



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: RIGHTS, REGULATION AND REPRODUCTIVE JUSTICE

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ABSTRACT

Surrogacy in India occupies a complex constitutional space where reproductive autonomy, bodily integrity, family, equality, and State regulation converge. The Surrogacy (Regulation) Act, 2021 seeks to prevent exploitation by permitting only altruistic surrogacy while imposing stringent eligibility conditions. Yet, restrictions on reproductive choices raise deeper questions about the extent of State control over family formation. Judicial developments, particularly in *Arun Muthuvel v. Union of India*, highlight the tension between statutory regulation and medically necessary reproductive choices. This paper examines surrogacy through the lens of reproductive justice, arguing that effective regulation must prevent exploitation without transforming protection into paternalism or undermining individual reproductive autonomy.

Surrogacy in India is placed precariously at the intersection of the law, the body, the ethics and the sheer longing of the human experience. It does not only occupy the spaces that pertain to assisted reproductive technologies, but is rather a liminal space where one navigates arguments relating to bodily autonomy, family, inequality and state power as well as a legal relation marked by consent, kinship, bodily labor and the aspirations of the constitution. These

THE INDIAN JOURNAL FOR RESEARCH IN LAW AND MANAGEMENT, VOL. 3, ISSUE 11, AUGUST - 2026

questions related to surrogacy were particularly acute in India when the country became a global 'destination' for commercial surrogacy, eliciting widespread criticism for being a space that fostered the exploitation of the economically marginalized woman. While India has in its recent legislation tried to prevent the same, this move also paved the way for larger constitutional questions about the extent of a state's reach into the reproduction of its citizens and its attempt to delimit reproductive freedom.

The Surrogacy (Regulation) Act, 2021¹ was enacted to create a National and State Boards, designate appropriate authorities for the regulation of surrogacy in India and regulate all forms of surrogacy practices within the geographical boundaries of India. It authorized only altruistic surrogacy while completely disallowing commercial surrogacy in an attempt to restrict the commoditization of conception. The surrogacy law also provided that the child born of surrogacy shall be the biological child of the intending couple or woman, which legalizes the entire process by granting legal status, legitimacy and rights that the naturally conceived child has in the eyes of the law.

The statutory process is extremely rigorous and structured: an intending couple would need to meet the specified eligibility requirements that includes conditions relating to marital status, age, having no living biological, adopted, or surrogate child (save specific exceptions) and a surrogate mother who is a married woman who has had a living child of her own, falls within the defined age group of the Act and is acting as a surrogate for the first time. These requirements although necessary, reduce the chances for those seeking surrogacy.

The most significant constitutional question is the possibility of a legislature controlling an individual's reproductive process to such an extent that this control inherently controls family building as well.

The judgment in *Arun Muthuvel v. Union of India*² was a testament to how much ground the courts have had to traverse in this specific issue: the protection of a woman with MRKH Syndrome's right to pursue gestational surrogacy, and the stay granted to an amendment barring a surrogate's access to donor gametes since it was prima facie in compatible with the spirit of the Act.

It's important to note that this was significant because it shifted the discussion from mere permission to the substantive possibility of access; reproductive autonomy does not cease to

¹ The Surrogacy (Regulation) Act, 2021, No. 47, Acts of Parliament, 2021 (India). ² *Arun Muthuvel v. Union of India*, 2025 INSC 1209 (India).

which technically accepts the formation of family but rejects it on frivolous grounds cannot claim to uphold autonomy when all it does is promise an illusion.

The 2023 notification² banning donor gametes for intending parents had generated substantial debate with law, arguing from one perspective that the state ought to maintain a biologically 'contained' form of surrogacy, and from another that such a move disregarded the live realities of the infertile and medically compromised, particularly women unable to provide eggs for the creation of their children, through the sheer negation of reproductive autonomy. The conflicting interests of the intention to adhere to a statutory provision and the administrative reality created a crisis and compelled courts across India to address the apparent discrepancy between regulatory intent and regulatory enforcement, which makes the bounds of absolute restriction clear. While it seems like an easy and morally acceptable option to prohibit surrogacy for one and all out of fear, the practice of medicine does not exist within a vacuum. Law needs to focus on the specific medical requirements and individual choice rather than relying on blanket bans.

Reproductive justice is concerned with the broader questions of who should have the right to reproduce, in what circumstances, and with which support services; in the context of surrogacy this translates to balancing the intentions of intending parents to have a child, a woman's bodily autonomy and agency and the child's interests without making one a handmaiden for the other. It's this legal framework that suggests that while surrogacy law may aim to provide legal support and protect intended parents as well as intending parents, such provision should not come at the cost of maternal bodily integrity and agency, as it risks to become a paternalistic and controlling measure instead of one that is responsive and liberal.

Regulation therefore must not be seen as a prohibition in surrogacy but rather as an ethical question in reproduction, balancing the needs of one while respecting the individuality and the choices of another. India's surrogacy law is a constitutional commentary on personhood, family and state control; whilst the legislature is commended on its attempts to prevent commercial exploitation and exploitation in the Indian context, ultimately, the success of this law will depend upon the degree of freedom that it provides in relation to individual reproductive

² Surrogacy (Regulation) Amendment Rules, 2023, Notification No. G.S.R. 179(E), The Gazette of India, pt.II sec.3(i) (Mar.14,2023).

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