



# The Indian Journal for Research in Law and Management

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Editor-in-Chief – Dr. Muktai Deb Chavan; Publisher – Alden Vas; ISSN: 2583-9896

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## SURROGACY IN INDIA: A CRITICAL ANALYSIS

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### INTRODUCTION

Surrogacy means when a surrogate mother agrees to carry the child of another person, who is unable to do it themselves. “Surrogacy” has been derived from the Latin word “subrogare,” which stands for substitution or to put in the place of another. According to Black's Law Dictionary, Surrogacy refers to the process of carrying and delivering a child by a surrogate mother for the intended parents. This idea of surrogacy has been gaining importance in recent times. In the case of surrogacy, after the child is born, the biological mother leaves the child to his or her intended parents. If a woman has undergone multiple miscarriages or there are some problems related to infertility, then the role of surrogacy comes into play. Though it raises serious ethical concerns, still, when people do not find adoption as a good option, they opt for surrogacy. When the husband's sperm is implanted in the surrogate mother through a process known as artificial insemination or traditional surrogacy

The major types of surrogacies are commercial surrogacy and altruistic surrogacy. In the case of altruistic surrogacy, the woman who carries a child for the couple will get no financial compensation apart from the medical expenses and other such prescribed expenses. It means that the reimbursement will be given only for the direct expenses and not for other expenses. According to the Surrogacy Act of 2021, the term altruistic surrogacy will include only the medical expenses, insurance coverage, and other expenses, and it does not include extra charges or fees, remuneration, or incentives to be given to the surrogate mother. In case of commercial surrogacy, sometimes also called womb for rent, the woman who carries a child (surrogate mother) for the intended parents will get the monetary compensation, be it in cash or kind, which is not limited to medical and insurance, but also the expenses incurred during the pregnancy. Here, it is seen as a business-like transaction where a hefty sum is being paid to the surrogate mother in return for the incubation service provided by her.

Surrogacy agreement is a legal contract that is made between the surrogate mother (who carries the child for the intended parent) and the intended parent, in which they include all the relevant information as to parental rights, liabilities of parties, medical procedure, and monetary terms. In the agreement, both parties show/declare that there is an intention of the parties to enter into the surrogacy agreement in which the surrogate agrees to carry the child and give birth for the intended parent. Under the surrogacy parenting agreement, they form a contract in which the conditions declare that the surrogate mother will bear the child in her womb for the intended parents, and after the birth, she will relinquish all rights to that child. Here, the surrogate mother gives away all the rights to the child as she carries the child for the intended parents only, so it is necessary to make a contract and obtain the consent of the parties to avoid any issues that might arise at a later stage. Hence, they have to sign the agreement after going through the entire agreement. In the case of a surrogacy arrangement agreement, it is an agreement between the intended parents and the hospital or the agency. It includes details as to the fee structure, payment mode, date of the procedure, medical tests, and all other medical procedures. This surrogacy arrangement agreement is enforceable, too.

### **HISTORICAL EVOLUTION OF SURROGACY LAWS IN INDIA**

Surrogacy has roots in ancient India. From the 90s itself, one can see the development of surrogacy law in India. Fertility centers were developing, but there was no clear legislation. So, since there was a lack of proper legislation, the chances of exploitation of women, who were willing to carry the child of intended parents or even the commercialization of reproductive practices, were rising, causing serious concerns.

Various judicial decisions brought changes to the regulation of surrogacy in India. The case of *Baby Manji Yamada v Union of India*<sup>1</sup> is a landmark judgement which raised serious issues related to the Status of the child born from surrogacy in India. In this case, a Japanese couple hired a surrogate mother in Gujarat, and before the child was born, the couple was divorced; now the intended mother no longer wanted the child. The legal status of a child born out of surrogacy was in question. The surrogate mother was not even married, and she was not able to arrange the legal documents that were necessary for the child to travel to Japan. In this case, the Hon'ble Supreme Court held that it is very crucial to create laws that protect the surrogate mother as well as the child born through surrogacy in these situations. The Supreme Court gave the child's custody to the Japanese grandmother. This case highlighted the existing

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<sup>1</sup> *Baby Manji Yamada v. Union of India*, A.I.R. 2009 S.C. 84 (India)

gaps in the system, where if the intended mother herself doesn't need the child born out of surrogacy, then what relief shall be relief that the child, as well as the Surrogate mother, get?

In 2008, the Indian Council of Medical Research (ICMR) made certain guidelines to provide certain standards for surrogacy. These guidelines prescribed the use of the Assisted Reproductive Technology (ART) procedure. It includes certain standards for commercial surrogacy, too. But the major problem with these guidelines was that they were not legally binding; rather, it was just suggestions only which is a choice to follow or not.

The Law Commission report (2009)<sup>2</sup> – The Law Commission in its 228<sup>th</sup> report recommended banning commercial surrogacy as there was no proper legal framework, and there was an increase in the rate of exploitation of Surrogate mothers and the use of Surrogacy by foreigners. It stated that there is an urgent need to regulate Surrogacy practices, which will ensure the well-being of the child born through surrogacy. The recommendation also included a ban on altruistic surrogacy, too, as it was considered an unethical practice. The report highlights the need to protect the Surrogate mother as most of those women agree to become Surrogate mothers due to their financial condition, like poverty or lack of education. They urged to making of laws which would protect all the parties and ensure ethical standards.

In 2016, the first Surrogacy bill was introduced in the Lok Sabha; the major points of the bill were a ban on commercial surrogacy, and the Surrogacy mother had to be a close relative of the intended parents. The crucial point is that if an intended parent is willing to go for surrogacy, they have to prove that they are infertile. Women who are not married cannot become Surrogate mothers; only couples can become Surrogate parents, which means no single parent can do so. There were important criteria for surrogacy clinics too, like the clinic should be registered, and all registered surrogacy clinics should keep Surrogacy records for 25 years. These regulations were crucial to safeguard the surrogate mother from being exploited, but this bill was not passed and so lapsed. Another crucial case which dealt with the issue related to international surrogacy came, it was *Jan Balaz v Anand Municipality*<sup>3</sup>. Here, a German couple hired a surrogate mother in India. Her name was Maratheben Immanuel, who gave birth to 2 twins. Now, the problem was that when the German couple applied for Indian passports for the twin children to travel to the UK, the passport authorities refused to grant the passports, and in Germany, there was no law for surrogacy, hence they could not get German citizenship. So here the court stated that the children have the right to be with their biological parents and that the Indian government

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<sup>2</sup> Law Commission 228th Report, August 2009

<sup>3</sup> *Jan Balaz vs. Union of India* 2010 (2) ALL MR (J) 14 (India)

will give all travel documents. This case is crucial to understand, as when such a situation arises in which foreign nationals are included, there is a need to make clearer rules and to remove the legal gap in Indian surrogacy.

Surrogacy Regulations Act, 2021- Under the Surrogacy Regulation Act, 2021, a woman (either a divorced or a widowed woman) between the ages of 35 -45 and a legally married couple can go for surrogacy if there exists any medical condition with the woman due to which surrogacy is the only option. It puts a ban on commercial surrogacy, for which the punishment is life imprisonment for 10 years and a fine of up to 10 lakhs. Only altruistic surrogacy for married couples is allowed.

### **ANALYSIS OF THE CURRENT PROVISIONS IN INDIA (SURROGACY REGULATIONS ACT 2021)**

Under this act, section 3 provides for the regulation of surrogacy clinics, like the surrogacy clinics should be registered, and commercial surrogacy should not be practiced in surrogacy clinics or by gynecologists. As the Surrogate mothers were being exploited, this act helps to stop the exploitation to an extent, but in a way, it has closed the way for women who are underprivileged or are poor to earn a legitimate income by being a surrogate mother. But having altruistic surrogacy is difficult, as in the case of altruistic surrogacy, there should be a close relative of a couple who is willing to be a surrogate mother.<sup>4</sup>It is very difficult to convince a family member to be a surrogate mother, which limits the options for the intended parents in choosing a surrogate. Section 4 talks about the requirements for the intended parents, like they must be Indian citizens and married for 5 years, and having a medical certificate that proves the need for surrogacy. This provision confines the access to only married couples, i.e, single parents or same-sex couples are not allowed to be an intended parent. The couple who doesn't fulfill these criteria but has an infertility issue will not be allowed to exercise their reproductive freedom. So, the equality is not being upheld; rather, the freedom to exercise reproductive rights is being given only to married couples and not to any foreign nationals or same sex couples.

It is mandatory that all procedures related to surrogacy have to be done only at a registered surrogacy clinic. The major drawback of this act is that it puts a ban on commercial surrogacy, and it allows only altruistic surrogacy, but it becomes very difficult to find someone willing to do so without giving money, except for the medical charges. Section 6 talks about the disclosure

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<sup>4</sup> Anita Stuhmcke, *For Love or Money: The Legal Regulation of Surrogate Motherhood* (Butterworths 2002).

of all information related to Surrogacy proceedings, like the side effects associated with it and the consequences. After understanding these terms, the surrogate mother should give consent in writing. It is very important that as many surrogate mothers agree to bear the child due to their financial situation and to make money, the doctors do not prefer to disclose the relevant information related to the procedure, like side effects, as otherwise the woman might want to go back on her decision. There was a practice that used to be followed, when a child was born with a certain genetic defect, the child used to be abandoned by the intended parent, so this act made a provision, i.e., section 7, which prohibits abandoning of the child born out of Surrogacy due to genetic conditions be it in India or outside India. This is a very important provision as the intended parent cannot do away with the child after the birth because the child will be considered as the biological child of the intended parent, and they have the privileges and all the rights that a natural child has, as given in section 8.

Even though it prohibits abandoning of child born through surrogacy but the law doesn't deal with the situation if the intended parents refuse to take the child due to some unforeseen medical conditions of the child. Section 15 talks about the establishment of the National Assisted Reproductive Technology and Surrogacy Registry. Under Section 38 of the Act, commercial surrogacy and exploitation are banned. It also talks about the penalties attached to activities like commercial surrogacy, sex selection, and exploitation of the surrogate mother. It is very evident that by allowing commercial surrogacy only, the idea of patriarchal society of the traditional era, i.e, the idea that there is no economic value attached to women's work, is being followed. It affects Article 21 of our Indian Constitution, which talks about the right to life and personal liberty of people, thereby affecting the fundamental rights. In case of *K S. Puttaswamy v Union of India*<sup>5</sup>, the court emphasized that making it mandate to show the infertility certificate to medical board, violate the fundamental right i.e article 21 which talks about Right to Privacy of the intended couple and it is unethical and goes against the moral standards, hence right of privacy in terms of fertility should be protected here. In the case of *H Siddaraju v Union of India*<sup>6</sup>, the court by giving against the restriction on the age of the intended couple under the Surrogacy Regulation Act, 2021, permitted a couple to go through the procedure of surrogacy which would otherwise not have been allowed as the husband was 57 years old and if we go by the Surrogacy Act 2021, the male should be between the age of 26 to 55 years of age. So here the court allowed a triple test, which included a genetic test, the court asked the husband

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<sup>5</sup> *K.S. Putta swamy vs Union of India* (2017) 10 SCC 1(India).

<sup>6</sup> 2023 Live Law (Kar)162(India).

to do the genetic test as it would determine the sperm's health and physical test to check the physical capacity to handle a child, and an economic test to see whether they are economically sound or not.

This act goes against the decision that was given by the court in the case of *Suchita Srivastava v Chandigarh Administration*.<sup>7</sup> The court held that the prohibition on commercial surrogacy will prevent women from making a legitimate financial gain, and it ignores the mental, physical, and medical costs involved in pregnancy, which they face, even after the pregnancy, and it is violative of Article 21 of the Constitution, i.e right to choose reproductive options available to them. In a recent case, where Bombay High Court rejected a petition of 38 years 38-year-old divorced woman who wished to opt for surrogacy by stating that section 4 of the Surrogacy Act 2021 prohibits an individual who has children from opting for surrogacy. The court also stated that if the court allows this petition, it would increase commercial surrogacy, which would go against the act's objectives.

## **SUGGESTIONS AND CONCLUSIONS**

There is a need to remove restrictions on male single parents and LGBTQ+ individuals who wish to become parents through surrogacy. Article 21 of the Indian Constitution<sup>8</sup> gives the right to choose one's reproduction option, and that right should not be hampered. The crucial requirement of the institution of marriage is procreation, but not everyone is privileged to become parents due to various reasons, like infertility of either of the spouses. So, to overcome this issue, there are various methods available, like surrogacy. But this act, while giving the privilege of becoming a parent to some, they are denying this right of. Under this act unmarried women cannot opt for surrogacy but the thing to consider here is it's her own choice to opt for reproductive option and they might not want to get married but want to become parents, so denying this opportunity by restricting surrogacy to only married women close doors for many who want to become parents but don't fall under the criteria's given under the act. Even though in the act altruistic surrogacy is permissible but the conditions attached to it, like the surrogate mother should be a close relative of the intended parent, make it difficult to find a surrogate mother. It is visible that the traditional ideas, like thinking that there is no economic value attached to women's work, are still embedded in people's minds. Hence, it becomes crucial to

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<sup>7</sup> *Suchita Srivastava v. Chandigarh Admin.*, (2009) 9 S.C.C. 1 (India).

<sup>8</sup> Indian Constitution (1950).

include LGBTQ+ couples, unmarried women, and single men too in the scope of this act to make sure that no violation of the fundamental rights of these individuals is taking place.