



Surrogacy Law

For Prelims: Surrogacy Law, [Surrogacy \(Regulation\) Act 2021](#), Altruistic surrogacy, Commercial Surrogacy, [Article 21 of the constitution](#).

For Mains: Surrogacy Law and Associated Challenges, Mechanisms, laws, institutions and Bodies constituted for the protection and betterment of these vulnerable sections.

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Why in News?

Recently, the Delhi High Court has questioned the **association of marital status** with eligibility for surrogacy under the [Surrogacy \(Regulation\) Act 2021](#).

- The petitioner challenged **Section 2(1)(s) of the Surrogacy Act**, which limits the right to avail surrogacy to Indian widows or **female divorcees between the ages of 35 and 45**.
- The petitioner's plea also challenges the regulation that compels a single woman (widow or divorcee) to **utilize her own eggs for surrogacy**. Due to her age, using her own gametes is medically inadvisable, and she **seeks a donor for female gametes**.

What is Surrogacy?

- **About:**
 - Surrogacy is an **arrangement in which a woman (the surrogate)** agrees to carry and give birth to a child on behalf of another person or couple (the intended parent/s).
 - A surrogate, **sometimes also called a gestational carrier**, is a woman who conceives, carries and gives birth to a child for another person or couple (intended parent/s).
- **Altruistic Surrogacy:**
 - It involves no monetary compensation to the surrogate mother other than the medical expenses and insurance coverage during the pregnancy.
- **Commercial Surrogacy:**
 - It includes surrogacy or its related procedures undertaken for a monetary benefit or reward (in cash or kind) exceeding the basic medical expenses and insurance coverage.

What is the Surrogacy (Regulation) Act, 2021?

- **Provisions:**
 - Under the **Surrogacy (Regulation) Act, 2021**, a woman who is a widow or a divorcee between the age of 35 to 45 years or a couple, **defined as a legally married woman and man**, can avail of surrogacy if they have a medical condition necessitating this option.
 - The intended couple **shall be a legally married** Indian man and woman, the man shall be **between the ages of 26-55 years** and the woman shall be between the ages of 25-50 years, and shall **not have any previous biological, adopted, or surrogate child**.

- It also bans **commercial surrogacy**, which is punishable with a jail term of 10 years and a fine of up to Rs 10 lakhs.
- The law allows only altruistic surrogacy where no money exchanges hands and where a surrogate mother is genetically related to those seeking a child.
- **Challenges:**
 - **Exploitation of the Surrogate and the Child:** The banning of commercial surrogacy moves from the rights-based approach to a **needs-based approach, thus removing the women's autonomy to make their own reproductive decisions** and right to parenthood. One could argue that the state must stop the exploitation of poor women under surrogacy and protect the child's right to be born. However, the current Act fails to balance these two interests.
 - **Reinforces Patriarchal Norms:** The Act reinforces **traditional patriarchal norms** of our society that attributes no economic value to women's work and, directly **affecting the fundamental rights of the women** to reproduce under [Article 21 of the constitution](#).
 - **Emotional Complications:** In altruistic surrogacy, a friend or relative as a surrogate **mother may lead to emotional complications** not only for the intending parents but also for the **surrogate child** as there is great deal of risking the relationship in the course of surrogacy period and post birth.
 - Altruistic surrogacy also limits the option of the intending couple in choosing a surrogate mother as very limited relatives will be ready to undergo the process.
 - **No Third-Party Involvement:** In an altruistic surrogacy, there is no third-party involvement. A third-party involvement ensures that the **intended couple will bear and support the medical** and other miscellaneous expenses during the surrogacy process.
 - Overall, a third party helps both the intended couple and the surrogate mother navigate through the complex process, which may not be possible in the case of altruistic surrogacy.
 - **Some Exclusion from Availing Surrogacy Services:**
 - There is exclusion of unmarried women, single men, live-in partners, and same-sex couples from availing surrogacy services.
 - This **amounts to discrimination based on marital status**, gender, and sexual orientation, and denies them the right to form a family of their choice.

What are the Recent Changes Made by the Supreme Court?

- A government notification in March 2023 amended the law, **banning the use of donor gametes**.
 - It said "intending couples" must use their own gametes for surrogacy.
- The petition was filed in the Supreme Court **challenging the amendment as a violation of a woman's right to parenthood**.
- The Court interpreted the requirement for the child to be "**genetically related**" as being **related to the husband**.
- The Court emphasized that the law permitting gestational surrogacy is "woman-centric," meaning that the decision to have a surrogate child is **based on the woman's inability to become a mother** due to her medical or congenital condition.
- The Court clarified that when **Rule 14(a) of the Surrogacy Rules Applies**, which lists medical or congenital conditions that allow a woman to opt for **Gestational Surrogacy**, the child must be related to the intended couple, especially the husband.
 - **Gestational surrogacy** is a process where one person, who did not provide the egg used in conception, **carries a fetus through pregnancy and gives birth to a baby for another person or couple**.
- The Supreme Court stayed the operation of Rule 7 of the Surrogacy (Regulation) Act, 2021, to allow **the woman suffering from the Mayer-Rokitansky-Küster-Hauser (MRKH) Syndrome** — a rare congenital disorder that affects the female reproductive system — to undergo surrogacy using a donor egg.
 - Rule 7 of the Surrogacy Act bans use of donor eggs for the procedure.

Way Forward

By focusing on inclusivity, ethics, and medical advancements, India can establish a robust legal framework for surrogacy that respects individuals' rights, ensures the well-being of all parties involved, and supports those seeking to start families through assisted reproductive technologies.

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