

# Surrogacy, Adoption and Transgender Rights

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## Abstract

Surrogacy is the topic of discussion in the country these days. Recent law on surrogacy has paved the way for this. The act on surrogacy contains many provisions which are controversial. The debate on the issue has always led to polarization of people. On one side are the groups which favor the traditional concepts of family while on the other hand are those who advocate the inclusion of the changing meaning of family with the changing world. In this light a discussion on transgender rights is done. Surrogacy law has imposed several conditions on the people wanting to have a child by employing this method. In a way these provisions will result in surrogacy being a tough choice to make for the couples or individuals. That brings us to adoption. Will the law on surrogacy actually result in increase in adoption? The paper attempts to analyse these issues.

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## Introduction

Parliament passed the bill known as "Surrogacy (Regulation) Bill, 2019" in December 2021. Lok Sabha passed the bill on August 5, 2019. Rajya Sabha passed the bill after amendments, and returned it to Lok Sabha on December 14, 2021. Commercial surrogacy has been completely banned in India by the present law. Several conditions have been imposed on the couples who want to have a child through surrogacy. Many may not be able to fulfill the criteria. It may be presumed that these stringent conditions for surrogacy might lead to a boost in adoption of children. Both Surrogacy and Adoption are great choices for persons who want to either create or add to families. Even then many people remain inclined towards surrogacy more than adoption because of the opportunity to have a child related to atleast one of the parents by blood.

## Objectives of the Study

The objective of the study is to analyse the issues related to surrogacy, adoption and transgender rights. The paper attempts to make a comparison between adoption and surrogacy. Also, the rights of transgender persons with reference to surrogacy are discussed.

## Adoption and Surrogacy

In a country like India which is still governed by age old traditions and customs the concept of continuing the bloodline holds great importance. Surrogacy allows the couples to carry forward their bloodline into the future using egg or sperm of one of them. Comparing it with adoption, this kind of physical connection with the child cannot be achieved by any means. Surrogacy also allows the persons involved to have a great amount of control over the whole process. They can choose the women who they want to be the surrogate mother to their child, the time of conception of the child and most of the things till birth can be as per their wishes. Intended parents of the surrogate child are familiar with not only the surrogate mother but also know about both the egg and sperm donor. One or both of the parents can be egg and sperm donor. The adverse factor about surrogacy is that it is very expensive if the method of commercial surrogacy is employed. Not to mention the possibility also that a surrogate mother may have a second thought and develops an emotional connect with the baby. This has been the cause of conflict between the intended parents and surrogate mother in Baby M<sup>1</sup> case of United states. However, in adoption, it is not the case as birth mother has already given up the baby. Adoption doesn't require the extraordinary expenses that commercial surrogacy has. Adoption also helps the poor children in terms of a family, proper food, shelter, education etc.

Where surrogacy laws close the doors for unmarried people to have a baby through surrogacy, adoption rules are more inclusive in comparison. Central government notified adoption regulations as framed by the Central Adoption Resource Authority under section 68(c) read with section 2(3) of the Juvenile Justice (Care and Protection of Children) Act, 2015. The regulations were later given statutory backing through the Juvenile Justice (Care and Protection of Children) Act, 2015. Under chapter VIII of the act rules relating to adoption are made. As per section 57 of the act the persons wanting to adopt should be fit not only physically but also mentally. Their financial status is also a ground which is considered. A single or divorced person is also allowed to adopt a child but a single man is not allowed to adopt a girl child. Thus, we see that unlike surrogacy marital status is not a bar. Even a single person who has never married is allowed to opt for adoption. But that is not the case with surrogacy. Also, if a couple already has a child of their own that does not make them ineligible from adoption.

Couples who already have a biological or adopted child who is not diseased cannot opt for surrogacy, the proposed law says. This condition is not there in adoption. If a couple wants to opt for surrogacy, they need to get a certificate issued by the appropriate authority mentioning that they are unable to bear a child through conventional way due to medical issues. However, in the case of adoption also, like surrogacy, a married couple needs to maintain a stable relationship. This time period to judge a stable relationship is different for both adoptive and surrogate parents. There are discrepancies between the adoption laws and surrogacy on the point that when a couple is "stable enough" to have a child<sup>[1]</sup>. While surrogacy laws allow a couple married for five years to opt for surrogacy, in case of adoption that minimum period is two years. In surrogacy the intended mother should be aged between 23 and 55 years. In the case of adoption, a couple who has a combined age of more than 110 years cannot adopt, nor can a single parent of age 55 years or more.

#### **Surrogacy and Transgender rights**

The bill on surrogacy which has already been passed by the parliament only allows a married couple to have a child through surrogacy. In these terms it does not seem like a very progressive law as it excludes other groups of people who want to have children but may not want to marry. Persons who have never been married or transgenders cannot have a child through surrogacy. This has in fact been the most criticized part of the bill. On one hand laws like section 377 of the Indian Penal Code has been struck down partially by our courts but on the other hand we are still not ready to give basic rights like that of having a child to members of LGBTIQ+ community. This seems to be a huge injustice with the members of this community. Marriage laws in India still allow two persons from opposite sexes only to get married. Very recently in the case of 'Abhijit Iyer Mitra vs. Union of India'<sup>2</sup> on the issue of recognition of same sex marriages government of India through solicitor general stated that marriage can be permitted only between a biological man and woman. Surrogacy bill allows only married persons or a widow or divorcee to have children. Thus, this community is dismissed and forced to completely vanish from the scenario and treated as non-existent. "This is the first time that the government's transparent homophobia has come out in the open"<sup>3</sup>. Nevertheless, the debate on surrogacy has at least forced us to think about the conflict between rights of various sections of the society and the societal morality. It has shaken our notions about who can become parents, and how. According to sociologist 'Ingvill Stuvøy', the debate on surrogacy has added new meanings to the concept of equality.<sup>4</sup> She points to the fact that those persons who are having a bright outlook towards surrogacy advocate for acceptance of new kind of families different from the traditional way in which we have understood families till now. They want equality in rights for all persons regardless of their marital status or their gender. Equality is then linked to diversity and anti-discrimination. Thus, there are concerns about the underlying orthodoxy of the surrogacy law, which excludes many groups or individuals like single parents, homosexual couples, live-in partners etc. from surrogacy. The exclusion of certain people shows that negative value judgments have been passed on them. This also promotes the thought that family can be only in one form, the form in which we have seen it till now and are comfortable with. But the modern realities of the society are different. Laws need to cope up with the changing form of families coming into existence with the breaking of traditional barriers of society. The same regressive thought is promoted by allowing only a relative to become a surrogate mother. In the Indian context this necessarily means allowing surrogacy only in same caste and community. It is also not clear why couples who already have a child have been excluded.

Even if transgender persons or couples are allowed to have children through surrogacy in the future the added eligibility conditions in the recent law will come in the way. A complete change in the act will be required to allow these couples or individuals to have children through surrogacy.

**Conclusion**

In arriving at a conclusion, it can be said that both adoption and surrogacy are beautiful ways to create or add families. Couples should be encouraged to explore all the options and choose the medium that will suit them the best. Also, the differences between the eligibility conditions for persons wanting to adopt and those wanting to choose the method of surrogacy really don't seem to be much meaningful. Certain restrictions which are there on couples wanting to go through the route of surrogacy are not there on the persons wanting to adopt and reasons for this discrimination are not clear. The lawmakers need to do a definite study making comparisons between the two and see that the meaningless differences between the two are done away with. As far as the rights of transgender persons are concerned excluding them completely from the purview of surrogacy closes all doors for them if they want to

have a biologically related child. This is against the progressive image of our country which we want to project before the world. Thus, it can be said that the law on surrogacy has come into force but it still leaves many questions unanswered.

**Footnotes**

1. *In re Baby M* - 109 N.J. 396, 537 A.2d 1227 (1988)
2. *One child, two yardsticks: Surrogacy vs adoption (indian express) Adoption law may also require changes, Health Minister Nadda hints* Written by Abantika Ghosh | New Delhi | Published: August 27, 2016
3. *W.P.(C) 6371/2020*
4. *Surrogacy for Gay Couples is Against Our Ethos: Sushma Swaraj* available at: <https://www.thequint.com/india/2016/08/24/union-cabinet-surrogacy-regulation-bill-2016-sushma-swaraj-against-our-ethos-commercial-surrogacy> (visited on January 1, 2022)
5. *Surrogacy challenges gender equality*, available at:
6. <http://kjonnsforskning.no/en/2016/10/surrogacy-challenges-gender-equality> (visited on January 1, 2022)