

**DE JURE NEXUS LAW JOURNAL**

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**ANALYSIS OF SURROGACY REGULATION LAWS IN INDIA****Abstract**

*Surrogacy is a kind of an arrangement wherein a woman carries a child which is not genetically related to her but she becomes pregnant through artificial implantation and gives birth to a child for another couple. She may or may not receive monetary compensation for her services. Commercial surrogacy was legalised in India in 2002 and it became a hub for surrogate mothers bearing children for foreigners and Non Residential Indians. Since then a lot of surrogate mothers have been prone to exploitation due to lack of bargaining power between the two parties. The Surrogacy (regulation) Act, 2021 was passed recently which puts a complete ban on commercial surrogacy and a partial ban on altruistic surrogacy to prevent the exploitation of surrogate mothers. This article aims to explain the provisions of the act and attempts to analyse the law regarding surrogacy.*

**Keywords**

Surrogacy, Commercial Surrogacy, Assisted Reproductive Technology, surrogate mother, altruistic surrogacy

**Introduction**

Parenthood is usually something which every person looks forward to and our society is constructed in such a manner that it appreciates and applauds parenthood after marriage. However due to some medical conditions sometimes a couple is unable to conceive a child.

On the other hand, a poor woman who may be medically and psychologically fit to carry a child but she is in poverty and struggles to feed her family every day. In such a situation if the gametes of couple are artificially fused and the resultant embryo is implanted in the uterus of the poor woman who is paid a good amount as compensation for 'renting her womb' to carry a baby who is not genetically related to her, then it seems like a win-win situation for both the parties as the childless couple get to enjoy parenthood and the woman gets money to sustain her family. But this is not true, in various cases the surrogate mother is exploited for her services. The Surrogacy (Regulation) Act, 2021 imposes a complete ban on commercial surrogacy to prevent this exploitation. But it is important to see if the ban will really help in reducing exploitation or it will lead to violation of rights of the surrogate mother and the people intending surrogacy.

### **What is Surrogacy?**

Surrogacy is a kind of assisted reproductive technology wherein a woman carries and gives birth to a child for another couple. The word surrogacy comes from the Latin word 'subrogare' which means to substitute. It is process by which a substitute woman becomes pregnant through methods of in vitro fertilisation, wherein both male and female gametes of a couple are artificially fused and the resulted embryo is implanted in the uterus of the surrogate mother, who acts as a 'carrier' for someone else's child. <sup>1</sup>As per Section 2 (zd) of the Surrogacy (Regulation) Act 2021, "*surrogacy means a practice whereby one woman bears and gives birth to a child for an intending couple with the intention of handing over such child to the intending couple after the birth*"<sup>2</sup>

### **Types of Surrogacy Practices**

- **Traditional Surrogacy:** In this type of surrogacy practice the eggs of the surrogate are used and the child is genetically related to the surrogate mother. The surrogate mother conceives the child through artificial insemination with the father's sperm.<sup>3</sup>
- **Gestational Surrogacy:** If a woman has healthy reproductive eggs but due to some problems with her uterus she is unable to conceive a child, then through in vitro fertilisation her eggs and her husband's sperms are fused together artificially, and the

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<sup>1</sup>Nayana Hitesh Patel et al., *Insights into Different Aspects of Surrogacy Practices* 11(3) J Hum Reprod Sci, 218, 218 (2018)

<sup>2</sup>The Surrogacy (Regulation), 2021, § 2 (zd), No. 47, Acts of Parliament, 2021

<sup>3</sup>D. Radhika Yadav<sup>†</sup> & Pavan Kasturi, *A Comprehensive Analysis on Reproductive Health and Surrogacy in India: A Study on the Law, Policy, and Practice*, 2021 SCC Online Blog OpEd 147

resultant embryo is implanted in the surrogate mother's uterus. This process is called Gestational surrogacy.<sup>4</sup>

Surrogacy if differentiated on the basis of monetary terms can also be:

- **Altruistic Surrogacy-** In altruistic surrogacy the surrogate mother gets no kind of monetary compensation for becoming pregnant and carrying the child of another couple. In this situation a woman willingly agrees to be a surrogate mother without any consideration out of a feeling of genuinely trying to help a childless couple.<sup>5</sup>
- **Commercial Surrogacy-** in Commercial surrogacy, a surrogate mother is compensated in monetary terms for the services she provides as a surrogate mother.

### **Why Surrogacy?**

There are some medical conditions which make it impossible for a woman to naturally conceive a child. It could be pre-existing medical conditions like heart, liver or kidney diseases or it could be infertility, or it could be a genetic defect wherein a woman is born without a uterus, or it could be complications arise out of previous pregnancies.<sup>6</sup> It is due to these medical conditions that a woman is sometimes unable to conceive on her own and hence she and her husband might look for alternative methods to welcome a baby, surrogacy being one of them. Through surrogacy it can be ensured that the baby is genetically connected to both the mother and the father which is not possible in adoption, and this is what most couples desire, that their child 'continues their bloodline' hence they opt for surrogacy.

### **Surrogacy: A Moral Dilemma?**

Though commercial surrogacy is considered to be a win-win situation for both the couple and the surrogate mother, there are moral and ethical dilemmas surrounding it. Motherhood is considered to be an important aspect of every woman's life and a child that comes out of her is considered to be a part of her own. The main moral dilemma surrounding surrogacy is the trading of motherhood. It is argued that even though the child might not be genetically connected to the surrogate mother, she has given birth to the child so she should be considered as the biological mother. However there are others who argue that a woman has

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<sup>4</sup>Id.

<sup>5</sup>Yadav, Supra note 3, at 1

<sup>6</sup>TIMES OF INDIA, <https://timesofindia.indiatimes.com/life-style/parenting/getting-pregnant/5-reasons-why-some-people-might-use-a-surrogate/photostory/74284615.cms> (last visited: February 21, 2022)

autonomy over her body and it is her decision if she wants to help a couple in starting a family with or without any monetary compensation.

### **Commercial Surrogacy and Exploitation of Women**

Commercial Surrogacy was legalised in India in 2002. Since then many foreign couples would approach surrogacy clinics in India to find a 'perfect surrogate mother' who would be ready to bear their child without being attached to it. It is more of a renting the womb situation. This has led to exploitation of women, as the women who become surrogate mothers do not choose to rent their wombs, but are in desperate need of money to sustain themselves and their families. These women are usually poor and illiterate. Surrogacy clinics and intending couples have taken advantage of this. Surrogacy has become a kind of gendered, exploitative and stigmatised labour. Commercial surrogacy became a kind of a temporary occupation and a strategy for surrogate mothers to be used for survival who are recruited by various surrogacy clinics for couples in India, and abroad. Surrogate clinics use recruitment tactics, the first and foremost being offering an amount of compensation to women who are in desperate need of money. Secondly they use a woman's anxiety of being bad mothers, they are told that they can be good mothers by earning money through renting their wombs, for they are bad mother currently as they are unable to feed their children. However intending couples usually look for a 'good mother', as they want a capable woman to carry and nurture their child. A surrogate mother is expected to be a good and selfless mother who will nurture the child in her womb as her own and not treat it as a business but at the same time she is also expected to be a disciplined contract worker who delivers the baby immediately after birth without being emotionally attached. If they treat it purely like a business then they will try to negotiate to increase the compensation that she might be getting. Surrogacy Contracts are usually written in languages the surrogate mother cannot understand. Also if due to any complications during the pregnancy the surrogate mother's body is medically harmed, she cannot hold anyone responsible but herself. Surrogate clinics counsel women before they become surrogate mothers; they let them know that they would not be genetically related to the baby, so they do not get attached to it. At the same time, they are asked to treat the baby as a 'god's gift' so that they take proper care of the baby and do not ask for more compensation. They are told that surrogacy is more ethical than prostitution.

Thus, the surrogate is under constant fear of crossing the thin line between morality and immorality and being a good mother and a good worker.<sup>7</sup>

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

The Surrogacy (Regulation) Act, 2021 received presidential assent on December 25, 2021. It placed a ban on the practice of commercial surrogacy. It also defined commonly used terms:

- **Altruistic Surrogacy:** In this kind of surgery only the medical expenses and insurance coverage is provided to the surrogate mother and no other charges, fees or compensation of any kind.<sup>8</sup>
- **Commercial Surrogacy:** The Act defines commercial surrogacy as “*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*”<sup>9</sup>
- **Couple:** It refers to a legally married man and woman<sup>10</sup>
- **Intending couple:** It refers to a couple seeking a child through surrogacy and for whom it is genetically important to seek gestational surgery<sup>11</sup>
- **Surrogate mother:** A surrogate mother is a woman who fulfils all the criteria for becoming a surrogate mother under the act and agrees to bear a child not related to her through surrogacy.<sup>12</sup>

### **Chapter II- Regulation of surrogacy clinics (Section 3 of the Act)**

The Act clearly states that for conducting any kind of surrogacy procedures a surrogacy clinic must be registered under the act. It also bars clinics, paediatricians, gynaecologists,

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<sup>7</sup>Amrita Pande, *Commercial Surrogacy in India: Manufacturing a Perfect Mother - Worker*, 35 SIGNS: JOURNAL OF WOMEN IN CULTURE AND SOCIETY 969–992 (2010).

<sup>8</sup>The Surrogacy (Regulation), 2021, § 2 (b), No. 47, Acts of Parliament, 2021

<sup>9</sup>The Surrogacy (Regulation), 2021, § 2 (g), No. 47, Acts of Parliament, 2021

<sup>10</sup>Id § 2(h)

<sup>11</sup>Id § 2(r)

<sup>12</sup>Id § 2(zg)

embryologists or any medical practitioner from practicing commercial surrogacy. Surrogacy procedures cannot take place at a place or by a person who is not registered under the act. No person can promote or advertise commercial surrogacy in any way and they cannot induce a woman to act as a surrogate mother. Abortion of the surrogate mother cannot be conducted without her written consent and without authorisation. Surrogacy clinics are also not permitted to conduct sex selection for surrogacy.<sup>13</sup>

### **Chapter III- Regulation of Surrogacy and Surrogacy Procedure**

A surrogacy procedure can only be undertaken when an intending couple has medical indication which necessitates gestational surgery, and the couple needs to obtain a certificate of recommendation from the board. Only altruistic surrogacy is permitted. Surrogacy procedure shall not be undertaken for producing children for sale, prostitution or any other form of exploitation. The intending couple needs to obtain a certificate of essentiality and for that the following conditions need to be fulfilled:

- (a) Possession of a certificate of medical indication necessitating gestational surgery from a district medical board
- (b) An order passed by a first class magistrate concerning parentage and custody of the child
- (c) An insurance coverage in favour of the surrogate mother for a period of thirty six months covering postpartum delivery complications from an insurance company or an agent recognised by the Insurance Regulatory and Development Authority established under the Insurance Regulatory and Development Authority Act, 1999

The surrogate mother needs to obtain an eligibility certificate from appropriate authority for which the following conditions need to be fulfilled

- (a) A surrogate mother needs to be married and between the age of 25-35
- (b) The intending couple should approach the appropriate authority with a willing woman to act as a surrogate
- (c) A woman is not allowed to help in surrogacy by donating her own gametes, that is traditional surrogacy is not permitted
- (d) A woman can act as a surrogate mother only once in her lifetime
- (e) Possession of a certificate of medical and psychological fitness from a regular medical practitioner

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<sup>13</sup>Id § 3



The intending couple needs to obtain an eligibility certificate as well, for which the couple should 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 and should not have had any surviving child biologically or surrogacy. But if their child is mentally or physically challenged or is suffering from a life threatening disease with no permanent cure, they may be allowed to opt for surrogacy.<sup>14</sup>

Surrogacy procedure can be conducted only when the surrogate mother is aware of all the side effects of the procedure and has given her consent in written form to undergo the procedure in a language she understands. She will be allowed to withdraw this consent before implantation of the embryo.<sup>15</sup>

The child born shall be considered to be the biological child of the intending couple<sup>16</sup> and if the child is born with any genetic defects or abnormalities of any kind then the intending couple is not allowed to abandon the child.<sup>17</sup> The surrogate mother cannot be forced to abort the child during surrogacy except in certain conditions.<sup>18</sup>

#### **Chapter IV- Registration of Surrogacy Clinics**

All surrogacy clinics need to be registered under the act.<sup>19</sup> A Surrogacy registry will be established to register clinics under the act.<sup>20</sup> The appropriate authority shall hold an enquiry and after making sure that all the requirements are fulfilled and fees is paid, it will grant a certificate of registration to the clinic within a period of ninety days from the date of application, it can reject the application if it feels that requirements are not fulfilled. This certificate will be valid for three years and shall be displayed at the clinic.<sup>21</sup> If the provisions of this act are violated by the clinic, its registration can be suspended.<sup>22</sup> Appeals against such suspension can be filed in the state government against order of appropriate authority of state and central government if it is filed against order of appropriate authority of a union territory.<sup>23</sup> The clinics are supposed to record all the details of surrogacy procedures.<sup>24</sup>

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<sup>14</sup>The Surrogacy (Regulation), 2021, § 4, No. 47, Acts of Parliament, 2021

<sup>15</sup>Id § 6

<sup>16</sup>The Surrogacy (Regulation), 2021, § 8, No. 47, Acts of Parliament, 2021

<sup>17</sup>Id § 7

<sup>18</sup>Id § 10

<sup>19</sup>Id § 11

<sup>20</sup>Id § 15

<sup>21</sup>Id § 12

<sup>22</sup>Id § 13

<sup>23</sup>Id § 14

<sup>24</sup>Id § 46

## **Chapter V- National Assisted Reproductive Technology and Surrogacy Board and State Assisted Reproductive Technology and Surrogacy Boards**

The central government shall constitute a board called the National Assisted Reproductive Technology and Surrogacy Board, for which the Minister in charge of the Ministry of Health and Family welfare will act as the chairperson and the Secretary to the government of India in charge of department dealing with surrogacy matter will act as vice chairperson. <sup>25</sup> It will have the following functions:<sup>26</sup>

- (a) to advise the Central Government on policy matters relating to surrogacy;
- (b) to review and monitor the implementation of the Act, and the rules and regulations
- (c) made thereunder and recommend to the Central Government, changes therein;
- (d) to lay down the code of conduct to be observed by persons working at surrogacy clinics;
- (e) to set the minimum standards of physical infrastructure, laboratory and diagnostic equipment and expert manpower to be employed by the surrogacy clinics;
- (f) to oversee the performance of various bodies constituted under the Act and take appropriate steps to ensure their effective performance;
- (g) to supervise the functioning of State Assisted Reproductive Technology and Surrogacy Boards; and
- (h) Such other functions as may be prescribed.

Each state and union territory having legislator shall constitute a board called State Assisted Reproductive Technology and Surrogacy Board for which the Minister in charge of Health and Family welfare in the state will act as the chairperson and the secretary in charge of department of health and family welfare will act as the vice chairperson. <sup>27</sup> It will have the following functions: <sup>28</sup>

- (a) to review the activities of the appropriate authorities functioning in the State or Union territory and recommend appropriate action against them;
- (b) to monitor the implementation of the provisions of the Act, and the rules and regulations made thereunder and make suitable recommendations relating thereto, to the Board;

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<sup>25</sup>Id § 17

<sup>26</sup>Id § 25

<sup>27</sup>The Surrogacy (Regulation), 2021, § 27, No. 47, Acts of Parliament, 2021

<sup>28</sup>Id § 26



- (c) to send such consolidated reports as may be prescribed, in respect of the various activities undertaken in the State under the Act, to the Board and the Central Government; and
- (d) Such other functions as may be prescribed.

### **Chapter VI- Appropriate Authority**

The central government shall appoint one or more appropriate authorities for each of the Union territories and the state government shall appoint appropriate authority for their respective states within ninety days from the commencement of the act.<sup>29</sup> Since this act was passed recently, no appropriate authority has been established yet. It shall have the following functions:

- (a) to grant, suspend or cancel registration of a surrogacy clinic;
- (b) to enforce the standards to be fulfilled by the surrogacy clinics;
- (c) to investigate complaints of breach of the provisions of this Act, rules and regulations made thereunder and take legal action as per provision of this Act;
- (d) to take appropriate legal action against the use of surrogacy by any person at any place other than prescribed, suo motu or brought to its notice, and also to initiate independent investigations in such matter;
- (e) to supervise the implementation of the provisions of this Act and rules and regulations made thereunder;
- (f) to recommend to the Board and State Boards about the modifications required in the rules and regulations in accordance with changes in technology or social conditions;
- (g) to take action after investigation of complaints received by it against the surrogacy clinics; and
- (h) to consider and grant or reject any application of surrogacy clinic within 90 days

### **Chapter VII- Offences and Penalties**

Section 38 of this act puts a complete ban on commercial surrogacy. If any person engages in commercial surrogacy or advertises it or exploit the surrogate other or child or conduct sex selection then they will be punished with imprisonment for a term upto ten years and a fine which may extend to ten lakh rupees.<sup>30</sup> The act also prescribes penalty for violation of

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<sup>29</sup>Id § 35

<sup>30</sup>The Surrogacy (Regulation), 2021, § 38, No. 47, Acts of Parliament, 2021

provision of this act.<sup>31</sup> The court shall presume that the surrogate mother was compelled to render surrogacy service.<sup>32</sup>

### **Surrogacy Law: An Analysis**

It can be clearly seen after interpreting the Surrogacy (Regulation) Act, 2021 that it seeks to protect the interests of the surrogate mother who was prone to exploitation, as discussed above. It does not permit commercial surrogacy so that women are not compelled to give up their bodily autonomy for monetary gain. In case of violation of provisions under the act the court assumes no fault of the surrogate mother and that she was compelled to 'rent her womb' to carry someone else's child. However a woman's right to bodily autonomy and right to make reproductive comes under her right to life Under Article 21 of the Indian Constitution. In *Suchita Srivastava v Chandigarh Administration*,<sup>33</sup> the court held that *"There is no doubt that a woman's right to make reproductive choices is also a dimension of 'personal liberty' as understood under Article 21 of the Constitution of India. It is important to recognise that reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected. This means that there should be no restriction whatsoever on the exercise of reproductive choices such as a woman's right to refuse participation in sexual activity or alternatively the insistence on use of contraceptive methods"*. So if it is a woman's choice to bear a child it should also apply when she bears which is not genetically related to her and she bears it for someone else.

Another disadvantage of this act is that it allows only legally married infertile couples to avail the service of surrogacy. It does not allow same sex couples, transgender, single parents and fertile couples to opt for any kind of surrogacy. This violates their personal liberty and freedom and is not very forward looking.

Though the act aims to put a stop on exploitation of surrogate mothers but putting a complete ban on commercial surrogacy is not the solution rather there should be strict legislations regulating the practice.<sup>34</sup>

### **Conclusion**

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<sup>31</sup>Id § 39

<sup>32</sup>Id § 42

<sup>33</sup>*Suchita Srivastava v. Chandigarh Admn.*, (2009) 9 SCC 1

<sup>34</sup>*Shefali Kohle & Anuj Kumar Gupta, Commercial Surrogacy: A Cluster Of Issues And Complexities Of Rights Under The Constitution Of India*, 9 NLIULR 441, 441-467 (2020)

Surrogacy aims give an opportunity to people to bear a child which is genetically related to them, wherein usually a poor and illiterate woman acts as a surrogate mother who bears the child for nine months and gives birth to the child only to give it up to the person(s) to whom the child is genetically related. In commercial surrogacy the surrogate mother gets paid for her services. It seems like great situation wherein the intending person(s) get a child and the surrogate get monetary compensation which she desires. But this leads to exploitation of women as most surrogate mothers are poor and illiterate. The Surrogacy Regulation Act, 2021 imposes a complete ban on commercial surrogacy and a partial ban on altruistic surrogacy, as only a legally married couple who cannot have a child of their own can opt for surrogacy. The act does not allow same sex couples, Tran's genders and single parents to opt for it, which is violate of their right to equality and right to personal liberty. Putting a ban on commercial surgery is also violating of the right of a woman to make reproductive choices of her own. Hence it can be concluded that though the act aims to prevent exploitation of surrogate women, it should try to make strict laws regulating commercial surrogacy and not banning it altogether.



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