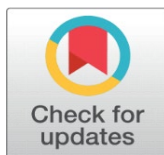


# INTERSECTION OF SURROGACY AND WOMEN'S REPRODUCTIVE HEALTH UNDER THE SURROGACY (REGULATION) ACT, 2021

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## ABSTRACT

Reproductive health entails a wide range of concerns that are associated with human reproductive system, fertility, contraception as well as maternal health. In India reproductive health includes a number of activities and option, among them surrogacy seem to have provided an effective solution to couple facing barrenness. The Surrogacy (Regulation) Act, 2021 is a major landmark in the domain on surrogacy law and ethics in India. The Act, being enacted for proper legal recognition of and protection to surrogate mothers and intended parents who seek surrogacy services, prescribe strict parameters and conditions for the contract of surrogacy. In continuation of the theme of surrogacy and women reproductive rights within the new legal regime this paper aims to examine the effect of this new legal regime on all parties of concern. This research aims at assessing how these provisions advanced in the following areas: Legal exploitation, ethics aspects, surrogate mothers and intended parents. The current paper aims at discussing the Surrogacy (Regulation) Act, 2021 in association with reproductive health and surrogacy procedures in India. It examines the role of the Act in relation to some of the previous legal and ethical issues concerning and the considerations provoked by its implementation. Through the provisions of the Act and its implications, this study extends knowledge of the means through which legal changes can improve reproductive health practices and address surrogacy ethicality.

**Keywords:** Reproductive Health, Surrogacy, Legal Practices, Regulation, Surrogate mother, Intending Parents

## 1. INTRODUCTION

When an organism is physically, psychologically, and socially healthy, it is said to be in a state of reproductive health. It raises awareness about a healthy period of reproduction which includes conceptive, prenatal, parturition, and reproductive health care service.

Another subject in the reproductive health realm, surrogacy is an agreement between a woman who becomes pregnant for another couple and gives birth to a child. This arrangements becomes pathway for those who have issue with infertility, medical and or genetic factors. The practice has many ethical, legal and even emotional aspects and steps. As the culture of the society is embracing other forms of family Early discussions of surrogacy remain in various periods of change as people's view of parenthood and the right of reproductive self determination emerge. Over recent decades' surrogacy in India has experienced certain changes – it has appeared as an unregulated method, and then The Surrogacy (Regulation) Act, of 2021 appeared. In the past, due to lack of elaborated legal regulation - controversies involving exploitation and ethical dilemmas surfaced in surrogacy agreements. And the intending parents opting surrogacy in

India, and India had become the surrogacy destination. On the other hand, countries all around the world are praising commercial surrogacy, even though it commercialises the human reproductive system. The bill passed to become the Surrogacy (Regulation) Act, 2021 highlights a change in the direction towards legalizing and regulating surrogacy in India.

The Surrogacy (Regulation) Act 2021 seeks to overcome the previous miscues as the act has laid down some stringent regulations for surrogate mother to improve her reproductive health and the intended parents. It has outlawed industry surrogacy and allows only surrogate gratuity where surrogate mothers are paid only their cost that includes only medical expenses and other incidental needs.

This was occasioned by the vices that included poor treatment of surrogate mothers and adverse health effects that befall them in the absence of such laws. Surrogacy cases revealed that surrogate women were provided unsuitable medical treatment and unreasonable payment. None of these is desirable if the proper surrogate, intended parents and clinics are not selected through clear guidelines that can be achieved through the eligibility criteria for surrogates and the criteria for legal classification of intended parents as required under the Acts provisions.

## 2. CONCEPT OF SURROGACY

In Latin, "surrogatus" means "to bear and deliver a child for another." This is where the English word "surrogacy" gets its start. The term "surrogacy" is often used to describe a medical practice when a woman consents to be fertilised by another couple's cell and then bears their kid. Making a woman pregnant with the express intention of having her give up the kid after delivery is known as surrogacy. Several characteristics differentiate surrogacy arrangements:

- a. The term "traditional surrogacy" refers to a method when the surrogate and her egg are both implanted. Although the child's father inherited her DNA, she is still legally considered the child's biological mother. The sperm may be from the person doing the commissioning or from a donor, and the pregnancy can be created either spontaneously or by artificial insemination, which is more common.
- b. The surrogate carries the embryo in her uterus during "gestational surrogacy," but her eggs are not harvested. In other words, she is not related to the kid via blood.
- c) In "altruistic surrogacy," the surrogate immediately gives the baby over to the parents-to-be without receiving any compensation, not even a symbol, for carrying the kid. The surrogate mother may be compensated for her medical costs.
- d. The practice known as "commercial surrogacy" occurs when a couple or individual agrees to pay a surrogate to carry and birth a child in return for financial compensation.

## 3. WOMEN'S RIGHT ON REPRODUCTION AND PRIVACY

A woman has the right to reproductive choice if she wants to decide for herself whether she wants to have children, how many children she wants to have, and even which type of birth control she wants to use. Respect for one's reproductive rights ensures the preservation of many other rights, including the right to life, the right to form a family, the right to procreate, and so on.

This case of **Suchita Srivastava & anr. v. Chandigarh Administration, AIR 2010 SC 235** is one of the landmark judgments that establish women's reproductive autonomy. In this case, the Court made the decision that state must respect the personal sphere of a mentally retarded woman and decide whether to terminate the pregnancy on own's own. A woman's decision to choose on issues of reproduction is also ('personal liberty') as referred to in the Constitution of India under Article 21. One has to realize that reproductive freedom can also be enacted in order to create, but not in order to abstain from creating. The important factor that should be examined closely is that a woman must be allowed to privacy, dignity or bodily interdependence.

The liberties in those reproductive rights would comprise the right decisions on voluntary sterilization, free from restraint or compulsion. **Devika Biswas v. Union of India & Others, (2016)10 SSC 726**: Recently in this public interest litigation, a health rights activist accused the State Governments of the country of forcing women (and sometimes men) to undergo unsafe tubal ligations in grossly unhygienic camps without obtaining their voluntary consent. The Supreme Court identified these practices – which affected poor, rural women in particular – as violating their right to health and, specifically, their reproductive rights, which are both contained in the right to life guaranteed in India's Constitution.

The "Right to reproductive freedom" is an essential component of the "Right to privacy," which is itself a composite of other rights. Following the decision in **B.K. Parthasarathi v. Government Of A.P. & Ors, AIR 2000 AP156**, this right was incorporated into Indian law. One component of the "right of privacy" is "the right of reproductive autonomy," which includes the freedom to choose the timing of a family's procreation, as stated in the case of B.K. Parthasarathi v.

Government Of A.P. & Ors, AIR 2000 AP156. Choice to give birth is a choice that women and prospective mothers have to make and any intervention from the State into this particular area of the lives of those women can only be regarded as violating those rights of women until there is enough and more reason needed for the society to infringe upon that right. The involvement of the state in such personal decision-making is a matter that the Constitutional Courts of our nation take very seriously.

#### 4. REGULATORY DIMENSIONS OF ASSISTED REPRODUCTIVE TECHNOLOGY

With the proliferation of IVF clinics throughout India, there was a pressing need for stringent regulation of the industry. After the Indian Council for Medical Research and the Ministry of Health and Family Welfare spearheaded the development of the guidelines for the Assisted Reproductive Technology Bill 2008, a committee was established to draft the bill. Additionally, in 2010, it underwent revisions with an emphasis on openness and ethical conduct within ART services. The purpose of the ART Bill 2013 is to add additional laws and oversight mechanisms to the ART Bill 2010, which has already been revised. It lays up the groundwork for national regulatory and administrative bodies via the construction of a legislative framework. Parliament ultimately enacted the Assisted Reproductive Technology (Regulation) Act, 2021 after much debate, to control the licensing and operation of ART facilities. To further guarantee the surrogate mother's rights are protected, the Act expands its scope to include surrogacy.

#### 5. CHANGING FACETS OF REPRODUCTIVE HEALTH : POSITION PRIOR TO SURROGACY( REGULATION ) ACT, 2021

Though it was previously unregulated, surrogacy has been around for a while in India. Due to the lack of specific national legislation regulating ART, India has long served as a centre for commercial surrogacy. Guidelines for the certification, regulation, and monitoring of ART clinics in India were initially proposed in 2002 by the Ministry of Health and Family Welfare. They were subject to controversy in several areas of the country in 2005. Concerning assisted reproductive technology (ART) treatments and surrogacy, the ICMR Guidelines serve as a compass.

Unfortunately, there are still issues like surrogate mother exploitation, legal irregularities, and uncontrolled commercial surrogacy contracts that arise from the absence of stringent laws. One seminal case involving the production/custody of a kid named Manji Yamada was **Baby Manji Yamada v. Union of India, JT 2008 (11) SC 150**. For the first time ever, the Supreme Court has brought attention to the problem of commercial surrogacy and ordered the passage of legislation addressing the practice. In addition to this, the case of **Jan Balaz v. Union of India, AIR 2010 Guj 21**, demonstrated the ambiguity and annoyance caused by problems that might emerge over parental status and citizenship in situations involving international surrogacy. It is critical, the court emphasised in this instance, that we pass thorough laws protecting the rights of surrogate mothers and their children.

Concerns about the commercialisation of maternity and women's rights arose as a result of the absence of regulation. The Surrogacy (Regulation) Bill, 2016 and other comprehensive laws were presented by the Ministry of Health and Family Welfare to address these concerns. The Surrogacy (Regulation) draft, 2019, aims to outlaw commercial surrogacy and was presented after public comments and debates helped the government improve the 2016 draft. A select committee was established to propose amendments to the law as this measure was a carbon copy of the 2016 bill.

It was passed by the Union Cabinet, the Surrogacy (Regulation) Bill, 2020. This updated draft takes stakeholder suggestions into account, providing for strict limitations on altruistic surrogacy. Surrogate mothers' rights were safeguarded and their responsibilities clarified, and a registration for surrogacy clinics was imposed. A new version was adopted by the cabinet on December 25, 2021, after extensive deliberations. Officially, it's called the Surrogacy (Regulation) Act of 2021.

#### 6. REPRODUCTIVE HEALTH UNDER SURROGACY (REGULATION) ACT, 2021

There are many different legal, ethical, psychological, and medical factors that contribute to reproductive health during surrogacy. When it comes to reproductive health, the Surrogacy (Regulation) Act, 2021 is a game-changer in India. The surrogate mothers' safety and respect have been the primary goals of the Act, which aims to prevent their exploitation. Important considerations for reproductive health during surrogacy include:

- The surrogate mother's physical and emotional health is an important part of reproductive health when she is a surrogate. The Act establishes standards for medical treatment before, during, and after surrogacy and requires

surrogates to undergo medical screenings to determine their pregnancy eligibility. This aids in protecting the surrogate's reproductive health.

- When it comes to surrogacy and reproductive health, assisted reproductive technologies (ART) are often used to help with conception. To guarantee that assisted reproductive technology (ART) treatments are performed in a safe and ethical manner that safeguards the reproductive health of all individuals involved, the Act governs their usage.
- The surrogate mother's and the unborn child's health and safety depend on the surrogate receiving appropriate prenatal care. The surrogate's health throughout the pregnancy is going to be closely monitored, and any medical issues that come up will be addressed, according to the rules of the Act.
- Ensuring reproductive health during surrogacy requires a thorough understanding of the processes, the dangers, and consequences for everyone involved. Acquiring informed permission from all parties involved is a crucial element of reproductive health care under surrogacy, and the Act emphasises its relevance. It is the explicit goal of the legislation to inform the surrogate mother of all potential risks and complications associated with the surrogacy process.
- Physical health is only one part of reproductive health in surrogacy; the surrogate, the intended parents, and the child's mental health are all equally important. The emotional and mental difficulties that may develop during the surrogacy process are acknowledged by the Act as a requirement for psychological support services.
- It is crucial to provide the surrogate mother with postpartum care after the kid is born so she may heal physically and emotionally. The surrogate's reproductive health requirements are covered even after the surrogacy contract expires, as outlined in the Act, which also addresses post-birth care.
- In order to pay any medical costs associated with the surrogacy procedure, the surrogate mother is required under the Act to get health insurance from the intended parents. This way, the surrogate may get the reproductive health care she needs without worrying about how she will pay for it.
- In order to maintain standards of reproductive health care and guarantee adherence to medical ethics, the Act further governs surrogacy clinics. The goal of the Act is to safeguard the reproductive health of everyone participating in surrogacy agreements by regulating and certifying these facilities. Under the Surrogacy (Regulation) Act, 2021, no surrogacy clinic may engage in, be associated with, or assist in the conduct of any activity pertaining to surrogacy or surrogacy procedures unless they are registered.

## 7. CONCLUSION

Finally, the Surrogacy (Regulation) Act, 2021, which addresses both surrogacy and reproductive health, sheds insight on the many successes and failures of the current ART legal and ethical framework. The Act's stated goals include safeguarding reproductive health for women, striking a fair balance between competing interests, and protecting the rights of women—especially those who choose to become surrogates—from unjustified interference.

The Act's extensive rules, which include a ban on commercial surrogacy and a focus on altruistic agreements, are an important step in addressing the ethical and exploitation concerns that have long plagued the surrogacy industry. The Act seeks to guarantee effective supervision and enforcement of these restrictions by creating a National Surrogacy and ART (Assisted Reproductive Technology) and Regulation Board. Strict eligibility requirements and legal safeguards for surrogate mothers are a significant step towards ensuring their rights and well-being.

But there are a lot of obstacles to putting the Act into practice, including qualifying requirements like age and marital status. Discrimination against single parents might result from the Act's exclusion of certain categories.

At long last, there is a law that will help strike a balance between the ethical considerations surrounding surrogacy and the complicated reproductive health issues it raises: the Surrogacy (Regulation) Act, 2021. The most important thing is to make sure that both the rights of women and the rights of those participating in surrogacy agreements are safeguarded.

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## CONFLICT OF INTEREST

None.

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