

## CHALLENGES AND CONCERNS SURROUNDING THE SURROGACY (REGULATION) ACT, 2021: A CRITICAL ANALYSIS

Rajat Choudhary<sup>1</sup> Dr. Samrat Datta<sup>2</sup>

<sup>1</sup>Research Scholar, Jaipur National University, Jaipur, Rajasthan

<sup>2</sup>Associate Professor, Jaipur National University, Jaipur, Rajasthan

### ABSTRACT

*Surrogacy is a method whereby intended parents who are unable to have children turn to a woman's womb who is ready to carry the child to maturity for them and serves as a stand-in for the biological mother. The Surrogacy (Regulation) Act, 2021, the first legislation governing the practice of surrogacy in India, received the assent of the President on December 25, 2021. This act strictly bans commercial surrogacy and only ratifies the practice of altruistic surrogacy. While surrogacy should be acknowledged as a reproductive right available to all persons regardless of their standing in the community, the provisions of the Act become a major concern as they pose certain barriers inter alia, age restrictions, barring people from the LGBTQ community to make use of the technique and reinforcing the patriarchal norms of the society taking control over the autonomy of females. The progressive law, which attempts to make surrogacy available to those unable to bear children, has failed to be progressive owing to its very own nature by being discriminator and constituting ambiguous clause that leaves room for much debate and misinterpretation. This paper goes through the prevailing practices of surrogacy in the Indian context and gives a critical analysis of the aforementioned Act.*

### I. INTRODUCTION

Surrogacy is derived from the Latin word “*Surrogatus*” which means “substitute” or someone appointed to act in the place of another.<sup>1</sup> According to Black’s Law Dictionary, is the procedure of bearing and delivering a child for someone else.<sup>2</sup> The types of surrogacies can be divided into categories – **Traditional/ Natural/ Partial** and **Gestational** surrogacy.<sup>3</sup> The traditional method of surrogacy is the most prevalent in India. In the traditional form of surrogacy, the embryo is created using the egg of the surrogate by ways of either intra-uterine insemination or in-vitro fertilization or sexual intercourse with the surrogate. If the intending couple consists of two women, they can use the sperm of some third male. In the gestational surrogacy process, the intended couple produce an embryo utilising their own sperm and egg or generate an embryo using a donated egg or sperm. Although traditional surrogacy was the sole technique to conduct the process of surrogacy for most of history, the gestational method has gained popularity over the last few decades. The latter not only permits a heterosexual couple to be

<sup>1</sup> R.S. Sharma, *Social, ethical, medical & legal aspects of surrogacy: an Indian scenario*, 140 IJMR 13, (2014), Social, ethical, medical & legal aspects of surrogacy: an Indian scenario - PMC (nih.gov).

<sup>2</sup> *Surrogacy*, Black’s Law Dictionary, (9<sup>th</sup> edition, 2009).

<sup>3</sup> P. Saxena et al., *Surrogacy: Ethical and Legal Issues*, IJCM, (2012), Surrogacy: Ethical and Legal Issues Saxena P, Mishra A, Malik S - Indian J Community Med (ijcm.org.in).

the biological parent(s) of the child, it also aids in avoiding certain legal and emotional complications that arise with the surrogate mother being related to the child genetically. In recent years, technological advancements have made it possible for women to carry children who are not biologically related to them. Intrauterine insemination (IUI), zygote intrafallopian transfer (ZIFT), tubal embryo transfer (TET), gamete intrafallopian transfer (GIFT), in vitro fertilisation (IVF), gestational surrogacy, include the most prevalent Assisted Reproduction Technologies (ARTs).<sup>4</sup>

In India, there are two forms of practices of surrogacy that are mostly carried out:<sup>5</sup>

***Altruistic Surrogacy:*** The surrogate mother gets no monetary support or rewards for her pregnancy or for subsequently returning the child back to the genetic parents, with the exception of certain essential medical costs.

***Commercial Surrogacy:*** When the surrogate is compensated in excess of the requisite medical expenses. Lawyer Noel Keane, in the United States of America, established the first formal surrogacy contract in 1976. There have been numerous historical glimpses of the growth in the practice of surrogacy since then. Surrogacy is not a new phenomenon; it has been around for a very long time. Once artificial insemination technology and Assisted Reproductive Technology were created, it gained traction. Surrogacy in India technically commenced when baby Kanupriya, the world's second and India's first IVF child was born in Kolkata in 1978.

## II. ETHICAL AND MORAL ISSUES

Albeit, the arrangement of surrogacy appears to benefit all the parts involved in the process, specific sensitive concerns should be addressed through carefully crafted legislations to preserve the surrogate's and the intending parents' interests. It is put forth by some that commercial surrogacy is unethical because it involves the buying and selling of a woman's womb, which is a part of her body. Looking at the problems that a surrogate face, the situation seems far worse and immoral. Oppressed, impoverished women could be used as a source if childbearing abused by the wealthy infertile or intending couples or individuals. In India, especially, illiterate women belonging to rural backgrounds are frequently enticed into these deals by their husbands or other family members or even intermediaries in order to make money. Such females basically have no right to make decisions and choices about their bodies or lives. The potential trauma undergone by the surrogate mother, relinquishing her child to the to-be parents is also something that needs to be considered.<sup>6</sup>

The emotional tie between a biological mother and her child is considered to be extraordinarily strong, and so motherhood through surrogacy is deemed as unnatural and unethical since it forcefully shatters this emotional bond.<sup>7</sup>

<sup>4</sup> Victoria Clay Wright et al., *Assisted reproductive technology surveillance - United States, 2004*, 56 MMWR MORB MORTAL WKLY REP. 1, 3-6 (2007), Wright: Assisted reproductive technology surveillance—U... - Google Scholar.

<sup>5</sup> *Supra* note 1.

<sup>6</sup> Pikee Saxena et al., *Surrogacy: Ethical and legal issues*, 37, IJCM, 211, (2012), Surrogacy: Ethical and Legal Issues Saxena P, Mishra A, Malik S - Indian J Community Med (ijcm.org.in).

<sup>7</sup> Ragini Kulkarni, *Ethical Dilemmas in Surrogacy*, HEK INT., (2017), Ethical dilemmas in surrogacy - Hektoen International (hekint.org).

### III.SURROGACY IN THE INDIAN CONTEXT

Surrogacy has a long history in India. In Indian Mythology, this practice of surrogacy has been referred as “Niyog” is widely mentioned in the folklore and fables. The genesis of this practice may be followed back to around the year 2002, when the concept of ‘Rent a Womb’<sup>8</sup> was being practiced in India to encourage ‘Reproductive Tourism.’<sup>9</sup> Reproductive tourism refers to travelling for the purpose of obtaining commercially offered reproductive technologies such as the ARTs. This brought a dramatic shift in the surrogacy landscape. It transformed the surrogacy regulations in the country by commercialising the practice and granting legal sanction to it. However, legalising commercial surrogacy arrangements led to India becoming a surrogacy destination for the people all over the globe.

As per the reports of the World Health Organization, the worldwide incidence of infertility, including in India, is around ten to fifteen percent.<sup>10</sup> According to a study done by the Confederation of Indian Industry, approximately, ten thousand foreign couples and individuals visit India every year in order to get a surrogate for themselves, and projected the industry to generate 2.3 billion dollars. About a third of such people are either single persons or people from the gay community. This led to India developing a growing surrogacy sector, considering the fact that laws regarding surrogacy in nations like Germany and the United States of America were much stricter than those in India.<sup>11</sup>

This was supported by the Apex Court’s decision in *Baby Manji Yamada v. Union of India*,<sup>12</sup> in which the position of a Japanese child born to an Indian surrogate mother was left in limbo since the Japanese parents divorced before the child was born. The baby’s father had expressed his desire to take the child with him, however, there were no laws that allowed for this and even the Japanese government did not authorize him to do so. At the end, via the judgement of the Court, the child was permitted to leave the country with her paternal grandmother. The court also acknowledged that the intending couple may also gay couples or women who even though fertile are not willing to carry their own child or become pregnant.

The Indian Council of Medical Research (“ICMR”) in 2005,<sup>13</sup> issued certain guidelines for doctors and clinics to follow in arrangements of surrogacy-

The intending couple has to first select a surrogacy clinic based on their monetary situations, the clinic’s reputation, its rate of success, location and other amenities offered by them. The clinics then performed some physical medical examinations, a comprehensive background investigation, and psychological testing to determine whether an intending surrogate can handle the demands and responsibilities, both emotionally and bodily, that accompany the role

<sup>8</sup> Sanjay Basu, *Rent a womb: Surrogate selection, investment incentives and contracting*, SSRN, (2006), Rent a Womb: Surrogate Selection, Investment Incentives and Contracting by Swapnendu Banerjee, Sanjay Basu :: SSRN.

<sup>9</sup> Raywat Deonandan, *Recent trends in reproductive tourism and international surrogacy: Ethical considerations and challenges for policy*, NCBI, (2015),

<<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4544809/>

<sup>10</sup> WORLD HEALTH ORGANIZATION, Infertility (who.int).

<sup>11</sup> Priya Shetty, *India’s unregulated surrogacy industry*, 380THE LANCET, (2012)India's unregulated surrogacy industry - The Lancet.

<sup>12</sup> (2008) 13 SCC 518.

<sup>13</sup> ICMR Guidelines (2005).

of being a surrogate. When an eligible surrogate is found, the embryo is implanted and the process of traditional or gestational surrogacy is commenced. The surrogate and the intending couple are to sign a surrogacy agreement that covers terms such as the form of surrogacy arrangement, the paternity of the child, questions of motherhood, the custody of the to-be-born child, the compensation or other financial provisions and other jurisdictional concerns. The surrogate mother is to forfeit any rights of parenthood as soon as the child is delivered and handed over to the couple. The birth certificate of the child is issued which bear the name of the couple who commissioned the surrogacy as its parents. As per the reports of the United Nations, India had been declared as the “*World Capital of Surrogacy*.” With the passing years, although, the negative impacts of the surrogacy industry became apparent leading to exploitation of women and the need for a legislation to regulate surrogacy was urgently needed. As a response a Commission was established to investigate the issues of surrogacy in the country. In 2009, the Law Commission of India, in its 288th report,<sup>14</sup> revealed that commissioning of surrogacy in India had become a 25,000 crore INR industry. The findings highlighted that the problems surrounding surrogacy were extremely complicated and that an exhaustive legislation was required to resolve the concerns. The ICMR guidelines, being the only standards regulating commercial surrogacy, were deemed ineffectual.

The Assisted Reproductive Technology Bill, 2010, was amended to bridge the gaps in the regulation related to surrogacy.<sup>15</sup> Various restrictive guidelines were laid down to arrest the exploitation of surrogate mothers. These changes were made in such a way that they acknowledged the rights and needs of both, the surrogate and the people commissioning surrogacy. The intending surrogate’s age was set to be between twenty-one and thirty-five years old. Moreover, she was restricted to carrying a maximum of five children all through this period so as to safeguard her health conditions. It was also stated that a baby, of foreign parents, but born to an Indian surrogate, would not be deemed as an Indian citizen, but rather a citizen of their parents’ native country.

In 2012, an occurrence sparked a controversy, with an Australian couple leaving one of their twins born via surrogacy as the child had been diagnosed with Down Syndrome.<sup>16</sup> Thereafter, in 2014, an issue surfaced again when a twenty-three-year-old woman died following a process of egg donation at an IVF clinic. In view of these events, in 2015, a Public Interest Litigation (PIL), was filed by Advocate Jayashree wad in the Supreme Court of India, urging that commercial surrogacy arrangements be abolished. This PIL influenced the public opinion and lobbied the government to enact laws with regard to surrogacy.

In the midst of these occurrence, the Parliament of India had introduced a new amendment in 2013, making it unlawful for foreign homosexual couples and single individuals to adopt the arrangement of surrogacy. In 2016, the Surrogacy (Regulation) Bill was introduced in the Parliament of India, by the Ministry of Health and family Welfare, which consequently lapsed.

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<sup>14</sup> Law Commission, *Need for legislation to regulate Assisted Reproductive Technology Clinics as well as rights and obligations of parties to a surrogacy* (Law Com No 288, 2009).

<sup>15</sup> Assisted Reproductive Technology (Regulation) Bill, 2010.

<sup>16</sup> *Aussie Couple Abandoned Surrogate Baby in India*, T.O.I, 2014, Aussie couple abandoned surrogate baby in India | India News - Times of India (indiatimes.com).

This bill was then brought again, in 2019, and finally in 2020, in the Parliament with some revisions to its provisions.

#### IV. THE SURROGACY (REGULATION) ACT, 2021

On 25th December 2021, the President gave his assent to the Surrogacy regulation Bill, 2021, passing the Surrogacy (Regulation) Act of 2021,<sup>17</sup> which came into effect on 25<sup>th</sup> January, 2022. This Act defines Surrogacy as a practice in which a woman carries and gives birth to a child for an intending couple with the aim of handing the child over after birth. This Act outlaws ‘commercial surrogacy’ by any person or clinic or organisation and only authorises altruistic surrogacy. It defines ‘commercial surrogacy’ as “the buying and selling of human embryos.”

Families in the 21<sup>st</sup> century are no more just static sociolegal institutions but breathing and developing structures that have defied stereotypes of a conventional heteronormative family. The practice of surrogacy has been effectively beneficial for a single-parent family or gay couples to have a child that is genetically or biologically related to them. Even though the idea of a ‘family’ existing in the Indian society has not evolved significantly, the judicial acknowledgement and recognition of live-in relationships and the decriminalization of homosexuality in *Navtej Singh Johar*<sup>18</sup> demonstrate a progressive shift towards the acceptance of Human Rights. Whereas this act prohibits same-sex couples or couples in live-in relationships or single persons (with the exception of single women who are widows or divorcees between the ages of 35-45) from making use of altruistic surrogacy, on the grounds that allowing them the practice of surrogacy would lead to the abuse of the arrangement. Because raising a child is a lifelong commitment that ideally requires the presence of both the parents- a mother and the father, such individuals might not be able to fulfil this role adequately. It was also reasoned that since gay or live-in couples are not legally recognized, they may separate at any point complicating the situation if it happens during the surrogacy process. With regard to homosexuals and singles, they claimed that surrogacy would require the use of a donor/ a gamete from a third party, which could lead to additional legal issues such as those involving custody rights in the future.

By virtue of this Act, only married heterosexual couples can adopt the practice of surrogacy and only a ‘willing,’ heterosexual female, who is married to a man can play the role of a surrogate. This goes on to reinforce the heteronormative view of a ‘family’ and limiting the reproductive options for the said non-conforming families.

Moreover, in the landmark decision of *National Legal Services Authority v. Union of India*,<sup>19</sup> transgender persons were declared as to be included in the ‘third gender. However, the said Act makes no provision for them to have equal rights of reproduction via the process of surrogacy. The justifications specified in the Act are extremely restrictive. By disempowering Transgenders and homosexual couples to commission surrogacy, these pose as roadblocks in this revolutionary epoch of constitutionalism which is heading towards the recognition of ideals of Universal Human Rights and values of equality and liberty.

<sup>17</sup> Surrogacy (Regulation) Act of 2021, No. 47, Acts of Parliament, 2021 (India).

<sup>18</sup> *Navtej Singh Johar v. Union of India*, AIR 2018 SC 4321.

<sup>19</sup> (2014) 5 SCC 438.

The Act is likewise restrictive with regard to who can function as a surrogate mother. Only a married woman, of a particular age (in her mid-twenties to early thirties) can become a surrogate or assist in the process by donating her egg. Agreed that these mandates are necessary in order to safeguard the exploitation of surrogates, they further foster the institutions of hetero patriarchy, wherein the marital status of a woman is crucial to determine if she can carry a baby or not. It also prescribes that the woman can become a surrogate only once during the course of her life, thereby undermining her body autonomy.

The current Act recognises that a woman may be coerced into commercial surrogacy, for improving the financial conditions of the family or for reasons otherwise, and consequently prohibits the husband or any other family member from pressuring her to participate in it and imposing penalties for violating these provisions. However, it is unclear if a woman has any legal recourse if she's forced into performing altruistic surrogacy.

Furthermore, according to the Act, the couple intending to go for surrogacy be married for at least five years and the woman should be aged between 23 and 50 years and the man 26 to 55 years. They must not have previously had a surviving biological/ adopted child or through surrogacy. There also exists a restriction on who can be deemed as an 'intending woman' within the purview of this act. These clauses preclude an elderly couple and single women falling out of the mandated categories and all other who do not meet these requirements from having a child through means of surrogacy, thus breaching their liberty and reproductive choices.

These classifications in this act, based on age, gender, marital status, tenure of the marriage, seem arbitrary and hence breach Article 14 of the Constitution.<sup>20</sup>

It also provides for requiring the intending couple to present a 'Certificate of Essentiality' as well as a proof of infertility from the District Medical Board. Yet again, it limits an individual's personal liberty by failing to consider the possibility that a woman may not desire to carry her own child. Furthermore, it has been held in *B.K. Parthasarathi v. Govt. of Andhra Pradesh*<sup>21</sup> that the meddling of the state in matters of procreation is a direct infringement of an individual's 'Right to Privacy,' as guaranteed by the Constitution. As a result, the requirement of such a certificate from the competent authorities can be viewed as a violation of one's 'Right to Privacy'.

In the case of *Gobind v. State of Madhya Pradesh*,<sup>22</sup> it was ruled that "nothing would advance women's welfare more than respecting their reproductive autonomy." In *Suchita Srivastava v. Chandigarh Admn*,<sup>23</sup> the Apex Court stated that the right of a woman to make reproductive choices is a facet of the 'Personal Liberty' under Article 21 of the Constitution. It has also been concluded by the court, in *Devika Biswas v. Union of India*<sup>24</sup> that 'Right to Reproduction' is an integral part of the 'Right to Life' envisaged by Article 21.

It has been found by the Apex Court that the term "Life" in Article 21 has a far broader

<sup>20</sup> Anil Malhotra, *Draft surrogacy bill violates the fundamental right of people to choose modes of parenthood*, THE INDIAN EXPRESS, Draft surrogacy bill violates fundamental right of people to choose modes of parenthood | The Indian Express.

<sup>21</sup> 1999 SCC OnLine AP 514.

<sup>22</sup> (1975) 2 SCC 148.

<sup>23</sup> (2009) 9 SCC 1.

<sup>24</sup> (2016) 10 SCC 726.

connotation and encompasses the ‘Right to Livelihood.’<sup>25</sup> In *Saghir Ahmad v. State of U.P.*,<sup>26</sup> the expression “Freedom” under Article 19(1)(g) was construed to mean that “every citizen has the liberty to choose his own or take up any trade or calling.” Commercial surrogacy has been a source of livelihood of many Indian women and families and suddenly depriving them of their means and taking away their discretion to choose this as their profession, is a direct curtailment of their Fundamental Rights.

Therefore, clearly this Act prima facie is violative of the fundamental rights of the individual. It not only breaches the Right to Equality under Article 14, Right to practice an occupation of choice under Article 19(1)(g), but also curtails on personal liberty provided under Article 21 of the Constitution of India. Hence, this Act goes distinctly against the provision of the ‘Golden Triangle’<sup>27</sup> of our nation’s Constitution.

The Act’s underlying premise that prohibiting commercial surrogacy would inevitably eliminate the prevalent exploitation, is questionable as it ignores the likelihood that arrangements of altruistic surrogacy can be just as oppressive and abusive as the commercial ones, albeit the mannerisms may differ. Moreover, even though it addresses various concerns that existed in the lack of any regulation, its provisions do not go far enough to protect the interests of the surrogate or nurture their agency and liberty in any manner. Such a ban on commercial surrogacy has the potential to propel the services of surrogacy to be carried out in illegal, clandestine mannerisms in India which would further, by taking undue advantage of their vulnerabilities, cause increased exploitation and mistreatment of women who belong to the socially and economically weaker sections.<sup>28</sup>

## V. CONCLUSION

Ultimately, surrogacy can be understood as the coming together of science, society, services and people that make it a reality.<sup>29</sup> Instead of an outright prohibition, proper comprehensive laws in place, can help avoid future exploitation and the creation of illicit markets. Laws should be enacted which are compatible with the Fundamental Rights of the people and at the same time cater for the feministic perspective. The existing living conditions of these surrogates and other potential concerns have to be kept in mind when supporting this blanket ban on commercial surrogacy. Just having an arrangement for altruistic surrogacy, in which the surrogate is compelled to bear the emotional and financial burdens solely, out of ‘compassion’ seems unrealistic and impractical. What was once seen as a societal obligation, such as having a child, can in these times be used to help women attain economic empowerment. If men, who donate their sperms get paid and compensated, why can’t women have the same freedom to exercise bodily autonomy?

<sup>25</sup> Consumer Education & Research Centre v. Union of India, (1995) 3 SCC 42.

<sup>26</sup> (1955) 1 SCR 707.

<sup>27</sup> *Minerva Mills v. Union of India*, AIR 1980 SC 1789.

<sup>28</sup> Swati Gola, One step forward or one step back? Autonomy, agency and surrogates in the Indian Surrogacy (Regulation) Bill 2019, 17 Int J of Law in Context 58–74(2021), One step forward or one step back? Autonomy, agency, and surrogates in the Indian Surrogacy (Regulation) Bill 2019 | International Journal of Law in Context | Cambridge Core.

<sup>29</sup> *Supra* note 1.

Surrogacy, hence, is a complex web of social, ethical, technological, and legal considerations.<sup>30</sup> It is not only a matter of legal question that needs to be delved into, but the society at large must ponder upon the social dimensions of this practice as well. These should be addressed in a way that our moral ideals are not compromised, while simultaneously we can take use of the evolving technological advancements.

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<sup>30</sup> Dr D. Radhika Yadav, Pavan Kasturi, *A Comprehensive Analysis on Reproductive Health and Surrogacy in India: A Study on the Law, Policy, and Practice*, SCC ONLINE, A Comprehensive Analysis on Reproductive Health and Surrogacy in India: A Study on the Law, Policy, and Practice | SCC Blog ([sconline.com](https://www.sconline.com)).