

6. Surrogacy Act – Polity

SC to examine if bar on surrogacy for a second child is state intrusion in citizens' private lives. The Supreme Court is reviewing the constitutionality of Section 4(iii)(C)(II) of the Surrogacy (Regulation) Act, 2021, which bans couples from using surrogacy to have a second child. Petitioners argue this violates the Right to Privacy (Article 21) and Equality (Article 14), while the government defends the altruistic-only law as necessary to prevent the exploitation of women and the commercialization of childbirth.

Supreme Court Reviews Surrogacy Act

The Supreme Court of India is currently reviewing the constitutionality of a specific clause within the Surrogacy (Regulation) Act, 2021. The clause in question prohibits married couples from using surrogacy if they already have one child, effectively barring them from having a second child via this method.

Background of the Case

Challenged Provision – The case directly challenges Section 4(iii)(C)(II) of the Surrogacy (Regulation) Act, 2021.

What the Law States – This section permits surrogacy *only* for couples who do not have a surviving biological, adopted, or surrogate child.

The Only Exception – The law allows an exception *only* in cases where the existing child has a life-threatening disability or a fatal condition.

Arguments of the Petitioner (Challenging the Ban)

Right to Privacy (Article 21) – The petitioner draws on the landmark K.S. Puttaswamy vs Union of India (2017) judgment. The argument is that reproductive decisions, which include how many children to have and by what means (including surrogacy), are a fundamental part of personal autonomy and privacy.

Right to Equality (Article 14) – The law creates an arbitrary distinction between couples seeking their first child and those seeking a second, even when both are medically infertile and require surrogacy.

Right to Reproductive Choice – The petitioner notes that the Supreme Court has previously affirmed that reproductive freedom is integral to human dignity.

Judicial Precedent – The case of Arun Muthuvel vs Union of India (2023) is cited. This ruling demonstrated the Court's willingness to strike down overly restrictive surrogacy rules (like the ban on donor gametes, which was later modified) when they conflict with reproductive rights.

Government Stand – Arguments Supporting the Restriction

Preventing Exploitation – The government argues that the 2021 Act's primary goal is to protect poor and vulnerable women from being coerced into surrogacy. Limiting surrogacy to first-time parents ensures it remains a medical necessity and does not become a lifestyle convenience.

Ethical Concerns – Allowing surrogacy for multiple children could risk turning childbirth into a commercial transaction. This, the government argues, would undermine the dignity of the women involved.

Medical Necessity Principle – The law is designed strictly for cases where natural conception or carrying a pregnancy is not possible. The government's stand is that having one healthy child removes this "necessity" for assisted reproduction.

Statutory, Not Fundamental, Right – The government argues that while reproductive choice is a right, surrogacy is not, as it involves the body of another person. Therefore, the state has the power to impose reasonable limits to balance individual desires with broader ethical and public interest considerations.

Surrogacy

Definition – Surrogacy is an arrangement where a woman (the surrogate mother) agrees to carry and give birth to a child for another person or couple (the intended parent/s).

Legal Outcome – The intended parent/s will become the child's legal parents after birth.

Why Was Surrogacy Regulated in India?

India needed the 2021 Act due to a history of uncontrolled commercial surrogacy.

Rise of Commercial Surrogacy Hub – By 2012, India was a leading global hub, with over 3,000 fertility clinics and an estimated \$400 million industry, driven by low costs.

Exploitation of Surrogate Mothers – Poor and vulnerable women were often forced or lured into surrogacy contracts due to economic necessity, leading to their exploitation.

Commodification of Women's Bodies – Critics argued that the industry treated women's bodies and reproductive capacities as commodities for sale.

Unclear Rights for Surrogates – Surrogates often lacked legal rights regarding fair compensation, proper medical care during and after pregnancy, and post-delivery support.

Child Abandonment – Legal complexities led to tragic cases of child abandonment, especially in instances of birth defects or disputes between the commissioning parents.

Ethical Concerns – The "womb for rent" concept raised questions about sex selection and the psychological impact on all parties.

Absence of Specific Legislation – Before the Act, only ICMR guidelines (2002) existed, which had no legislative backing and led to lax enforcement.

Goal of the 2021 Act – The Act was enacted to prevent commercial exploitation, protect the rights of surrogates and intending parents, and ensure ethical practices.

Key Provisions of the Surrogacy (Regulation) Act, 2021

Prohibition of Commercial Surrogacy – The Act bans all commercial surrogacy. It permits only altruistic surrogacy, where no monetary compensation is paid to the surrogate. The only payments allowed are for medical expenses and insurance coverage during the pregnancy.

Regulatory Bodies

National Surrogacy Board (NSB) – Advises the government on policy and formulates a code of conduct for clinics.

State Surrogacy Boards (SSBs) – Oversee and regulate surrogacy practices within their respective states.

Registration of Surrogacy Clinics – It is mandatory for all fertility clinics conducting surrogacy procedures to register under the Act.

Parentage and Rights of the Child – A child born through surrogacy is legally deemed to be the biological child of the intending couple. The Act prohibits the abandonment of the child for any reason, including sex, birth defects, or other conditions.

Surrogate Mother's Protection – Mandates insurance coverage for the surrogate mother for 36 months (3 years) to cover any postpartum complications. The surrogate mother retains the right to withdraw from the surrogacy, but only *before* the embryo is implanted in her womb.

Penalties – The Act imposes stringent penalties for violations like commercial surrogacy, exploiting the surrogate, or abandoning the child. Punishments include imprisonment up to 10 years and a fine up to ₹10 lakh.

Who is Eligible for Surrogacy in India?

As an Intending Parent

Citizenship – Both partners must be Indian citizens (or OCI cardholders).

Marital Status – Must have been legally married for a minimum of five years.

Age

Female Partner – 23 to 50 years old.

Male Partner – 26 to 55 years old.

Medical Need – Must have a certified infertility diagnosis from a medical practitioner.

No Living Child – The couple must not have a living biological, adopted, or surrogate child. Exception – This rule is waived if the existing child suffers from a life-threatening illness or a permanent physical/mental disability.

2024 Amendment – The law now includes widowed or divorced women. Age (Widowed/Divorced) – Must be between 35 and 45 years.

As a Surrogate Mother

Relationship – Must be a "close relative" of the intending couple.

Marital Status – Must be a married woman.

Parenthood – Must have delivered at least one healthy biological child of her own.

Age – Must be between 25 and 35 years old at the time of implantation.

Frequency – A woman can act as a surrogate only once in her lifetime.

Fitness – Must possess a certificate of medical and psychological fitness for surrogacy.

Gametes – The surrogate mother cannot provide her own gametes (eggs) for the procedure; it must be a gestational surrogacy.

Challenges of the Surrogacy (Regulation) Act, 2021

Restrictive Eligibility – The law is criticized for excluding a large part of the population, including single men, unmarried women, live-in partners, and LGBTQ+ individuals/couples. The "no prior child" clause is seen as overly rigid and is the subject of the current Supreme Court case.

Ambiguous "Close Relative" Clause – The Act lacks a clear, precise definition of "close relative." This ambiguity could lead to family pressure or coercion on women. It also creates a practical shortage of eligible surrogates.

Ban on Commercial Surrogacy (Altruistic-Only Model) – Critics argue this denies a legitimate income source for women, especially from marginalized backgrounds. It risks pushing surrogacy into an unregulated, illegal grey market, which could increase exploitation. The compensation (only medical bills/insurance) is seen as inadequate and devaluing the significant physical and emotional work of the surrogate.

Medical and Psychological Concerns – The Act is criticized for not adequately protecting the surrogate's long-term physical and mental health, especially regarding post-birth support and addressing emotional trauma.

What is the Way Forward for Surrogacy Regulation?

Revisiting Eligibility Criteria – Consider expanding eligibility to include other family structures (single men, unmarried women, LGBTQ+ individuals), focusing on the "best interest of the child" rather than the parents' marital status.

Refining the "Close Relative" Clause – Provide a precise legal definition to avoid ambiguity. Alternatively, consider allowing non-relative altruistic surrogacy under strict regulatory oversight to increase the pool of eligible surrogates.

Balanced Approach to Compensation and Welfare – Introduce a model of "compensated altruism." This would allow surrogates to receive reasonable compensation for loss of wages, discomfort, and the inherent risks involved, in addition to medical expenses and insurance. Mandate comprehensive medical, psychological, and social support for surrogates throughout the process and for a fixed period post-birth.

Strengthening Regulatory Mechanisms – Ensure the National and State Surrogacy Boards are fully functional and effective. Proactively monitor and prevent the emergence of an illegal surrogacy market.

Continuous Review and Adaptation – Laws must be dynamic and subject to review based on legal challenges, medical advancements, and evolving societal norms. India should learn from international best practices (e.g., from the UK or Australia) and adapt them to the Indian socio-cultural context.

Conclusion

To be truly effective, the Surrogacy Act must evolve. A forward-looking approach is needed to harmonize the crucial goal of preventing exploitation with the need to uphold inclusive reproductive rights for all citizens.

Source – <https://www.thehindu.com/news/national/sc-to-examine-if-bar-on-surrogacy-for-a-second-child-is-state-intrusion-in-citizens-private-lives/article70240699.ece>