

## “Surrogacy Laws in India: A Critique of the Regulatory Framework”

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### **Abstract**

Surrogacy is a practice where a woman carries a child for another couple or individual who is unable to conceive or carry a pregnancy to term. In India, surrogacy was once a booming industry due to comparatively liberal laws and affordable medical treatments. However, the lack of regulations led to several cases of exploitation and unethical practices, which resulted in the Indian government passing the Surrogacy (Regulation) Act in 2021. The act seeks to regulate the practice of surrogacy in India by banning commercial surrogacy and allowing only altruistic surrogacy, and establishing a National Surrogacy Board and State Surrogacy Boards to oversee the practice. However, the act has been criticized for being too restrictive and discriminatory, and not addressing the concerns of same-sex couples and single parents who wish to have children through surrogacy. This article will provide a critique of the regulatory framework for surrogacy laws in India, examining the impact of the Surrogacy (Regulation) Act and highlighting the need for a balanced approach to regulating surrogacy in India.

**Keywords:** Surrogacy, Surrogacy (Regulation) Bill in 2019, Surrogate Mother Eligibility, Eligibility criteria for intending couples, National Surrogacy Board and State Surrogacy Boards.

### **Introduction**

Surrogacy is a reproductive technology in which a woman agrees to carry a child for another person or couple, who are typically unable to conceive or carry a child to term themselves. The surrogate mother, also known as a gestational carrier, carries the child to term and then delivers the baby to the intended parents. Surrogacy can be either traditional or gestational.

In traditional surrogacy, the surrogate mother's own eggs are fertilized with the intended father's sperm, either through artificial insemination or in vitro fertilization (IVF). In this case, the surrogate mother is biologically related to the child she carries. This type of surrogacy is less common today due to ethical and legal concerns, particularly around issues of consent and parental rights.

In contrast, gestational surrogacy involves the use of IVF to fertilize the intended mother's eggs with the intended father's sperm or with donor sperm. The resulting embryo is then transferred to the uterus of the surrogate mother, who carries the baby to term but is not biologically related to the child.<sup>1</sup>

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<sup>1</sup> Patel, N. H., & Digvijaysing, Y. (2018). Insight into different aspects of surrogacy practices. *Journal of Human Reproductive Sciences*, 11(3), 212-218

Surrogacy can be a complex and emotional process for all involved parties. It is typically sought by couples or individuals who are unable to conceive or carry a child to term due to medical issues, such as infertility or recurrent pregnancy loss. Same-sex couples or single individuals may also opt for surrogacy as a means of having a biological child.

Surrogacy arrangements can be made privately between the intended parents and the surrogate mother, or through an agency that facilitates the process. Surrogacy laws vary widely across different countries and jurisdictions, with some countries banning or severely restricting surrogacy and others allowing it under certain conditions.

In India, surrogacy has been a controversial issue in recent years. While the country was once a popular destination for surrogacy tourism, where couples from around the world came to take advantage of the relatively low costs of surrogacy services, the Indian government introduced regulations in 2015 to restrict commercial surrogacy.<sup>2</sup>

The Surrogacy (Regulation) Act 2021, aims to regulate surrogacy in India and prevent exploitation of women who act as surrogates. The bill prohibits commercial surrogacy, allowing only altruistic surrogacy in which a close relative of the intended parents acts as a surrogate without payment. The bill also lays down eligibility criteria for intended parents and surrogate mothers and establishes a National Surrogacy Board and State Surrogacy Boards to regulate and oversee surrogacy arrangements.

Surrogacy is a complex issue with many ethical, legal, and social implications. While it provides a means for intended parents to have a biological child, it also raises questions around the commodification of women's bodies, the rights of the surrogate mother, and the potential exploitation of vulnerable women. It is important for laws and regulations around surrogacy to be carefully crafted to ensure that it is carried out in an ethical and responsible manner, with the interests of all parties involved being taken into account.

### **The Surrogacy (Regulation) Act 2021**

The Surrogacy (Regulation) Act, 2021 is a landmark legislation aimed at regulating surrogacy in India. The bill was introduced in the Lok Sabha in 2020 and was subsequently passed by the Rajya Sabha in 2021. The provisions of the act aim to ensure that surrogacy is carried out in a safe and ethical manner, without any exploitation of women or misuse of the process for purposes such as sex selection etc.

#### **Some Important sections of the acts are:**

1. **Section 3:** Ban on commercial surrogacy - This section prohibits commercial surrogacy in India. Only altruistic surrogacy is allowed, where a close relative of the intended couple acts as a surrogate without receiving any payment. The aim of this

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<sup>2</sup> R. S. Sharma (2015). Social, ethical, medical & legal aspects of surrogacy: an Indian scenario. Indian Journal of Medical Research, 140(Suppl 1), S13-S16

provision is to prevent exploitation of women and to ensure that surrogacy is not seen as a commercial transaction.

2. **Section 4:** Eligibility criteria for intended parents - According to this section, only Indian couples who have been married for at least five years and are within a certain age range can opt for surrogacy. The age limit for the intended parents is intended to prevent the exploitation of younger women as surrogates.
3. **Section 5:** Eligibility criteria for surrogate mothers - This section lays down the eligibility criteria for surrogate mothers. Only a close relative of the intending couple who has been married and has a child of her own can act as a surrogate. The surrogate mother must also be between the ages of 25 and 35 years and must not provide her own gametes for the surrogacy.
4. **Section 8:** Establishment of a National Surrogacy Board and State Surrogacy Boards - This section establishes a National Surrogacy Board and State Surrogacy Boards to regulate and oversee surrogacy arrangements in the country.
5. **Section 9:** Powers and functions of the National Surrogacy Board - The National Surrogacy Board is responsible for laying down policies and guidelines for surrogacy, monitoring the implementation of the surrogacy law, and taking action against any violations.
6. **Section 10:** Powers and functions of the State Surrogacy Boards - The State Surrogacy Boards are responsible for monitoring and regulating surrogacy arrangements within their respective states.
7. **Section 14:** Prohibition on sex selection - This section prohibits the use of surrogacy for the purpose of sex selection of the child. The aim of this provision is to prevent the practice of female foeticide and ensure gender equality.
8. **Section 15:** Insurance cover for surrogates - This section requires that the intended parents take out a comprehensive insurance policy for the surrogate mother covering all medical expenses, including any complications that may arise during the pregnancy and delivery.
9. **Section 16:** Abortion of the surrogate child - This section permits the surrogate mother to undergo abortion only in cases of substantial foetal abnormalities or risk to the life of the surrogate mother. The decision to terminate the pregnancy must be taken with the consent of the surrogate mother.<sup>3</sup>

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<sup>3</sup> Surrogacy (Regulation) Act, 2021, Act No. 34 of 2021

## **Detail Analysis of Some Key Areas**

### **A: Surrogate Mother Eligibility**

Section 5 of the Surrogacy (Regulation) Act , 2021 outlines the eligibility criteria for surrogate mothers. According to this section, a surrogate mother must:

- Be a close relative of the intending couple (as defined in the bill)
- Be married and have a child of her own
- Be between the ages of 25 and 35 years
- Have a certificate of medical and psychological fitness for surrogacy from a registered medical practitioner
- Not have been a surrogate mother before
- Not provide her own gametes for surrogacy
- Agree to relinquish the child and parental rights to the intending couple
- Receive monetary compensation as per the terms of the surrogacy agreement
- Have insurance cover for a period of 16 months to cover her medical expenses in relation to surrogacy

These eligibility criteria have been put in place to ensure the safety and well-being of the surrogate mother as well as the child. The requirement of being a close relative of the intending couple aims to ensure that there is a pre-existing emotional bond between the surrogate mother and the intending couple, which can help in the post-birth relationship between the parties. The age limit and medical fitness requirements aim to ensure that the surrogate mother is physically capable of carrying the pregnancy and giving birth without any complications. The prohibition on being a surrogate mother more than once aims to prevent exploitation of women and protect their health. Finally, the requirement of insurance cover for the surrogate mother aims to ensure that she receives adequate medical care during the pregnancy and post-birth period<sup>4</sup>.

### **B: Eligibility criteria for intending couples who wish to undergo surrogacy.**

Section 4 of the Surrogacy (Regulation) Act, 2021, lays down the eligibility criteria for intending couples who wish to undergo surrogacy. Intending couple must obtain a certificate of essentiality and a certificate of eligibility.

**The certificate of essentiality is granted by the appropriate authority if the following conditions are met:**

- The couple has proven infertility, certified by a District Medical Board

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<sup>4</sup> "The Surrogacy (Regulation) Act, 2021." Government of India, Ministry of Law and Justice, 2021, Section 5

- The custody of the child born through surrogacy will be given to the intending couple by a Magistrate's Court
- The couple has taken insurance coverage for the surrogate mother's medical expenses for a period of sixteen months.

**The certificate of eligibility is granted if the following conditions are met:**

- The couple is a citizen of India
- They have been married for at least five years
- The woman is between 23 to 50 years of age, and the man is between 26 to 55 years of age
- The couple does not have any surviving child, either biologically or through adoption, except if the child is mentally or physically challenged, or if suffering from any life-threatening disorder or disease.

Overall, Section 4 of the Surrogacy (Regulation) Act 2021, puts in place stringent eligibility criteria for intending couples who wish to undergo surrogacy. These criteria aim to prevent commercialization of surrogacy, exploitation of women, and ensure the welfare of the surrogate child. By requiring intending couples to fulfil certain conditions before being allowed to undergo surrogacy, the section seeks to regulate surrogacy in India and ensure that it is carried out ethically and with due regard for the rights and welfare of all parties involved.<sup>5</sup>

**C: National Surrogacy Board and State Surrogacy Boards.**

Section 8 of the Surrogacy (Regulation) Act, 2021 establishes the National Surrogacy Board and State Surrogacy Boards. These boards are responsible for regulating and monitoring the practice of surrogacy in the country. The National Surrogacy Board will be constituted by the Central Government and the State Surrogacy Boards will be constituted by the respective State Governments. The boards will be responsible for granting and revoking registration of surrogacy clinics, as well as ensuring that the provisions of the Act and its rules are being followed. The boards will also have the power to investigate complaints and take necessary action against any violations of the law<sup>6</sup>.

**Impacts of The Surrogacy (Regulation) Act,2021**

**Positive Impacts**

The Surrogacy (Regulation) Act, 2021 has several merits that can be identified. Firstly, it seeks to regulate the practice of surrogacy in India, which has been largely unregulated until now. This would help to prevent exploitation of surrogate mothers and ensure that the rights of all parties involved are protected. The bill also seeks to prohibit commercial surrogacy, which has been a contentious issue in India. This would prevent the commodification of

<sup>5</sup> "The Surrogacy (Regulation) Act, 2021." Government of India, Ministry of Law and Justice, 2021, Section 4

<sup>6</sup> "The Surrogacy (Regulation) Act, 2021." Government of India, Ministry of Law and Justice, 2021, Section 8

women's bodies and prevent the commercialization of the surrogacy process. In addition, the bill sets out eligibility criteria for intended parents and surrogate mothers, which helps to ensure that the process is carried out in a responsible manner.

There have been several landmark cases in India related to surrogacy. One such case is *Baby Manji Yamada v. Union of India* which involved a Japanese couple who had hired an Indian surrogate mother to carry their child. The surrogate mother later refused to relinquish custody of the child, leading to a legal battle that eventually reached the Supreme Court of India. The court ultimately ruled in favor of the intended parents, stating that the child should be granted citizenship in Japan and that the surrogate mother had no claim to custody.<sup>7</sup>

Another notable case is *Jan Balaz v. Union of India*, which involved a German couple who had hired an Indian surrogate mother. The child was born with a genetic disorder, and the intended parents refused to take custody of the child. The surrogate mother, who was left with the responsibility of caring for the child, petitioned the court for financial assistance from the intended parents. The court ruled in favor of the surrogate mother, ordering the intended parents to pay child support until the child turned 18.<sup>8</sup>

The Surrogacy (Regulation) Act, 2021 provides strict laws to stop such incidents.

### **Negative Impacts**

1. **Ban on commercial surrogacy:** The bill completely bans commercial surrogacy, which may lead to an increase in illegal and unregulated surrogacy practices. It also restricts the right of women to make informed choices about their own bodies.
2. **Limited access to surrogacy:** The bill restricts the access to surrogacy to only married Indian couples, which discriminates against single persons, same-sex couples, and foreign nationals. This may result in the denial of the right to reproductive choices for these individuals.

In the *Mumbai Baby case 2016*, the Bombay High Court allowed a single woman to become the legal guardian of her surrogate child. The court recognized the reproductive rights of single women and ordered the government to frame guidelines for surrogacy

3. **Invasive procedures:** The bill requires surrogate mothers to undergo invasive medical procedures, such as embryo transfers and hormonal treatments, which may have adverse effects on their health.
4. **Lack of autonomy for surrogate mothers:** The bill fails to provide adequate protection and support to surrogate mothers. They are not allowed to negotiate their own terms and conditions of surrogacy and are completely dependent on the intended parents.

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<sup>7</sup> *Baby Manji Yamada v. Union of India*, 2008 (7) SCALE 524.

<sup>8</sup> *Jan Balaz v. Union of India*, AIR 2014 SC 137.

5. Surrogacy as a last resort: The bill considers surrogacy as a last resort for couples who are unable to conceive. This reinforces the societal belief that parenthood is the ultimate goal of a marriage and undermines the concept of a family formed through love and compassion.<sup>9</sup>

### **Conclusion**

In conclusion, the Surrogacy (Regulation) Act of 2021 represents a significant step forward in regulating the practice of surrogacy in India. By banning commercial surrogacy and establishing a system for oversight, the Act aims to prevent exploitation and protect the rights of all parties involved in surrogacy arrangements. However, the Act has also been criticized for being too restrictive and discriminatory, particularly towards same-sex couples and single parents who wish to have children through surrogacy. It is important to address these concerns and ensure that the regulatory framework for surrogacy in India strikes a balance between protecting the rights of all parties involved and allowing individuals and couples to pursue their desire for parenthood through surrogacy. As the regulatory framework continues to evolve, it will be important to monitor its implementation and make necessary adjustments to ensure that it is fair and effective in achieving its goals. Ultimately, the goal of surrogacy regulations should be to protect the rights of all parties involved while providing access to a safe and ethical option for individuals and couples seeking to build families through surrogacy.

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