

SURROGACY REGULATION ACT 2021- A WAY FORWARD OR A SHOT IN THE DARK

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Abstract

In India, infertility is frequently seen as a social taboo, despite the fact that it is now curable owing to great developments in medical technology. One of the most crucial infertility therapies is surrogacy, however for a few decades now, commercialization of surrogacy has had an effect on India. Due to the fact that surrogacy is a relatively new notion in the country, there was neither formal legislation to govern it nor understanding that there should be one. The discussion is furthered by the fact that exploitative, unethical, and misinformed marketing was fostered by the fact that surrogacy was not even regarded as socially acceptable in the nation. India now has laws that outline the benefits of surrogacy and protect against its unethical promotion and dangers. The country's stereotypically gendered society, which stigmatizes infertility and views childlessness as unnatural, as well as the absence of infertility treatment in the public health system, can be blamed for India's huge privatized infertility care market's rise. The private infertility care sector makes money off of prevailing patriarchal normative cultural norms and attitudes. The proliferation of assisted reproductive technology is one of the most obvious examples of a reaction to market requirements, in this case, contemporary facilities enabling women to become mothers. The surrogacy market for ARTs in India has seen an increase in cross-border activity, demanding an investigation of the involvement of the major players as well as industry regulation.

Introduction

The practice of using a woman to carry a child for a future couple with the intention of delivering it to the intending parents is known as surrogacy. It can be used by couples who have diagnosed infertility. The Latin term "*Surrogatus*" (which means "substitute" or "someone appointed to act in place of another") is the root of the English word "surrogacy," which describes the practice of using a woman as a surrogate mother. It is defined as the process of carrying and giving birth to a child on behalf of another person by Black's Law Dictionary.

Assisted reproduction or more specifically Surrogacy is a blessing for those childless infertile couple who cannot procreate naturally. It is a replacement designated for someone else who cannot have their biological child natural process. Surrogates may not be used for profit in any way, including any form of harassment or forced prostitution. Additionally, the kid will be legally recognized as the couple's biological child whenever it is born. Only with the consent of the surrogate mothers, the authorities, and in line with the Medical Termination of Pregnancy Act's regulations may such a fetus be terminated.

India emerged as a hub for infertility treatment and childlessness, which attracted people from

different corners of the world due to availability of top-notch technology at affordable prices. Women found a way to navigate through derogatory economic conditions and income inequality through this method thereby making enough for their survival.¹ But the lack of regulatory framework raised concerns about the exploitation of the surrogate mother, the legal rights of other parties involved.

Prior to 2005, there were no laws or regulations in India that controlled the use of surrogacy or assisted reproduction, the operation of infertility clinics, or their commercial activities. The National Guidelines for Accreditation, Supervision, and Regulation of Assisted Reproductive Technology (ART) Clinics in India (ICMR Guidelines), which filled this gap and made it possible to keep a national registry of these clinics, were only published in 2005 by the Indian Council of Medical Research (ICMR) and National Academy of Medical Sciences (NAMS).

The Law Commission of India in its 228th Report, published in 2009, addressed the need for legislation to regulate assisted reproductive clinics as well as the rights and obligations of parties to a surrogacy and recommended outlawing the practice due to the lack of an adequate legal framework.

While providing hope to millions of infertile couples, in vitro fertilization and other kinds of assisted reproductive technology (ART) have also brought about a number of moral, legal, and societal issues. In addition to analyzing the myriad ethical, legal, and sociological issues that this technology raises, the aim of this article is to point out the aspects of ART that are most relevant to modern society.

Legislative Aspect of Surrogacy Regulation Act, 2021

In order to regulate the unchecked gaps and loopholes in the already existing laws and the state policies concerning reproductive rights, the Assisted Reproductive Technology Act, 2021 as well as the Surrogacy Regulation Act 2021 was passed by the Indian Legislature. The surrogacy regulation act 2021, came into force on 25th January, 2022. Prior to the passing of the said act, only guidelines issued by the Indian Council of Medical Research concerning the assisted reproduction and surrogacy procedure existed. The Surrogacy Regulation Act bans commercial surrogacy, allowing, people who are infertile these services much in line with the ART act which includes such people in its net of ‘Beneficiary persons’.²

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.*”³

The Surrogacy (Regulation) Act, 2021, is a significant step towards regulating surrogacy arrangements in India are conducted in an ethical and responsible manner, thereby ensuring that the surrogates’ right are not violated. The law limits the number of surrogacy agreements that an intended parent may enter into and forbids commercial surrogacy. Additionally, it establishes intended parents' eligibility requirements and outlaws sex preference in surrogacy contracts.⁴

¹ <https://www.insightsonindia.com/2022/06/09/insights-editorial-analysis-the-debates-around-the-surrogacy-act/>

² <https://www.newsclick.in/Reproductive-Justice-Constitutional-Issues-Plaguing-ART-Surrogacy-Laws-India>, last visited on

³ Kapoor Aishwarya, “*A Study on Surrogacy: Issues and Perspectives in Indian Scenario*”, International Journal of Law Humanities and Management, volume 5, Issue 5

⁴ <https://legalvidhiya.com/the-impact-of-the-new-surrogacy-regulation-act-2021-on-surrogacy-arrangements-in-india/>

The Act is a significant step towards addressing the concerns of the parties involved, ensuring the legal rights of the child born out of such arrangement and providing proper regulation for surrogacy agreements in India. The Act permits surrogacy only for those couples who are unable to conceive naturally after being married for five years.

The act also provides for establishment of National Surrogacy Board in order to keep a check on enforcement of surrogacy agreement in compliance with the law, thereby preventing exploitation and also to keep a check that the rights of surrogate mother is duly protected.

This act aims to protect the surrogate mother from being exploited by ensuring that the agreement is carried out in ethical manner. Women who embark on the journey of a surrogate have various reasons for doing so apart from the discussed above adding to the happiness and completing a family is also among them.⁵

The act forbids sex selection in surrogacy contracts, thus intended parents who adopt a child through a surrogate cannot decide the sex of their kid. This clause intends to eradicate gender prejudice and advance gender equality.⁶

The Surrogacy Act also specifies a number of conditions for the surrogate mother, such as that she must be a close relative of the intended parents, be married and have children of her own, be between the ages of 25 and 35, be able to carry the child only once, and be in sound physical and mental condition.⁷ The Surrogacy Act also establishes requirements for the intended parents, one of which is that neither of them has ever given birth to a child who survived them naturally, through adoption, or through surrogacy. Additionally, they must be between the ages of 26 and 55 for men and between 23 and 50 for women.⁸

According to the law, intended parents cannot pay a surrogate mother to bear their child. Commercial surrogacy is also prohibited. Surrogacy agreements can only be signed for charitable purposes, in which case the surrogate mother voluntarily donates her body to carry the kid without receiving anything. This clause intends to stop the commercialization of surrogacy and protect surrogate mothers from being taken advantage of.⁹

The act further provides for eligibility criteria for intended parents, which include being married for at least five years and also having a certificate of infertility. Even though this provision aims to prevent the misuse of assisted reproductive agreement by people, the eligibility criteria has come under hammers for being too narrow as well as restricting certain people from benefits of this arrangement. According to the law, concerned parties cannot pay a surrogate mother to bear their child. Commercial surrogacy is also prohibited. Surrogacy agreements can only be signed for charitable purposes, in which case the surrogate mother voluntarily donates her body to carry the kid without receiving anything. This clause intends to stop the commercialization of surrogacy and protect surrogate mothers from being taken

⁵<https://blog.ipleaders.in/surrogacy-act/#:~:text=The%20Surrogacy%20Act%20of%202021,of%20insurance%20and%20medical%20coverage.>

⁶ <https://legalvidhiya.com/the-impact-of-the-new-surrogacy-regulation-act-2021-on-surrogacy-arrangements-in-india/>

⁷ Surrogacy (Regulation) Act, 2021, §4, No. 47, Acts of Parliament, 2021 (India).

⁸ Ajay Bhargava, *The Evolution of Laws around the Practice of Surrogacy and Assisted Reproductive Technology Performance - India*, Mondaq (Dec. 22, 2022), <https://www.mondaq.com/india/performance/1263870/the-evolution-of-laws-around-the-practice-of-surrogacy-and-assisted-reproductive-technology>.

⁹ <https://legalvidhiya.com/the-impact-of-the-new-surrogacy-regulation-act-2021-on-surrogacy-arrangements-in-india/>

advantage of. Complete exclusion of any form of payment as a persuasion for surrogacy is what highlights the nature of benefit this act intends to impart. In altruistic surrogacy, there is no third-party involvement. Third party involvement provides assistance to the intending parents as well as the surrogate mother in dealing with the legal complexities and understanding the complex process.

Loopholes in the Act

This article also looks at the significant ethical, legal, and social repercussions of these Acts. Firstly, some of the clauses of the act could be questioned from the right based perspective due to their excluding, discriminatory and arbitrary nature as the classification provided under this act is based on age, gender, marital status and tenure of marriage.

Altruistic surrogacy within the family may lead to some coerced choices being made thus hampering the reproductive choices of women. This further aggravates one of the cannons of Article 21 i.e. right to privacy. The said act prohibits LGBTQ community and gay couple from making the use of altruistic surrogacy on the ground that allowing such members from the society would lead to abuse of the surrogacy agreement.

This act further provides that, only married couples can adopt the practice of surrogacy and only a 'willing,' heterosexual female, who is married to a man can be a surrogate for the intending parents. Hence confirming to the traditional concept of family, this act makes it almost impossible for people like LGBTQ and single person to utilize this technique their interest invokes a third-party involvement which further complicates legality¹⁰

In, *Justice K.S. Puttaswamy & Anr. V. Union of India & Ors.*,¹¹ the Supreme Court observed that right to privacy emanates from Article 21 of the Constitution and protects the inner sphere of the individual from external interference, allowing a person to make autonomous life choices pertaining to the construction of identity in personal, familial and social contexts. Any act which over rides this fundamental right must have a constitutional backing and must be proportionate to the need of it.

The degree of interference with regard to various age restrictions, marital status, and sexual orientations and identities has little to do with the regulatory goals that the Acts seek to achieve. Furthermore, one discovers that the State interest in regulating and registering clinics for offering "safe and ethical" ART services as well as surrogacy operations has not been adequately tailored under the Acts when using the compelling State interest criterion to the provisions of the ART and SR Acts.¹²

With the manifold increase in the number of persons using this procedure, this act comes as a boon. However, steps need to be taken to keep it comprehensible enough to absorb the changes in societal and moral demands. The above discussed Act recognizes that a woman may be coerced into commercial surrogacy, to improve the financial conditions of family, and hence has the clause which prescribes the husband or any other family member to involve in such practices and has penalties for same. However, the act is silent on the provision that whether any legal remedy is available if she is forced for altruistic surrogacy.

This ban is also against the decision in *Suchit Srivastava v. Chandigarh Administration*,¹³

¹⁰ Kapoor Aishwarya, "A Study on Surrogacy: Issues and Perspectives in Indian Scenario", International Journal of Law Humanities and Management, volume 5, Issue 5

¹¹ ((2017) 10 SCC 1), (Puttaswamy I).

¹² <https://www.newsclick.in/Reproductive-Justice-Constitutional-Issues-Plaguing-ART-Surrogacy-Laws-India>

¹³ Suchita Srivastava and Anr Vs Chandigarh Administration (2009) 9 SCC 1.

which held that Article 21 of the Indian Constitution includes the right to elect method of reproduction. The prohibition on commercial surrogacy prevents women from using their reproductive abilities for financial gain by neglecting the mental, physical, and emotional work they put in as well as the costs of medical care they accrue during and after the pregnancy.¹⁴

RECENT DEVELOPMENTS.

Mr. Arun Mathuvel has petitioned the Supreme Court of India to overturn the provisions of the aforementioned Acts. On behalf of the petitioner, it has been argued that:¹⁵

- The basic objective of regulating surrogacy and other assisted reproduction procedures is not adequately addressed by any of the Acts;
- Suddenly outlawing commercial surrogacy will inevitably lead to a criminal market and further abuse;
- The Acts lack transitory provisions and include uncertainties on arbitrary demands that increase the expense of surrogacy; and
- The provisions of both Acts are likely to lead to surrogacy marketplaces that are uncontrolled and internal family exploitation of women analogous to forced labour.

As a result, the Ministry of Health and Family Welfare, the Ministry of Women and Child Development, and the India Council of Medical Research have been asked to respond, and the issue has been set for hearing on January 9, 2023, according to the Supreme Court of India. Similarly, in the case of *Karan Balraj Mehta & Anr. vs. Union of India*,¹⁶ Karan Balraj Mehta and Dr. Pankuri Chandra petitioned the Delhi High Court to decriminalize commercial surrogacy under the Assisted Reproductive Technology (Regulation) Act, 2021, to contest the exclusion of a single, unmarried male and a married lady with a child from surrogacy.

A single, unmarried man's personal decision to have a child through surrogacy, according to the petitioner Karan Mehta, is not permitted since it is discriminatory and violates Articles 14 and 21 of the Constitution. Petitioner No. 2 Dr. Pankuri Chandra is also ineligible according to the provisions of the above-mentioned act.

Conclusion

The Act is undoubtedly a good thing, especially considering that one of the largest hubs for these procedures is in India. However, there are a few situations when the surrogacy laws are unclear. According to Article 21, the right to life encompasses the freedom to procreate and is a basic concept. Women's reproductive rights encompass both the right to parent and the right to carry a pregnancy to term. It follows that it is against Articles 21 and 14 to ban surrogacy while denying other reproductive options.

However, in occupations where there is a risk to a person's life, it is imperative to follow certain standards. Because of this, the central government published rules for the creation of excellent surrogacy clinics and outlined the standards that these clinics must satisfy in order to provide

¹⁴<https://blog.ipleaders.in/surrogacy>

act/#:~:text=The%20Surrogacy%20Act%20of%202021,of%20insurance%20and%20medical%20coverage.,last accessed on

¹⁵ Arun Mathuvel vs. Union of India & Ors., W.P (Civil) No. 756/2022 (India).

¹⁶ Karan Balraj Mehta & Anr. vs. Union of India, Delhi High Court, 8448/2022 (India).

their services. A lady seeking surrogacy or a couple intending on adopting a child are also given a list of guidelines. These actions create a surrogate mother's defence mechanism. So, this brings us to the point where we can see a balance being struck between regulation of the procedure as an occupation as well as ensuring a women's right to health. Although as mentioned above the act still has a hazy layout for some of the important aspect regarding beneficiaries of the act, the net of which can be broadened with careful deliberations. It is hoped that with the broadening societal prospects the act accommodates the changes and becomes more effective with time.