

UNVEILING THE DRAWBACKS OF SURROGACY ACT 2021: NAVIGATING THE COMPLEXITIES AND CONTROVERSIES

- Vineeta Kumari Chowdhary*

Abstract

Surrogacy is a complicated process involving various parties and medical procedures, which is now regulated under a legal framework in India. The article focuses on the regulations imposed under the Surrogacy (Regulation) Act 2021 on the procedure of surrogacy. The Surrogacy Act 2021 seeks to address long-standing issues with legal uncertainties, ethics, and reproductive rights involved in regulating surrogacy agreements. Before the commencement of the Act, the surrogacy market in India was so unregulated and uncontrolled in the absence of any enactment, which created a legal grey. The only regulatory measure available to regulate surrogacy practices was the guidelines issued by the Indian Council for Medical Research in 2002, which resulted in ineffectiveness because of the lack of any legal backup and the lack of a sanction attached to it. Meanwhile, the issue was addressed by the Law Commission and the apex court as well. Finally, the first Surrogacy Bill was introduced in 2014. Due to various reasons, it never came into the picture. The Surrogacy Bill 2018 has gone through various changes and was brought into force on 25th December 2021, which was a dire need at the time to regulate uncontrolled practices. The Act is effective and lacking in certain areas, which is a deal under the article. Nevertheless, there are several disadvantages to this regulation, which have sparked discussions about how well it works to manage the complexity of surrogacy procedures. This article exposes the flaws in the Surrogacy Act 2021, such as unclear legal requirements, issues with commercialisation and exploitation, inadequate protections for surrogate mothers, discriminatory practices, and moral conundrums. The difficulties in regulating surrogacy and guaranteeing fair and moral procedures for all parties can be solved by critically analysing these disadvantages.

Keywords: Surrogacy, Regulations, Surrogacy, Loopholes and Parentage Rights.

* D. Phil @ University of Allahabad, Prayagraj (U.P.)

INTRODUCTION

The roots of the medical history of surrogacy germinated since Dr. Subhash Mukhopadhyay carried out the nation's first successful in-vitro fertilisation on October 3, 1978, yielding "Durga," also known as Kanupriya Agarwal, the second test tube baby in the history. However, every development must be subject to control and regulation. The first legal issue arose back in the year 2008, when a Japanese couple abandoned a child born out of surrogacy, and it concerned the judiciary and the entire legal system; the case was *Baby Manji Yamada v. Union of India*¹. The Law Commission India reported in 2009 and gave recommendations for bringing legislation on surrogacy and assisted reproductive technologies regulation.

Surrogacy, according to Black's Law Dictionary, is "an agreement wherein a woman agrees to be artificially inseminated with the semen of another woman's husband. She agrees to conceive, carry the child for a term and after the birth, assign her parental rights to the biological father and his wife"². According to the definition provided in the Surrogacy 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.³

Surrogacy is an arrangement whereby a woman consents to an assisted reproductive technology-achieved pregnancy in which neither her husband nor she owns any gametes are part, with the goal of carrying the pregnancy to term and giving the child to the person or people for whom she is acting as a surrogate. For those who are unable to become parents for medical or other reasons, surrogacy is a blessing.

On 25 December 2021, the Surrogacy (Regulation) Bill 2019, along with a few modifications, became law. It was enacted with the Assisted Reproductive Technology (Regulation) Act of 2021, and on January 25, 2022, it came into effect. The Act seeks to control Indian surrogacy procedures, and also it forbids all sorts of commercial surrogacy and allows altruistic surrogacy only. It also lays out the requirements for using surrogacy as a substitute for reproduction. The condition for a close relative was lifted, but other restrictions remain.

Under Article 21 of the constitution, the Supreme Court has recognised the right to reproductive choices as a component of the right to personal liberty in the cases of *Suchitra Shrivastava v.*

¹ (2008) 13 SCC 521

² Garner A. Brayan, *Black's Law Dictionary*, p. 1445 (West Thomson Reuters, U.S.A. 6th, 1990)

³ Surrogacy Regulation Act 2021, sec. 2(zd).

*Chandigarh Administration*⁴ and *Meera Santosh Pal v. Union of India*⁵. It's not everyone's fortune, though, but with the development of technology, becoming a surrogate parent has turned out to be a realistic option for some people who are childless to get their own biological child. While the Surrogacy (Regulation) Act 2021 is a step in the right direction, it has various shortcomings, including a lack of inclusivity, the exclusion of non-binary gender, the restriction of commercial surrogacy, and the ambiguity of several sections.

In the case of Justice *K.S. Puttaswamy & Anr. v. Union of India*⁶, it was decided that obtaining and displaying a certificate of infertility violates one's right to privacy. Moreover, making a district board certificate of infertility mandatory is morally and ethically wrong. As such, this fundamental right must be upheld. The statute restricts the reproductive choices of single men, unmarried women, elderly couples, and the LGBTQI population. It also only applies to heterosexual couples and widowed or divorced women. Due to criminal penalties, it is now illegal to provide surrogacy services, including altruistic surrogacy, to single individuals, live-in partners, and lesbian, gay, bisexual, transgender, and queer couples. The act forbids using a surrogacy process to have a second child. Limiting a person's ability to choose whether or not to have multiple children is an infringement on their fundamental right to reproductive choice.

The Indian Constitution's Article 13 strengthens and legitimises the idea of fundamental rights. In order to safeguard fundamental rights, any legislation that conflicts with the rights outlined in part III of the Indian constitution is invalid. According to Article 13(2), the state is not allowed to enact laws that restrict or eliminate the rights granted by Part III of the Constitution. Any legislation that violates this provision would be declared invalid to the degree that it does so. The authority of legislatures and other law-making bodies is expressly limited by Article 13(2) by declaring any law as unconstitutional, which is in contravention of fundamental rights at its very outset.

PREREQUISITES FOR SURROGACY UNDER THE SURROGACY (REGULATION) ACT 2021

The Act is a social welfare legislation that states that only married couples with medically indicated conditions and age for a woman between the ages of the day of certification 23 and 50 and a male between 26 and 55, the intended couple must be married for at least five years. The intending

⁴ (2009) 9 SCC 1.

⁵ (2017) 3 SCC 462.

⁶ (2017) 10 SCC 1.

parent should not have any surviving children. The only exception to this rule is if the surviving child has a fatal illness or any disabilities. The district medical board must certify a certificate when there are medical indications, and only those instances that meet the criteria would be eligible to undergo the surrogacy method.

In Indian society, it is taboo to be infertile. For a woman to be a surrogate mother, she must be a married woman between the ages of 25 and 35 who is having a living child of her own, and she may only do so once in her lifetime. The previous condition of a woman as a close relative in the bill is lifted in the Act of 2021.

In 2022, the Surrogacy (Regulation) Act of 2021 underwent an amendment, which require the intending parent to get 36 months of insurance coverage.⁷ This is a progressive approach because it's crucial to assess the safety of any medical procedure performed on an expectant mother in addition to taking any potential immediate consequences into account.

The Union Health Ministry announced new regulations on surrogacy on June 21, 2022, limiting the number of times a surrogate mother might undergo the process to three. The Ministry of Health and Family Welfare, working under Mansukh Mandaviya, developed the Surrogacy (Regulation) Rules 2022 on June 21, 2022, with the goal of improving the facilities offered in surrogacy clinics. The regulations specify the number of employees and the qualifications they must have. Furthermore, it specifies how and in what format registration will be completed, as well as how surrogacy clinic fees will be paid.

PROHIBITIONS UNDER THE SURROGACY (REGULATION) ACT 2021

No surrogacy shall be conducted other than for the purpose mentioned under the Act, which is altruistic surrogacy.⁸ If the surrogate mother has not given her written informed permission regarding the risks and consequences of being a surrogate, then no surrogacy will take place. Before the embryo is implanted in her womb, the surrogate mother will have the choice to withdraw at any time.

Additionally, it is forbidden for the intended mother or couple to leave the intended child born through surrogacy for any reason, including but not limited to birth defects, genetic defects, other

⁷ Surrogacy (Regulation) Act, 2021, sec. 4, Explanation III.

⁸ Surrogacy (Regulation) Act, 2021, sec. 4.

medical conditions, the child's sex, or having more than one baby, whether the child is born in India or resides outside of it.

No surrogacy clinic, laboratory, or clinical establishment of any type may coerce the surrogate mother to have an abortion for any cause other than those specified in the Medical Termination of Pregnancy Act of 1971.

PEOPLE WHO ARE EXEMPTED FROM SURROGACY IN INDIA

Under the Act, certain exemptions are provided; a woman can be a surrogate only once in her lifetime and must be of the prescribed age. The intending couple must be married for not less than five years. The Act exclusively allows surrogacy for Indian couples. A couple that is already parents to a living child is not eligible to use surrogacy for a second child unless the surviving kid is gravely ill or suffers from a physical or mental illness. Couples who are deemed medically infertile are required to present with a medical certificate for their infertility. The Act forbids a homosexual couple from becoming parents using surrogacy. The Surrogacy (Regulation) Act 2021 forbids foreigners, single people, live-in couples, and same-sex couples from using surrogacy services in India, much like the previous bill did. Nonetheless, the legislation permits altruistic surrogacy only, in which a surrogate mother has a child without getting paid, though there are provisions for necessary medical expenses and insurance for a period of 36 months postpartum.

RULES FOR SURROGACY CLINICS⁹

Clinics conducting surrogacy procedures are required to adhere to specific rules; failure to do so will result in their operation being completely unauthorised. Under this Act, every clinic that performs surrogacy or provides surrogacy services needs to be registered. An application for registration must be submitted in the required format and with the required payments to the relevant body, which is very high. Within sixty days following the appointment of the competent authority, every such clinic that performs surrogacy or surrogacy treatments must apply for registration with the appropriate authority. If the clinic fails to register within the allotted time, they will stop doing surrogacy or surrogacy procedures. Under this law, surrogacy clinics cannot be registered unless the relevant authorities are satisfied that the clinic is able to supply and maintain the proper sorts of standards and equipment.

⁹ Surrogacy (Regulation) Act, 2021, sec. 11.

THE SURROGACY ACT 2021; WHETHER IT VIOLATES FUNDAMENTAL HUMAN RIGHTS

Senior Congress politician Ajit Kumar Bhuyan stated that the surrogacy Act's provisions are "out-of-touch with ground reality," referring to the nation's main opposition party. The Surrogacy (Regulation) Act 2021 came into force on January 25, 2022. As far as we know, the Act, which aims to abolish commercial surrogacy, permits altruistic surrogacy. The surrogate mother is compensated for her services in commercial surrogacy in addition to being paid for her medical expenses. The remuneration structure might make it possible for intended parents and surrogate moms to be exploited in an unequal society. In addition to the possibility that the supply and demand chains played a role, intermediary hospitals and IVF facilities were abusing the circumstances. The facilities known as "surrogate homes," which were built to provide temporary housing to surrogate mothers in commercial surrogacy, have also participated in the exploitation process. The surrogate mother in an altruistic surrogacy only gets reimbursed for her prenatal care and insurance.

1. **Legal Gaps and Ambiguities:** The Surrogacy (Regulation) Act 2021 offers a framework for regulating surrogacy agreements, although it has several gaps and ambiguities. The ambiguity around the rights and obligations of intended parents, surrogate moms, and the surrogate child is one of the main causes of concern. Legal disputes and concerns resulting from unclear circumstances around topics like parental rights, custody arrangements, and financial duties can eventually affect the well-being of persons involved.
2. **Concerns about Commercialization and Exploitation:** The Surrogacy Act of 2021 also poses a risk of continuing the commercialisation of surrogacy and the exploitation of weaker people, especially surrogate moms, as there is no measure to keep a check on it. Although the Act seeks to control commercial surrogacy agreements, some contend that it falls short in addressing the underlying power imbalances and economic inequalities that could result in surrogate mothers being exploited¹⁰. Furthermore, the Act's provisions on surrogate mother compensation create moral concerns regarding the fair distribution of financial rewards and the commodification of reproductive labour.
3. **Limited Protections for Surrogate Mothers:** The Surrogacy Act 2021 might not go far enough in offering complete protections for surrogate mothers, even with all of the efforts made to defend their rights. There is provision for statutory insurance for surrogate

¹⁰ Radhey S. Sharma, "Social, ethical, medical & legal aspects of surrogacy: an Indian scenario", *Indian Journal of Medical Research* 140 Suppl(Suppl 1), S13-S16. (2014).

mothers under the Act, but as the condition of close relatives is lifted, that created scope for exploitation of surrogate mothers.

Since they are frequently from underprivileged backgrounds, surrogate moms may find it difficult to stand up for their rights and negotiate equitable treatment during the surrogacy procedure. Issues that still need more attention and activism are surrogate mothers' legal representation, psychological assistance, and access to healthcare.

4. **Social Implications and Exclusionary Provisions:** Some Surrogacy Act 2021 provisions, such as intended parent eligibility requirements, have sparked concerns about its potential to bar members of particular communities from using surrogacy services. Restrictions that stem from factors such as nationality, marital status, or sexual orientation may disproportionately affect people and couples who don't fit the mould, restricting their options for reproduction and sustaining social injustices. These clauses are of discriminatory character and emphasise the necessity of a more egalitarian and inclusive approach to surrogacy regulation.
5. **Moral Controversies and Ethical Dilemmas:** The Surrogacy Act 2021 has also rekindled moral and ethical discussions about the surrogacy industry. The sacredness of motherhood, the commercialisation of reproduction, and the commodification of children continue to spark contentious debates among the general public, ethicists, and legislators. The Act reflects the inherent difficulties in regulating a very private and morally delicate part of human reproduction by attempting to strike a balance between conflicting ethical considerations while negotiating the complexities of surrogacy operations.

CONCLUSION

The total prohibition might force it to operate as an unregistered underground enterprise with disastrous results. In conclusion, the Surrogacy Act 2021 has restrictions and several shortcomings despite being a significant step towards regulating surrogacy arrangements. The Act faces many obstacles in managing the intricacies and disputes surrounding surrogacy practices, ranging from legal ambiguity and commercialisation concerns to inadequate rights for surrogate mothers and exclusionary measures. In order to ensure the ethical and equitable practice of surrogacy for all parties involved, it is necessary to critically assess the weaknesses of the Surrogacy Act 2021 and work towards improving them as policymakers, stakeholders, and advocates continue to engage in discourse and lobbying.