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# **SURROGACY REGULATION: LEGAL AND ETHICAL ISSUES**

AUTHORE BY - YASHRAJ MISHRA

## **ABSTRACT**

This paper is a summarization, comparison and critique of the legislations, policies and sanctions dealing with regulation of surrogacy in the country, particularly Surrogacy (Regulation) Act 2021. It aims to explore legal measures that could be proposed to ensure fairness and equal opportunities for individuals seeking surrogacy arrangements. By questioning the existing eligibility criteria, the paper aims to identify legal remedies that promote equitable access to surrogacy services, including study of commercial surrogacy, and address concerns arising from the current restrictive framework. It critically evaluates the Act's impact on the surrogacy landscape, the rights of intended parents and surrogate mothers, and the overall ethical framework underpinning surrogacy arrangements. Through this analysis, it aims to identify legal and ethical frameworks that can guide the development of a comprehensive approach to surrogacy regulation, striking a delicate balance between safeguarding surrogate mothers against exploitation and ensuring fair compensation and protection for all parties involved. The methodology undertaken for the research of this topic is analysis of the Act and its consequences by using published articles from reputed journals from around the world and statistical data from verified sources. Through this paper, multiple suggestions have been made about how to evolve the traditional surrogacy regulation framework in order to support the aggrieved by analysing various case-law, legislations, rules, regulations, etc.

**Keywords:** Surrogacy; Commercial Surrogacy; Surrogate Mothers; Intended Parents.

## **INTRODUCTION**

With the purpose of carrying the pregnancy to the term and giving the child to the biological parents for whom she is serving as a surrogate, a woman accepts to carry a pregnancy that is genetically unrelated to her or her spouse. This is basic concept of surrogacy as a practice, which could be altruistic or commercial in nature.

Fundamentally, a surrogate mother bears the child of another couple throughout the gestation

period of the baby. Once, the gestation period is completed and the child is delivered, the infant is supposed to be handed over to the actual parents. This can be done as a result of financial motives or due to selfless concerns of well-being. Because there is a law-obligated arrangement with the woman to deliver birth to a baby and transfer full parenting rights to the intended parents, it is also known as a “contract pregnancy”.

Development of its legal framework internationally. A study conducted by the PRS Legislative Research, compared the laws and regulatory guidelines in the Indian Surrogacy Bill 2016 with surrogacy laws in various countries such as Netherlands, UK, South Africa, Greece, and Russia. This research provides with a fundamental idea of the international framework of surrogacy regulations. The following are some of the categories considered for the comparison of the countries' frameworks<sup>1</sup>:

1. Type of surrogacy allowed: The Bill prohibited commercial surrogacy and only allowed altruistic surrogacy to take place. Commercial surrogacy is similarly prohibited in Netherlands, UK, South Africa and Greece. However, commercial surrogacy is allowed to take place in Russia.
2. Payment to the surrogate: As per the 2016 Bill, medical expenses and insurance are covered for the surrogate. In Netherlands, reasonable expenses related to IVF, the pregnancy, delivery, those expenses not covered by insurance, adoption, insurance and legal charges. In the UK, reasonable expenses excluding payment for the benefit of the surrogate mother. South Africa provides medical expenses and insurance coverage and compensates for any loss of earnings due to surrogate pregnancy. Greece provides expenses related to the pregnancy, the gestation, delivery and the post-partum period and provides compensation for any loss due to pregnancy to the surrogate mother. However, in Russia, there is no limit on the payment provided to the surrogate.
3. Eligibility criteria for commissioning parent: Out of all the countries in the study, only the Indian Bill had the mandate of being married. Other criteria considered under this category were – citizenship or residency and existence of medical reason.
4. Eligibility criteria for surrogate mother: There was a restriction in the Indian Bill that the number of times a female can be a surrogate is only once, which is not the case for the other countries. The other conditions in the Bill stated that the surrogate mother can only be a close relative; there was a requirement to be married; there should be at least one child of her own; etc. However, there was no provision for the consent required of the

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<sup>1</sup> International comparison of surrogacy laws, PRS Legislative Research, <https://prsindia.org/billtrack/prs-products/international-comparison-of-surrogacy-laws-2713>

surrogate mother's partner. Whereas, in Netherlands and the UK, the consent was not required; and in South Africa, Greece and Russia the consent was required.

## **HISTORY OF SURROGACY REGULATIONS IN INDIA**

Surrogacy capital. India is considered as the "Surrogacy capital" of the world and were a leader in the surrogacy market due to its legal absences and cheaper donor fees. It was not formally subject to any set of regulations. Legislators in India did not attempt to formalise the 2002 legalisation of commercial surrogacy until 2008. As a result, until that point, surrogacy functioned lacking a defined legislative structure.

The surrogacy regulatory framework in the country has developed as a result of landmark cases and evolving legislations. These have provided foundations for the need of such framework and for the expansion of its scope to include various facets of surrogacy as a concept – such as commercial surrogacy; altruistic surrogacy; interests of intended parents; interests of surrogates; etc.

In the case of *Baby Manji Yamada vs Union of India*<sup>2</sup>, the Court decided that the Commission for Protection of Child Rights Act, 2005 served as the appropriate place to file concerns about surrogacy abuse and its illegality in India. The Court further declared that as Baby Manji was not the subject of any complaints, the order compelling her to appear before the Court was unconstitutional. The Regional Passport Authority granted her request for a passport in order to make it easier for her to leave Indian Territory. Ultimately, the Indian Supreme Court had to step in and grant Manji's permission for travelling abroad with the grandmother. Following this case, the SC of India ruled in 2008 that surrogacy is legal in India. This decision increased worldwide trust in surrogate reproduction in India.

In the case of *Jan Balaz v. Anand Municipality*<sup>3</sup>, there was couple from Germany who got twins from a surrogate in India. The German commissioning parents approached the Gujarat High Court to authorise their surrogate twins with an Indian passport in order to prevent the impending legal challenges posed by immigration laws. According to the Gujarat HC, a child born to a surrogate mother will have the surrogate mother's identity instead of the biological mother's and he or she must be authorised with an Indian passport that proves they are citizens of India. The surrogate mother was then required to hand over the children to German couples for adoption. These case-law provided a basis for the Indian legislators and policymakers to formulate a

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<sup>2</sup> *Baby Manji Yamada vs Union of India & Anr* (2008) 13 SCC 518

<sup>3</sup> *Jan Balaz v. Anand Municipality*, 2009 SCC OnLine Guj 3913

structured basis for controlling surrogacies in India. The Manji case started this movement since it was the first ever case in which the Apex Court delivered a judgement related to surrogacy. These judgements sparked a focused approach in education, which led to the passing of a surrogacy laws in the country that exclude foreign nationals attempting to get surrogate mothers from India without following certain procedures.

Thousands of families are travelling to India, because there is less bureaucracy and excellent medical care, to avoid the complicated and costly surrogacy procedure in the Western countries. In India, this procedure is simple, affordable, and effortless. India legalised commercial surrogacy in 2002 as a component in its efforts to encourage medical tourism, a sector in business which the Confederation of Indian Industry estimates is worth US\$2.3 Billion yearly.<sup>4</sup>

In 2009, the Law Commission of India in its 228th report included a revised legislative proposal to control the procedure of surrogacy in India. It suggested prohibiting the practise of commercial surrogacy and adopting appropriate legislation that permits ethically aligned altruism-based surrogacy. Additionally, it also promoted proactive legislative action to support responsible applications of the recently developed Assisted Reproductive Technologies (ART).<sup>5</sup>

This was followed by formulation of several Bills and subsequent statutes that regulated the surrogacy procedure. According to Surrogacy (Regulation) Bill 2019<sup>6</sup>, surrogacy is the practise of a woman carrying a child for another couple with plans to give the newborn back to them when the child is born. While altruistic surrogacy is permitted, commercial surrogacy is prohibited. Under this Bill, a certificate of eligibility and a certificate of essentiality for factual proof were to be granted.

According to the Surrogacy (Regulation) Act 2021<sup>7</sup>, a woman who is 35 to 45 years old who has become a widower or has ended up divorcing her spouse, or a married couple who is lawfully married, may undergo surrogacy if she has a medical problem that justifies it. It also prohibits the use of surrogates for profit through commercial surrogacy, a crime that carries a maximum fine of 10 Lakh Rupees along with a 10-year prison sentence. Altruistic surrogacy is allowed by this legislation in situations where it involves no financial exchange and where the intended parents have a genetic link to the surrogate mother.

## **ISSUES ASSOCIATED WITH THE SURROGACY**

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<sup>4</sup> Priya Shetty, *World Report "India's unregulated surrogacy industry"*, 380, *The Lancet*, 1633–1634 (2012)

<sup>5</sup> 228<sup>th</sup> Law Commission of India Report, 2009

<sup>6</sup> Surrogacy (Regulation) Bill 2019

<sup>7</sup> Surrogacy (Regulation) Act 2021, Acts of Parliament, 2021 (India)

## (REGULATION) ACT 2021

Since the Surrogacy (Regulation) Act 2021 only acknowledges altruism, this implies that the surrogate receives no compensation other than any costs that may be required or expended as a result of healthcare or insurance protection.<sup>8</sup> In order to handle nationality and citizenship concerns that frequently arise when a surrogacy is requested by a couple from abroad, surrogacy is now exclusively available to Indian citizens. Even though this is the single positive change, the Act is characterised by restricting, inflexible, and vague requirements.

The Act solely acknowledges altruistic surrogacy and prohibits commercial surrogacy. Altruistic surrogacy refers to surrogates receiving no compensation other than any costs that may be mandated or expended as a result of their insurance or healthcare requirements. Additionally, commercial surrogacy is now illegal according to the Act. Concerning the potential for a surrogate's exploitation, regulations around the surrogacy procedure are crucial. However, regulations and controlling legislations are not the same as outright prohibiting commercial surrogacy.<sup>9</sup>

Since same-sex marriages are still illegal in India, fewer same-sex couples can meet the requirements outlined in Section 2(h) of the Act. The clause additionally emphasises that a relationship must consist of a male and a female, restricting the capacity to use surrogacy procedures to married heterosexual couples only.<sup>10</sup> In addition to restricting beneficiaries according to the Act to heterosexual married couples, it unfairly distinguishes its stance towards a number of individuals, including unmarried women who are not included in the term of "intending woman", which only includes widows and divorcees, non-binary and same-sex couples, and unmarried and single men.

The financial compensation given to the surrogate mother is one way that commercial surrogacy varies from altruistic surrogacy. The surrogate mother receives remuneration in addition to her medical costs, unlike in altruistic surrogacy when the surrogate mother's only compensation is her healthcare expenses. The very sum of something more than the healthcare bills is what entices women to serve as surrogate mothers for prospective commissioning couples. A strong educational programme may be suggested as a useful way to increase awareness of the surrogates and the commissioning parents and making them realise the changes that are brought about from

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<sup>8</sup> Surrogacy (Regulation) Act 2021, Acts of Parliament, 2021 (India)

<sup>9</sup> Diksha Tekriwal, "Lacunae in the Surrogacy (Regulation) Act, 2021", The Leaflet (November 2, 2023, 11:30 PM), <https://theleaflet.in/lacunae-in-the-surrogacy-regulation-act-2021/>

<sup>10</sup> Surrogacy (Regulation) Act 2021, Section 2(h), Acts of Parliament, 2021 (India)

undertaking surrogacy.<sup>11</sup>

The goal of commercial surrogacy is to provide financial security to one family and biological children to the other. However, it ultimately puts in risk the status of the two primary participants in the procedure, that is, the surrogate and the kid who was conceived and delivered through the surrogate mother. Since those whose interests most need to be protected are also the least able to participate in the process, the courts and the legislature bear a higher responsibility in this regard. Commercial surrogacy produces benefits for the intended parents. It happens as a result of them receiving the best surrogate selection. It is reasonable because when they consider that a surrogate has less incentive to include you in the pregnancy if you do not compensate her for her labour or efforts. For intended parents, the biggest advantage of commercial surrogacy is that a consultant organization will assist them through every step from beginning to end.

The surrogates gain from commercial surrogacy as well. Surrogacy may be quite expensive. The surrogate is going to have greater access to services and monetary assistance if the pregnancy is the result of a commercial surrogacy. She may not receive an increased compensation as a result of this. Rather, this entails additional assistance for any unforeseen circumstances that may occur, such time off from work and a variety of other costs. Furthermore, not all commercial surrogates are only motivated by financial gain. By assisting someone else in becoming a parent for the first time, many surrogates experience a profound sense of fulfilment.

On the other hand, following the birth, interaction with the child or the intended parents is usually prohibited in commercial surrogacy. Since they are carrying the intended parents' child, surrogate mothers are typically well-cared for throughout pregnancy. But once the baby is born, the surrogate mother loses her eligibility to interact because her competencies are no more needed. The surrogate gives up her rights to the infant she carried after receiving compensation. However, cutting off communication could be harmful to the child as well as the surrogate mother. Since, she is the child's biological mother, the surrogate mother is significant. Another major concern is that children should have the opportunity to be aware of who their surrogate moms are.

Altruistic surrogacy by same-sex couples is prohibited by the 2021 Act. It perpetuates a preconceived notion of families by assuming that women lack independence and perpetuating a domestic structure which promotes heterosexuality. For a child to mature fully, both parents must be of different sexes, according to Indian law, society norms, and the teachings of religion. Against this perspective, the concept's deception stems from the reality that it allows widowed

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<sup>11</sup> Diksha Munjal-Shankar, "COMMERCIAL SURROGACY IN INDIA: VULNERABILITY CONTEXTUALISED", 58, *Journal of the Indian Law Institute*, 350-366 (2016)

and divorced women to use ART services. This is unjust since it keeps the LGBTQIA+ population outside of the surrogacy industry.<sup>12</sup>

This is another blatant issue with the Act, that is, its lack of inclusivity – whether be it imposing restrictions on who can avail surrogacy or be it exclusion of same-sex and homosexual couples. For instance, it forbids an unmarried single woman from contracting a surrogate. A single woman should not be prevented from being a mother for whatever reason. Such a discrepancy makes little sense in respect to the goal that the Bill seeks to accomplish. The paradox in this situation is that, in spite of the law's apparent embrace of modernity, it actually serves to uphold the traditional stigma of accepting motherhood without marriage.

### **COURSE OF ACTION**

Developing an international policy framework for surrogacy is incredibly challenging. It is so clear that an international agreement on surrogacy may not be achievable, and unfortunately most of the policies pertaining to surrogacy must be regional or, at the very least, nation specific. One major challenge is that we are unable to predict whose ethical standards will be prioritised in any future international policy. It may be argued that any policy action at all is ethnically focused. Furthermore, as surrogacy is deeply rooted in local economies and histories, changes must be made to the way business is handled in general, not just in relation to the surrogacy sector.<sup>13</sup>

Protecting the interests of surrogate mothers and other women considering surrogacy requires a robust structure of law and is absolutely necessary. When it comes to the problem of women being exploited, words like "commercial" and "ethical" have no real meaning because they lack precise definitions. It is critical to realise that surrogacy charges are paid for services rendered instead of paying them for the profit of the surrogate mother. If the surrogate views the pay as profit, then is a very different story. This is an issue of comprehension, and raising women's status through education and awareness may be one of the solutions.<sup>14</sup>

The following are the suggestions that may help in removing the identified lacunae in the Surrogacy (Regulation) Act 2021:

1. Rather than prohibiting commercial surrogacy, the appropriate bodies should set pricing

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<sup>12</sup> Narayan G, Mishra H, Suvvari T, et al. "The Surrogacy Regulation Act of 2021: A Right Step Towards an Egalitarian and Inclusive Society?". *Cureus* 15(4): e37864. doi:10.7759/cureus.37864 (2023)

<sup>13</sup> Marcin Smietana, Sharmila Rudrappa and Christina Weis, "Moral frameworks of commercial surrogacy within the US, India and Russia", Vol. 29, *Sexual and Reproductive Health Matter*, 377-393 (2021)

<sup>14</sup> Mrinal Barua, "Surrogacy Debate", Vol. 51, *Economic and Political Weekly*, 4-5 (2016)

for the services provided by surrogate mothers and prevent any form of negotiation. If there is a fixed price in place, it may significantly reduce the problem of compensation to the surrogate mother and her efforts as a bearer of the intended parents' child will not be underappreciated. This may also lead to increase in involvement of the intended parents in the procedure who may look after the surrogate and provide her direct support.

2. There should be formulation of new clauses and policies that include all those people who have a genuine desire to become a parent. There should be modification of clauses to include same-sex couples and unmarried women. This should be done to further the main goal of the Act itself, which is, an effort to balance the divergent interests that comprise the surrogacy procedure. The Act may not be aligning with the constitutional principles of equality and liberty at its current form.
3. Setting a minimum age for prospective parents is unreasonable given the purpose of the Act. For individuals who are prepared to take on parenthood but are older than the specified age, this is unfair. As a result, this clause must be modified in order to prevent discrimination in terms of age, which may prevent a parenthood to an individual or a couple.
4. Epstein suggests a “maternalistic” strategy for surrogacy in its place. This strategy relies on the notion that the government has a responsibility to safeguard the best interests of children and that surrogacy agreements ought to be scrutinized for the possible impacts on the welfare of the baby.<sup>15</sup>
5. Psychologists should be consulted by surrogate mothers to provide guidance along their journey. They need to educate her about surrogacy, address any concerns she may have, and support her in maintaining her mental health. At the same time, she needs to be supported financially throughout the pregnancy outside of the already agreed upon compensation fee based on contract.

## **CONCLUSION**

The way the Indian surrogacy sector affects the socioeconomic circumstances of the women involved. A large number of surrogate mothers come from remote regions of extreme poverty and want to improve the economic status of their family. However, it can be argued that the surrogacy industry often perpetuates discrimination and maintains gender stereotypes. For

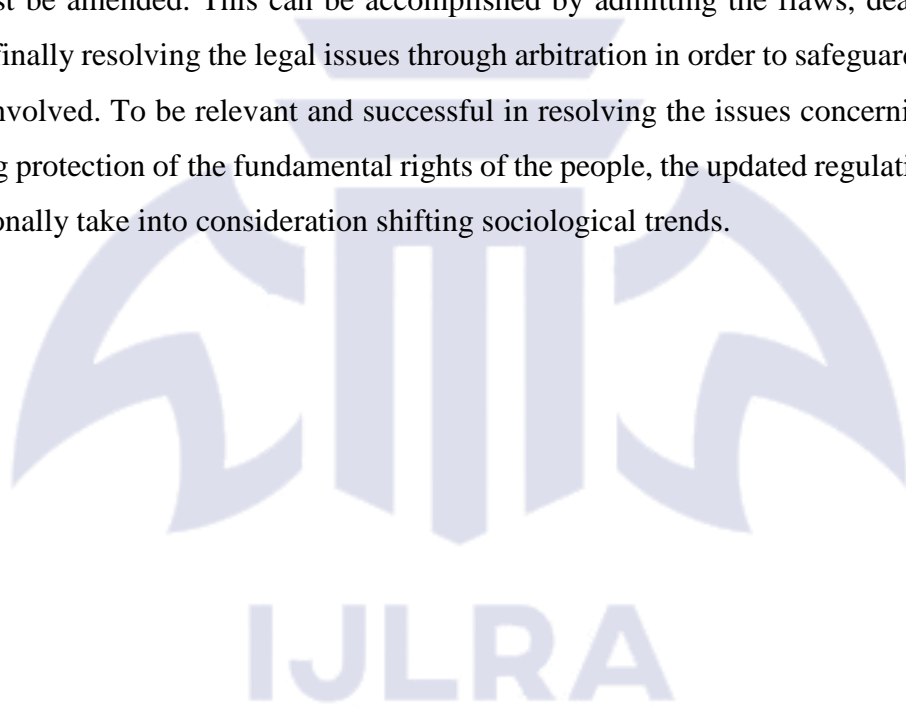
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<sup>15</sup> Richard A Epstein, “*Surrogacy: The Case for Full Contractual Enforcement*”, 81, Virginia Law Review 2305 (1995)

example, women who serve as surrogates are often condemned and ostracised by the general public due to their inclination to marry and have children of their very own.<sup>16</sup>

The Act requires revision since it appears to be significantly out of step with the progressive stances of higher constitutional courts, that have consistently placed the utmost importance on women's reproductive independence and every citizen's freedom to procreate. For the legislation to operate smoothly, effectively, and without difficulty, it must be made more inclusive of the various segments of the population that were unfairly left out. It also has to be clear who has the right to make decisions on jurisdiction. Furthermore, prohibiting commercial surrogacy completely is neither an alternative nor a goal that will be achieved.

To become an even broader instrument of law that promotes a welcoming and equitable society, the Act must be amended. This can be accomplished by admitting the flaws, dealing with the issues, and finally resolving the legal issues through arbitration in order to safeguard the needs of all parties involved. To be relevant and successful in resolving the issues concerning surrogacy and ensuring protection of the fundamental rights of the people, the updated regulations and rules must additionally take into consideration shifting sociological trends.



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<sup>16</sup> Amrita Pande, “*Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker*”, Vol. 35, Signs, 969-992 (2010)