

COMMERCIAL SURROGACY: A DUALITY OF MOTHER-WORKER

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ABSTRACT

In the last decade, India saw an emerging economic opportunity in the frame of Commercial Surrogacy. It became a temporary solution for penurious women to uplift themselves and their families from poverty and destitution. Recent years saw an exponential rise in the business of surrogacy due to the influx of international couples. This happened because of the presence of qualified medical practitioners, quality care for surrogates, relatively low cost, and above all, the readiness of poor women as surrogates. The Surrogacy (Regulation) Act, the act bans the practice of commercial surrogacy in India, allowing only altruistic surrogacy to infertile Indian married couples. This act makes conditions that only legally married Indian heterosexual couples, divorced and widow women can opt for surrogacy, thus excluding single people, live-in couples, widowers, and gay couples, amongst others. But parenthood is beyond gender and sexual preferences. Excluding anyone from availing it based on their sexuality, nationality, the status of marriage etc. is a severe infringement of their human rights. Further, this act allows altruistic surrogacy, implying it should not include any monetary benefits and should be done only for the sake of humanity. This act is made with an aim to curb exploitation, but ironically, it is curtailing the rights of surrogate women by removing the commercial benefit. Through the Surrogacy (Regulation) Act 2021, the government failed to acknowledge the nuanced forms of exploitation prevalent in altruistic surrogacy and has a limited understanding of the freedom, rights and choices of women.

Keywords: *Commercial Surrogacy, Motherhood, Agency, Exploitation, Heteronormativity*

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Introduction

Surrogacy is “an arrangement, often supported by a legal agreement, whereby a woman agrees to become pregnant, carry the pregnancy to due term and give birth to child/children, all of this for another person, who will ultimately become the parent of the child/children”¹. Two distinct types of surrogacies have emerged—first, traditional surrogacy is where the donor of an egg also serves as the surrogate mother; it means that the eggs of the surrogate mother are used to conceive a child. The surrogate mother conceives through the process of In-Vitro Fertilisation (IVF) or Intrauterine Insemination (IUI) through the sperm of intending father.² Gestational surrogacy is another type of surrogacy in which eggs come from another woman who is not the surrogate mother.³ In both types of surrogacies, the child/children born are intended to be raised by an intending couple, i.e., its biological father and his partner.

The first IVF baby was born in 1978, named Louise Brown, in England,⁴ and the first baby from egg donation was born in 1983, just after five years of IVF birth. These two radical and innovative advancements in the field of pregnancy-related technologies resulted in the origination of Gestational Surrogacy.⁵ In 1985, through reproductive advancement, doctors gave birth to a child using gestational surrogacy for the first time.⁶ This gave hope and a sphere of possibilities for both intending couples and to-be surrogates.

Surrogacy falls in a legal grey area at the international level. There is no consensus among countries on how to control and regulate the vast ambit of reproductive technologies. The twenty-fifth anniversary of the International Conference on Population and Development was commemorated by the ICPD25 also failed to acknowledge surrogacy in the ambit of reproductive rights. The lack of rules has led to conditions that are exploitative, particularly by

¹ Surrogacy in India | Kiran Infertility Centre, Kiran Infertility Centre, <https://kicbengaluru.com/surrogacy-in-india/>

² O.B.A. van den Akker, *Introduction to Surrogacy: Historical and Present-Day Context*, in SURROGATE MOTHERHOOD FAMILIES 5–37 (2017).

³ *Ibid.*

⁴ Ashley M. Eskew & Emily S. Jungheim, *A History of Developments to Improve in vitro Fertilization*, 114 Missouri Medicine 156 (2017).

⁵ Mark V. Sauer, *Revisiting the early days of oocyte and embryo donation: relevance to contemporary clinical practice*, 110 Fertility and Sterility 981 (2018).

⁶ Hugo Valverde, U.S. GOVERNMENT ENDS POLICY REQUIRING BIOLOGICAL TIES TO U.S. PARENTS FOR CHILDREN’S CITIZENSHIP Valverde Law PLLC (2021), <https://www.valverdelaw.com/us-government-ends-policy-requiring-biological-ties-to-us-parents-for-childrens-citizenship> (last visited Jan 9, 2022).

doctors and other agents who may leverage their privileged positions and resources to dominate surrogates and infringe on their civil liberties. In addition to this, there have been allegations of the kidnapping of women from developing nations for the illicit trade of surrogacy, as well as instances when the commissioning parents and the mother who serves as a surrogate have clashed. These problems have prompted some nations to outright outlaw surrogacy while others only authorise it in altruistic contexts.

The practice of surrogacy is a complex phenomenon which needs to be looked at through multiple and interacting lenses of gender, race, class and ethnic inequalities. Surrogacy has raised many legal, ethical and social conundrums for national and international communities to deal with. It has introduced new dimensions in the debate on reproductive rights for women. Surrogacy has forced/ensued social scientists, feminists, doctors, and legal scholars to redefine the concept of motherhood, question the new ways of exploitation of rural poor women in Third World countries, increasing commodification and medicalization of women's bodies and reinforcement of patriarchal norms.

Conflicts and Hurdles in the path of Surrogacy

Elizabeth Kane (pseudonym), in the year 1980, was the first lawful surrogate mother in the United States who delivered a son via traditional surrogacy the same year. However, she eventually regretted her decision and wrote about the experience in her book "Birth Mother: The Story of America's First Legal Surrogate Mother", 1988⁷. During a talk show at the National Women's Studies Association Annual Conference, she explained the reasons for entering this field because she felt that infertile women did not have alternatives to their sterility. But she was unaware and unprepared for the waves of emotions she faced during pregnancy and at birth. She described that during the two psychological examinations, there was no discussion about my bonding with the baby. A female attorney hired by the intended parents threatened Kane with breach of contract every time she asked for something. She wrote, "*I was only a healthy uterus without a brain or a heart*"⁸.

⁷ Gita Aravamudan, *Baby Makers: The Story of Indian Surrogacy* 40-43 (2014).

⁸ Elizabeth Kane, *Surrogate parenting: a division of families, not a creation*, 2 *Issues in Reproductive and Genetic Engineering: Journal of International Feminist Analysis* 105-109 (2022).

Meanwhile, in 1986, another case came up which had far-reaching legal consequences, a woman named Mary Beth Whitehead, who had an agreement with William Stern and Betsy Stern (intending parents), resisted transferring legal custody of the child to the intending mother and father. This was the famous case that came to be known as 'Baby M'. Bill Stern and Mary Beth entered into a surrogacy contract, according to which Beth would relinquish her parental rights in exchange for 10000 dollars. However, once the child was delivered, the surrogate decided to keep the child. For the same, she had a two-year-long custody battle with the intending couple. Later, the court sided with the biological father and gave custody of the child to him.⁹ Due to both the cases of Kane and Baby M, it was thought to do away with the biological connections between a surrogate and the child born would reduce the chances of the surrogate being attached to the child carried and delivered by her. Many in this field favoured legally contracted surrogacies and supported a modern alternative which is gestational surrogacy.

Gestational surrogacy saw a watershed moment in its recognition as a legally binding agreement for both parties. In the case of *Johnson v. Calvert, 1993*, a surrogate mother who agreed to carry a child through gestational surrogacy and signed an agreement with the commissioning parents for the same refused to give her custody after the child was born. However, the court sided with the intending parents arguing that the surrogate and child have no "biological connection" and stated that "a gestational surrogacy agreement was a legally binding agreement that would be supported in the courts, ensuring the intended parents' parentage"¹⁰.

Surrogacy in India: Adaptation and Recasting of Legislations, Guidelines and Laws

In India, children are considered to be a great asset (especially male children). "The fabric of Indian culture recognises the necessity of having a child upon which a marital relationship is said to be fulfilled, and not having a child is viewed as a stigma in Indian society. Therefore, for those unfortunate couples who are not able to conceive a child due to certain reasons such as infertility, age-related factors etc., a surrogate mother plays the role of an angel in

⁹ Elizabeth Kolbert, *A DISPUTE ON BABY M*, New York Times, 1986, <https://www.nytimes.com/1986/10/06/nyregion/a-dispute-on-baby-m.html> (last visited Jan 10, 2022).

¹⁰ *Johnson v. Calvert* (1993) No. S023721. May 20, 1993., Justia Law, <https://law.justia.com/cases/california/supreme-court/4th/5/84.html> (last visited Jan 10, 2022).

disguise”¹¹. Surrogacy has opened new possibilities for different people who dream of becoming parents, like single people, LGBTQIA+ couples & heterosexual couples experiencing infertility. At the same time, surrogacy has also raised complex legal and ethical issues.

Surrogacy in India was governed by neo-liberal market theory, which means surrogacy was entirely managed by the private sector with no state regulations or laws in place. Due to this legal leniency, commercial surrogacy in India became a multi-million-dollar industry. According to research supported by the UN in July 2012, India's surrogacy industry generates over four hundred million dollars in revenue annually, with over three thousand fertility clinics spread out across the nation.¹²

The worldwide surrogacy industry has dramatically expanded in India in recent years, attracting foreign couples looking for surrogate mothers here. Because of the presence of qualified doctors and healthcare workers, quality care for mothers, relatively low cost, and all above poor women who are willing to become surrogates, an unregulated private sector emerged in the name of commercial surrogacy. The increasing commercialisation of surrogacy has raised many legal, social, philosophical, and ethical demographic issues. As the discussions indicate, these technological breakthroughs have the ability to reshape not just the superficial aspects of human society but also the very essence of the human community. (CSR, 2010)¹³. According to CII data, surrogacy has become an industry of \$2.3 billion sustained through the absence of laws, poverty and destitution.¹²

Baby Manji Yamada v. Union of India and Another, (2008) 13 S.C.C. 518 (India)¹⁴

In the landmark case of Baby Manji where the Japanese couple Yuki and Ikufumi Yamada desired to bring a baby into this world, and to achieve this, they signed an agreement with an Indian woman to become their surrogate. But the commissioning parents got divorced shortly before the baby could be born; however, Ikufumi, the intended father, insisted that he should be granted custody of the baby girl. He encountered many legal hurdles because the adoption

¹¹ *Trailing the journey of Surrogacy Laws in India*, Tathya Walk the Law (Sept. 8, 2020), www.tathyalaw.org/post/trailing-the-journey-of-surrogacy-laws-in-india, (last visited Jan 14, 2022)

¹² Priya Shetty, India's unregulated surrogacy industry, 380 *The Lancet* 1633–1634 (2012).

¹³ Ranjana Kumari, SURROGATE MOTHERHOOD ETHICAL OR COMMERCIAL, *Centre for Social Research*, 30–33 (2010).

¹⁴ Kari Points, COMMERCIAL SURROGACY AND FERTILITY TOURISM IN INDIA: The Case of Baby Manji, *The Kenan Institute for Ethics, Duke University* 1–10 (2015).

of a girl child by a single male is strictly forbidden by Indian law. The case got further complicated as both the intended mother and the woman who agreed to become a surrogate refused the guardianship or protective care of the child. The Indian Government was paralysed or incapable of taking any effective decision regarding this crisis, partially because of their inability to build a census on surrogacy law which left India without any concrete framework for surrogacy. The Apex Court of India ordered NCPCR to handle this case. The Supreme Court, in its order, recognized the biological connection of the father with the baby. Later Baby Manji was allowed to enter Japan when the government of Japan granted her a humanitarian visa which was valid only for a year, and temporary custody of the baby was granted to the grandmother.

*Jan Balaz vs Anand Municipality & 6 (S), 11 November 2009*¹⁵

In another case where a childless German couple hired a Gujarati woman to become their surrogate when the twin babies were born via surrogacy, they faced multiple legal challenges. German officials denied the twins' requests for visas because they don't recognise infants born from surrogacy, while the Indian government refused to award the twins Indian citizenship because of their surrogate birth. The parents later filed an appeal with the Gujarat High Court, claiming “that since the children were born of an Indian surrogate, they were eligible for Indian Citizenship”. Since the surrogate mother is a citizen of India, the court determined that the children born to her should also be considered citizens of India and given Indian passports. Therefore, the baby was given citizenship by India, allowing the couple to adopt twins via the Indian adoption system.

The Law Commission of India addressed the urgent need for legislation to govern assisted reproductive technology (ART) facilities as well as put out a proposal for the regulation of the surrogacy agreement and procedure in its 228th report, published in August 2009. The following were some of the report's main takeaways:

- The surrogacy contract should explicitly state that when a surrogate mother gives birth, she will relinquish parental rights of the infant to the commissioning parents. Also, all medical and other costs would be the responsibility of the intending or commissioning parents.

¹⁵ Gita Aravamudan, *Baby Makers: The Story of Indian Surrogacy* 161 (2014).

- Additionally, it was suggested that a surrogate kid should get financial support in the event that the intended parents pass away before the birth of the infant or in the event that the intended parents separate due to a divorce.
- The standards mandate that one intended parent should also act as a donor in order to preserve their emotional connection to the child.
- Adding a provision to the law that recognises the legality of the surrogate kid without requiring adoption or parental guardianship on the part of the intended parents.
- The birth certificate for the surrogate kid needs to list the names of the intended parents. Also, the privacy of both the donor woman and the surrogate mother should be protected.

Another significant case in the journey of India's Surrogacy: Baby Dev Case

In another case called the Baby Dev case, where intending parents were Australian, they came to India for surrogacy. In 2012, they travelled to India to see their twins. But a few weeks later, they returned with one of their twins, a girl, leaving the twin boy. As reported by The Guardian, "The Australian high commission in Delhi was approached by the couple – identified in a summary of the case by the then department of immigration and citizenship as Mr and Mrs S – who said they had come to India to meet their twin biological children born through international surrogacy arrangements. The couple allegedly decided they wanted to take only one baby, a daughter, back to Australia, saying they could not afford to support both children. Mr and Mrs S told the consular staff they had left the unwanted baby with friends who could not have a baby. It was unclear whether money changed hands"¹⁶.

In 2012, Indian Home Minister circulated a memo according to which same-sex couples and unmarried individuals cannot avail of surrogacy. The rules said, "Foreign couples seeking to enter into a surrogacy arrangement in India must be a man and woman (who) are duly married, and the marriage should be sustained at least two years"¹⁷

The Surrogacy (Regulation) Bill 2019 was presented before the lower house on July 15, 2019, by the Ministry of Health and Family Welfare with an aim to regulate the process and practice

¹⁶ Ben Doherty, Melissa Davey & Daniel Hurst, *Surrogate baby left in India by Australian couple was not trafficked, investigation finds*, The Guardian, 2014, <https://www.theguardian.com/australia-news/2014/oct/09/surrogate-baby-left-in-india-by-australian-couple-was-not-trafficked-investigation-finds> (last visited Jan 15, 2022).

¹⁷ NDTV, *India bars foreign gay couples, singles from surrogacy*, 2013, <https://www.ndtv.com/india-news/india-bars-foreign-gay-couples-singles-from-surrogacy-510752> (last visited Jan 15, 2022).

of surrogacy and other related matters in the field of surrogacy¹⁸. The bill consists of eight chapters, Chapter I describes “Definitions, Short Titles, Extent and Commencement”. Chapter II And III states the “Regulation of Surrogacy Clinics and Regulations of Surrogacy & Its Procedures”, respectively. Chapter IV is titled as “Registration of Surrogacy Clinics”. Chapter V laid rules for the “Constitution of National and State Surrogacy Boards”. Chapter VI defines powers of “Appropriate Authority”. Chapter VII assigns “Offences and Penalties”. Chapter VIII deals with “Miscellaneous”¹⁹.

Key Features of the Surrogacy (Regulation) Bill, 2019

As per Article 4 (ii) of the Bill, “*surrogacy procedures shall be performed only for the altruistic purpose*”²⁰. Article 4 C (i), (ii), and (iii) of the bill specified that “surrogacy would be availed only when either or both the partners are suffering from proven infertility, for which a certificate is proof. An eligibility certificate would be issued separately by the appropriate authority only if the conditions were fulfilled, which included the couple being married for at least 5 years and being Indian citizens. A wife must be 23-50 years, and the husband must be 26-50 years. Intending couples should not have any surviving biological child/children either through adoption or through surrogacy, only possible if the child is mentally/physically disabled or has any fatal disease”²¹.

The bill also defines a “*Surrogate Mother as a woman bearing child, who is genetically related to the intended couple, through surrogacy from the implantation of an embryo in her womb and fulfils the conditions as decided*” in Article 2 (zf).²² It further defines a Surrogate mother as a married woman between the ages of 25 and 35 on the day of implantation and already the mother of at least one child. It also adds a clause that woman providing her own gametes could not become a surrogate mother of the same baby; instead, she must be an immediate relative of the couple and may only serve as a surrogate once in her lifetime.²³

¹⁸ The Surrogacy (Regulation) Bill, 2019, PRS Legislative Research, <https://prsindia.org/billtrack/the-surrogacy-regulation-bill-2019> (last visited Jan 14, 2022).

¹⁹ Surrogacy (Regulation) Bill, 2019 (Bill No. 156-C of 2019), 2447LS.p65 (rajyasabha.nic.in)

²⁰ Article 4 (ii) of the bill.

²¹ Article 4 C (i), (ii), (iii) of the bill.

²² Article 2 (zf) Of the bill.

²³ Article 4 b (I), (II) of the bill.

As per Article 3 (i) of the bill, “*only surrogacy clinics registered under the bill would be able to perform procedures related to surrogacy*”²⁴. It further in Article 3 (v) “*described no surrogacy clinics, registered medical practitioners, gynaecologist or any other person shall promote, publish, canvass, propagate or advertise commercial surrogacy or induce women to be surrogate mothers*”²⁵. In chapter VII of the bill, it also “*made selling, importing, purchasing or trading of human embryos or gametes for the purpose of surrogacy or if someone has abandoned, exploited or disowned a surrogate child an offence and would be liable for imprisonment of up to 10 years and a fine of up to 10 lakhs*”²⁶.

Critical Assessment of the Bill

The 2019 bill faced sharp criticism from fertility clinics, women’s organisations and LGBT activists for circumscribing the accessibility of surrogacy for traditional married couples, i.e., man and woman only. The bill limited the definition of family in accordance with the hetero-patriarchal norms. By denying single people, unmarried domestic partners and LGBTQ+ couples their right to form families, the bill reinstated the patriarchal idea that only married heterosexual couples could form legitimate families. Feminist groups have also criticised the bill that by inserting restrictions on the eligibility of surrogates to just those of immediate family, the bill completely ignores the patriarchal setup of Indian families. The power structure of Indian families limits the agency of women to take their own decisions. The bill does not take into account how domestic violence and intimidation can force a woman to become a surrogate. Also, the bill had an ambiguous nature in terms of defining ‘close relative’. The bill did not clear to what extent should a close relative be. By making surrogacy an altruistic one, the bill also ignored the fact that surrogacy has been proven to be one of the sources of livelihood for economically weaker women.

Surrogacy (Regulation) Act, 2021

On 25th December 2021, with the assent of the President of India, the Surrogacy (Regulation) Act 2021 came into force to control the process and practice of surrogacy²⁷. The new act has incorporated a few changes from recommendations suggested by the Select Committee under the chairmanship of Rajya Sabha MP Bhupender Yadav, appointed in November 2019, which

²⁴ Article 3 (i) of the bill.

²⁵ Article 3 (v) of the bill.

²⁶ Chapter VII of the bill.

²⁷ The Surrogacy (Regulation) Act, 2021 (No. 47 of 2021) accessible at <https://egazette.nic.in/WriteReadData/2021/232118.pdf>.

presented its report to the Rajya Sabha on 5th February 2020²⁸. These changes to the 2019 bill include access to surrogacy for Indian divorced women and widow women between the age of 35-45.²⁹ The minimum period of 5 years for sterile heterosexual married couples who desired to become parents through surrogacy has been omitted. Section 4(I) “requires a medical certificate in favour of either or both members of the intending couple or intending woman from a District Medical Board”. It has also increased the insurance coverage for surrogate mothers up to 36 months from an earlier period of 16 months.³⁰ Furthermore, the act has eliminated the controversial clause of ‘close relative’ and changed it to “a willing woman”³¹. Sections 17 & 26 of the act laid down the rules for “the constitution of National Assisted Reproductive Technology and Surrogacy Board, State Assisted Reproductive Technology and Surrogacy Boards”.

The Surrogacy (Regulation) Act 2021, takes an ignorant shift from the earlier draft bills of ART by looking at surrogacy and other assisted reproductive technologies separately. The Assisted Reproductive Technology (Regulation) Act, 2021, “regulation and supervision of the assisted reproductive technology clinics and the assisted reproductive technology banks, prevention of misuse, safe and ethical practice of assisted reproductive technology services for addressing the issues of reproductive health”³². Like the Surrogacy Act, ART Act 2021, also follows a similar heteropatriarchal legal philosophy which only recognises married heterosexual couples as families.

The Surrogacy (Regulation) Act, 2021 follows a gender binary framework while defining the surrogate mother. The act completely ignores the transgenders, non-binary and other gender-diverse individuals’ ability to reproduce. The act, according to transgender rights groups in India, makes it more difficult for trans males to exercise their reproductive rights. While both gender identification and access to sexual and reproductive healthcare are important human rights, queer activists have argued that trans men must choose between the two. As a result, many trans individuals postpone transitioning so they can start a family, even though doing so is harmful to their health and well-being. However, laws’ inability to address such issues leads to trans-men losing the custody of their children.

²⁸ Select Committee, REPORT OF THE SELECT COMMITTEE ON THE SURROGACY (REGULATION) BILL, 2019 (2019). Select Comm Report- Surrogacy Bill.pdf (prsindia.org).

²⁹ Section 2 (1) (s) of the act.

³⁰ Chapter III, Section 4(I) & (III) of the act

³¹ Section 4 (b) of the act.

³² The Assisted Reproductive Technology (Regulation) Act , 2021 (No. 42 of 2021) accessible at The Assisted Reproductive Technology (Regulation) Act, 2021.pdf (prsindia.org).

Surrogacy: A Social and Ethical Dilemma

In the Indian imagination, commercial surrogacy is considered a financial option only for poor women to uplift themselves from abject poverty. However, studies have highlighted that many women opted for surrogacy as a one-time opportunity for upwards social mobility, which other blue-collar jobs could not provide. Surrogates also pointed out that surrogacy is both a practical and strategic solution in times of crisis like debt³³.

In general, the public views commercial surrogacy as often equated with prostitution and is considered to be a highly stigmatized occupation³⁴. India is a patriarchal society where women's agency is reduced to the will of her husband, in-laws and family. Thus, women's ability to take decisions for their life remain marginal. Studies have shown that women who become surrogate mothers are often rejected by their husbands, as they are considered to be of questionable status as someone who has traded their respectability for money³⁵.

Due to the stigma attached to surrogacy, a complex nexus of medical professionals and brokers work together for the recruitment of women. They use different mediums for the recruitment process, like word of mouth, former surrogates, and traditional midwives who become brokers³⁶. Many times, women get stuck into the trap laid by 'surrogate traders' and become victims of exploitative conditions. Such exploitation includes the illegal extraction of multiple eggs from donor women, the inability of surrogate mothers to meet their biological children, and forced surrogacy on the pretext of more payment or fulfilment of previous payments. This exploitation of surrogate mothers is well documented in different documentaries like "Made In India: A Film About Surrogacy", 2010 by Rebeca Haimowitz & Vaishali Sinha³⁷, "Womb on Rent", 2013 by Ishani K. Dutta³⁸ and "Can We See The Baby Bump Please?", 2013 by SAMA, a resource organisation for women's health, and Surabhi Sharma³⁹.

³³ Virginie Rozée, Sayeed Unisa & Elise de La Rochebrochard, *The social paradoxes of commercial surrogacy in developing countries: India before the new law of 2018*, 20 BMC Women's Health 1-14 (2020).

³⁴ Amrita Pande, *Not an 'Angel', not a 'Whore'*, 16 Indian Journal of Gender Studies 141-173 (2009).

³⁵ S. Bagchi, *Mothers who turn to surrogacy to support their families face ostracism, study shows*, 348 BMJ g3257 (2014).

³⁶ Amrita Pande, *Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker*, 35 Signs: Journal of Women in Culture and Society 969-992 (2010).

³⁷ Rebeca Haimowitz & Vaishali Sinha, *Made In India: A Film About Surrogacy (Women Make Movies)* (2010) <https://www.womensvoicesnow.org/films/womb-on-rent>.

³⁸ Ishani K. Dutta, *Womb on Rent' (Women's Voices Now)* (2013) <https://www.womensvoicesnow.org/films/womb-on-rent>.

³⁹ Surabhi Sharma, *Can We See The Baby Bump Please?* (2013) <https://samawomenshealth.in/can-we-see-the-baby-bump-please/>.

The selection of a surrogate is based on a number of factors and one of which is the caste of a surrogate. India being a Brahmanical patriarchy, caste remains an influential agent in the life of individuals and communities. A study titled “Birthing A Market: A Study on Commercial Surrogacy”, carried out by SAMA, a resource organisation based in Delhi that focuses on women's health issues, in 2012 highlighted how commissioning parents preferred surrogates with fair skin colour or of higher caste, particularly Brahmin⁴⁰.

Conclusion

Despite the changes in the Surrogacy (Regulation) Act 2021, on the recommendation of the select committee, the act still has a restrictive approach. Excluding homosexuals, live-in couples, divorced men, widowers, single men & women and foreign couples/non-Indian origin couples from availing of surrogacy, the act violates not only reproductive autonomy but fundamental rights as well. The act also violates Article 14 of the Indian Constitution, which promises equality for all citizens.; it reads, *“The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on the grounds of religion, race, caste, sex or place of birth”*.

But the Act of 2021 forbids certain sections of people from accessing surrogacy to become parents on the grounds of their sexual identity or orientation, the status of marriage, age, and nationality. The act also disallows unmarried, divorced or widow women to be surrogate mothers, reimposing the idea of heteronormative families where only a married woman has a right to become a mother. Though the Act considers the exploitative conditions which are the result of commercial surrogacy, it fails to acknowledge the nuanced forms of exploitation prevalent in altruistic surrogacy as well. By regulating the practice of surrogacy, the government should not curtail the autonomy and agency of a woman to become a surrogate. The act is framed in the limited understanding of freedom, rights and choices of women.

⁴⁰ Sama, Birthing A Market Study on Commercial Surrogacy 40 (2012).