

THE SURROGACY (REGULATION) ACT, 2021: A CRITICAL ANALYSIS

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Abstract

The word “surrogate”, having roots in Latin “subrogare”, means “appointed to act in the place of.” The intended parent(s) is the individual or a couple who intend to rear the child after its birth.¹ Surrogacy² is an assisted reproduction procedure that makes a childless couple possible to have a child through a surrogate mother who agrees to bear a child for them. This was initially considered a welcome breakthrough

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1 *Baby Manji Yamada v. Union of India*: AIR 2009 SC 84, 2008; AIR SCW 6964.

2 There are different types of surrogacies including “traditional surrogacy” (also known as the straight method) where the surrogate is pregnant with her own biological child, but this child was conceived with the intention of relinquishing him/her to be raised by others; In “gestational surrogacy” (also known as the host method) the surrogate mother becomes pregnant *via* embryo transfer with a child of which she is not the biological mother. She may have made an arrangement to relinquish it to the biological mother or father to raise, or to a parent who is himself/ herself unrelated to the child (see explanation to s. 4 of the Surrogacy Act. It may or may not be commercial surrogacy but surrogacy act legalizes only non-commercial gestational surrogacy; “Altruistic Surrogacy” is a situation where the surrogate receives no financial reward for her pregnancy or the relinquishment of the child (although usually all expenses related to the pregnancy and birth are paid by the intended parents such as medical expenses, maternity clothing, and other related expenses; (s. 2 (b) of the Surrogacy Act) and “Commercial surrogacy” that is a form of surrogacy in which a gestational carrier is paid to carry a child to maturity in her womb and is usually resorted to by well off infertile couples who can afford the cost involved or people who save and borrow in order to complete their dream of being parents. (g) “commercial surrogacy” means commercialisation of surrogacy services or procedures or its component services or component procedures including selling or buying of human embryo or trading in the sale or purchase of human embryo or gametes or selling or buying or trading the services of surrogate motherhood by way of giving payment, reward, benefit, fees, remuneration or monetary 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 mother. *Ibid*.

but soon became a subject of intense ethical, economic, legal, and societal debate globally. In India, surrogacy became controversial for additional reasons also. India is a hugely populated country, equipped with a reasonably good medical technology and comparably low -cost medical services that attracted the childless couple who could easily afford a surrogate mother. India soon became a very popular destination for surrogacy. The Confederation of Indian Industry report, 2012 pegged the size of the Indian surrogacy industry to 2 Billion annually and estimated that more than 3,000 fertility clinics around the country are facilitating surrogacy. It was encouraged by the Central Government under the banner of medical tourism by facilitating visa to foreigners who exclusively travel to India for surrogacy purpose.³ With the passage of time, it was realised that the surrogacy is fraught with the socio-economic and moral issues that hardly find solutions in the existing Contract or Tort Laws. The Law Commission of India in its 208th Report recommended a ban on commercial surrogacy because of the lack of required legal framework and its exploitative use by foreigners on account of poverty and gullibility of Indian women folk. Based on these recommendations, the Indian Government withdrew visa permission for surrogacy for foreign nationals.⁴ The Law Commission's recommendation of banning commercial surrogacy and having legal framework in place became a *raison de etre* for the Indian Parliament to pass the Surrogacy Act, marking a significant milestone in the country's approach to regulate surrogacy. This paper attempts to analyse the historical context, ethical debates, and legal challenges surrounding surrogacy, highlights the transition from an unregulated practice to a regulated legal framework aimed at protecting the rights of the surrogate mothers, intending parents, and children born through surrogacy. Furthermore, it critically examines the provisions of surrogacy legislation and develops a case for its amendments so as to make it more broad-based, inclusive and free from ambiguities.

I Introduction

SURROGACY IS not a recent phenomenon. It is commonly accepted that this practice is prevalent not only in India but across nations. The factual and legal recognition of surrogacy has garnered considerable attention around the globe. In 1881, the first successful surrogacy with artificial insemination happened in an ethically questionable way in United States. It had gained a lot of criticism and raised diverse issues since then. There was no formal legislation across globe till 1976 and that was when a lawyer drafted the first traditional surrogacy agreement. The British scientists, Patrick Steptoe and Robert Edwards, are considered as pioneers of in vitro fertilization (IVF). The first successful IVF procedure that resulted in the birth of Louise Brown, credited with the world's first "test-tube baby," was carried out on July 25, 1978. This

3 Ministry of Home Affairs, (Foreign Division) Government of India, letter even number dated July 9, 2012 (Grant of medical visa for foreign nationals intending to visit India for commissioning surrogacy).

4 Ministry of Home Affairs, (Foreign Division) Government of India, letter No. 25022/74/2022-F.1 (Vol. II), Nov. 3, 2015.

path breaking scientific achievement marked the beginning of modern assisted reproductive technology (ART) but without any legal mandate.⁵

In India, of late, the practice of surrogacy has witnessed a significant surge due to advancements in the medical technologies, inexpensive procedures and readily available rental wombs. These socio-medico developments have boosted reproductive tourism and resulted into the evolution of new societal norms. However, the lack of comprehensive regulation had left the domain fraught with issues of exploitation, ethical dilemmas, and legal ambiguities.⁶ India's surrogacy market was regulated by private arrangements between the parties which were loosely drafted and at times self-defeating, making it a preferred destination for transnational parents interested in surrogacy. It led to a surge in the commercial surrogacy, raising concerns over the treatment of surrogate mothers, the commercialization of human womb, rental and other rights of the surrogate mothers and rights of the children born through surrogacy.⁷ Reports of exploitation, coercion, and a lack of informed consent among surrogate mothers highlighted the negative aspects of what was often touted as a mutually beneficial arrangement. Recognizing the urgent need for oversight, the Indian government enacted the Surrogacy (Regulation) Act, 2021, marking a significant milestone in the country's approach to managing surrogacy.⁸ The exploitative socio-economic reasons were essentially a driving force for the enactment of the Surrogacy Act. A halfway house approach was adopted in this Act that was conceived with the primary aim of protecting women from potential exploitation and ensuring the rights of the child born through surrogacy and banning of commercial surrogacy.

The objectives of the Surrogacy Act are manifold, aiming to prohibit commercial surrogacy while allowing altruistic surrogacy under the strict conditions. The Act endeavours to prevent the exploitation of surrogate mothers, protects the rights of children born through surrogacy, and ensures ethical practices in the arrangement of surrogacy. By drawing a clear distinction between an altruistic and commercial surrogacy, the legislation seeks to eradicate the commercial aspects of surrogacy, which are often linked to the exploitation and commodification of women's bodies. Furthermore, this Act spells out eligibility criteria for intending parents and surrogate mothers,

5 Mishra, I., and Khamari, C. P. "A Comprehensive Study on The Surrogacy (Regulation) Act, 2021 vis-a-vis The Assisted Reproductive Technology (Regulation) Act, 2021". *YMER Digital* (2022). DOI: 10.37896/ymer21.06/75

6 Verma, R. (2023), "Surrogacy (Regulation) Act, 2021: Effectiveness and Concerns". *Indian Politics and Law Review Journal*. DOI: 10.55662/iplr.2023.803

7 Savla, A. (2023). "Surrogacy (Regulation) Bill, 2020 and its Implications on the Reproductive Tourism Industry in India," *Medical Journal of Dr. D.Y. Patil Vidyapeeth*. available at: <http://journals.lww.com/MJDY/pages/current.aspx> (last visited on May 20, 2025).

8 The Surrogacy (Regulation) Act was enacted on Dec. 25 2021 after it got the assent of President Ramnath Kovind. Hereinafter referred to as the Surrogacy Act.

aiming to create a safe and ethical environment for surrogacy to take place.⁹ These criteria include stipulations regarding the nationality, marital status, age, and medical conditions of the intending parents, as well as, ensuring that the surrogate mothers are adequately informed, willing, and medically fit to carry the pregnancy. The Act envisages a comprehensive regulatory framework for surrogacy in India, including the creation of National and State Surrogacy Boards. These boards are tasked with overseeing surrogacy arrangements within the country, ensuring compliance with the Act, and safeguarding the rights and welfare of all the parties involved. The legislation mandates strict adherence to ethical guidelines, informed consent, and the provision of insurance and financial support for surrogate mothers. This regulatory framework represents a significant effort to institutionalize ethical standards and legal oversight in the domain of surrogacy, reflecting a shift towards more responsible and rights-based approaches to assisted reproduction.¹⁰

II Constitutional questions in surrogacy and Indian judicial approach

The constitutional courts in India have not shied away in protecting the interest of the genuine couple interested in having their child through surrogacy much before the enactment of the Surrogacy Act. The courts have proceeded step by step in establishing right to surrogacy. This right, like other implied constitutional rights, evolved over the period of time. The right to choose, followed by the reproductive rights as a natural corollary of right to life cleared the deck for right to surrogacy. In *Suchitra Shrivastava v. Chandigarh Administration*,¹¹ the Supreme Court read right to make reproductive choices as a part and parcel of Article 21 and an essential component of right to life and opined that the marriage partners are at a liberty to make their reproductive choices and the state has no role in it. This case has set a strong precedent for reproductive rights in India. In *Meera Santosh Pal v. Union of India*,¹² the recognition of reproductive rights was further strengthened by invoking body autonomy doctrine that reinforces reproductive choices as a fundamental right.

*Baby Manji Yamada v. Union of India*¹³ marks a beginning of the judicial concern for unregulated surrogacy in India. This case raised some unprecedented issues for the court to adjudicate upon. In this case, a couple from Japan sought their child through surrogacy in India and identified a lady. When the lady successfully conceived, the

9 Narayan, G., Mishra, H., Survari, T. K., Mahajan, I., Patnaik, M., Kumar, S., Amanullah, N. A., and Mishra, S. S. (2023), “The Surrogacy Regulation Act of 2021: A Right Step Towards an Egalitarian and Inclusive Society?” *Cureus*, available at: pubmed.ncbi.nlm.nih.gov/37213977/ (last visted on May 20, 2025).

10 Chandran, A. (2022), “Valuing Women’s Labour: Some Notes on the ‘Compensatory Model of Surrogacy’” *Journal of South Asian Development*. Available at: journals.sagepub.com/doi/10.177/09731741221097576, (last visted on May 20, 2025).

11 (2009) 9 SCC 1.

12 (2017) 3 SCC 462.

13 (2008) 13 SCC 521.

couple went back to their country. They developed differences before the delivery of the child and got separated. The lady refused to take the child born through surrogacy and the father was not legally eligible to take the child. The child earned the tag of first orphan through surrogacy. The grandmother then stepped in to take the child back to Japan and the apex court granted custody of the child to her. Hence, this legal battle and the need for comprehensive legislation on this subject received shot in the arms. The apex court observed that the legal and ethical challenges posed by surrogacy can be properly address through legislative will by enacting an enactment governing the filed. Thus, the apex court advocated for a comprehensive legislation on the subject of surrogacy.¹⁴

Jan Balaṅ v. Anand Municipality, order delivered on May 13 ,(2009)¹⁵ represents a case with unprecedented facts involving constitutional questions through a prism of the Citizenship Act, 1955. The petitioner was German National who was interested in having a child in India through surrogacy because his lawful wife, Susanne Anna Lohle, could not conceive the child as she was unable to produce eggs. Marthaben Immanuel Khristi, an anonymous India citizen, volunteered to donate ova. The sperm of the petitioner was fertilized with the Ova of the donor and the fertilized embryo was then implanted in the uterus of the surrogate mother and two bay girls were successfully born. The petitioner applied for registration of birth of his children in the prescribed form to Anand Nagar Palika, and a certificate of birth was issued. He then applied for Indian passport of the babies as he wanted to settle in United Kingdom (UK) but that was not issued because their case was not falling within the Citizenship Act. This decision was challenged by the petitioner before the High Court of Gujarat. The petitioner was directed to submit his passport also till the case is decided by the court. This direction was also challenged by the petitioner before the Supreme Court. The petitioner found himself in a legal cauldron which he might not have thought of even in his wildest dreams. His citizenship of twin children became the bone of contention. He could not get the citizenship of his home country, *i.e.*, Germany for his children because they were not born there. They were not citizens of India as per the applicable provision of the Citizenship Act. The High Court of Gujarat raised a number of pertinent questions that justified the need to have comprehensive legislation on the subject and took a humanitarian approach to resolve the issue in hand. In the words of the court:

“We are primarily concerned with the rights of two new born innocent babies, much more than the rights of the biological parents, surrogate mother, or the donor of the ova. Emotional and legal relationship of the babies with the surrogate mother and

14 *Baby Manji Yamada v. Union of India* (2008) 13 SCC 521.

15 *Jan Balaṅ v. Anand Municipality* (2009): *Jan v. Anand* on July, 29, 2008 Author: Jayant Patel Bench: Jayant Patel High Court of Gujarat Case Information System Print CA/6719/2008 ... Special Civil Application No. 3020 of 2008.

the donor of the ova is also of vital importance. Surrogate mother is not the genetic mother or biologically related to the baby, but, is she merely a host of an embryo or a gestational carrier? What is the status of the ova (egg) donor, which in this case an Indian national but anonymous. Is the ova donor the real mother or the gestational surrogate? Are the babies motherless, can we brand them as legal orphans or Stateless babies? So many ethical and legal questions have come up for consideration in this case for which there are no clear answers, so far, at least, in this country". The court made a comparative study of laws in vogue in other jurisdictions, more particularly of the laws in Ukraine and Japan and laid down that the gestational mother is the natural mother of the surrogate child in such cases and the child is entitled to Indian Citizenship.

In *P. Geetha v. the Kerala Livestock Development*,¹⁶ the court had to delve on the attendant issues surrounding the surrogacy and held that there should be no discrimination of women on availing the maternity benefits merely on the ground that she got child through surrogacy. The petitioner is entitled to all the maternity benefits post-delivery, except the leave involving the health of the mother after delivery.

III A critical analysis of the Surrogacy Act

A plain reading of the Surrogacy Act reveals that this enactment is more of a prohibitive than regulative in nature as promised in its preamble¹⁷ and it prohibits more than it permits that is in practice. This approach is bound to raise questions without answers.

The Surrogacy Act defines the "couple" as the legally married Indian man and woman above the age of 21 years and 18 years, respectively.¹⁸ This definition by implications excludes foreigners, LGBTIQ+, and would not include a couple where only one of them is Indian. The NRIs or Green card holders enjoying citizenship of India are within the purview of the Surrogacy Act. Only legally wed Indian couple can avail surrogacy subject to the condition that they do not have any surviving child, biologically or through adoption or through surrogacy earlier¹⁹ However, this does not apply to the intending couple whose child is mentally or physically challenged or suffers from life threatening disorder or fatal illness with no permanent cure and approved by the appropriate authority with due medical certificate from a District Medical Board. The surrogacy Act follows a one child norm which does not have any parallel legislative

16 2015 SCC Ker. 71,

17 It reads: An Act to constitute National Assisted Reproductive Technology and Surrogacy Board, State Assisted Reproductive Technology and Surrogacy Boards and appointment of appropriate authorities for regulation of the practice and process of surrogacy and for matters connected therewith or incidental thereto.

18 S. 2 (h).

19 S. 2 (c) (II).

support. Does the permitted surrogacy include a scenario where one of the spouses is either in a vegetative state or dies but has preserved sperm or eggs before that vegetative state or death?

In a first of its kind judgment, recently the High Court of Delhi²⁰ was called to resolve the question whether posthumous reproduction is prohibited in India. A father approached the High Court of Delhi with a plea that the Ganga Ram Hospital authorities be directed to release sperm of his deceased son that has been preserved in the hospital. The hospital authorities in response to the notice issued by the court contended that there are no Assisted Reproduction Technology Laws related to the release of frozen sperm or eggs. The ICMR guidelines regarding posthumous reproduction and Surrogacy Act are also silent on it. The court directed the release of sperm with a rider that it will not be used for commercial surrogacy.

The court found that “under the prevailing Indian law, there is no prohibition against posthumous reproduction if the consent of the sperm owner or egg owner can be demonstrated. If the deceased had been married and had a spouse, the issues would not have been as complex. “In the absence of a spouse, the question arises: is there any prohibition on posthumous reproduction under the existing law? The answer is clearly in the negative. In the absence of any such prohibition, this court is unable to read a restriction where none exists.”

The court further said that “the decision shall be communicated to the Union Ministry of Health and Family Welfare for considering whether any law, enactment, or guidelines are required to address issues related to posthumous reproduction or post-mortal reproduction”. It is submitted that the decision is forward looking and it is bound to solve many social and economic problems by permitting posthumous reproduction. In order to bring more clarity on the subject, the Surrogacy Act may be amended to incorporate express provision in it so as to legalize posthumous reproduction.

The definition of couple does not include live- in relationship²¹ inspite of the fact that this relationship has been declared by the Supreme court as a natural corollary of the fundamental right to choose.²² The Domestic Violence Act, 2015 formally recognises this relationship and the Supreme Court of India in a number of cases has held that a child born out of live in relationship is legitimate.²³

20 Decided on Oct. 5, 2024, per Justice Prathiba M. Singh.

21 See for instance: *S. Khushboo v. Kanniammal* (2010) 5 SCC 600.

22 See for instance; *S. Khushboo v. Kanniammal* AIR 2010 SC 3196; 2010 (5) SCC 600; *Lata Singh v. State of U.P.* 2006 AIR SCW 3499; 2006 (5) SCC 475, 2006 CRI. L. J. 3309; *Indra Sarma v. V.K.V. Sarma*, 2013 AIR SCW 6783, 2013 (15) SCC 755, 2014 (1) AIR BOM R 615.

The Surrogacy Act defines “intending couple” as a couple who has a medical indication necessitating gestational surrogacy and who intend to become parents through surrogacy;²⁴ and the expression “gestational surrogacy,” “means a practice whereby a surrogate mother carries (i) a child for the intending couple through implantation of embryo in her womb and the child is not genetically related to the surrogate mother; (ii) when it is only for altruistic surrogacy purposes; (iii) when it is not for commercial purposes or for commercialisation of surrogacy or surrogacy procedures; (iv) when it is not for producing children for sale, prostitution or any other form of exploitation; and (v) any other condition or disease as may be specified by regulations made by the Board”. The expression “altruistic surrogacy,” “means the surrogacy in which no charges, expenses, fees, remuneration or monetary incentive of whatever nature, except the medical expenses and such other prescribed expenses incurred on surrogate mother and the insurance coverage for the surrogate mother, are given to the surrogate mother or her dependents or her representative.”²⁵ The combined reading of these provisions makes it clear that the Surrogacy Act does not apply to IVF where sperm of the husband has been used for fertilization of the eggs in the womb of his wife during the life time of her husband or after his death where his sperm has been preserved. The Surrogacy Act does not legalize surrogacy where there is no medical necessity for gestational surrogacy. Nowadays, popular surrogacies, especially of celebrities to preserve body figure, will not be covered under this Act.

The Surrogacy Act legalize limited surrogacies which are purely non-commercial for surrogate mothers and necessitated by the medical indications of the “intending couple” leaving aside a whole lot of surrogacies wanted by a desperate couple who cannot find surrogate mother willing to qualify for altruistic surrogacy. The banning of commercial surrogacy is also considered as an assault on the woman’s autonomy right. The moot point is what will drive a woman to volunteer herself for bearing unbearable pain and health hazards during and after pregnancy? Prohibiting what is possible in surrogacy and permitting what is near impossible cannot be called as a regulation of surrogacy as mentioned in the preamble of the Act. There will be always private lucrative arrangements between the parties that will persuade a willing woman to rent her womb but that may not be in conformity with the provisions of the Surrogacy Act.²⁶

23 In *S.P.S Balasubramanyam v. Suruttayan*, 1994 AIR 133, 1994 SCC (1) 460 the Supreme Court for the first time considered the question of the legitimacy of children born from live-in relationships. It was held that “*If a man and woman are living under the same roof and cohabiting for some years, there will be a presumption under Section 114 of the Evidence Act that they live as husband and wife and the children born to them will not be illegitimate.*”

24 S. 2 (r)

25 S. 2 (b)

26 As defined in s. 2(Zd)

The definition of commercial surrogacy²⁷ has caste its net on wide waters because it not only prohibits sale and purchase of human embryo or gametes but also trading in the sale or purchase of human embryo or selling or buying or trading the services of surrogate motherhood, immaterial of the free consent of the parties. This definition prohibits commercialization of surrogacy services or its procedures or its component services. Does this mean that any registered medical practitioner, gynaecologist, paediatrician, embryologist who charges for surrogacy services or its procedures or components of services in a case where surrogacy is itself an altruistic surrogacy will be held liable for undertaking commercial surrogacy? Does this mean that the services of the registered medical practitioner for carrying out surrogacy should be free; otherwise even an altruistic surrogacy may fall in the category of commercial surrogacy? This is further fortified by the fact that section 40 of the Surrogacy Act provides punishment for not following an altruistic surrogacy and makes punishable conducting of surrogacy procedures for commercial purpose that may include service charges of the medical practitioners undertaking altruist surrogacy which may not be the intention of the legislature. Why should a medical practitioner in a private clinic render services free of charges?

The Surrogacy Act defines “intending woman” as an Indian woman who is a widow or divorcee between the age of 35 to 45 years and who intends to avail the surrogacy²⁸ but a different age limit is prescribed for an intending couple. It is provided that the intending couple must be married and between the age of 23 to 50 years in case of female and between 26 to 55 years in case of male on the day of certification.²⁹ There is no apparent rational of providing different age limit and providing of age limit at all. This provision is likely to be observed more in breaches. The recent news on March, 20 2024 that of a late Punjabi folk singer Moosewala’s parents had opted for IVF is a case in point. The couple was in their late 50’s and their successful surrogacy did not invite any legal consequences but was widely celebrated by the fans of late singer and parents who called it the blessings of eternal Lord.³⁰ It is also not clear where from an ‘intended woman” who should be a divorcee or

27 S. 2(g) defines “commercial surrogacy” means commercialisation of surrogacy services or procedures or its component services or component procedures including selling or buying of human embryo or trading in the sale or purchase of human embryo or gametes or selling or buying or trading the services of surrogate motherhood by way of giving payment, reward, benefit, fees, remuneration or monetary 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 mother.

28 S. 2 (s)

29 S. 2 (C) (I)

30 Available at: http://timesofindia.indiatimes.com/articleshow/108557798.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst (last visted on Feb. 19, 2025).

widow of a prescribed age will get the sperm. The High Court of Calcutta³¹ has already ruled that a widow is the rightful owner of the sperm of a dead husband as against the father-in-law but where such sperm is not available; is an intended woman free to use sperm of any other person? This issue seems to have been addressed now by the Surrogacy (Regulation) Amendment Rules, 2024³² by allowing one donor gamete in certain circumstances. This will apply to an intending couple as well as intending woman.

The Surrogacy Act makes a provision for an “intended woman” but similar provision for “intended man” has not been provided perhaps on a mistaken notion that a male divorcee or widower may not be interested in surrogacy. However, this notion has been proved wrong by the celebrities like Karan Johar, Tushar Kapoor and others who got their children through surrogacy without any kind of marriage, of course, well before the enactment of the Surrogacy Act. The point to drive home is that like “intended women”, “intended men” should have been given an option of surrogacy.

The Surrogacy Act does not permit surrogacy of unwed persons and one may argue that if this right has been given to a divorcee or widow of a prescribed age, why the similar right has not been given to unwed women. What is the difference between the two? Will the tag of marriage make surrogacy acceptable in the society for a divorcee or widow but not for unwed women? Are we governed by the constitutional morality or social morality? Is this classification reasonable or will it hit the fundamental right of body autonomy or to right to leave alone?

The case of an unwed woman craving to become a mother as a single parent was hotly debated before the Supreme Court very recently.³³ The apex court told the petitioner that he “can’t have everything in life” and observed that, “the institution of marriage is to be protected unlike the West, where children are born outside of marriage.” The bench, comprising Justices B.V. Nagarathna and Augustine George Masih, expressed its reservation while hearing the petition of a 44-year-old woman who approached the court seeking permission to become a mother through surrogacy. The apex court ruled that “according to the Surrogacy Regulation Act, only those women who are widowed or divorced and between the age of 35 to 45 years can avail the surrogacy route. This implies that a single unmarried woman is not allowed to become a mother through surrogacy.” The apex court observed:

It is a norm here to become a mother within the institution of marriage. Being a mother outside the institution of marriage is not

31 Available at: http://timesofindia.indiatimes.com/articleshow/80396053.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst, Only widow, not dad, has right to dead man’s sperm (last visited on Mar. 28, 2025).

32 Available at: <https://www.sconline.com/blog/post/2024/02/22/mohfw-notifies-surrogacy-amendment-rule-2024-legal-news/> notification issued by the Ministry of health and family welfare (MOHFW), (last visited on Mar. 28, 2025).

33 *The Wire* Feb. 6, 2024.

the norm. We are concerned about it. We are speaking from the point of view of (the) child's welfare. Should the institution of marriage survive or not in the country? We are not like western countries. The Institution of the marriage has to be protected. You can call us and tag us conservative, and we accept it.

The apex court did not accept the argument that allowing only widows and divorcees of a specific age to avail surrogacy is discriminatory and may encourage the unwed woman to marry first and then get divorce for availing this provision that would be an absurd result of this interpretation.

Similar sermons were given by the High Court of Allahabad³⁴ by holding that “no live-in relationship shall be permitted at the cost of country's social fabric” in case of interfaith couple seeking protection for their live in relation but that was over turned by the supreme court by holding that the courts cannot be the moral guards to the couple opting for live in relationship and cannot sermon them on the societal norms.

The definition of the surrogate mother³⁵ has to be amended so that it is in harmony with the Surrogacy (Regulation) Amendment Rules, 2024 which have now permitted the use of egg or sperm of a donor if the intending couple has any medical condition that necessitates it. In fact, these new rules should have been framed only after bringing necessary changes in the main Act. There will be interpretational issues when rules contradict the Act under which they have been framed. The definition of the surrogate mother still provides that she is one who agrees to bear a child who is genetically related to the intending couple which means that egg as well as sperm should be of an intending couple which contradicts with the Amendment Rules, 2024.

The broader implications of the Surrogacy Act, extend beyond the immediate realm of surrogacy, touching upon fundamental issues of gender rights, body autonomy, and the definition of family in the contemporary Indian context. The Act's emphasis on protecting surrogate mothers from exploitation is commendable, yet it also raises questions about women's autonomy and the right to make decisions regarding their bodies. Furthermore, the legislation's approach to define eligible intending parents reflects underlying societal norms and values regarding family structures, marriage, and parenthood. These considerations illustrate the Act's potential to influence social norms and legal precedents relating to assisted reproduction and family formation.³⁶

34 Available at: <https://www.livelaw.in/high-court/allah> (last visited on Feb. 28, 2025).

35 S. 2 (zg).

36 Misra, S., and Mishra, P. (2021). “*Surrogate Motherhood: Challenges and Legal Implications*. *Indian Journal of Forensic Medicine and Toxicology*.”, available at: https://www.academia.edu/99200550/Surrogate_Motherhood_Challenges_and_Legal_Implications (last visited on Feb. 20, 2025).

IV Legal consequences for violations

The Surrogacy Act establishes a comprehensive framework to regulate surrogacy in India, emphasizing the prohibition of commercial surrogacy and prioritizing altruistic surrogacy under specific conditions. The critical aspect of the Act is its stringent approach towards offences and penalties to deter violations of its provisions.

Offences and penalties

Prohibition of commercial surrogacy and exploitation: This section makes it an offence to; Undertake or facilitate commercial surrogacy, Advertise commercial surrogacy services, Abandon, exploit, or disown children born through surrogacy, Exploit surrogate mothers, Sell or trade human embryos or gametes for surrogacy, Import human embryos or gametes for surrogacy, Conduct sex selection for surrogacy. Violations can result in imprisonment of up to ten years and fines up to ten lakh rupees.³⁷

However, the **Surrogacy (Regulation) Amendment Rules, 2024** have now permitted the use of donor gametes and consent agreements in surrogacy arrangements. The Centre had banned last year the use of donor gametes that was challenged before the Supreme Court in a number of petitions. Now the centre has amended these rules in 2024 and has allowed the use of the egg or the sperm of a donor if the ‘intending couple’ has a medical condition that necessitates it. This is subject to certification of the District Medical Board that either husband or wife constituting the intending couple suffers from medical condition necessitating the use of donor gamete. Only then the surrogacy using donor gamete is permitted with a condition that the child to be born through surrogacy must have atleast one gamete from the intending couple. This necessitates amendments in the Surrogacy Act.

Punishment for contravention of act provisions

Medical professionals or anyone associated with the surrogacy clinics found violating the Act (other than Section 38 offences) may face an imprisonment up to five years and fines up to ten lakh rupees. Repeated offences could lead to suspension of medical registration.³⁸ This provision holds liable the registered medical practitioners and by implications excludes the unregistered medical practitioners. There are uncounted numbers of the medical practitioners who may be qualified but are not registered either because they have obtained their medical certificates from the countries or colleges which are not recognised or they have not registered themselves.

Punishment for not following altruistic surrogacy:³⁹ Intending couples or individuals seeking commercial surrogacy services can be penalized with an imprisonment up to five years and fines up to five lakh rupees for the first offence.

37 S. 38.

38 S. 39.

39 S. 40.

Subsequent offences may attract harsher penalties. This provision prohibits even commercial service or component thereof which is required to perform altruistic surrogacy.

Presumption in surrogacy cases:⁴⁰ The Surrogacy Act has created an irrebuttable presumption that “the woman or surrogate mother was compelled by her husband, the intending couple or any other relative, as the case may be, to render surrogacy services, procedures or to donate gametes for the purpose other than those specified in clause (ii) of section 4 and such person shall be liable for abetment of such offence under section 40 and shall be punishable for the offence specified under that section”. There appears a drafting mistake that instead of the word “woman” it should have been “wife” because liability is fasten on the husband and there cannot be a husband without a wife.

Nature of offences⁴¹ The Surrogacy Act has made all the offences created under it cognizable, non-bailable, and non-compoundable, highlighting the seriousness with which the Act approaches surrogacy regulation.

Cognizance of offences⁴² The Act specifies that the “offences can only be prosecuted, based on a complaint, by (a) the appropriate authority concerned, or any officer or an agency authorised in this behalf by the Central Government or the State Government, as the case may be, or the appropriate authority; or (b) a person including a social organisation who has given notice of not less than fifteen days in the manner prescribed, to the appropriate authority, of the alleged offence and of his intention to make a complaint to the court”. This provision has widened the *locus standi* and has authorised *inter alia* the individual or the social organisation to file a complaint but this laudable move has been diluted by making it a condition precedent that the individual or the social organisation should first inform the appropriate authority fifteen days in advance of its intention to file a complaint. Generally, in criminal actions, third party is not given locus to file a complaint but Surrogacy Act does so, However, this provision has been blunted by making it necessary for the individual or the social organisation to inform the appropriate authority 15 days in advance without any apparent rationale. There is also no definition of the “Social Organisation” provided in the surrogacy Act.

Exclusion from plea bargaining (section 45): Plea bargaining, as outlined in the Code of Criminal Procedure, 1973, (Now BNNS, 2023) is not applicable to offences under this Act, reinforcing the intent to strictly penalize violations. The approach of the Surrogacy Act to offences and penalties reflects a robust legal framework designed to deter commercial surrogacy, protect surrogate mothers from exploitation, and

40 S. 42.

41 S. 43.

42 S. 44.

ensure the welfare of children born through surrogacy. By categorizing offences as cognizable, non-bailable, and non-compoundable, the Act seeks to maintain strict control over surrogacy practices. The inclusion of specific provisions for punishment, presumption of coercion, and the procedural aspects of taking cognizance of offences underline the comprehensive and stringent nature of the regulatory mechanism. However, this rigorous approach may also necessitate careful implementation to ensure that it does not inadvertently penalize parties involved in legitimate altruistic surrogacy arrangements or hinder the accessibility of surrogacy for those genuinely in need.

V Registration of surrogacy clinics⁴³

The Surrogacy Act, includes specific provisions for the regulation and registration of surrogacy clinics in India, ensuring that these clinics meet established standards and practices. Here's a detailed overview of these provisions:

Registration of surrogacy clinics⁴⁴

Mandatory registration: Establishing or operating a surrogacy clinic without registration under the Act is prohibited. This ensures that only compliant clinics offer surrogacy and related procedures.

Application process: Applications for registration must be submitted to the designated authority in the prescribed form and accompanied by the stipulated fees. This standardizes the registration process.

Timely application: Existing surrogacy clinics are required to apply for registration within 60 days from the designation of the appropriate authority, emphasizing the urgency in complying with the new regulatory framework.

Registration Criteria: The appropriate authority will only register clinics that have the necessary facilities, equipment, and standards, including specialized manpower and infrastructure, ensuring that clinics are adequately equipped to provide surrogacy services.

Certificate of registration (section 12)

Issuance and inquiry: After an inquiry and ensuring compliance with the Act's requirements, the appropriate authority will issue a registration certificate within 90 days of receiving the application.

Rejection of application: If a clinic fails to meet the Act's requirements, the application for registration can be rejected, with reasons documented by the authority.

43 Available at: <https://www.indiacode.nic.in/bitstream/123456789/17046/1/A2021-47.pdf> (last visited on Feb. 10 2025).

44 S.11.

Validity and renewal: The registration certificate is valid for three years and can be renewed as prescribed, necessitating ongoing compliance with the Act's standards.

Display of certificate: Clinics must display their registration certificate prominently, promoting transparency and informing clients of their legal compliance.

Cancellation or suspension of registration (section 13)

Grounds for Action: The appropriate authority can suspend or cancel a clinic's registration if it violates the Act's provisions, ensuring accountability and adherence to legal and ethical standards.

Immediate Suspension: In the public interest, the authority can immediately suspend a clinic's registration without prior notice, addressing urgent concerns.

Appeal process (Section 14)

Right to appeal: Clinics, intending couples, or intending women can appeal against decisions related to registration rejection, suspension, or cancellation to the State or Central Government, providing a mechanism for review and redress.

Establishment of National Registry (sections 15 and 16)

National registry: The Act mandates the creation of a National Assisted Reproductive Technology and Surrogacy Registry for the registration of surrogacy clinics, centralizing and standardizing the registration process.

Application of ART Act Provisions: The provisions of the Assisted Reproductive Technology (ART) Act regarding the National Registry also apply to the surrogacy registry, ensuring consistency and integration between these related regulatory frameworks.

These sections of the Surrogacy Act, illustrate the comprehensive approach taken by the legislature to regulate surrogacy clinics, emphasizing standards, accountability, and transparency. By establishing stringent registration, monitoring, and enforcement mechanisms, the Act aims to safeguard the interests and well-being of the surrogate mothers, intending parents, and the children born through surrogacy.

VII Impact of Surrogacy Act

The enactment of the Surrogacy Act, has profoundly influenced India's surrogacy practices, introducing critical regulatory measures for surrogacy that previously lacked comprehensive oversight. By prohibiting commercial surrogacy, the Act has caused a drastic shift away from the profit-driven surrogacy arrangements, leading to the closure or operational overhaul of numerous surrogacy clinics. Additionally, the Act's limitation of surrogacy services to married couples has notably excluded single individuals, same-sex couples, and those in non-marital partnerships from availing of these services.

This exclusion has sparked debate over potential discrimination and the infringement on individuals' rights to reproductive freedom.⁴⁵

The legislation also establishes significant legal safeguards for both surrogates and the children born through surrogacy. It mandates written consent from surrogates, who are also granted the right to medical care and insurance coverage at the expense of the prospective parents. Children born from surrogacy are assured the same rights as biological offspring, including inheritance rights. Furthermore, the creation of a Surrogacy Regulation Authority and the National Surrogacy Board aims to ensure ethical surrogacy practices and provide a regulated framework for the surrogacy, enhancing transparency and accountability.

Despite these advancements, the Act's restrictive nature has raised concerns about the potential for an increase in unregulated and exploitative surrogacy arrangements. The move towards exclusively altruistic surrogacy may reduce the availability of surrogates, as financial compensation has been a motivating factor for many. The Act's ethical guidelines for surrogacy clinics, which emphasize informed consent, medical screening, and comprehensive care for surrogates, aim to uphold the dignity and well-being of all parties involved.

Overall, the Surrogacy Act, represents a pivotal change in India's approach to surrogacy, prioritizing ethical considerations and the welfare of surrogates and children. However, it also faces criticism for its potentially exclusionary and restrictive impacts, underscoring the complexity of regulating such a sensitive area of reproductive technology.

VII Challenges ahead

The Surrogacy Act, represents a significant step towards establishing a regulated framework for surrogacy in India, aiming to protect the rights of surrogate mothers, intending parents, and children born through surrogacy. However, the Act and its provisions on the registration of surrogacy clinics, among other aspects, present several challenges that necessitate careful consideration and targeted recommendations for improvement.

Challenges

Restrictive scope: One of the major challenges lies in the Act's restrictive criteria for eligible surrogate mothers and intending parents, potentially excluding single individuals, LGBTQ+ communities, and non-traditional families from accessing surrogacy services.

45 Rudra pal, "Impact of The New Surrogacy (regulation) Act, 2021 On Surrogacy Arrangements In India, India", *available at*: <https://aklegal.in/impact-of-the-new-surrogacy-regulation-act-2021-on-surrogacy-arrangements-in-india/> (last visited on Feb. 10, 2025).

This limitation raises concerns about the Act's alignment with broader human rights principles, including equality and non-discrimination.

Complete prohibition on commercial surrogacy: The outright prohibition on commercial surrogacy aims to prevent exploitation and commodification of women's bodies. However, this prohibition may result in the practice underground, making it more unsafe, unregulated and exorbitant. Moreover, it ignores the potential for ethical commercial surrogacy frameworks that can provide financial empowerment to surrogate mothers while ensuring their rights and well-being are protected.

Monitoring and effective implementation: The establishment of a regulatory framework for the registration and monitoring of surrogacy clinics is crucial. Yet, the effective implementation of these regulations poses a significant challenge, particularly in ensuring uniformity and high standards across all states and territories. Additionally, the capacity of the appropriate authorities to enforce these standards and manage the registration process effectively remains a concern.

Awareness and counselling: There is a need for widespread awareness and education among potential surrogate mothers, intending parents, and healthcare providers about the legal and ethical aspects of surrogacy. Misunderstandings and misinformation could lead to exploitation and other negative outcomes.⁴⁶

VIII Conclusion

Surrogacy's journey has been marked by significant cultural, ethical, legal, and technological evolutions. Initially, practiced in a legal grey area, surrogacy has transformed into a well-regulated domain, particularly with the introduction of the Surrogacy Act in India. This legislation represents a critical response to the challenges of exploitation, ethical dilemmas, and legal ambiguities surrounding surrogacy. By distinguishing between altruistic and commercial surrogacy, setting stringent eligibility criteria for participants, and establishing comprehensive oversight mechanisms, the Act aims to safeguard the interests of surrogate mothers, intending parents, and children born through surrogacy. While the Act has been a significant stride towards ethical and regulated surrogacy, it also raises questions regarding inclusivity, autonomy, and the evolving definitions of family, highlighting the complex interplay between societal norms, medical advancements, and legal frameworks. The Act has many grey areas which have to be sorted out by way of amendments. There is a disharmony between the Surrogacy Act and Surrogacy (Regulation) Amendment Rules, 2024. What is prohibited under the Act has been permitted under the rules that has to be revisited. The surrogacy continues to evolve and with the passage of time the Act's impact on social norms, legal precedents, and the broader discourse on assisted reproduction and family formation will be closely observed and critically analysed.

46 Rudra Pal, "Impact Of The New Surrogacy (regulation) Act, 2021 on Surrogacy Arrangements In India", *available at*: <https://aklegal.in/impact-of-the-new-surrogacy-regulation-act-2021-on-surrogacy-arrangements-in-india/> (last visited on Jan. 22, 2025).