
SURROGACY LAWS IN INDIA THROUGH THE YEARS

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ABSTRACT

Surrogacy laws were first introduced in India in the form of Guidelines rather than codified laws in 2002. The concept of surrogacy is considered by many a noble and virtuous act as it allows childless parents to beget children that not only allows them to legally consider them their offspring but also have a biological link to them as well via genetics. Although practiced in India since a time before one can attach a date to it, surrogacy was largely unregulated and therefore, susceptible to many corrupt practices that cropped up with time. Being a vast concept the author's aim is to concisely cover all the rules, regulations, guidelines and laws that have been formulated over time in order to regulate and monitor surrogacy practices throughout the country. Along with the codified laws, the author has also mentioned the different classification of surrogacy as well as its existence in ancient as well as present day modern India. Each Bill introduced in the Parliament has been briefly discussed enumerating the pros and cons of each, leading up to the current Surrogacy (Regulation) Act, 2021 with its main aim being the elimination of commercialisation of surrogacy, while putting down other conditions regarding eligibility for availing and volunteering for surrogacy. The author in this paper has striven to make a comparison between the various versions of the surrogacy bill. The author has also tried to figure out to what extent a blanket ban on the commercialisation of surrogacy has had the desired effect of curbing corruption and exploitation in this field and whether commercialisation can in fact be a positive aspect that has not yet been explored enough to bring to fruition.

the semen of another woman's husband".

According to the **New Encyclopaedia Britannica** surrogacy define as:

"Surrogate motherhood as the practise in which a woman bears a child for the other couple to produce children in the usual way".

It is imperative to note here that surrogacy is not a process in itself it is a name given to the means by which a child is carried to full term before it's birth. Surrogacy is a term used to describe a covenant between at least two people of whom one is the surrogate mother while the other is the intended parent. Ideally it is a pact involving a couple and their surrogate but single parents also avail the assistance of a surrogate.

Surrogacy can be classified into two categories:

- Traditional Surrogacy
- Gestational Surrogacy

Traditional Surrogacy: a woman who carries a child who is biologically related to her. She is artificially inseminated with the sperm of the intended father, and her eggs are used to conceive the baby. She then carries the baby to term and delivers him or her.⁴ The risk of this type of surrogacy is that usually there are many complications regarding the mother and child. For instance, half of the baby's genetics are from the surrogate mother instead of the intended mother. This leaves 50% chances of the child being born with genetic defects that neither intended parents have. Not to mention being related to the surrogate mother there may be a need to follow through with an adoption process in order to establish the parenthood of the intended parents. Another risk would be the mother forming a maternal bond with the child and may refuse to give up the child any moment.

Gestational Surrogacy: It is also known as "host surrogacy" or "full surrogacy" whereby the child is not genetically related to the surrogate mother.⁵ The surrogate mother is considered to be a vessel to carry the child to full term and is often referred to as gestational carrier. This process is done by injecting an embryo containing the eggs and sperm of the donors through IVF into the surrogate mother. Although this type of surrogacy also has its complications like the lack of genetic information from one of both sides of the donors, second parent adoption

⁴ Virginia Frank, Different Types of Surrogacy, <https://virginiafrank.com/blog/different-types-of-surrogacy/#:~:text=However%2C%20the%20two%20main%20types,altruistic%E2%80%9D%20and%20%E2%80%9Ccompensated.%E2%80%9D> (Visited 6th Nov. 2022)

⁵ Ibid.

being necessary to legally adopt the child and the same risk of the surrogate forming maternal bonds yet, it is much easier to establish the intended parent's parenthood as at least one parent is genetically related to the child while the surrogate has no genetic connections.

There are two sub-categories of surrogacy namely:

- Commercial Surrogacy
- Altruistic Surrogacy

Commercial Surrogacy: Commercial surrogacy refers to any surrogacy arrangement where the surrogate mother is compensated for her services beyond reimbursement of medical expenses.⁶ Even though the concept of commercial surrogacy may have started in order to benefit all parties involved, it has also led to corruption where women have been coerced and exploited by corrupt agencies into becoming surrogates.

Altruistic Surrogacy: A woman volunteers to carry a pregnancy for intended parents without receiving any monetary compensation in return.⁷ This might be a better form of surrogacy as it is usually done by those women who know the intended parents on a personal note. But it also has problems associated with it namely the costs and safeguards remain ambiguous due to a lack of professional contract as is done by agencies thereby causing strain on relationships.

The author would like to bring to notice at this point that surrogacy may be a means of becoming a vessel to carry a child to full term when it is impossible for the intended parents to do so, it is through procedures like Assisted Reproductive Technology (ART), in vitro fertilisation (IVF), intracytoplasmic sperm injection (ICSI) that the embryo/zygote is artificially inseminated into the womb of the surrogate thus allowing the unborn child to grow within her womb.

III. RISE IN ASSISTED REPRODUCTIVE TECHNOLOGY

Research has shown that motherhood is an instinct driven physiological phenomena. This instinct resides in every living being. Ancient Indian philosophy states that the purpose of life on earth is to propagate and pass down one's genes to the next generation. The fulfilment of this purpose is dependent on factors that lead to the best chances of survival of the offspring.⁸ The most common example can be seen in migrating species of animals that do so every year

⁶What Is Commercial Surrogacy, <https://surrogate.com/about-surrogacy/types-of-surrogacy/what-is-commercial-surrogacy/> (Visited on 8th Nov. 2022)

⁷ Ibid.

⁸ Social, Ethical, Medical & Legal Aspects Of Surrogacy: An Indian Scenario, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4345743/> (Visited on 10th Nov. 2022)

in order to breed in an environment where their offspring can have the highest chances of surviving until they become capable of returning to their natural habitats. It is no surprise therefore, that even humans instinctively want to have children to carry their legacy forward.

However, modernisation, global warming, major changes in life-style and consequent deterioration of health has contributed to an increase in case of infertility among humans and animals alike. In many countries, especially those like India the label of infertility comes with extra tags attached with it which are equally if not more stigmatised in our society. Many infertile couples have to go through innumerable questions about their personal lives and speculations about their inability to have children – so much so that many even end up dissolving their relationships under constant scrutiny and societal pressure. Thus, the need to project and conform to social perceptions of a stable family takes precedence more than one's own personal desires.

With the advent of science and technology and advances in the field of medicine and research, however, there are now procedures like Assisted Reproductive Technology (ART), in vitro fertilisation (IVF), intracytoplasmic sperm injection (ICSI), etc. that have made it possible for humans to procreate and have offspring.

The first ever case of surrogacy in India and second in the world was that of Baby Kanupriya alias Durga born in Kolkata on 3rd October 1978 brought about by Dr. Subhash Mukherjee who performed India's first official IVF resulting in the former's birth.⁹

IV. SURROGACY IN INDIAN HISTORY

Steeped in history and culture, there are very few topics that one would not find within the ancient texts of Indian civilisation. From philosophy to medicine to even the most mundane acts of life can be found in these texts – including the topic of surrogacy – found in the Manusmriti, the Mahabharata and many other mythological texts. It is also known as Niyog Dharma as per the epic Mahabharata. An instance is given in the Mahabharata – that of Queen Satyawati asking her eldest son Vyasa to perform niyoga with the widows of his younger brother Vichitravirya thereby giving birth to Dhritarashtra, Pandu and Vidura. It is a practice in

⁹Problems of Commercial Surrogacy in India, <https://deliverypdf.ssrn.com/delivery.php?ID=726071067021027018090016124122123028058084022041061078026025027075120031068088089010010097040106104063121088081100004125104102022084007077063112065119106108064065075017040017004106092097081026118124102064101028119123001097022107022115070080028000127105&EXT=pdf&INDEX=TRUE> (Visited on 11th Nov. 2022)

whereby a woman whose husband is unable of siring or has died before siring a child would request and appoint a revered man for helping her bear children.¹⁰

The same concept was followed in case of Pandu and his wives Kunti and Madri. Another example would be the legend of the 7th child of Devki and Vasudev, Balram had been transferred to the womb of Rohini while still an embryo. Kartikey the god of war and fertility has been said to have been born of Lord Shiva and Ganga (as the surrogate mother), not Goddess Parvati.¹¹

Myth or reality, these stories prove the existence of assisted reproduction has always been present in our lives be it men fathering children for other women or women providing an opportunity for childless parents to have children. Despite the air of taboo, reluctance and hesitancy that has followed words like surrogacy, there is proof that there was once a time when women and men who acted as surrogates were revered and venerated and even sought out by others. There was no conflict between assisted reproduction and socio-religious mores.¹²

V. SURROGACY IN MODERN INDIA

Major lifestyle changes among humans and the poor conditions of way of life has led to an increase in many diseases and health issues, one of the most common being that of becoming infertile thus increasing a demand in artificial ways to conceive. At the same time with the acceptance of same sex marriages/union and the recognition of the basic human right to have family and children has given rise to surrogacy manifold. With the recent growth in the Intended parents opting for surrogacy here, India has become the much sought-after surrogacy destination.

Although there are other options for people to become parents such as adoption – surrogacy has however, become a popular choice for intended parents for various reasons:

1. Through surrogacy even though the womb is someone else's the genetic material of one or both parents will be present in the unborn child thus making the child genetically

¹⁰Niyoga, <https://en.wikipedia.org/wiki/Niyoga#:~:text=In%20this%20practice%2C%20a%20woman,helping%20her%20bear%20a%20child>. (Visited on 8th Nov. 2022)

¹¹ <https://www.shethepeople.tv/news/surrogacy-in-mythology/> (Visited on 8th Nov. 2022)

¹²An Understanding of Surrogacy: A Legal Analysis in Indian Context, <https://deliverypdf.ssrn.com/delivery.php?ID=319121006065081093002099069105103104056074007011089060073092002025097003014073006125123036060024038014002024000097113090110018103054002035031031112105112114116000030008080030066024101094031022096106092004083068085112088126024125081088008117015002008100&EXT=pdf&INDEX=TRUE> (Visited on 8th Nov. 2022)

theirs. The birth mother in this case will not necessarily be the biological mother as well. It helps maintain a genetic link between the parents and children.¹³

2. Apart from being genetically linked the parents will also be able to anticipate and if need be mitigate any genetic diseases or other health issues based on their family history.
3. The stigma of adoption will never be put on the child/children or on the parents.
4. The intended parents will have all the information they need about the surrogate including her medical, financial and family history thus giving them an opportunity to know what to expect in the coming future regarding the mother and the child.
5. Legal issues tend to crop up during the process of adoption whereas contracts are made and signed beforehand in case of surrogacy thereby bypassing many legal issues from the start.

Over the years there have been many cases where Indian women have agreed to become surrogates for reason that vary from person to person. The first gestational surrogacy in India took place in Chennai in 1994 and in 1997, a woman from Chandigarh agreed to carry a child for INR 50,000/- in order to obtain medical expenses for her paralyzed husband. In 1999 a Gujarati woman had agreed to serve as a surrogate for a German couple.¹⁴ Over the years of 2003 to 2006 the number of surrogacy cases in India doubled. As per research done in 2012 the number of children born to surrogates had gone up to 25,000 in India and it the numbers have only increased over the years.¹⁵

VI. LEGAL ASPECT OF SURROGACY IN INDIA

As with many other upcoming or developing industries, laws regulating the growing medical industry specially in respect of ART, surrogacy etc are in their nascent period. It was only in 2005 the Indian Council of Medical Research (ICMR) under the Ministry of Health and Family Welfare decided the National Guidelines for accreditation, supervision and regulation of ART in India. It was not drafted with surrogacy in mind exclusively rather it contained guidelines that were to be followed by ART Clinics in terms of carrying out all surrogacy

¹³ Surrogacy Vs. Adoption – Which Is Right For Our Family, <https://surrogate.com/intended-parents/the-surrogacy-process/surrogacy-vs-adoption-which-is-right-for-our-family/> (Visited on 11th Nov. 2022)

¹⁴ Dr. Jyotsna Jain, Surrogacy and Health Issues, IJSR, <https://www.ijsr.net/archive/v6i8/ART20175875.pdf> (Visited on 12th Nov. 2022)

¹⁵ India's Unregulated Surrogacy Industry, [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(12\)61933-3/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(12)61933-3/fulltext) (Visited on 12th Nov. 2022)

procedures.¹⁶ Under these guidelines there was no legal bar on a single or unmarried woman from using ART and children borne would have legal rights on the woman or man concerned. These guidelines however, were solely advisory and not legally binding.

When the Law Commission realised that there was a need for legislation to regulate the ART clinics and to codify the rights and duties of the parties involved, it took *Suo Moto* action and dealt with surrogacy in its 228th Law Report¹⁷ under the chairmanship of Dr. Justice A.R. Lakshmanan in 2009.

It is pertinent to note here that a 12-member Specialist Drafting Committee was assigned apart from the National Advisory Committee under the Chairmanship of Director General of ICMR and was responsible for the drafting of the 2008, 2010 and 2013 Bills. In 2008 and 2010 the Bills were circulated extensively in the public in order to get the public's opinions but in 2013 the draft was not submitted to the public for discussion, comment or opinion. In 2013 the draft for ART (Regulation) Bill was made on the basis of revisions made by the Ministry of Law and Justice.¹⁸

The author is going to provide a timeline of event leading up to the current 2020 Bill being drafted regarding surrogacy laws:

- In 2008 the ART Bill was initially drafted but not presented before the Parliament.
- In 2009 the 228th Law Commission report on the need for legislation to regulate assisted reproductive technology clinics as well as rights and obligations of parties to a surrogacy was submitted to the Ministry of Law and Justice.¹⁹
- In 2010 in light of the Law Commission's Report a new Bill was formulated.
- Several modifications were made in 2013 and 2014.
- In 2016 The Surrogacy (Regulation) Bill was introduced and passed by the Lok Sabha in 2018. It was however, not placed before the Rajya Sabha.
- In 2019 the bill was reintroduced in the Lok Sabha under the title "Surrogacy (Regulation) Bill, 2019 and was passed in 2019.

¹⁶ India: Surrogacy Regulations In India, <https://www.mondaq.com/india/constitutional-administrative-law/1126150/surrogacy-regulations-in-india> (Visited on 13th Nov. 2022)

¹⁷ Ibid.

¹⁸ <file:///C:/Users/Pritha%20Sen/Downloads/SocialImplicationsofSurrogacyinIndia.pdf> (Visited on 13th Nov. 2022)

¹⁹ <https://indiankanoon.org/doc/168220859/> (Visited on 13th Nov. 2022)

- In 2020 the Union Cabinet approved the Bill after considering the changes suggested by the Rajya Sabha.²⁰

VII. LANDMARK CASES INVOLVING SURROGACY IN INDIA

One of the first cases to come to light regarding surrogacy is *Baby Manjhi Yamada v. UOI*²¹ where a Japanese couple entered into a contract with an Indian woman to be the surrogate mother for their child. However, there were marital discord between the couple. After the baby was born, the commissioning father Mr. Yamada tried to take his child to Japan for which he applied for visa to Japan. The embassy of Japan in India denied as the Japan civil code did not grant the surrogate child. Mr. Yamada tried to file for Indian visa which requires a birth certificate. The name of the Father and Mother of the child must be there in the birth certificate, but in this case Mr. Yamada was the genetic father of the baby while ambiguity arose in the case of the mother there were three mothers for that child – the commissioning mother, the egg donor and the surrogate mother. Seeing this, authorities refused to give visa to the child as the legal mother was not certain. In the end the Apex court of India had to intercede and the child Manji was allowed to leave the country with her grandmother.

This is considered to be a landmark case as it was in this case that the Supreme Court of India held that surrogacy would be permissible in India, thereby opening the doors for couples to approach India more often for surrogacy procedures.

Another case of note is that of *Jan Balaz v. V. Anand Municipality & Ors*²² in this case a childless German couple had twins through the surrogate mother with the help of Anand Infertility Clinic Gujarat. Since the German laws did not recognise the surrogacy as a means of parenthood, twins were not treated to be the German citizens. The German commissioning parents, to avoid the foreseeable hurdle of the Immigration laws, approached the High court of Gujarat to authorise their surrogate twins with Indian Passports. The High Court held that a child born through the surrogate mother will carry the name of the surrogate mother not of the biological mother and the child should be authorized with the Indian Passport and certify him as the Indian citizen. As a result, the surrogate mother in turn had to give the child to the German couple via adoption.

²⁰ <https://www.hindustantimes.com/india-news/rajya-sabha-panel-recommendations-get-cabinet-nod/story-itB4FkNggJq0qnNfoCY6FM.html> (Visited on 19th Nov. 2022)

²¹ WP (C) No. 369 of 2008

²² AIR 2010 Guj 21

Another case was that of an Israeli gay couple coming to India in order to become parents with the help of a surrogate mother. As per Israeli laws they had to conduct a DNA test to prove their paternity and only then was the child's passport and other documents were cleared.²³

Cases like these led to the process of surrogacy bill coming into existence as a consequence. As has been mentioned before, although the concept of a surrogacy may have been introduced in 2008 but it was not before 2016 that a Surrogacy Bill was drafted. The Union Cabinet approved the Surrogacy Regulation Bill in 2016 allowing only Indian married infertile couples to avail surrogacy services.²⁴ This Bill was passed by the Union Cabinet in 2019 as Surrogacy (Regulation) Bill, 2019.

VIII. SURROGACY (REGULATION) BILL 2019 AND ONWARDS

One of the most important changes brought about by the 2019 Bill was the absolute restriction on commercial surrogacy that had not only been rampant but legal ever since the 2002 draft of the ART Guidelines that had been approved by the government in 2005.²⁵ The 2019 Bill:

- promoted altruistic surrogacy whereby the surrogacy would be performed by a woman who is a close relative of the intended parents.
- prohibited foreign nationals from availing surrogacy services in India.
- sought to restrict surrogacy services to a married couple to the exclusion of unmarried/single persons and persons in live-in relationships.²⁶

There were however, inadequacies in the Bill:

- impinged upon the rights of equality and right to life of single persons, LGBTQIA+ persons and those in live-in relationships while there is no such restriction on them when it comes to adoption

²³ <https://timesofindia.indiatimes.com/india/israeli-gay-couple-gets-a-son-in-india/articleshow/3724754.cms> (Visited on 18th Nov. 2022)

²⁴ An Understanding of Surrogacy: A Legal Analysis in Indian Context, <https://deliverypdf.ssrn.com/delivery.php?ID=319121006065081093002099069105103104056074007011089060073092002025097003014073006125123036060024038014002024000097113090110018103054002035031031112105112114116000030008080030066024101094031022096106092004083068085112088126024125081088008117015002008100&EXT=pdf&INDEX=TRUE> (Visited on 18th Nov., 2022)

²⁵ Refer to chapter VI

²⁶ Surrogacy Laws in India – Past Experiences and Emerging Facets, <https://www.barandbench.com/columns/surrogacy-laws-in-india-past-experiences-and-emerging-facets#:~:text=The%20turning%20point%20came%20in,in%20India%20through%20commercial%20surrogacy.> (Visited on 19th Nov. 2022)

- the term ‘close relative’ when conferring to the surrogate mother was not given any parameters thereby making it possible to still carry out commercial surrogacy in the garb of altruistic surrogacy.

Changes were suggested by a 23 member Select Committee of the Rajya Sabha which was approved by the Union Cabinet in 2020²⁷ thus giving rise to the Surrogacy (Regulation) Bill 2020.

The 2020 Bill contained major changes:

- Promoted only altruistic surrogacy.
- Allowed a willing woman to be a surrogate mother
- Reduced the term of infertility from 5 years to 1 year
- Established National and State Surrogacy Board to regulate and monitor surrogacy
- Certificates of essentiality and eligibility mandatory for couples
- Covered live-in persons, divorced, widowed, NRI, Person of India Origins, Overseas Citizenship of India

This Bill also however, had lacunae that needed to be rectified:

- Rights of unmarried or single women and LGBTQIA+ were denied thereby infringing their right to equality (Art. 14)²⁸ and right to life (Article 21)²⁹
- Did not cover the financial constraints of poverty-stricken women resorting to provide surrogacy services to survive thereby infringing their livelihood under Art. 21.³⁰
- Possibility of corruption, black marketing and clandestine surrogacies being carried out, and extra costs incurred due to misinformation or other outliers, exploitation of surrogate mothers, encouraging forced labour etc.
- Loss suffered by surrogate other in terms of their wages, suffering, death etc not covered
- No time limit of certificates given
- Provided for consent of surrogate mother for abortion but did not cover the consent of the intending parents’ consent leading to surrogate mothers taking advantage.

²⁷ Supra. note 20

²⁸ *E.P. Royappa v. State of Tamil Nadu* 1974 AIR 555; *State of West Bengal v. Anwar Ali Sarkar* AIR 1952 SC 75; *National Legal Services Authority v. UOI* AIR 2014 SC 1863

²⁹ *Devika Biswas v. Union of India* (2016) 10 SCC 726; *R. Rajagopal v. State of Tamil Nadu* AIR 1995 SC 264; *K. S. Puttaswamy v. Union of India* (2017) 10 SCC 1

³⁰ *Consumer Education and Research Centre and Ors. v. Union of India* (1995) 42 SCC 3; *Olga Tellis v. Bombay Municipal Corporation* AIR 1986 SC 180

In the backdrop of all this the Parliament, in December 2021, passed the Assisted Reproductive Technology (Regulation) Act, 2021 with the aim of regulating and supervising ART clinics ART banks, prevention of misuse and safe and ethical practices of this service.³¹ On the heels of this the Surrogacy (Regulation) Act, 2021 was passed and came into effect on 25th January 2022. The 2021 Act however, still suffered from the above-mentioned controversies.

IX. COMMERCIAL SURROGACY³²

A point of controversy when it comes to surrogacy, and its implementation and regulation is that of commercial surrogacy. It was in 2002 that commercial surrogacy was legalised in India by the Apex Court in the case of Baby Manji Yamada where the child conceived through commercial surrogacy was not only given to her father but was allowed to go back to Japan with her grandmother. The decision created a pathway for promotion for India's medical tourism thereby making India the "hub of surrogacy". Although it was legalised, the business of surrogacy was by and large unregulated.

As is wont to happen, undue advantage was being taken of this loophole by many. Unethical practices became rampant.

Due to a lack of any legal parameters or regulatory laws, the parties could not be aware of the legal necessities. This goes for both the parties if one side is a foreign national and thereby unaware of the laws or the existence of it and the other side is uneducated thereby at a disadvantage. There was no proper procedural mechanism due to which a lot of fake surrogacy agreement documents were possible to make. It was difficult to find a middle way when it came to commissioning parents being foreign nationals specially from countries that did not recognise surrogacy or surrogate children. Apart from this there was no real remedy available if there was any breach of contract from either side.

Women who were surrogates were not treated well; they were exploited beyond capacity. They were forced into bad living conditions, unhealthy or nutrient deficit food, next to no medical treatments, and were given the barest of payment by the agencies and middle men all in the name of the latter making profits out of this business.

³¹ Assisted Reproductive Technology (Regulation) Act, 2021: A Timely Legislation For A Timeless Problem, <https://www.barandbench.com/columns/assisted-reproductive-technology-act-a-timely-legislation-for-a-timeless-problem> (Visited on 20th Nov. 2022)

³² Refer chapter II

Low nutrition as a result led to the child to be born malnourished and sickly. No regard was given to either the mother or the child. This opened up a possibility of many of these children being rejected – by the commissioning parents as well as the surrogate – leaving them to vulnerable to other forms of corrupt practices.

Child traffickers also got an opportunity to get children at a minimal amount or free of cost. Other corrupt agencies also found a way to misuse this service in order to make their own profits. In the garb of surrogacy services, they began running organ trafficking rackets, exportin/importing embryos, etc.

However, it was not before 2015 that the government of India completely banned commercial surrogacy from its country. This ban has finally been codified in the form of the Surrogacy (Regulation) Act, 2021 whereby only altruistic surrogacy has been made mandatory to curb exploitation of women for commercial gains.³³

X. CURRENT SCENARIO

The Surrogacy (Regulation) Act, 2021 has recently come into the limelight even more not only because of its recent codification but also due to certain events that have taken place – the current one being the announcement of a certain south Indian movie celebrity couple becoming parents via surrogacy. Even though theirs was more a debate mired in conservatism and ignorance it however shed light on many other cases where the public has face difficulty in becoming parents simply because the current law does not allow it.

One such example is that of a single lawyer and his friend, who is married and a mother of one, cannot have children, each of their own, via surrogacy only because the 2021 Act does not allow it.³⁴ The very first condition for being able to avail surrogacy services is that the commission parents must be a couple. More specifically they must be a heterosexual couple not having any previous children of their own. The next condition being the couple will be able to avail such services only on medical grounds. Not to mention the surrogate has to be a close relative of the couple which is usually hard to find.³⁵

³³Surrogacy (Regulation) Act, 2021 (Act 47 of 2021), S. 3

³⁴ <https://www.livelaw.in/news-updates/centre-opposes-vires-surrogacy-act-assisted-reproductive-technology-act-delhi-hc-213410> (Visited on 21st Nov. 2022)

³⁵ <https://www.civildaily.com/news/surrogacy-law-faces-challenge-in-court/> (Visited on 20th Nov. 2022)

Another example is that of a couple who lost their daughter during COVID-19 and wanted to have another child through surrogacy. Due to medical conditions and age of the couple they could not conceive naturally. They tried to look for a volunteer who would be their surrogate but it became difficult as not only was it being looked down upon by their society but also because the conditions of being a surrogate had severely limited their options.³⁶

XI. CONCLUSION

It is said that sometimes the best of intentions can lead to bad outcomes.

Surrogacy has not always been a controversial topic in India, however with the recognition and confirmation of corrupt practices being carried out in this regard, it has become a complicated task. Since the very beginning the laws regarding surrogacy were unregulated and when it was suggested that a legislation be made in order to curb the rampant commercialisation and exploitation the laws fell short of many expectations.

It has however, at the same time created a lot bars and limitations for a lot of people who one might say are innocents in this matter. The Act has completely bypassed the needs and requirements of a whole community that conforms to a different sexual identity and orientation thereby overshadowing the struggles and subsequent efforts to decriminalise not only Section 377 of the CrPC but also the efforts made to bring them under the protection of the Fundamental Rights. For people who do not conform to the social status mentioned in the conditions of the Act, it has created high barriers when it comes to surrogacy, thereby taking away not only their choice of how they want to live, their privacy and right to equality but also their freedom to choose the way in which they would prefer to procreate.

Apart from this surrogacy is still not cost effective enough for the general public to avail, and even if they are able to cover the costs, the stringent conditions create more trouble than they do good. The purpose of volunteering as a surrogate was mostly to make a livelihood for many women who were in dire need of money for one reason or another. The current act, by limiting the volunteers to close relatives and reducing the amount of money to be paid took away many women's livelihood in their zeal to check corrupt commercialisation.

Many medical professionals, legal experts and even the suffering public also argue that the current Act of 2021 may have been made with the intention of making life better by

³⁶ <https://www.thenationalnews.com/world/2022/03/29/indias-new-surrogacy-laws-could-limit-chances-for-some-would-be-parents/> (Visited on 21st Nov. 2022)

uprooting corruption when it came to surrogacy and its ensuing exploitative practices. As has been mentioned above commercialisation is not always a bad thing. If done properly with the right system of checks and balances it could prove to be fruitful and profitable for many involved.

To conclude the author is of the opinion that there is a need for a better legislation to be formulated that would not only cover the loopholes left by the 2021 Act but would also take into consideration both the pros and cons of commercialisation. It would be prudent in the author's humble opinion to come up with ways to keep track of the commercial aspects involved in this industry while creating better implementation mechanisms, administrative laws and stricter agreement/contract laws in order to avoid corruption from blooming.