



# UNDERSTANDING SURROGACY: “THE RENTING OF THE WOMB” PARADIGM

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## ABSTRACT

The term "surrogacy" refers to situations when couples who are unable to conceive a child rely on some other woman to bear their kid. The practice of surrogacy was first made public in 1980, and was made legal in India in 2002. Yet as the year went on, the GOI became aware of several shortcomings and abuses in commercialized surgery. In response, the ICMR put up several measures to stop surrogacy abuse. Many changes were made to the law throughout the years. The Government of India outlawed the practice of commercial surgery in the year 2015 and also prohibited Non-Resident Indians from engaging. India was named the "Global Capital of Surrogacy" and was referred to as the “Cradle of the World” in 2012. The famous case of **Baby Manjhi Yamda vs. Union of India**, in which travel permits for a child born to Japanese parents via an Indian surrogate mother was at issue, exposed various weaknesses in the surrogate bill and eventually led to the creation of several rules under the act.

The most recent Surrogacy Regulation Act's main points have been facts like the revision of the definition of infertility, the outlawing of commercial surrogacy, the definition of the post-delivery period of 36 months during which the couple was required to take care of any medical complications resulting from the surrogate mother's pregnancy. India nevertheless has a long road ahead toward achieving its goal of reducing the prevalence of unlawful acts and the inappropriate use of surrogacy, despite the entire Act's modifications.

Key words: - surrogacy, medical termination of pregnancy, medical infertility.

## INTRODUCTION

In India, having children is viewed as a gift, and being infertile is treated as a misfortune. India's societies have a fairly solid family structure, with sons serving as the prime carrier of the family name over generations. In the event of female infertility, it is viewed as a plague against them. Prospective parents can now have children of their own thanks to the developments in biology and procreative technology. India's hospitals have made artificial reproductive technologies available by virtue of a regulatory act. Two years back, The Assisted Reproductive Technology Act, 2021 was approved by both houses of parliament, and the President gave his approval on December 18 of the same year.

The 2021 Regulatory Act was initially tabled in the Lok Sabha in September 2020 with the intention of guiding the centers and clinics that exclusively administer Assisted Reproductive Technologies and guaranteeing that no dishonest activities are being pursued. In any event, the governing body deemed the measure unfit for enforcement. A permanent board of trustees was established in the same manner as the equivalent. By completing the gap in the Bill and presenting it to Parliament, the board was given shape. In its 129th report, the panel made a significant effort to address various concerns raised by the regulatory body and other interested parties over the Bill, but major flaws were overlooked. The board of trustees and the council ignored issues related to communication and the rights of the queer community, live-in pairs, and single male parents. The list of medical procedures enlisted includes intrauterine insemination, pre-implantation genetic diagnosis, in vitro fertilization, genetic donation, intracytoplasmic sperm injection, and surrogacy.

## THE ART (REGULATION) ACT: A CONSTITUTIONALITY CRITIQUE

There had been ICMR and MCI guidelines in place before to the art regulation, but it was necessary to create the rule in order to consolidate all supporting infrastructure into one location because there was previously no power to do so. It has concentrated mostly on the ART clinics and banks that are in charge of holding and providing gametes, such as sperms and oocytes, as well as the clinics that are in charge of executing the procedures to assist the worried couple struggling with infertility. It should be mentioned that the statute forbids commercial surrogacy because of the way it was used in the Gujarati region of Anand, where it resulted in health problems that were fatal for the women who agreed to function as surrogate mothers within a month of giving birth. The legislation is always read in conjunction with the surrogacy act, which constitutes one of the most popular ART techniques, as well as the MTP act and the PCPNDT Act. Every member of society has a fundamental right to a decent life and identity. The concept, which is the preservation of an individual's fundamental rights, is the same whether it concerns a person's right to reproductive health or their freedom to start a family without regard to their gender, sexual orientation, or marital status. It was claimed during the Lok Sabha discussion before the act's implementation that the regulation, in a formal sense, has a prejudiced stance when it comes to individuals who are a part of the bisexual and transgender groups.

First off, "an infertile married couple" is how the regulation describes the commissioning pair. Although homosexuality has been legalized in accordance with the decision in **Navtej Singh Johar v. UOI**, gay people still do not have the legal right to wed, consequently, even if they probably adopt any of these strategies, they cannot. Only weddings between men and women have been recognized in India. Second, long-term live-in partners that are unable to be hitched due to a variety of factors are likewise prohibited from using any of these strategies. The standing of a long-term live-in pair, however, was elevated to that of a married couple when they had a child in the case of **Ayesha v. Ozir Hassan**.

The Apex Court held that live-in offspring are considered the same as biological kids of a married spouse in the case of **S.P.S. Balasubramanyam versus Suruttayan**. There is an assumption of marriage for couples who reside jointly, even in the event of live-in relationships, the Supreme Court said in the case of **Tulsa & Ors. versus Durghatiya & Ors**. The problem is brought about by preventing live-in couples from using ART. In its findings, the Standing Committee notes that it is a well-known reality that it is challenging for Indian family structures and norms to accept a kid whose parents are living jointly despite not being officially married.

Under this law, the legislature wishes to make sure that if a kid is born via ART, there will be no subsequent legal issues. The legislation aims to guarantee that the kid is conceived and reared in a family. The justification for prohibiting gay marriage is that the idea of marriage in our culture is associated with the idea of a man and a woman being married to one another. Moreover, the statute prohibits surrogacy as a means of parenthood for single parents. Although single and divorced people are permitted to adopt children under sections 7 and 8 of the Hindu Adoptions and Maintenance Act of 1956 and Section 57 of the Juvenile Justice (Care and Protection of Children) Act of 2015, respectively. The simple fact that these laws let single parents to raise children provides a compelling argument for include single and divorced people of either gender under the contested Act. It is a matter of principle that if the state makes a difference or distinction that is not related to the goal pursued, or if there is no rational basis for the distinction, then article 14 may be violated.

Nevertheless, the Act's peculiarities can be justified on the grounds that they contribute to children's welfare by giving them a safe haven and preventing the emergence of new legal disputes stemming from the perennially debatable legality of the child's position. According to the committee, it would not be practical to let same-sex couples and live-in couples to utilize ART method facilities since doing so would imperil the welfare of the kid produced as a result and create parentage issues. A proposal of this nature, however, conflicts with the accepted notions of what defines child protection. Concerning issues involving an Act in the United States that concerns the protection of familial units in the country, the renowned American Sociological Association filed a short with the United States Apex Court on behalf of kids raised in same-sex family units. The short comes to the conclusion that children who live in same-sex-headed households do equally well academically, cognitively, socially, psychologically, and in terms of early sexual involvement and substance misuse as children who live in distinct parent households. Social determinants and family structure account for the majority of variations in child well-being.

Also, the Supreme Court ruled in the case of **Mausami Moitra Ganguli v. Jayanti Ganguli** that a child's welfare is a comprehensive concept that includes safety and stability, love, and an environment that supports a child's healthy growth. There isn't any basis for believing that committed gay couples can't provide their children with the identical environment as a straight marriage. The conditions of a kid's upbringing, regardless of the sexuality or gender identity of the parents, are eventually a result of the general environment and the unique temperaments of the kid and his or her parents.

## THE ABUSE OF SURROGATES

**Black's Law Dictionary** defines surrogacy as the act of bearing and giving birth to a child on behalf of another person. Hence, a surrogate mother is a woman who carries a child for another woman using either her own egg or the implantation of a fertilized egg from a different woman in her womb. 1978 saw the birth in Calcutta of the second baby ever born in the world and the first IVF (in vitro fertilization) baby in India. The area of assisted reproductive technology (ART) has advanced quickly since that time.

Growing medical infertility is a major hindrance to couples' overall well-being and cannot be ignored, especially in a patriarchal country like India. Surrogacy serves as an ultimate savior in this situation. In India, the child socially builds the parents while the parents construct the child physiologically. In this country, a woman is recognized as a wife if she gives birth to a child since the lineage is preserved and her husband's manhood and sexual potency are established. Because of this, surrogacy in Indian society is both a must and a choice. The cost of surrogacy in India is around one-third that in affluent nations like the USA. Given these facts and more, India has been a popular choice for international couples looking for affordable infertility treatment, and an entire industry of medical tourism has sprung up around the surrogate practice.

The Indian government has cited the practice of "renting the womb" as a problem. The Indian government outlawed surrogacy for non-Indians in 2015, citing the practice of "renting the womb." Many of these reasons contribute to the commoditization of the kid caused by surrogacy. Renting the womb destroys the relationship between a mother and her kid, meddles with nature, and frequently results in both the exploitation of underprivileged women and the exploitation of the child born. There have been reports of intermediaries or agents taking advantage of surrogates. There hasn't been a procedure to oversee the clinics or a law to guarantee that the clinics or the intended spouses don't take advantage of the moms. The moms of the surrogates receive poor nutrition, minimal medical care, and no postpartum support.

The majority of surrogate moms are unaware of their contract's details. In fact, a sizeable percentage of people don't even own a copy of it. These days, surrogacy contracts are primarily between the clinic and the commissioning parents and frequently do not include the surrogate herself. A baby becomes a product and a pregnancy becomes a service through surrogacy. The agents that work for clinics get in touch with the surrogates, or more specifically their husbands. The majority is also collected by middlemen who link women to clinics. These middlemen are frequently undetectable on paper since they are not officially connected to the clinics that typically pay them covertly. One mother stated that she was only left with about Rs. 1,300 after promises, not even enough to cover her eight-year expenses.

These middlemen are frequently undetectable on paper since they are not officially connected to the clinics that typically pay them covertly. The significant unpredictability and financial burden of recurrent failures that need painful surgery must be accepted by the surrogate. The contractual party bears no responsibility for the surrogate mother recovery, postpartum care, maternal death, or other health hazards. She must put up with invasive clinical treatments such as the transfer of several in vitro embryos or, in the case of non-consensual sex or multiple pregnancies, foetal reductions.

Far beyond the dichotomy between for-profit and charitable surrogacy, the concept of commercial surrogacy is riddled with numerous urgent ethical questions. Whether this government effort will be successful in resolving the issue is the question at hand.

### **THE SURROGACY REGULATION ACT, 2021**

The Act has caused the designated infertility condition—the inability to procreate even after 5 years of unprotected sexual activity—to be eliminated. The drafting committee noted that the five-year waiting requirement for the couple to give birth is excessive, arbitrary, and completely at odds with the stated purposes of this specific Act. The Act allows a couple between the ages of 23 and 55 to choose moral surrogacy. Yet, such a pair should always be of Indian descent. The Act is sufficiently progressive since it gives single moms between the ages of 35 and 45 the option to use a surrogate and have a child. Before beginning the surrogacy procedure, the Act now requires that the couple receive both an eligibility certificate as well as a certification of essentiality. Furthermore, individuals who are divorced, or bereaved, in addition to a couple, described as a man and woman who are lawfully married, may use a surrogate mother if their medical situation calls for it. Moreover, commercial surrogacy is prohibited and is subject to a 10-year prison sentence and a penalty of as much as Rs. 10 lakhs. The legislation only permits altruistic surrogacy, in which no money is exchanged and also the surrogate mother is biologically linked to individuals who wish to become parents. The intended parents cannot leave the kid for any reason, and the child will be guaranteed to all the rights and benefits accorded to a child born naturally. Moreover, sex selection is outright prohibited under the Act.

The state has to ban using impoverished women as surrogates and preserve the kid's right to be born, according to one argument. Other difficulties include the exploitation of the surrogate and the child. These two interests are not sufficiently balanced by the existing Act, nevertheless. The second issue in line is the reinforcement of patriarchal norms that the Act implies. The Act directly affects the basic rights of women to procreate under Article 21 of the Constitution and upholds traditional patriarchal norms of our society that place no economic value on women's labour. It further denies legal sources of revenue for surrogates by outlawing commercial surrogacy. The surrogates are also denied a legal source of income, which reduces the number of women who are willing to become surrogates.

A friend or relative serving as a surrogate mother in an altruistic surrogacy may result in emotional issues for the intended parents as well as the surrogate kid because there is a significant degree of danger to the relationship during the surrogacy process and after the baby is born. Altruistic surrogacy further restricts the options available to the intended parents in terms of selecting a surrogate mother because very few family members will be willing to participate in the process. Additionally, it makes sure that there isn't any involvement from a third party in an altruistic surrogacy. Using a third party assures that the intended pair will cover and support the surrogacy process's medical and other incidental costs. Ultimately, a third party aids the intending parents and the surrogate mother in navigating the challenging process. By taking this action, couples who choose to become parents are essentially denied having children.

In order to perform surrogacy-related treatments, surrogacy clinics must be registered with the relevant government. Clinics have 2 months from the moment the authorized authorities appointed them to submit an application for registration. The National Surrogacy Board (NSB) and the State Surrogacy Boards (SSB) are created by the federal and state governments, respectively. The NSB's duties include assisting the federal government with surrogacy-related policy issues; establishing the surrogacy clinics' rules of conduct; and monitoring the operation of SSBs.

### **THE SURROGACY ACT AND THE ROAD AHEAD**

As of right now, surrogacy is legal in India because it is not against the law there. Nevertheless, the **Surrogacy (Regulation) Act 2019** aims to make altruistic surrogacy the sole type of surrogacy permitted and to outlaw commercial surrogacy. Altruistic surrogacy involves a heterosexual married couple who have been childless for five years of their marriage using a "near relative" as a surrogate. The legislative provisions, however, do not define what a "near relative" is.

Commercial surrogacy incorporates a contract that covers the surrogate mother's monetary pay as well as the pregnancy's medical costs. The goal of altruistic surrogacy is to avoid paying the surrogate mother any money. According to the Law, the intended spouses must be united as married Indian couples. The possibility of non-resident Indians living or learning overseas and wanting to return home to start a family is not mentioned. The Act excludes a wide range of individuals who might seek to become parents through surrogacy, such as unmarried men and women, homosexual lovers, and single men and women.

Childbirth is a fundamental human right. Men and women of legal age have the freedom to marry and start families without restrictions based on their race, nationality, or religion, according to the 1948 Declaration of Human Rights. The judiciary in India has also acknowledged the human right to procreate as a fundamental freedom. The right to bear a child through surrogacy should be a basic constitutional right if the right to an intact reproductive system is. The Law also makes it clear that any sort of financial gain or promotion of the surrogacy procedure is illegal and subject to punishment. But this will put at risk the livelihood of underprivileged women who use commercial surrogacy.

The Surrogacy Law makes reference to "donor eggs" legislation, although there is no actual law that governs assisted reproductive technologies. It is difficult to control commercial surrogacy due to the prevalence of illegal commercial surrogacy, which would further contribute to the abuse of women. Also, the Act outlaws "fashion surrogacy," since only infertile couples may choose to use a surrogate.

Although the Surrogacy (Regulation) Act of 2019 firmly establishes the outlawing of commercial surrogacy, it falls short in its attempt to address the more important societal, physiological, mental, sentimental, and financial crisis that continues to jeopardize the welfare and security of the surrogate mother as well as the baby. The potential of exploitation does not disappear just because the existing surrogacy agreements have no economic components. Thus, it is imperative that ART be strictly controlled along with the liberties of the surrogate mother and the child delivered.

The following is a list of recommendatory changes:

1. Embryos must be cultivated in various In-Vitro Fertilization (IVF) facilities in order for surrogacy to take place. So, legislation governing assisted reproductive technology must come before laws regulating surrogacy (ART).
2. Instead of punishing surrogacy, the individual who donates their womb must be covered by a contract, assuring sufficient insurance and medical examinations.
3. Both the surrogate mothers and the donor's right to privacy should be safeguarded.
4. All social classes should be allowed to use surrogates, regardless of their sexual orientation.

## CONCLUSION

In India, being a mother is regarded as the most valuable event in a woman's life and is thought to be a divine intervention since ancient times. Parenthood is referred to as a couple's second birth. Despite the medical support and nurturing that the mother receives, which is seldom available or affordable for them during their natural pregnancies, becoming a surrogate mother is dangerous and carries a chance of developing serious problems.

It is an undeniable reality that commercial surrogacy had been a major source of revenue for so many women from monetarily disadvantaged backgrounds. Unfortunately, this implies that they would be bereft of their means of subsistence owing to the social injustices that exist. In India, the surrogacy market is already developed, so outlawing it now might make implementation more difficult and drive the sector underground, where it would be hidden from the official view. Male infertility cases are on the rise in India, and the right of the couple to have a child is being taken away by the restriction on commercial surrogacy. Notwithstanding the fact that commercial surrogacy is prohibited, adequate legislation with stringent restrictions and enforcement is needed to allay the worries of industry participants.

The denial of a person's fundamental human right cannot be based on their sexual orientation, gender, or marital status. These elements are unrelated to the child's well-being and upbringing. The legislature has demonstrated it's a conventional, morally absurd, and unscientific way of thinking through its discriminatory policies. The Indian Supreme Court made an effort to abolish the moralistic constraint on freedom through a string of rulings. The author suggests changing the ACT to be gender-neutral since it is inexcusable as it is now. To achieve the objectives of child welfare, it is necessary to amend Section 2(1)(e) and Section (1)(u) and substitute the phrases "infertile couple" and "women" with "couple or individual," which would encompass single parents, live-in pairs, and same-sex partners.

