
THE UNDUE IMPORTANCE OF MARRIAGE IN INDIA'S CURRENT SURROGACY LEGISLATION: WHY SINGLE WOMEN CANNOT ASPIRE TO MOTHERHOOD

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Abstract

Focusing specifically on the marginalization of “single”, unmarried women in the Indian Surrogacy (Regulation) Act 2021, we highlight the socio-cultural biases that centre on the notion of marriage in the legislation. Drawing on insights from legislative mobilization (Kothari 2024) post 2021, we suggest that the current surrogacy legislation in India only selectively empowers certain women’s reproductive autonomy. This defies the constitutional “right to family” of especially single women and discriminates against their equality of citizenship. The barriers presented by patriarchal concepts which frame the contexts in which the law is enacted must be recognized to remove the intentional and unintentional gender biases through which the law is implemented and experienced.

Keywords: surrogacy; marriage; singlism; gender bias; discrimination.

[A] INTRODUCTION

Surrogacy legislation globally continues to play catch-up with the rapid advances in technologies of assisted reproduction and the social, economic and ethical dilemmas that emerge in their wake. While there are similar issues of reproductive inequity—access and vulnerability that arise across countries as infertile individuals and couples strive to create the families of their choosing, the cultural context (language, concepts) in which the laws are framed, experienced, practised and challenged differs.

This article reflects on the legal significance placed on “marriage” within Indian surrogacy legislation and follows on from previous work of Unnithan on the absence of legal recognition of the reproductive needs

(right to have a family) of poor, infertile Indian women in the assisted reproductive technology (ART) and surrogacy Bills up until 2016 (Unnithan 2013; Unnithan-Kumar 2019) and on the legal and advocacy expertise of Kothari. We draw on the writ petitions filed by single unmarried women and transgender persons in the Supreme Court of India, in 2023 and 2024, following the promulgation of the Surrogacy (Regulation) Act of 2021 and the amendment of the Surrogacy (Regulation) Rules in Form II (2022). The primary source of legal expertise that shapes the ideas in the article derives from the experiences of individual petitioners as intended parents seeking a child through surrogacy and of an established legal aid and advocacy organization seeking to redress the cause of single women as a ground for discrimination (Kothari 2024).

The Surrogacy (Regulation) Act was introduced in 2021 in India following over seven years of deliberation through different Bills since 2014. The Government of India further issued the Surrogacy (Regulation) Rules 2022, as an amendment to the Act in 2023. One of the main features of the Act is that it permits only married couples or only a woman who is a widow or divorcee between the age of 35 to 45 years to have children through surrogacy, thus excluding single unmarried women from availing of surrogacy. The exclusion of single unmarried women from accessing surrogacy would mean that all women who are single, and never married, or women in live-in relationships, women in same-sex relationships and queer women would be completely excluded from availing of surrogacy procedures. By contrast, in other jurisdictions where surrogacy is legally permitted, there is no restriction on the marital status of the person intending to have the child through surrogacy (see, for example, the United Kingdom (UK) Surrogacy Arrangements Act 1985).¹

What do the restrictions and exclusions for unmarried single women under the law mean and how should one respond to such a law? It is with this question in mind that several interventions and legal petitions were filed in the Indian Supreme Court by single unmarried women and by transgender persons in *Aqsa Shaikh v Union of India* (2024). The broader reproductive rights question underlying these legal challenges is: are single women in India discriminated against in their right to have a family, and in their aspiration to motherhood? In the discussion below, we suggest that the presence of such discrimination is evident.

¹ Under the Surrogacy Arrangements Act 1985 of the UK, for example, all persons can avail of surrogacy arrangements, and there are no distinctions based on the marital or single status of a person.

By way of background, it is useful to first chart the landscape of surrogacy petitions more generally since the promulgation of the Act in 2021. We then examine the meaning of the term “single” in this context and the underlying connection with perceived stigma (Goffman 1963). In conclusion we argue that this stigma is perpetuated through an inherent discrimination against single women in the current surrogacy legislation.

[B] THE BROADER LEGAL CONTEXT: SURROGACY WRIT PETITIONS AND PUBLIC INTEREST LITIGATIONS POST 2021

Since the passing of the Surrogacy (Regulation) Act of 2021 in India and the closely related Assisted Reproductive Technology (Regulation) Act 2021 (ART Act), there have been a slew of writ petitions and interventions challenging the constitutionality of the Acts on a range of diverse aspects to do with marital status, age limits and gender orientation, for example. Most of the individual petitions challenging the Surrogacy Act between 2022 and 2024 have come from intended parents (approximately eight), who seek to have a child through surrogacy arrangements. It is interesting to note that no petitions have been filed by the surrogates themselves (showing how far removed they are in social, cultural and economic terms from an engagement with the law in India; see for example, Unnithan-Kumar 2019). A further three important petitions have been filed in the form of public interest litigations (PILs).

PILs are petitions where a challenge is made or a claim is sought in the common public interest (hence the term public interest litigation). In the context of the Surrogacy Act and the ART Act, the most overarching PIL has been brought by Chennai-based infertility specialist Dr Muthuvel in the *Arun Muthuvel v Union of India & Ors* (2022) case. The PIL (decision pending) challenges the definition of surrogacy, its impact on medical practitioners and its support for commercial surrogacy, as well questioning the exclusion of single and unmarried women. The two other PILs to date (decisions pending) are also led by medical associations and practitioners who seek to overturn the restrictions on sperm and oocyte donation and the costs of treatment (*Aniruddha Narayan Malpani v Union of India & Ors* 2022; and *The Indian Sperm Bank Association v Union of India* 2023).

Among the individual petitions by intending parents, there are an equal number of petitions submitted by petitioners who are single (four of the eight mentioned above), as compared to those who are married and physiologically unable to bear children. In the latter category, the key

issues faced by intending parents have to do with: a) medical complaints (relating to kidney deterioration, locomotor disability, hysterectomy due to myopathy); b) being past the age limit (including a case where the embryos of the intended mother were frozen prior to the Surrogacy Act) as well as where the intention is to have a second child through surrogacy; and c) petitions and interventions relating to an adequate compensation for the reproductive labour of surrogates, and the ban on commercial surrogacy.

We now turn to those petitions filed in the Supreme Court of India challenging the provision of the law as being discriminatory on the ground of women's single status. Under the Surrogacy (Regulation) Act 2021, section 2(s) defines the "intending woman" who is eligible to avail of surrogacy, and she is defined as "an Indian woman who is a widow or divorcee between the age of 35 to 45 years and who intends to avail the surrogacy". Thus, this section precludes a single unmarried woman from access to surrogacy. Of the four petitions filed which challenge the clause of singlehood in the Surrogacy (Regulation) Act 2021, and which concern us in this article, two are about medical and conception issues of single women and two are centrally concerned with prohibitions based on women's single status. We especially focus on the latter two cases.

In *Neha Nagpal v Union of India* (2023), the petitioner, a single unmarried woman, a lawyer of 40 years, challenged the exclusion of single unmarried women from being able to avail of surrogacy under the Surrogacy (Regulation) Act 2021 as being arbitrary and violative of the right to family, privacy and reproductive choice and autonomy under Article 21 of the Constitution of India 1949. In this petition, a women's rights organization, Aweksha, also filed an intervention to support the challenge to exclusion of single women.

The other petition filed in this context is that by *Dr Aqsa Shaikh v Union of India* (2024): a medical doctor, trans person and activist. In this petition, the petitioner challenged the exclusion of single women and trans persons from the definition of "intending woman" under the Act on the ground that such exclusion is without any justifiable reasons either by way of any medical reason or for parental suitability. It argued that by excluding single unmarried women and trans persons from availing of surrogacy, the law discriminates against them based on their sex and gender identity. It thereby perpetuates harmful stereotypes by implying that they are incapable of becoming parents or are undeserving of parenthood and, unfairly, permanently forecloses a perfectly viable route to parenthood. Such an exclusion under the Surrogacy Act would

exclude women in live-in relationships, where they have partners but are unmarried and hence unable to avail of surrogacy, or queer women or women in same-sex relationships where they are unable to get married as the law does not permit same-sex marriages. In such situations, single unmarried women would be deprived of the right to a family life. This petition, as with the others mentioned above, is still pending in the Supreme Court and awaiting a final decision.

[C] SOCIAL REPRODUCTION AND THE STIGMA OF THE UNMARRIED/SINGLE PERSON

Bias against single women

In addressing the two petitions, the Supreme Court made several remarks that show bias against single women. The sitting judge in one of the hearings remarked that there were other ways in which the woman petitioner could have a child: she could get married or adopt. Further it was suggested that “she cannot have everything in life as she had chosen to remain single, and ... that the institution of marriage was important in society as children need to know their fathers” (Wire 2024). In addition, one of the arguments to explain the exclusion of single women in availing of surrogacy draws upon the *best interests of the child*, which would include the need for the child to know the father.

Thus, it appears that the discrimination against single women as we see here stems from patri-focused notions of the family as comprising a heterosexual couple as parents. The requirement of a male figure similarly reflects customary notions that the presence of a father will ensure the best welfare of the child, thereby discriminating against single women who may have the financial and emotional facilities to cope with a child on their own or with other support systems that are not necessarily part of the notion of the “traditional” family.

The Surrogacy Act and Surrogacy Rules, in prohibiting single unmarried women from availing of surrogacy facilities, take away the reproductive rights of single unmarried women to be able to decide on the social arrangements through which they wish to have children. In the present law, as single women are excluded from the Act, the only option available to them to have children would be through adoption or through ART, which may not always be available, affordable or possible for them to access. *In vitro* fertilization (or IVF) treatments are often traumatic, expensive and extremely difficult as the experiences of women globally have shown (in the UK, for example, see Franklin 2022). Similarly, adoption may also not

always be an option of choice for women who would wish to have a child of their own, only possible through surrogacy, and hence the exclusion restricts their rights to reproductive autonomy.

More generally, the provisions of the Act and related comments in excluding single women from availing of surrogacy bring to the fore a whole range of important issues and the inherent biases that are embedded within wider Indian patriarchal ideology against women's reproductive rights and freedom, especially that of the single woman.

Sex-based legal inequality is still very much present when it comes to single women in India. Even women who are divorced or widowed, who hold less social status than married women, are seen in a more positive light than single unmarried women. It is marriage, closely followed by childbirth, that confers women full adult personhood in most Indian communities even today. This is despite the economic independence that working, middle-class women might be able to achieve through their employment.

In many caste-based communities, middle-class women who choose to be single or are never married are popularly regarded as deviating from social norms stipulated through patriarchy (resulting in their stigmatization), with negative stereotypes of wanting to "have it all" (social status outside the norm/control of men). Hence the remark of the judge which suggested that single women should not be permitted in the law to have biological children. The observation of the judge stems from popular discourse where single, never married women are assumed to be immature, maladjusted and self-centred (DePaulo & Morris 2005). Thus, compared to married women, single women are subject to an unfair disadvantage socially and in the law.

Legislation on reproductive rights and choices is especially discriminatory towards single women. This discrimination permeates institutions and is systemic, inbuilt within laws, regulations and policies. The Surrogacy Act, as we have seen, for example, benefits people who are, or were, legally married by permitting them to use surrogacy, and hence turns single persons, more notably single women, into second-class citizens, a disadvantaged class, by not allowing them to have children through surrogacy.

The discrimination on the ground of single/marital status against single women is often referred to as "singlism". Singlism has been defined as stereotyping and discrimination toward single adults, most often single women (De Paulo & Morris 2005). Single women are stereotyped as having

characteristics and behaviours that are predominantly negative and represent a deficit identity, in addition to being denied advantages and benefits that are available only to individuals based solely on their non-single (relationship) status. It is important to note that such stereotypes are not necessarily regarded within the formal context of law and policy as being discriminatory and wrong.

Other related exclusions of concern

An additional area of concern is that the exclusion of single unmarried women from the law also excludes lesbian and queer women from availing of surrogacy procedures, and hence their right to have a child through surrogacy. This ground of discrimination of singlism against lesbian and queer women needs to be recognized as a ground of discrimination and prohibited. This has not been recognized in India to date. Under Article 14 of the European Convention on Human Rights 1950, courts have now interpreted marital status to be one of the characteristics included in “other status” and thus a ground on which discrimination is prohibited. The European Court of Human Rights considers the absence of a marriage tie as one of the aspects of personal “status” which may be a source of discrimination prohibited by Article 14. Similarly, this ground needs to be seen as a ground of discrimination in the Indian context.

The notion of the central figure of the father as necessary in the best interests of the child (as discussed above) also discriminates against queer couples. Instead, we suggest that the “need for a father” be replaced with the “need for supported parenting” that can ensure a commitment to the health, well-being and development of the child. A change in assessment of the welfare of the child would also be in keeping with the Indian Supreme Court’s recognition of legal rights for non-traditional or atypical families in *Deepika Singh v Central Administrative Tribunal* (2022), where the court held that:

Familial relationships may take the form of domestic, unmarried partnerships or queer relationships. Household may be a single parent household for any number of reasons, including the death of a spouse, separation, or divorce. Similarly, the guardians and caretakers (who traditionally occupy the roles of the “mother” and the “father”) of children may change with the remarriage, adoption, or fostering. These manifestations of love and of families may not be typical but they are as real as their traditional counterparts. Such atypical manifestations of the family unit are equally deserving not only of protection under law but also of the benefits available under social welfare legislation. The black letter of the law must not be relied upon to disadvantage families which are different from traditional ones. ... (2022: paragraph 26).

Discrimination based on women's single status is not only present in the surrogacy law, but also prevalent in other reproductive rights legislation in India. The Medical Termination of Pregnancy Act 1971, for example, even after it was amended in 2021, did not contain any reference to single women, and only states in rule 3(B)(c) that abortions would be permitted within 24 weeks on the ground of change in marital status of the women to divorce or widowhood. It is completely silent on the single status of a woman, and, due to this, single women have been facing insurmountable barriers in getting access to safe abortions. The Supreme Court had to interpret this to include the right of single women to terminate their pregnancies as doctors were refusing to do so, unless they obtained consent from husbands or family members (*X v Principal Secretary, Health* 2022). Despite the positive interpretation from the Supreme Court, single women seeking termination of pregnancies are still facing hurdles.

[D] CONCLUSION

While there is an increasing concern for the recognition of non-traditional families, which include different family structures and live-in relationships which are recognized under the law for certain remedies, the exclusion of single unmarried women from the Surrogacy (Regulation) Act 2021 is contradictory to these rights. It stereotypes single women as not being capable of being parents and having the right to choose to have a child through surrogacy only based on their single status. Inequalities in reproductive rights including the right to access surrogacy, fertility treatment and other reproductive choices reveal the social and institutional stigma that single women face. It is time that the ground of singlism is seen as a form of discrimination. The current constitutional challenges to the Surrogacy Act hopefully will pave the way for such recognition of structural discrimination against single women in the law.

Popular community concepts of marriage and personhood arising from patriarchal contexts, although not given recognition in developing legislative frameworks, are critical to understand the case of current Indian surrogacy legislation, to ensure the dispensation of the law is free from discrimination. Similarly, surrogacy legislation which focuses on surrogates rather than intending parents, where there has been contention regarding remuneration for their reproductive labour (see Ragoné 1999; Rao 2012; Rudrappa 2012; Pande 2014; Unnithan-Kumar 2019; and Jana & Kotiswaran in this special section, for example, on the feminist debates regarding commercial versus altruistic surrogacy) needs to acknowledge the significant barriers placed by patriarchal ideas of reproductive labour (eg as taken for granted or "natural") to an

effective and just implementation of the law. When it comes to bodily based reproductive rights the law must enable the voices of women and single persons to be heard beyond the patriarchal structures that erase and simplify their individual, contextual circumstances. This should go some way towards moving the law beyond carceral solutions to what are fundamentally issues of gender equity amongst women irrespective of their social status, including as determined by conventional, patriarchal notions of marriage.

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