

SURROGACY RIGHTS OF THE LGBTQ COMMUNITY

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ABSTRACT

Surrogacy has emerged as a complex reproductive behaviour governed by biological and contentious issues, particularly talks about the rights of the LGBTQ community for surrogacy. It explores the legal and social dilemmas faced by the LGBTQ community. Highlighting discrimination in access and acknowledgement for the LGBTQ community." Additionally the position of the LGBTQ community for surrogacy in India and foreign countries" includes judicial judgments related to surrogacy law of the LGBTQ community and this abstract also talks about religious beliefs about surrogacy. By synthesizing societal attitudes and legal frameworks towards LGBTQ parenthood, this abstract gives insights into the ongoing struggle faced by the LGBTQ community for surrogacy rights.

Keywords: LGBTQ, Surrogacy, Guardianship.

WHAT IS THE MEANING OF SURROGACY?

Surrogacy is a process through which the surrogate mother agrees to carry the eggs of another person and give birth to a child for somebody like a single person, the LGBTQ community or a couple who is unable to conceive. After the birth of a child, the surrogate mother, also known as the biological mother' after delivery of child gives up all custody and guardianship of the child. Surrogacy is similar to the birth of a child, not through his mother but by a chosen mother. it involves a lot of complicated medical steps and legal processes that must be followed. It is necessary to know about the process and seek expert advice to build support for the Fertility World Surrogacy Center in India.

HISTORICAL ORIGIN OF SURROGACY

Surrogacy has been practised since ancient times, although Indian culture and society were not ready to accept, not even open about the idea of surrogacy. It has been shown in the Indian Mythological show of Mahabharata Dhritrashta's wife Gandhari conceived a child but the pregnancy went on for two years after that she delivered a semi-mass. 101 cells were quite

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normal in the mass found by Bhagwan Vyasa and put in a nutritious medium to grow out of these one female child and 100 male children were born. King Drupada wanted a son strong enough to kill Dronacharya because he had a rivalry with him to have a son Rishi was given medicine and collected his semen and then put it in a yajna kunda from which Draupadi and Dhrishtadyumna were born.

In Islam, there are so many concepts that talk about the necessities of human beings that require promotion, protection and preservation, the concepts are Hifz al-Mal (Protection of wealth), Hifz al-din (Protection of Religion), Hifz al-Aql (Protection of mind), Hifz al-Nafs (Protection of life) from beginning owns words Islam promote and support reproduction, it also extends his support for treatment of women for infertility and care of pregnant women. Further, protects the genealogy of the child, the right of the child to be related to both parents. it's a completely new concept in Islamic jurisprudence to hire a womb for the procreation of a child is not acceptable. since surrogacy involves the mixing of genealogy and donor sperm which is unethical from an Islamic point of view. According to one of the renounced Islamic scholars Mufti Sheikh Ahmad Kutty, said that putting male sperm into the woman's uterus to whom he is not married goes against the desire of Allah.¹

WHAT DO RELIGIOUS BELIEFS SAY ABOUT SURROGACY?

Hinduism

Hinduism is one of the third-largest religions in the world and always encourages having a child in a family' they allow surrogacy of the child but prefer both sperm and egg come from the married couple only. In the story of Balram, the seventh child of Vasudev and Devki, to protect himself from Kansh, Vasudev transfers the egg to his first wife. Hinduism followed surrogacy from ancient times and now they accept fertility treatment and surrogacy to grow Hindu families.

Christianity

Christianity is also one of the largest religions in the world. Christianity accepts alternative reproduction but also advises taking a lot of vigilance if taking this path. They also express concern about the surrogate mother's physical and mental state and the future well-being of

¹ *Historical Origin*, https://blog.iplers.in/surrogacy-a-battle-of-law-and-ethics/#Historical_origin (last visited on June 10, 2024)

children born through surrogacy. Christianity accepted surrogacy when sperm and egg come from a married couple who will be raising the child.

Judaism

Judaism has a view about surrogacy that it is a medium to remove sadness and darkness from a couple who are not able to conceive. Judaism accepts surrogacy as long as nobody is harmed in the process they are also concerned about the cost of surrogacy and think this process can be afforded by rich people only.

Islam

Islam has two different views about surrogacy. some sects of Muslims consider surrogacy as adultery because the surrogate mother carries a fertilized embryo from a man who is not her husband, and the child born from that process would be considered illegitimate, some sects of Muslims accept a way to preserve species of humans.²

SURROGACY RIGHTS OF LGBTQ

Surrogacy rights of LGBTQ couples are necessary because, at the end of the day, they are also human beings who want to have a child due to the physical condition of their body wouldn't have it through surrogacy! They have the opportunity to have a child

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Situation Around the world

There are very few countries around the world that support same-sex marriage or give legal validation of the marriage, same with surrogacy rights of the LGBTQ community. There are very few countries that allow and even support surrogacy law or even include gay couples to have children through the process of surrogacy. These countries are Canada, Mexico, some states of Australia, Colombia, the United States and a few European countries like Belgium, the UK, Denmark and the Netherlands. Most countries around the world legalise or even legislate surrogacy in their law at the same time they restrict gay couples not even including

² Religion & Surrogacy, <https://www.montanasurro.com/blog/2018/2/28/religion-surrogacy> (last visited on June 11, 2024)

gay couples for surrogacy and countries like Ukraine and Russia prohibit surrogacy of gay couples.³

The United States is the only country in the world that provides facilities for commercial surrogacy for the LGBTQ community. United States laws related to surrogacy are friendly' Even states support surrogacy contracts signers' after signing automatically' become legal parents of the child. However, some other states of the US ban surrogacy contracts and the cost of surrogacy in the US is high. It has been popular among wealthy LGBTQ Community couples.

In the United Kingdom, surrogacy for LGBTQ couples is legal. The challenging part in the UK is finding a surrogate mother' it is difficult due to the legislation also prohibiting third parties' involvement in arranging surrogacy for profit and restrictions on surrogacy advertisement.⁴

Colombia is a very progressive country' their laws are equally progressive. The constitution' of Colombia does not discriminate against LGBTQ citizens. They even pursue surrogacy' Colombia has constitutionally legalized rules and regulations for the LGBTQ community for surrogacy and even provides a guideline for proper implementation of these rules and regulations known as de facto in Colombia.⁵

Situation in India

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If asked " Is surrogacy for the LGBTQ community allowed in India", " No surrogacy for the LGBTQ community is not allowed in India. Earlier it was allowed but a few years back the government put restrictions on the well-being of the children as parents left the child if they were born with diseases or any other arbitrary reason. The Surrogacy Bill of 2019 maintains that surrogacy for live-in relationship couples and homosexual couples having a child through surrogacy is not allowed. It is a complete violation of Article 14 of the constitution, which provides equal rights to all the citizens of India. Bill allows only heterosexual couples to have children through the process of surrogacy.

³ Surrogacy for Gay couples worldwide, <https://www.sensiblesurrogacy.com/gay-surrogacy/> (last visited on June 12, 2024)

⁴ Surrogacy for LGBTQ Couple in UK, <https://gaiafertility.com/surrogacy-for-gay-couples-in-uk/> (last visited on June 12, 2024)

⁵ Surrogacy for Gay couples worldwide, <https://www.sensiblesurrogacy.com/gay-surrogacy/> (last visited on June 12, 2024)

According to "Surrogacy Regulation Act of 2021" Section 4 (ii)(e) allows surrogacy, on condition that the "National Assisted Reproductive Technology" as well as the "Surrogacy Board" identify whether both parents have the disease that particular disease may be in contact with the child the act not explicitly defined about the disease or condition.⁶

WHAT DO JUDICIAL DEVELOPMENTS SAY?

One of the NGOs' named Naz Foundation' works for the rights of the LGBTQ community. In the year 2001, they worked for the prevention of AIDS/HIV "Naz Foundation" filed petition in the Delhi High Court raising questions on articles 14,15,19 and 21 of the constitution, which provide fundamental rights to the Indian citizens. Naz Foundation claims that section 377 includes an "Unnatural offence which penalized all types of sexual relationships exclude heterosexual relationships, thus its' violation of basic human rights which given in the Indian constitution. But the Delhi High Court rejected his petition' and said that Naz Foundation had no Locus Standi to file a petition. The government also made a statement that if we legalized homosexuality in the country, it would open other demands of people.⁷

In 2006, the Naz Foundation again filed a dismissal petition in the Supreme Court for the decision of Delhi High. The Supreme Court said that the Naz Foundation has the right to file PIL (Public Interest Litigation) and directed the Delhi High Court to review the case again. Naz Foundation expresses its concern that if a homosexual relationship is considered a sexual offence, it will harm the very noble cause of the prevention of the "AIDS/HIV" LGBTQ community.

In 2009, a landmark judgement was passed by the Supreme Court in the case of the "Naz Foundation v/s Govt, of NCT Delhi"⁸. The court held that section 377 is a violation of articles 14,15,19 and 21 of the Indian constitution and would infringe on the privacy of the two adults. However, it does not strike down the whole act, but the portion of section 377 and still the nonconsensual sexual intercourse is an offence punishable' also stated that the law will remain there until parliament amends it.

⁶ Surrogacy Regulation Act 2021, https://blog.ipleaders.in/is-surrogacy-legal-in-india/#Lacunae_in_the_Surrogacy_Regulation_Act_2021 (last visited on June 12, 2024)

⁷ A brief timeline of the legal battle against section 377, <https://indianexpress.com/article/india/a-timeline-of-section-377-5341910/> (last visited on June 14, 2024)

⁸ Naz Foundation v. Govt, of NCT Delhi, <https://indiankanoon.org/doc/100472805/> (last visited on June 14, 2024)

After the judgement of the Delhi High Court, several individuals and organizations were unhappy a few years back. In 2013, in the case of "Suresh Kumar v/s Naz Foundation"⁹ in this case, the court reversed the decision of the Delhi High Court, held that the authority to Decriminalise and consensual sex between two adult members is not in the hands of the court' only parliament had the authority to make law further said that section 377 is not motive to target group of people.

The word gender is biased in society from the very beginning. The Surrogacy Act of 2019 allows only a married couple in India to avail of the process of surrogacy, Same-sex and nonbinary couples are excluded under this act even if they wish to become parents. In the case of "Navtej Singh v/s Union of India, 2018,¹⁰". The Supreme Court decriminalized homosexuality, same-sex marriage is not legal in India, and homosexual couples are outside the purview of the act. This act only allows heterosexual couples to avail the process of surrogacy.

Recognition of the LGBTQ community in promoting equality in society is very critical. In India, every citizen is entitled to fundamental rights of the Indian constitution. Supreme Court deals with surrogacy for the first time in this case only¹¹ "Baby Manji Yamada v/s Union of India (2008)¹²" The Supreme Court accepts surrogacy as the process of becoming parents, parents may be a single or homosexual Couple but after implementation of the act, it makes illegal for a homosexual Couple. It is necessary to give the right to have children not only for a heterosexual Couple but also for a homosexual Couple.

Article 21 talks about the right to life' The article includes privacy rights, also in the case of "K. S Puttaswamy and Anr. v/s Union of India¹³". In this case, the court found that showing a certificate of infertility for obtaining surrogacy to the district medical board is an infringement of the right to privacy of fundamental rights granted under the Indian constitution.

⁹ Suresh Kumar v. Naz Foundation, <https://www.scobserver.in/journal/supreme-court-cases-on-the-rights-of-lgbtqia-persons/> (last visited on June 14, 2024.)

¹⁰ Navtej Singh v. Union of India, 2018, <https://indiankanoon.org/doc/168671544/> (last visited on June 14, 2024.)

¹¹ LGBTQ+Community exclusion, https://blog.ipleaders.in/is-surrogacy-legal-in-india/#LGBTQIA_community_exclusion (last visited on June 14, 2024).

¹² Baby Manji Yamada v. Union of India (2008), https://blog.ipleaders.in/is-surrogacy-legal-in-india/#Lacunae_in_the_Surrogacy_Regulation_Act_2021 (last visited on June 14, 2024).

¹³ K. S Puttaswamy and Anr. v. Union of India, https://blog.ipleaders.in/is-surrogacy-legal-in-india/#Lacunae_in_the_Surrogacy_Regulation_Act_2021 (last visited on June 14, 2024).

CURRENT STATUS

After so many amendments still, homosexual couples could not have the same rights as heterosexual couples, but after running a long battle' in the year 2018, they got legal rights only to have sexual relationships and do not have the right to marriage, adoption or even become parents through surrogacy. The Surrogacy Regulation Bill of 2021 has given the right to surrogacy only to a married couple, women who have a certification as infertility from the National Assisted Reproductive Technology and Surrogacy Board and a woman who want to become a mother but does not conceive can avail of this process. This act does not give rights to homosexual couples to avail the process of surrogacy for having a child even if they wish to become parents.

The reason behind lawmakers restrict the right of the LGBTQ community to avail the rights of surrogacy and having a child due to legal complications arising from the third-party donation of egg and sperm, also resulting in a future custody battle or very "lack of legal recognition from the lawmaker of a same-sex couple and live-in couple" and challenges of up bring a child a alone.¹⁴

CONCLUSION

LGBTQ community rights were first time curtailed' through the British Act when section 377' was introduced by the British, which made consensual relationships criminalized. After that, So many organizations work for LGBTQ community rights one of the organizations. Naz Foundation' has filed a petition for the rights of the LGBTQ community but his petition was rejected by the Delhi High Court. Years back the historical judgement of Navjot Singh Johar the rights of the LGBTQ community are still the same. Don't have the right to become parents of a child' not even recognised same-sex marriage, once a couple filed a case in the Kolkata high court for recognition of same-sex marriage' nothing happened. LGBTQ community still face difficulties for recognition from society, as well as the law, the law only allows the same-sex couple and live-in-relationship couple for cohabiting each other. The government now recognises the LGBTQ community as a third gender. If the law' recognised adoption or surrogacy for opposite-sex couples and single women' then why'n't a same-sex couple use the process of surrogacy for having children in India.? Our history literature accepts this then why

¹⁴ **Surrogacy in India not just for married and heterosexual**, <https://360info.org/surrogacy-in-india-not-just-for-married-heterosexuals> (last visited on June 14, 2024).

can't we? We are living in the 21st century and consider ourselves modern but still lag behind some of the Western countries that have separate laws related to the surrogacy rights of the LGBTQ community. But India is still, fighting for legal recognition for marriage and adoption rights of the LGBTQ community. India often talks about diversity and equality among citizens. But some of the positions still behind which we need to work and fight for the same as the coming generation did not fight for basic human rights and dignity in society.

