

ISSN: 2582-6433



INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS

Open Access, Refereed Journal Multi Disciplinary
Peer Reviewed 6th Edition

VOLUME 2 ISSUE 7

www.ijlra.com

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INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS
ISSN

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“SURROGACY IN INDIA: A DREAM FOR MOTHERHOOD OR A PAVE TO COMMERCIAL EXPLOITATION”

**AUTHORED BY –
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& M. SAI DEEKSHITHA**

ABSTRACT

In India, motherhood is valued and a dream for many women because of the strong cultural pressure on the couple to bear and rear children. However, due to the high incidence of infertility cases, it is difficult to conceive. So, surrogacy is viewed as a means of completing the family and finding happiness.

As there were no barriers for strict laws and regulations in India in the 1990s, surrogacy was widespread there. Because of this reason, they were constrained, deprived of essentials, subjected to human trafficking, threatened, and many more. They focused more on the impoverished and illiterate surrogates. There have been instances where multiple eggs have been implanted to boost the likelihood of becoming pregnant for saving money and time.

The Surrogacy (Regulation) Act, 2021 focus to combat the unethical and legal challenges, facilitate the needy infertile couple, protects the child born out of surrogacy, prohibits commercial surrogacy and allows altruistic surrogacy. Although the motive behind the present Act is to regulate surrogacy and prohibit commercial exploitation, some provisions of the Act are in conflict with the fundamental rights guaranteed under the Constitution of India such as right to equality, right to privacy and right to life etc.

This Article includes special emphasis on the legal provisions of ‘The Surrogacy (Regulation) Act, 2021’, status of Commercial surrogacy, lacunas and constitutionality of the Act.

INTRODUCTION

The term "surrogate" derives from the Latin word “Subrogare” (to substitute) which means "appointed to act in the place of ”¹. In the present context a woman is referred to as a "surrogate mother", if she becomes pregnant and gives birth to a child with the purpose of giving the child to another individual or couple, often known as the "intended" or "commissioning" parents. It refers to a replacement, particularly a person substituting in for another in a particular position.

When pregnancy is physically impossible, when the risks to the intended mother make it unsafe, or when a single guy or a male couple wants to have a family, people may look into surrogacy arrangements. One of the various assisted reproductive technologies is believed to

¹ Collins, <http://www.collinsdictionary.com>

be surrogacy.

Commercial Surrogacy became lawful in 2002 when the Indian Council of Medical Research (ICMR) published guidelines for the procedure², but no laws were passed to support it. Due to non-stringent regulations and no effective enforcement, the surrogacy industry flourished as a result. India has always been a popular destination for people seeking surrogacy children. Due to the low services' cost and easy accessibility, commissioning parents travelling from many other nations are also able to utilize the procedure.

The Surrogacy Act 2021, which was recently passed, regulates surrogacy in India. This law established stringent eligibility and ineligibility requirements for surrogate couple and surrogate mother, distinguished explicitly between altruistic and commercial surrogacy, and permitted only altruistic surrogacy to married couples exclusively on medical reasons.

HISTORICAL INSIGHTS ABOUT SURROGACY

Surrogacy is not a new phenomenon. For thousands of years, women have designated others to give birth on their behalf and even when referring to the ancient scriptures it can be found that, a woman bear a child for a couple to nurture, typically with the male partner serving as the biological father.

It may not come as surprise that surrogacy was practiced in antiquity. Some of the insights of mythology that were practiced, respected and socially accepted are mentioned below:

- During the Biblical Times, the first mention of surrogacy can be found in "The Book of Genesis". The first book of both the Hebrew and Christian Old Testaments is the Book of Genesis. This book mentions the story of Sarah and Abraham, despite being married, they were unable to bear children of their own. As a result, Sarah asked her servant Hagar to give birth to Abraham's child. In this instance of traditional surrogacy, the surrogate uses her own egg in the child she is carrying for the intending parents. Although Sarah and Abraham were not the child's biological parents per se, they both claimed ownership of the infant³.
- Even in Hindu mythology, the Mahabharata describes "Surrogate Fatherhood," a practice that was formerly socially acceptable. Queen Satyawati asks her son Ved Vyasa to cohabit with her widowed daughters-in-law Ambika and Ambalika so they can have children in order to preserve her dynasty⁴.
- Balarama, the eighth child of Vasudeva and Devaki, was conceived through surrogacy by Rohini, Vasudeva's first wife. In this instance, surrogacy was required because Devaki's brother Kamsa had sworn to kill any child conceived in her womb⁵.

² Legal Service India, <http://www.legalserviceindia.com>

³ David J Zucker, in/Voluntary Surrogacy in Genesis, 76/1 : 9-24, The Asbury Journal, 01,2021

⁴ NCBI, <http://www.ncbi.nlm.nih.gov.com>

⁵ BooksFact, <http://www.booksfact.com>

DEFINITION OF SURROGACY

Surrogacy is defined in section 2(zd) of Surrogacy (Regulation) Act, 2021. It means a practice whereby one woman bears and give birth to a child for an intending couple with the intention of handing over such child to the intending couple after the birth⁶.

The two types of Surrogacies that are mentioned under the Surrogacy (Regulation) Act, 2021 are :

1. Altruistic surrogacy –

Altruistic surrogacy is defined in section 2(b) of the Surrogacy (Regulation) Act, 2021. This is a surrogacy in which the surrogate mother, her dependents, or her representative receives no fees, compensation, expenses, or other financial benefits of any kind aside from the medical costs she incurs and the insurance coverage for the surrogate mother.

2. Commercial surrogacy –

Commercial surrogacy is defined in section 2 (g) of Surrogacy (Regulation) Act, 2021. It refers to the commercialization of surrogacy services or procedures or its component services or component procedures, such as selling or buying human embryos or gametes or selling or buying or trading the services of surrogate motherhood by giving payment, reward, benefit, fees, remuneration, or financial incentive in cash or kind to the surrogate mother or her dependents or her representative, except the medical expenses and such other prescribed expenses incurred on the surrogate mother and the insurance coverage for the surrogate mother⁷.

Apart from the above mentioned, the other types of surrogacies that are recognized in India are:

I. Traditional Surrogacy:

Traditional surrogacy is also known as straight method surrogacy because in this type of surrogacy the surrogate is carrying her own biological child . The child is conceived with an intent to be raised by the intending parents. Some of the methods used for this type of surrogacy are :

- i. Impregnation by IUI (intrauterine insemination)
- ii. Artificial insemination
- iii. Impregnation by ICI all of which is to be performed at a fertility clinic.⁸

II. Gestational Surrogacy:

⁶The Surrogacy (Regulation) Act, 2021, No. 47, Acts of Parliament, 1949 (India)

⁷ The Surrogacy (Regulation) Act, 2021, No. 47, Acts of Parliament, 1949 (India).

⁸ Libertatem Magazine, <http://www.libertatem.in>

This type of surrogacy is also known as host method surrogacy wherein the surrogate will not be the biological mother as it includes a process called ‘embryo transfer’ unlike traditional surrogacy. Hence the actual mother is the biological mother and the object behind this type of surrogacy is to gestate the child. On the other hand, the surrogate mother is referred to be gestational carrier⁹.

COMMERCIAL SURROGACY IN INDIA

The Law Commission of India in its 208th report recommended for prohibiting commercial surrogacy and that there is an urgent need to enact a law to regulate the commercial surrogacy. The main reasons behind this recommendation were larger scale of exploitation of the surrogate mothers who may have been coerced to become surrogate due to lack of education and poverty ; with a motive of availability of getting cheap labor there was prevalent use of surrogacy by foreigners and lastly there was lack of proper & effective legal framework.

Earlier the only guide for surrogacy was the National Guidelines for Accreditation, Supervision and Regulation of ART clinics in India, 2005.

In *Baby Manji Yamada V. Union of India*¹⁰, a Japanese couple, Dr. Ikufumi Yamada and his wife, decided they wanted a child and signed a surrogacy agreement with an Indian lady in Anand, the Gujarati city that pioneered the surrogacy industry. The father insisted on having custody of the child despite the couple's marital . Under Indian Law, a single father cannot adopt a girl child. So he sent his mother instead and a petition was filed before the Supreme Court. The Government seemed to be helpless in this matter as there were no laws governing the effect of surrogacy. The writ petition challenged the legality of surrogacy and criticized it as fostering an illegal industry in India and stressed the need for enactment of a surrogacy law.

This was the first case wherein a decision linked to surrogacy was made by the Apex Court and it marked the importance of developing surrogacy regulation laws in India¹¹.

On the basis of Apex court’s directions, the Legislature had drafted The Artificial Reproductive Technology (ART), Bill, 2008 . This is the first time in India towards regulating the surrogacy industry which was subsequently amended in 2010, 2013,2014, 2016 & 2019.

One of the biggest changes in the new law is a ban on “commercial surrogacy,” only “altruistic surrogacy” is legal. This means a surrogate can only be paid for her medical expenses, insurance cover for 36 months to cover post delivery complications.

Although there are two types of surrogacies, section 3(2) of The Surrogacy (Regulation) Act,

⁹Libertatem Magazine, [http:// www.libertatem.in](http://www.libertatem.in)

¹⁰ AIR 2009 SC 84

¹¹ Legal Services India, <http://www.legalservicesindia.com>

2021 clearly prohibits and mentions that no surrogacy clinics, pediatrician, gynecologist, registered medical practitioner or any person shall conduct, offer, undertake or avail commercial surrogacy in any form.

Any intending couple or intending woman who seeks to aid surrogacy clinic or laboratory etc. for not following altruistic surrogacy and or conducting surrogacy for commercial purposes shall be punishable for a term extend to five years and a fine upto five lakh rupees and for the subsequent offence punishable upto ten years and fine upto ten lakh rupees¹².

NECESSITY OF SURROGACY:

Due to the surge in infertility, many women were unable to conceive for a variety of reasons, making surrogacy essential. In *Suchita Srivastava v. Chandigarh Administration*¹³, the Supreme Court held that the right to choose one's reproductive options falls under the protection of personal liberty provided under Article 21. The right of women to privacy, dignity, and physical integrity includes the right to carry a pregnancy to full term, whether or not to give birth.

REGULATION OF SURROGACY CLINICS:

Section 3 of the Surrogacy (Regulation) Act, 2021 clearly prohibits that no surrogacy clinic, pediatrician, gynecologist, embryologist, registered medical practitioner or any person shall act in any form as mentioned below:

- I. Should not conduct or associate with or help in any in any manner, for conducting surrogacy and procedures unless registered.
- II. Shall not conduct, offer, undertake, promote or associate with or avail commercial surrogacy in any form.
- III. Shall not take services of any person, whether honorary basis or on payment who does not possess such qualification.
- IV. Shall not aid in conducting himself or through any other person surrogacy or surrogacy procedures at a place other than registered place.
- V. Should not promote, publish or advertise or cause to be promoted or advertised which aims to induce a woman to act as surrogate mother, aim at promoting surrogacy, aim at seeking to act as surrogate mother, advertises commercial surrogacy in print or electronic media.
- VI. No person including the intending parents shall conduct or cause abortion without written consent of surrogate mother and after the compliance of appropriate authority as per Medical Termination of Pregnancy Act, 1971.
- VII. No person shall store human embryo or gamete for the purpose of surrogacy. Unless the storage is for medical purposes such as sperm bank, IVF and medical research.

¹² The Surrogacy (Regulation) Act, 2021, Sec 40, No. 47, Acts of Parliament, 1949 (India).

¹³ (2009) 9 SCC 1

VIII. No person shall in any form conduct or cause to be conducted sex selection for surrogacy¹⁴.

CIRCUMSTANCES UNDER WHICH SURROGACY PROCEDURE CAN BE PERFORMED:

Surrogacy is not permitted under any other situations than those listed under Sec 4(ii) of the Act -

- a. When an intending couple has a medical indication necessitating gestational surrogacy. The couple of Indian origin and intending woman shall obtain certificate of recommendation from the board. In the gestational surrogacy there will be implantation of embryo inside the womb of surrogate mother of the intending couple and the child is no way related to surrogate mother.
- b. When it is only for the altruistic surrogacy.
- c. When it is not for commercial surrogacy.
- d. When it is not for sale of children , prostitution and exploitation .
- e. Any other disease that is specified by the board¹⁵.

THE DIRECTOR OR IN-CHARGE AND PERSON QUALIFIED CAN CONDUCT SURROGACY WHEN THE BELOW ARE SATISFIED:

- 1) a certificate of a medical indication in favor of either or both members of the intending couple or intending woman necessitating gestational surrogacy from a District Medical Board.
- 2) An order passed by the first class Magistrate on an application by the intending couple or the intending woman and surrogate mother concerning the parentage and custody of the child.
- 3) Additionally, an insurance coverage of the amount as prescribed by the surrogate mother for period of 36 months covering postpartum delivery complications¹⁶.

ELIGIBILITY FOR SURROGATE MOTHERS:

- i. A Woman who is not married and does not have a child of her own and is between the age of 25 to 35 years on the day of implantation can be a surrogate mother or help in donating her oocyte.
- ii. No woman shall provide her own gametes.
- iii. A woman can be a surrogate mother only once in her lifetime.
- iv. The woman should have a certificate of medical and psychological fitness for surrogacy.

When all the above conditions are satisfied then the woman is eligible to get the certificate to be the surrogate mother¹⁷. Additionally, the intending woman or intending parents shall approach the appropriate authority with the willing woman who agrees to be a surrogate

¹⁴ The Surrogacy (Regulation) Act, 2021, No. 47, Acts of Parliament, 1949 (India)

¹⁵ The Surrogacy (Regulation) Act, 2021, No. 47, Acts of Parliament, 1949 (India)

¹⁶ The Surrogacy (Regulation) Act, 2021, Sec 4(iii)(a), No. 47, Acts of Parliament, 1949 (India).

¹⁷ The Surrogacy (Regulation) Act, 2021, Section 4(iii)(b), No. 47, Acts of Parliament, 1949 (India)

mother.

No organization, clinic or person etc. shall force the surrogate mother to abort except to the conditions prescribed by the board¹⁸.

INTENDING PARENTS:

The below conditions must be satisfied for the eligibility of the intending couples by the appropriate authority:

- i. The intending female must be between age of 26 to 55 years and intending parents must be between the age of 23 to 50 years.
- ii. The intending couple can opt for surrogacy when they don't have child neither biologically nor through adoption. Provided if the appropriate authority approves with medical certificate from district medical board that the child of the intending couple suffer with physical or mental illness, which cannot be permanently cured then they are legally allowed to opt for surrogacy.
- iii. And any other conditions as specified by regulations¹⁹.

PROCEDURAL REQUIREMENTS:

Section 6 of the Surrogacy (Regulation) Act, 2021 clearly mentions that the below should be followed for seeking or conducting surrogacy:

- i. The surrogate mother shall be explained about the known side effects and the procedures.
- ii. The surrogate mother should give written informed consent as prescribed from the language which she understands.
- iii. The surrogate mother shall an option to withdraw her consent before the implantation of human embryo in her womb.

RIGHTS OF THE SURROGATE CHILD:

- I. A child born out of the procedure of surrogacy shall be deemed to be the biological child.
- II. Child born out of the procedure of surrogacy shall be entitled to all rights and privilege's available to natural child.
- III. The child should not be abandoned whether within or outside India for whatsoever reasons such as defects developing subsequently, sex of child, or more than one child born etc.²⁰.

REGULATORY AUTHORITY FOR SURROGACY IN INDIA:

A Registry is established called as National Assisted Reproductive Technology²¹ and

¹⁸The Surrogacy (Regulation) Act, 2021, Section 8, No. 47, Acts of Parliament, 1949 (India)

¹⁹ The Surrogacy (Regulation) Act, 2021, Section 4(iii)(c), No. 47, Acts of Parliament, 1949 (India)

²⁰The Surrogacy (Regulation) Act, 2021, Section 7 & 8, No. 47, Acts of Parliament, 1949 (India)

Surrogacy Registry for the purpose of registering the surrogacy clinics, enforce standards, investigate complaints, recommend about the modifications, grant or reject application etc.

CONSTITUTIONAL VALIDITY OF THE ACT

Right to make reproductive choices falls under the personal liberty guaranteed under Article 21 and this right includes women's entitlement to carry a pregnancy to its full term, whether to give birth or not, these rights form part of women's right to privacy, dignity and bodily integrity²².

The Surrogacy (Regulation) Act, 2021 further excludes other people based on their nationality, sexual orientation, marital status, and age, and limits and conditions surrogacy to married Indian couples alone. This criteria does not pass the test of the reasonable classification under Art 14 of the Constitution.

In *Devika Biswas v. Union of India*²³, the Apex Court ruled that the "Right to Life" guaranteed by Article 21 of the Indian Constitution included the "Right to Reproduction" as a fundamental aspect. The right to reproduce involves the right to conceive, carry, give birth, and raise children. Therefore, restricting surrogacy to exclusively heterosexual couples in a certain age range results in a partial imbalance. Communities that are fully denied the freedom to have reproductive options include single persons, elderly couples, and couples that identify as LGBTQ+. This is potentially a breach of both Article 14 and Article 21 of the Indian Constitution

In the case of *KS Puttaswamy & Anr v. Union of India*²⁴, the SC held that obtaining a certificate of infertility from the district medical board is in violation to "right to privacy" and has been recognized as a fundamental right to be protected under Art 21 of the constitution.

The surrogacy (Regulation) Act, 2021 clearly defines who can be the intending couple and the intending women as:

- 1) Intending couple: Section 2(r) of the Act defines intending couple as a couple who have a medical indication necessitating gestational surrogacy and who intend to become parents through surrogacy and the married couple should be between the age of 23 to 50 for females and 26 to 55 for males. This section is violating the fundamental rights as guaranteed under the constitution as mentioned below:

- a) Live in Relationship

The legal status of live-in relationships in India has been evolved and determined by the Supreme Court in various judgments. In the case of *S.P.S. Balasubramanian v. Suruthaya*²⁵ the court held that if a man and woman cohabitating under the same room for a number of years, there will be a presumption of marriage under section 114 of Indian Evidence Act and the

²¹ The Surrogacy (Regulation) Act, 2021, Section 15 & 17, No. 47, Acts of Parliament, 1949 (India)

²² *Suchita Srivastava v. Chandigarh Administration*, (2009) 9 SCC 1

²³ (2016) 10 SCC 726

²⁴ ((2017)10 SCC 1)

²⁵ 1994 AIR 133 SCC

children born under this relationship will be treated legitimate. Even after the change in time and acceptance among the society with the evolution of law still the couple in live-in relationships are not included under the definition of section 2(r) of the Act. As per Sec 2(r) of the Act, the intending couple who is intending to become parents by surrogacy is restricted to **only** the married couple and this restrictive meaning for the term 'intending couple' is violating the rights of couple in live-in relationship.

Article 14 of the Constitution of India guarantees fundamental right to equality. As the definition provided under Sec 2(r) of the Act is limited to the married couple per se, it does not stand the test of reasonable classification provided under the Art 14.

Hence the Fundamental right of equality provided under Art 14 is being violated to the couple in Live-in relationship.

Article 21 of the Indian Constitution guarantees right to life and personal liberty, this right includes the right to reproductive autonomy either naturally or through surrogacy.

When the Supreme court held that live-in relationships are not illegal in the eyes of law and the children out of such relationship are treated as legitimate then why are they not allowed to opt for surrogacy?

b) LGBTQ

Even after repeated judgements from the Naz foundation v. Government of NCT Delhi²⁶ to Puttaswamy case that the right to equality, right to life, right to privacy are the fundamental rights guaranteed to every individual under Art 14, 21 of the constitution of India. Even till date the LGBTQ committee is being subjected to discrimination as homosexuals, a separate class. In the case of Nalsa v. Union of India²⁷, Supreme court clearly held that the rights provided under Article 14 are the rights that are to be enjoyed by any person, as per Article 15 and 16, there shouldn't be any gender-based discrimination, as per article 21, Privacy, gender identity and integrity are protected where the right to life includes right to live with dignity which is inclusive of right to choose gender identity. But still LGBTQ are not yet included in the ambit of section 2(r) of the act and this is in clear violation to Article 14, 15, 16 and 21 of the constitution. Hence, the question arises as to why aren't LGBTQ allowed to opt for surrogacy?

- 2) Intending woman: an intending woman is defined in section 2(s) of the Act as a widow or divorcee who is between 35 to 45 years of age and intends to avail

²⁶ 160 Delhi Law Times 277

²⁷ AIR 2014 SC 1863

surrogacy. This section is violating the fundamental rights guaranteed under the Constitution of India as mentioned below:

a) Unmarried Individuals

As per the eligibility criteria of the prospective adoptive parents by the central Adoption resource authority (CARA), regulated by the Ministry of Child and Resource Development, a single female can adopt a child of any gender and a single male is eligible to adopt a male child. Then why are they excluded from the 'intended persons' to opt for surrogacy? This fails the test of reasonable classification and is violative of Article 14, 15 and 21 of the constitution.

b) Divorced Husband

According to the section 2(s) of the Surrogacy (Regulation) Act, 2021, intending woman is defined as a widow or divorcee who is between 35 to 45 years of age. But this act completely excludes the divorced husband. When a divorcee and a widow woman can avail surrogacy then why should a divorced man be excluded? This is in clear violation to Article 14, 15 and 21 of the constitution.

c) Widower

A widow between the age of 35 to 45 years can opt for surrogacy as per section 2(s) of the Surrogacy (Regulation) Act, 2021 but there was no mention of widower, why is a widower excluded from the purview of surrogacy in totality? This fails the test of reasonable classification and is violative of Article 14, 15 and 21 of the constitution.

RECOMMENDATIONS:

- i. The Surrogacy statute restricts surrogacy to married couples and to that extent, excludes the members of the LGBTQ community, live-in couples, and single, divorced, or widowed parents. Since the right to reproductive autonomy and parenting are guaranteed by the right to life as stated in article 21 of the Constitution, everyone has this right and thus should be permitted to choose surrogacy. Accordingly, an amendment with respect to definition of intending parents/intending persons is much required.
- ii. The Surrogacy statute also limits the autonomy of married couples and potential surrogates to a huge extent, by means of stringent conditions and requirements of eligibility certificates. The heavy onus laying prerequisites such as childlessness, five years of infertility for intending parents, the surrogate being a close relative, amongst others, are prone to criticisms. Although the stringent provisions play a crucial role in effective implementation of the Act it should not be in such manner that the objectives for which the Act was enacted goes in vain.

CONCLUSION

Having child is everyone's dream, regardless of any gender. In India, a women's life is subjected to be incomplete when she is not able to have child. Surrogacy is a therapeutic option available to single women with medical issues who want to become pregnant, to couples with specific medical challenges so they can help them have their own genetic children, and to homosexual men who want to become parents. Furthermore, by making surrogacy the only source of income for some people, surrogacy opens the door for economic exploitation, which causes excruciating physical, emotional, and psychological suffering.

Therefore, it is necessary to arrive at a mid-way that facilitates commercial surrogacy but in a better and sufficient regulatory manner. Accordingly, the Surrogacy Regulation Act, 2021 was enacted by the legislature to address the issue and preserve the harmony between outlawing commercial exploitation and allowing surrogacy when it was necessary. However, those in need including persons belonging to LGBTQ community , single persons, unmarried couples, widowers, etc. are not included in the Act. The lacunas in the Act conflicts with the fundamental rights thus are in violation of Article 14, 15(1) and 21 of the constitution. Thus, the legislature should make necessary amendments to the Act which is in compliance with fundamental rights of citizens and reflect the changing social mores, to fulfill the objectives of the Act.

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