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INDIAN SURROGACY LAW: WHO IS A PARENT AND WHO ISN'T

- *Ananya Yaduvendu*

The Surrogacy (Regulation) Act, 2021¹, it defines eligibility through two categories only. Section 2(1)(r)² covers the "intending couple", a legally married man and woman. Section 2(1)(s)³ covers the "intending woman", a widow or divorcee within that specific age band. Nowhere in the statute is there room for an unmarried single woman, a live-in partner, or a queer person.

In 2021, Indian law made a quiet acknowledgement. Amid a surrogacy bill that limited access to legally married heterosexual couples, it introduced one more category: widows and divorcees, aged 35 to 45. On paper, this appears to be progress that families can be formed through more than just marriage. In practice, the same law requires these women to use their own eggs, at an age when egg viability is already declining. The exception was never generous. It was narrow enough to look like inclusion without costing the law its underlying assumption: that reproduction belongs to marriage, and everyone outside it is, at best, a special case.

The consequences of that drafting choice are now working their way back through the courts. This act brought a debate on the non-inclusion of queer and single women. In 2024, the landmark case of *Dr Aqsa Shaikh v. Union of India*⁴. The petitioner, a transwoman and public health academic, filed a public interest litigation directly challenging the exclusion of single, unmarried women and transgender persons from surrogacy, arguing it violates Articles 14⁵, 15(1)⁶, and 21⁷ of the Constitution, equality, non-discrimination, and the right to life and personal liberty. The

¹The Surrogacy (Regulation) Act, 2021

² The Surrogacy (Regulation) Act, 2021, § 2(1)(r).

³ The Surrogacy (Regulation) Act, 2021, § 2(1)(s).

⁴ Aqsa Shaikh v. Union of India, 2024.

⁵ INDIA CONST. art 14.

⁶ INDIA CONST. art 15, cl. 1.

⁷ INDIA CONST. art 21.

Supreme Court issued notice to the central government and, notably, chose to hear this petition separately from other pending surrogacy cases, since those involved married women as petitioners and this one did not. That procedural separation is itself telling: the Court recognised that marital-status exclusion and orientation-based exclusion are a distinct constitutional question from the disputes couples have been raising over donor gametes and age limits.

This isn't the first time reproductive autonomy has been framed as a constitutional right in India. In *K.S. Puttaswamy v. Union of India (2017)*⁸, the Supreme Court held that decisions about procreation fall within the right to privacy under Article 21, and that state interference in such decisions requires strong justification. That reasoning is the backbone of nearly every argument now being made against the surrogacy law's exclusions, if reproductive choice is a right, marital status is a strange place to draw the line.

The Court has also had to reckon with family diversity more broadly. In *Supriyo v. Union of India (2023)*,⁹ the same-sex marriage case, the Court declined to extend legal marriage to same-sex couples but explicitly acknowledged that queer couples face real discrimination, and left it to Parliament to address their rights and entitlements. Petitioners in the surrogacy debate have leaned on this acknowledgement, arguing that if the Court accepts that families take non-traditional forms, the surrogacy law's insistence on marriage as a gateway is inconsistent with that recognition.

The Court's own inconsistency is visible elsewhere, too. A 44-year-old unmarried woman once petitioned the Supreme Court for permission to undergo surrogacy. She was turned down not because the statute explicitly named her exclusion, but because the Court expressed concern that allowing it might undermine the institution of marriage. It's a strikingly paternalistic basis for denying someone a family, and it shows the exclusion isn't only statutory. It's judicial instinct, too.

This law lets widows and divorcees have a child without needing to remarry, showing that a woman doesn't need a husband to be a good parent. It helps widows continue their reproductive plans after loss, and gives divorced women a way to become mothers on their own. It also opens

⁸ K.S. Puttaswamy v. Union of India, AIR 2017 SUPREME COURT 4161

⁹ Supriyo v. Union of India MANU/SC/1155/2023

the door for future changes to include more groups and replaces unsafe, unregulated surrogacy with proper legal and medical protection.

None of this has yet produced a ruling that reads down the marriage requirement itself. Shaikh's petition, and others like it, remain pending. What the law currently offers is a single, oddly-shaped exception, one that lets widows and divorcees in, but only within a narrow age window, and only using their own eggs. It looks like the law bent to accommodate family diversity. What it actually shows is how little bending it was willing to do, and how much is still left for the courts to decide.

The law's willingness to bend once for widows and divorcees is proof that the door was never truly locked, only left ajar for a select few. A single woman who has never been married wants a child just as much as one who has lost a husband or ended a marriage. A queer couple raising a family is no less capable, no less deserving, and no less real than the heterosexual one the statute mentions. The Constitution's promise of equality and personal liberty cannot recognize reproductive autonomy for some citizens while quietly withholding it from others based on who they love or whether they ever married at all. The courts have already laid the groundwork for privacy as a fundamental right, discrimination against queer families acknowledged, and petitions from single and transgender persons are now pending before the highest bench. What remains is the will to finish what has already been started. The law does not need to invent new principles to include single and queer parents; it only needs to apply the ones it already believes in, consistently. Until then, the Surrogacy (Regulation) Act, 2021 will keep offering parenthood as a privilege reserved for the married, and calling it protection. It is time for the judiciary to close that gap, not as an act of charity, but as the plain, overdue extension of rights it has already claimed to believe in.