

SURROGACY REGULATION IN INDIA: A CRITICAL ANALYSIS OF THE SURROGACY (REGULATION) ACT, 2021

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ABSTRACT

Surrogacy and in vitro fertilisation (IVF), many people have been able to realise their desire to create a family. In recent years, surrogacy in India has grown in popularity as a viable alternative for infertile couples. Ethical, exploitation, and regulatory issues have been voiced in response to the practice. The Surrogacy (Regulation) Act, 2021 was enacted by the Indian government in response to these concerns; its goals include the regulation of commercial surrogacy, the protection of surrogate mothers' rights, and the assurance of the welfare of children born via surrogacy agreements. This study examines the Surrogacy (Regulation) Act, 2021, and its contents through a critical lens, concentrating on the consequences it has for intended parents, surrogate mothers, and the larger ethical context. It delves into the Act's social and legal aspects, touching on topics including the surrogacy eligibility requirements, the limitations on international couples, and the prohibition on commercial surrogacy. Finding a middle ground between safeguarding vulnerable persons and encouraging reproductive autonomy is another topic covered in the paper. Although the Act is a positive start in creating a surrogacy framework that is more organised and open, the study points out that it has several flaws, such as vague language and the possibility of socioeconomic discrimination. In order to promote ethical surrogacy operations in India, it concludes by discussing the need of a thorough regulatory system that puts everyone's rights first.

Keywords: Surrogacy, India, Regulation Act, 2021.

INTRODUCTION

The Latin phrase "Surrogatus" translates to "substitute" or "designated to act on behalf of another," which is the origin of the English word "surrogacy." The act of gestating a kid for another individual is described in Black's Law Dictionary as. Surrogacy is characterised as "an agreement wherein a woman consents to gestate a pregnancy, facilitated by assisted reproductive technology, utilising gametes that are not her own or her spouse's, with the purpose of delivering the child to the individual or individuals for

whom she is serving as a surrogate." A "surrogate mother" is a woman who consents to gestate an embryo created from the sperm of a man who is not her spouse and the oocyte of another woman, with the intention of carrying the pregnancy to term and delivering the child to its biological parents. According to the Merriam-Webster dictionary, it is described as "the practice by which a woman designated as a surrogate mother becomes pregnant, carries a child to term, and relinquishes it to individuals unable to conceive."¹ Surrogacy has been growing in favour globally, particularly in the West where adoption is scarce, despite the fact that it raises problematic and ethical questions. One in six couples struggle with infertility, according to research. While some find relief via medical therapies, others find that there is no such thing.

When a woman has had a hysterectomy, miscarried many times, or was born without a womb, surrogacy becomes a lifesaver for these couples. To really grasp surrogacy, one must be familiar with the idea of a commissioning parent. The individual or individuals designated as the primary carers of a child during pregnancy are sometimes referred to as the commissioning parents, or intended parents. Foreigners, Non-Resident Indians (NRIs), or Indians themselves might choose surrogacy as a parenting option. The practice of surrogacy is gaining popularity and acceptance among childless couples in India. The majority of the commissioning parents are from the upper class, where they are able to afford the astronomical expense of surrogacy.²

Surrogacy (Regulation) Act, 2021

The Surrogacy (Regulation) Act, set to be formally released in 2021 by the Ministry of Law and Justice, aims to address all aspects of the subject matter. The Act aims to prevent the exploitation of women and intermediaries involved in the importation of human embryos and gametes, as well as address the alarming rates of child abandonment in India, which is emerging as a global surrogacy hub. The Act addresses both of these difficulties. Altruistic surrogacy is the only sanctioned method for the natural delivery of a baby outside the genetic mother's womb. The SRA 2021 permits the practice only with "close relatives" (Ministry of Law and Justice 2021). The objective is to render commercial surrogacy, which encompasses the exchange of human gametes and embryos, as well as the financial transaction for

¹ Bindel, Julie. 2015. Commercial surrogacy is a rigged market in wombs for rent. *The Guardian*, 20 February 2015.

² Manjunath, Chandrika. 2018. Surrogacy in India and the debates surrounding the practice. *Feminism in India*, 23 January 2018.

surrogate services (excluding insurance), unenforceable. Furthermore, it aims to facilitate altruistic surrogacy, when surrogates get no money or advantages other from the coverage of medical expenditures and insurance. The Surrogacy (Regulation) Bill, 2019 stipulates that only accredited establishments may conduct medical procedures associated with surrogacy.

Furthermore, it forbids the employment of persons with less experience or the use of misleading advertising to coerce women into surrogacy, while ensuring their accreditation. These clinics cannot perform abortions without obtaining consent from both the surrogate mothers and the relevant authorities. Furthermore, it forbids the use of human embryos and gametes for the purpose of sex selection. A woman may serve as a surrogate mother just once in her lifetime.³ According to the Ministry of Law and Justice (2021), she is required to provide a certificate affirming her great health, as well as a document verifying her mental and physical well-being. Furthermore, since surrogates cannot provide their own gametes, the only option is gestational surrogacy implantation. Furthermore, for the prospective pair to qualify for treatment, they must obtain a "certificate of eligibility" and a "certificate of essentiality" from the accredited agency. In cases of infertility among an intended pair, a certificate of essentiality will be issued only if certain conditions are met. To qualify for a certificate of eligibility, the couple must have been married for at least five years, both individuals must be Indian nationals, and the male must be aged between 26 and 55 years, while the female must be aged between 23 and 50 years. Individuals incapable of procreation is similarly restricted from doing so, save for those who are mentally or physically disabled. The National Assisted Reproductive Technology and Surrogacy Board is required to provide certificates of recommendation to both the intending parents and the surrogate as stipulated in Section 4(ii)(a) of the Act, established under Section 17 of the Act. According to Section 2(h), the Act defines a "intending couple" as a legally married man and woman from India, aged at least 21 and 18 years, respectively.⁴ This definition complies with the provisions of the Act. The phrase "intending couple" is defined under Section 2(r) of the Act. This word denotes a couple seeking to become parents via surrogacy, with medical documentation that endorses the practice of gestational surrogacy. A "widow" or "divorcee" aged 35 to 45 intending to use this service is classified as a "intentional woman" as per the provisions in Section 2(a) of the Act. In the legal framework, the intended parents will be acknowledged as the biological parents of any child

³ Kannan, Ramya. 2022. The debates around the surrogacy act. *The Hindu*, 6 June 2022.

⁴ Parry, Bronwyn, and Rakhi Ghoshal. 2018. Regulation of surrogacy in India: whenceforth now? *BMJ Global Health* 3(5): e000986.

conceived via surrogacy. The intended parents are prohibited from abandoning a surrogate-born kid, irrespective of their location in India, and regardless of factors such as the child's gender, the number of births, or any genetic or congenital anomalies. The SRA 2021 stipulates that surrogacy is prohibited for financial gain and is only permitted for intending parents who discover their inability to conceive.

It is an egregiously malevolent conduct to procreate with the goal of selling a kid, using them as prostitutes, or exploiting them in any other capacity.⁵ The acquisition or importation of human embryos and gametes for surrogacy, along with the advocacy of commercial surrogacy, the mistreatment of surrogate mothers, the abandonment, exploitation, or social marginalisation of surrogate children, and the recruitment of surrogate mothers are all considered criminal offences.⁶

Unmarried women who want to have a family but can't find a partner are one group that this eliminates. The traditional taboo against acknowledging maternity outside of marriage is perpetuated by this regulation, despite its seeming embrace of modernity. Abortions are illegal in the United States as per the Medical Termination of Pregnancy Act of 1971. They face further punishment if they get pregnant from sexual encounters and are forced to give birth. Surrogacy services are available to couples who want children but are unable to have them, although widows and single women cannot utilise this option. Married individuals who are "Indian man and woman" and over the ages of 21 and 18, respectively, are defined as a pair under the 2021 Act. Those in live-in relationships are not eligible to utilise these services because of the limitations.⁷ The Act's definition of a couple, according to Section 2 (h), establishes marriage as a fundamental institution. The Act does not include couples who are physically unable of conceiving or those managing chronic illnesses that increase the risk of complications for the developing baby. This is also relevant for couples desiring to conceive. Because the Act remains vague on the matter, the National

⁵ Tekriwal, Diksha. 2022. Lacunae in the Surrogacy (Regulation) Act, 2021. The Leaflet, 16 September 2022.

⁶ Zelizer, Viviana A. 2005. The purchase of intimacy. Princeton, NJ: Princeton University Press.

⁷ Babbar, Karan, and M. Sivakami. 2022. The Surrogacy Regulation Act 2021: another attempt to reproduce a heteronormative patriarchal society? Feminism in India, 2 February 2022

Assisted Reproductive Technology and Surrogacy Board retains the authority to determine the permissibility of illnesses or conditions for surrogacy.⁸

Exclusion of the LGBTQIA+community

In India, only married individuals are eligible for surrogacy procedures. This data underscores the pervasive gender prejudice present in our society. This limitation prevents same-sex couples or those who do not identify with either gender from experiencing the fulfilment of motherhood. The Act blatantly discriminates against those identifying as LGBTQ+ and unmarried guys desiring to have a family. Approximately fifteen percent of the population identifies as lesbian, gay, bisexual, transgender, or queer (LGBTQ+), whereas over twenty percent of single parents choose for surrogacy to conceive their children. The Supreme Court of India overturned the prohibition on homosexuality under Section 377 of the Indian Penal Code in the case of *Navtej Singh Johar v. Union of India* (2018). Nevertheless, since same-sex marriages remain illegal in India, many same-sex couples cannot meet the requirements of Section 2(h) of the Act.⁹ Furthermore, the clause confines surrogacy to married heterosexual couples by asserting that a partnership must have both male and female participants. The legislation clearly stipulates that only married heterosexual couples with children are eligible for surrogacy. The overt homophobia present throughout the government is more evident than ever before. Sushma Swaraj, who held the position of India's minister of foreign affairs from 2014 to 2019, said that surrogacy for LGBT persons is inconsistent with the "Indian ethos."

Every citizen of India is entitled to social equality under the fundamental rights conferred by the Indian Constitution, thereby necessitating the recognition of the LGBTQ community to advance social equality. In 2008, the Supreme Court of India was first compelled to address a matter pertaining to surrogacy.¹⁰ The case at hand was *Baby Manji Yamada v. Union of India*. In that specific instance, the court upheld the legality of surrogacy as a means of obtaining parental rights, as well as the legitimacy of a gay couple or a single parent serving as legal guardians. The second interpretation has been totally debunked by the implementation of the Act. Consequently, it is essential to recognise and assist non-binary individuals, as

⁸ Kush Kalra, "Surrogacy Arrangements; Legal and Social Issues" *Journal of Law Teachers India* 125 (2010)

⁹ Barbara S. Parish, "Test Tube on Trial: Let California Blaze the Trail to the Legitimation of Surrogacy"

¹⁰ Manali Singh, —Surrogacy in India and its Legal Aspects, *Pen Acclaims*, Vol. 10, page no.1-17, (May,2020)

well as couples identifying as heterosexual, gay, or queer, in their pursuit of parenthood. Artificial reproductive technologies (ART) have transformed perceptions of reproduction and parenting, placing the want to raise a child at the forefront when biological procreation becomes unfeasible.¹¹ This is due to ART enabling the possibility of procreation. No moral or cultural bias exists that would inhibit some persons from having parents in this context. The intent-based approach to surrogate parenting remains uncodified; nonetheless, the Supreme Court has ruled that in matters of guardianship and custody, an individual's genuine goal and involvement in child-rearing supersede any genetic connection or formal marriage. This remains true even in the absence of definition of the idea. The explanation differentiates between legal and biological parenting, so providing a persuasive justification for expanding the ability to parent via surrogacy without constraints related to an individual's biological capabilities.¹²

The Surrogacy (Regulation) Bill may face constitutional challenges because to its infringement on the privacy provisions established in Article 21. The conventional notion of family has been supplanted by the ideas of private ordering and intent-based parenting, which prioritise individual liberty above the traditional family structure.¹³

Types of surrogacies

The following surrogacy arrangements are necessary for the research at hand, while there are many more:

1. Altruistic Surrogacy

This term refers to the situation in which the birth mother receives no remuneration or formal agreement. Typically, it is an agreement made between family members or intimate acquaintances. The fundamental elements of altruistic surrogacy are a surrogate mother's capacity to conceive, the genetic parents' capability to provide financial remuneration, and the relinquishment of her parental rights post-

¹¹ Anil Malhotra, "Business of Babies" The Tribune, December 14, 2008

¹² Susamma Kurian, "Iceland Accepts Surrogate Baby Born in Thane" Hindustan Times, December 21, 2010

¹³ Banerjee, Sneha, and Prabha Kotiswaran. 2021. Divine labours, devalued work: The continuing saga of India's surrogacy regulation. *Indian Law Review* 5(1): 85–105.

delivery. Either no money is offered, or the surrogate is compensated for the distress she has experienced, which may include reimbursement for medical and other expenses.¹⁴

2. Commercial Surrogacy

Conversely, surrogacy is seen as a commercial venture in the context of commercial surrogacy, when the surrogate is compensated significantly for her services, alongside any expenses incurred throughout the gestation period. In return for the birth mother relinquishing her child during delivery, there is a fee for the gestational service, akin to a commercial transaction. In addition to ancillary charges, missed wages, and comparable financial arrangements, there are often additional expenses. The birth mother may be mandated to undergo tests, terminate the pregnancy if the foetus has a handicap, or refrain from smoking and drinking, among other requirements. Birth moms and the commissioning couple are often complete strangers.¹⁵ Numerous individuals believe that the agreement cannot be classified as commercial if it just addresses expenditures and earnings, excluding the provision of services or the transfer of custodial rights.¹⁹ Owing to the nation's robust medical infrastructure, substantial global demand, and the ready availability of economically disadvantaged surrogates, this medical procedure is nearing industrial scale in India, one of the few countries where it is legal. "Wombs for rent," "outsourced pregnancies," and "baby farms" are among the most emotionally charged and derogatory terms used to commercial surrogacy.¹⁶

Surrogacy parenting agreement

The surrogacy arrangement involves two parties: one, the intended parent, and another, the surrogate mother. The surrogate mother agrees to carry the embryo throughout pregnancy at the intentional parent's expense and gives up all legal claim to the child she carries. A surrogacy contract cannot be legally

¹⁴ Bassan, Sharon. 2018. Different but same: A call for a joint pro-active regulation of cross-border egg and surrogacy markets. *Health Matrix* 28(1): 323–374.

¹⁵ Bindel, Julie. 2015. Commercial surrogacy is a rigged market in wombs for rent. *The Guardian*, 20 February 2015.

¹⁶ Reetu and Basabdutta, "Surrogate Birth" AIR 2009 Jour 109.

executed without the spouse of the surrogate mother's agreement. When the mother gives birth, she often gives up whatever parental rights she may have to the couple, according to the agreement.¹⁷

The surrogate mother, the intended parent or parents-to-be, and the surrogacy arrangement all have their roles and responsibilities laid out in an agreement. Everyone involved in the surrogacy process, including the intended parents, the surrogate mother, and any connections between the two, should be clearly defined in the surrogacy agreement. There is a provision in the agreement for the surrogate mother's compensation. When a surrogacy agreement reaches its last stage, the intended parents decide how much money to pay the surrogate. The agreement specifies the responsibilities and dangers that each participant assumes in the case that they choose to be a surrogate or intended parent. After carefully reading and understanding the surrogacy agreement, both the intended parent(s) and the surrogate are needed to sign it.¹⁸

Surrogacy arrangement agreement

The intended parents, surrogacy agency, and hospital all sign an agreement outlining the program's limitations and protocols. Before executing the agreement, which encompasses the price framework, procedural timelines, payment methods, required medical tests, embryo implantation dates, and further medical procedures, the prospective parents will get unlimited support. Given that the Surrogacy Arrangement Agreement is legally binding, the intended parents may be certain of receiving the services stipulated within it.¹⁹

OBJECTIVES

1. To study on Surrogacy (Regulation) Act, 2021 & Types of surrogacies
2. To study on Surrogacy parenting agreement and Surrogacy arrangement agreement

METHOD

¹⁷ Chandran, Aishwarya. 2022. Valuing women's labour: some notes on the 'compensated' model of surrogacy. *Journal of South Asian Development* 17(2): 195–209.

¹⁸ Fotedar, Tansi. 2019. The Surrogacy Bill, 2016: A step back for inclusivity. *The Leaflet*, 9 June 2019.]

¹⁹ Martha A. Field, *Surrogate Motherhood: The Legal and Human Issues* 155 (1990).

Doctrinal' is the research approach used in this study. Doctrinal research has relied on both primary and secondary sources for its data. The main source of information is the legislation, judicial decisions, executive orders, rules, and regulations of different administrative authorities. Publications such as books, newspapers, websites, and more are all considered secondary sources. In addition, the analytical topic is based on a number of references to legislation, treaties, and studies at the national and international levels. Researchers are keeping up with the most recent developments in replacement law by consulting online resources, print publications, and newsletters.²⁰

ANALYSIS AND RESULT:

Surrogacy (Regulation) Act, 2021, and the Assisted Reproductive Technology (Regulation) Act, 2021

The Rajya Sabha adopted the Assisted Reproductive Technology (Regulation) and Surrogacy (Regulation) measures in 2021. The objective of these two proposals is to prohibit commercial surrogacy in India and to regulate IVF clinics.²¹ In June 2022, the Ministry of Health and Family Welfare promulgated the Assisted Reproductive Technology (Regulation) Rules, 2022, using the rule-making authority conferred by Section 42 of the Act.²²

Assisted Reproductive Technology (Regulation) Act, 2021

1. The goal of the Assisted Reproductive Technology (Regulation) Act, 2021, is to control and oversee facilities that provide ART, such as clinics and banks, and to stop their abuse.
2. According to the Act, all ART clinics and banks must be registered with the National Registry of Banks and Clinics of India. The National Registry, established under the Bill, would serve as a centralised database containing information on all ART clinics and banks in the country.
3. The Act also specifies requirements for the supply and donation of gametes.

²⁰ Garner, Bryan A. 2009. Black's Law Dictionary, 9th ed. Saint Paul, MN: West Group.

²¹ Civil Code of Quebec, Article 541 (1991), "any agreement whereby a woman undertakes to procreate or carry a child for another person is absolutely null".

²² Ramesh Vinayak, "A Womb for Rent" India Today 82 (June, 1997)

4. No donor will have any parental rights over a child born using assisted reproductive technology, as stated in the Act.²³

Surrogacy (Regulation) Act, 2021

1. The Surrogacy (Regulation) Act, 2021 explicitly prohibits commercial surrogacy, allowing it only for altruistic grounds.
2. The couple intending to marry must get a certificate of eligibility and a certificate of essentiality from the appropriate authorities.
3. The Act only allows gestational surrogacy, eliminating the biological link between the child and the surrogate mother.

Indian council for medical research

A number of surrogate protections were included in the suggestions made by the International Committee of Medical Research (ICMR) in its 2000 statement of specific principles for Assisted Reproductive Technologies using Substitution.²⁴

1. Surrogacy should only be considered in cases where it may be legally paired with adoption;
2. The belief that a mother is the woman who carries and gives birth to a child should be disproven;
3. The child's adoption should be prioritised for the prospective parents, who must wait six weeks after the birth of the child for the mother to give her consent;

²³ Pratibha Ganesh Chavan, "Psychological and Legal Aspects of Surrogate Motherhood"

²⁴ Indian Council of Medical Research, National Academy of Medical Sciences (India), National Guidelines for Accreditation, Supervision And Regulation of Art Clinics in India, New Delhi: Ministry of Health And Family Welfare, Government of India; 2005.

4. The legitimacy of the replacement contract will rely on the substitute's right to retain the child if she so desires, regardless of whether there is a suitable payment of compensation following completion of the adoption.²⁵
5. The only choice for the biological parents would be to seek custody by arguing what's best for the kid;
6. The right to an abortion for medical reasons should be guaranteed by the law governing abortion; in this instance, the money that was previously paid by the adoptive parents is not due to them.

On September 4, 2002, the draft regulations for ART clinics were also released by the Secretary of Family Welfare. The guidelines for substitution were draughted by a joint effort between the ICMR and the National Academy of Medical Sciences in New Delhi.²⁶

Law commission

Pay close attention to the Law Commission 228th Report, August 2009. Law Commission of India's major recommendations on surrogacy include:

An agreement between the parties will continue to govern substitution planning; this agreement will cover all the bases necessary for the substitute mother to have a child, including getting her spouse's and other family members' permission. But this agreement shouldn't have any commercial overtones.²⁷

In the event that the commissioning parents pass away before the child is born, or if the prospective parents divorce and neither wants the child, a replacement agreement should include provisions for financial support for the child.

²⁵ Ministry of health & finance Welfare (India), —ART Clinics In India(September,2002),Surrogacy (Regulation) Bill, 2019, Section 36

²⁶ Gola, Swati. 2021. One step forward or one step back? Autonomy, agency and surrogates in the Indian Surrogacy (Regulation) Bill 2019. *International Journal of Law in Context* 17(1): 58–74.

²⁷ Genesis 16:2 So she said Abraham, “the Lord has kept me from having children. Go, sleep with my slave; perhaps I can build a family through her.”

Every surrogacy agreement must include the surrogate mother's life insurance. A biological relationship is the main source of love and affection between a child and his or her parents, thus one of the prospective parents should contribute.

The Medical Termination of Pregnancy Act of 1971 ought to be the only authority governing and regulating abortion.²⁸

Indian legislature

The Indian government has made a significant advancement in surrogacy legislation by enacting the Surrogacy (legislation) Act, 2021. This legislation will protect the rights of all involved parties and guarantee that surrogacy practices conform to ethical standards. Concerns around the commercialisation of reproduction, the exploitation of women, and the lack of regulation have made surrogacy a divisive subject in India. The Act aims to address these issues by delineating the criteria that define an ethical surrogacy arrangement. Prior to the enactment of legislation, India has already emerged as a hub for international surrogacy due to its very low costs and absence of rigorous regulations. The outcome was a rise in unethical practices and the exploitation of surrogate mothers.²⁹

The Surrogacy (Regulation) Act, 2021 emphasises altruistic surrogacy by forbidding any kind of remuneration for the surrogate mother beyond medical expenses and insurance costs. The Act prohibits commercial surrogacy, which entails compensating surrogates with a significant sum of money. The objective is to inhibit surrogacy from becoming into a profitable sector and to protect women from victimisation by these entities. The Act also imposes significant restrictions on eligibility for surrogacy services. Surrogacy is a viable option for infertile Indian couples who are legally married and meet certain criteria, including age limitations of 26–55 for males and 23–50 for women. The surrogate mother must be both emotionally and physically prepared for the process, which includes having her own children and

²⁸ Jaiswal, Sreeja. 2012. Commercial surrogacy in India: An ethical assessment of existing legal scenario from the perspective of women's autonomy and reproductive rights. *Gender, Technology and Development* 16(1): 1–28.

²⁹ Bella Jaisinghani, "Rows May Hit the Surrogacy Industry" *The Times of India*, May 11, 2012. 66 (2017).

being a close relative of the intending parents, as mandated by the Act.³⁰ The Surrogacy (Regulation) Act establishes surrogacy boards at both state and federal levels to monitor surrogacy operations and ensure compliance with regulations. Surrogacy oversight committees are tasked with maintaining records, monitoring surrogacy agreements, and safeguarding the rights of all parties involved, particularly the surrogate mother and the surrogate child. Furthermore, the Act emphasises the need of mental support and medical guidance.³¹ For foreign people who used to go to India in droves for surrogacy services, this rule has had a profound effect. When commercial surrogacy was outlawed, it had a significant impact on the industry's bottom line. Supporters of the legislation, on the other hand, say it was essential in preventing the commercialisation of women's bodies and guaranteeing an ethical surrogacy process. But others say the legislation would make it harder for couples to locate a surrogate or will encourage them to go abroad for surrogacy services because of how strict the regulations are. Although the Surrogacy (Regulation) Act, 2021, is a significant step towards surrogacy regulation and the protection of vulnerable women, it has ignited discussions over the limitations of the law and the need to strike a balance between safeguarding individual rights and facilitating access to reproductive technology.³² How well the regulatory agencies carry out their duties, how well the Act is put into practice, and how well it can adjust to new social and technical developments in reproductive health are all factors that will determine the Act's ultimate success or failure.³³

Role of judiciary

Judicial response to surrogacy in India

Presently, there is no regulation in India that pertains to the intricate issue of surrogate motherhood. Surrogacy is a domain in which India, a country steeped in history and tradition, has lagged behind

³⁰ “Revealed: How More and More Britons are Paying Indian Women to Become Surrogate Mothers” The Telegraph, May 26, 2012.

³¹ Deuteronomy (5th book of Hebrew Bibles, chapter 25 verse 5)

³² Priya Pareek, “Surrogacy- Concept of Renting a Womb” Available at:

³³ Ashley Kate, “History of Surrogate Motherhood” Available at: <http://www.ezinearticles.com> (visited on 27.09.23).

contemporary developments. Although recognised as a "Surrogacy Hub," India's surrogate motherhood sector—among the nation's most profitable—remains uncontrolled.³⁴ The significant case *Baby Manji Yamada vs. Union of India* concerned a Japanese couple, Dr. Iku Fumi Yamada and his spouse. The couple sought to have a family and engaged a surrogate mother in Anand, a city in the Indian state of Gujarat, where the practice originated. The woman was unprepared to welcome the child, resulting in marital discord. Despite the surrogate mother also abandoning her, the father remained resolute in obtaining legal possession of the child. The child's fate was jeopardised due to the absence of explicit legislation concerning surrogacy.³⁵

The Supreme Court's legitimisation of surrogacy in India has reinstated the monetisation of surrogate motherhood, comparing it with an industry. Concerns regarding women's exploitation, reproductive organ abuse, lack of agency, and patriarchal societal pressure to generate income have been raised in the context of surrogacy alongside other outsourcing practices, citing factors such as "superior medical infrastructure, significant international demand, and the ready availability of economically disadvantaged surrogates." The Karnataka High Court has established a triple test hypothesis to let a couple to pursue surrogacy. Previously, this was prohibited by the Surrogacy (Regulation) Act, 2021, since the spouse, at 57 years of age, beyond the age qualifying limit.

DISCUSSION

The government of India has proposed the Surrogacy (Regulation) legislation, 2021 to regulate surrogacy activities. The main goals of the legislation are to prohibit commercial surrogacy and to promote altruistic surrogacy. Surrogacy is a controversial practice, and this act aims to regulate it, protect surrogate mothers, and ensure the best interests of any surrogate children.³⁶ Concerns about accessibility, ethical implications, and the balance between legislation and individual rights have been raised by the good and controversial effects of this law's passage. Commercial surrogacy, which was formerly a thriving sector in India, has come to an end as a result of the Surrogacy (Regulation) Act, 2021. Because of this change, surrogate mothers are no longer financially exploited, as they were in the past when they were often paid

³⁴ RSTV: IN DEPTH- NEW SURROGACY BILL, INSIGHTS ON INDIA (AUGUST 5, 2019).

³⁵ "The new surrogacy bill will stop exploitation of women", Hindustan Times, August 25, 2016

³⁶ Surrogacy (Regulation) Bill, 2019, Section 36

too little and exposed to harmful medical procedures. The purpose of prohibiting commercial surrogacy is to promote ethical and selfless practices in the industry and to protect women from being exploited as commodities.³⁷ Women, especially those from disadvantaged socioeconomic situations who may have been forced into surrogacy contracts for financial benefit, would be better protected by this provision of the Act. The transition to surrogacy for the benefit of others, however, has not been trouble-free. The Act's eligibility requirements are a big problem. Surrogacy is an option for infertile married Indian couples, but only if they are of a certain age. People who don't fit the requirements, same-sex couples, and single people have all voiced their concerns that the regulation is too restrictive. A lot of people think surrogacy is a good way to establish a family, but this stringent requirement means they can't use it. The basic human right to access reproductive technology is called into doubt by this restriction, which also gives rise to worries about prejudice.³⁸

CONCLUSION

The ability to have children is a fundamental condition for marriage to exist. The ability to carry a child to term is a gift bestowed upon women. It is a national holiday here to honour the birth of a child. It is only when a woman has children that she is considered a wife in our society. However, not all ladies have this luxury, and some cannot even attend the festivities since neither of their husbands is wearing a shirt. A variety of procedures may be used to accomplish the objective of having children. Surrogacy and in vitro fertilisation are two examples of such services. A growing number of couples are turning to surrogacy as a way to round out their families. However, there are interminable problems associated with it due to the large number of unanswered questions. Even though now we have an Act on Surrogacy but the Act suffers from serious lacunae such as firstly, the Act does not provide the benefit of surrogacy to the LGBTQ+ couples thereby violating their rights under Art. 14 and 21 of the constitution, secondly Section 2(s) of the Surrogacy (Regulation) Act 2021 does not take into consideration the unmarried woman who aims to opt for surrogacy, thirdly even though altruistic surrogacy is permitted but at the same time finding a surrogate mother is a challenge in itself, fourthly the Act aims to ban commercial surrogacy rather than regulating it, fifth the Act permits only Indian citizens to go for surrogacy and does not allow the foreigners and NRI's to opt for same and lastly surrogacy as a concept still has number of societal stigmas attached. It is

³⁷ Assisted Reproductive Technology Regulation Bill proposes national registry of clinics, *The Hindu*, February 19, 2020 A

³⁸ Esha Roy, "Surrogacy regulation Bill and ART Bill passed by Rajya Sabha", *Indian Express*, 9 December, 2020

recommended that, instead of passing bills quickly, thorough and extensive debate should be held on the provisions that are meant to be included. There has to be an amendment to the Act that recognises surrogacy as a right for LGBTQ+ couples, single women, males who are not married, and couples living together, because the current version of the Act is flawed. The aforementioned questions and concerns must also be addressed or clarified by the legislative branch.