

Before the Supreme Court, questions over the age cap in surrogacy law

The Assisted Reproductive Technology (Regulation) Act, 2021 and the Surrogacy (Regulation) Act, 2021, prescribe the legal framework for surrogacy.

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Several writ petitions have been filed before the Supreme Court by couples who find themselves stuck in the process due to a change in the law on surrogacy.

The Supreme Court this week reserved its verdict in a clutch of petitions challenging the age cap for couples seeking to have a child through surrogacy, especially those couples who had started the process before the current law on this matter was enacted by Parliament.

The Assisted Reproductive Technology (Regulation) Act, 2021 and the Surrogacy (Regulation) Act, 2021, prescribe the legal framework for surrogacy.

Together, these laws lay down age limits on those intending to have a child through surrogacy. The intending woman, if married, must be between 23 and 50 years of age; fathers must be between 26 and 55, and single women must be between the ages of 35 and 45 years.

The case before SC

Several writ petitions have been filed before the Supreme Court by couples who find themselves stuck in the process due to a change in the law on surrogacy. Essentially, they had begun their treatment before the enactment of the law, but the new law's age limits make them ineligible for surrogacy.

A Supreme Court Bench comprising Justices B V Nagarathna and K V Viswanathan heard three petitions filed by couples requesting eligibility certificates under the Surrogacy Act, arguing that they had initiated the process before the Act was brought in.



In one of the petitions, the husband is 62 years old, while the wife is about 56 years old. The couple lost their only child in 2018 and, desirous of having another child, began fertility procedures in 2019.

After facing delays due to the disruptions induced by the [COVID-19](#) pandemic, they were able to eventually arrange for an embryo transfer in early 2022.

The petition states that their pregnancy was unsuccessful — and by the time they sought to proceed with another transfer, they had crossed the age limit laid down by the surrogacy law.

The petitioners argued that the retrospective application of these conditions was unreasonable, especially when medical procedures were already underway at the time the Act came into force.

They also submitted that the age limit created an unreasonable classification, violating Article 14 of the Constitution, and also interfered with reproductive autonomy, which is a facet of Article 21, which protects personal liberty.

Regulatory laws usually offer transitional safeguards for those navigating compliance during a legislative shift. These provisions are called “grandfather clauses”, which “grandfather in” certain existing situations. The Surrogacy Act has no such transitional clauses.

The petitioner’s challenge also raised broader concerns, including the right of single, unmarried women to pursue parenthood through surrogacy, a choice that the current law does not accommodate.

Provisions of the law

The Surrogacy (Regulation) Act, 2021, and the Assisted Reproductive Technology (Regulation) Act, 2021, enacted in January 2022, together ban commercial surrogacy and allow only altruistic surrogacy.

According to the government, this change in law was intended to prevent the commodification of reproductive labour and to impose procedural safeguards to ensure that surrogacy is used only in cases of medical necessity.

The Surrogacy (Regulation) Act lays down eligibility conditions for couples intending to seek surrogacy. The law states that for intending couples, the woman must be between 23 and 50 years of age, and the man between 26 and 55 years.

The process requires the couple to obtain a certificate of essentiality, which includes proof of infertility, a court order establishing parentage and custody, and insurance for the surrogate.

Single women are eligible only if they are widows or divorcees between the ages of 35 to 45. This is under challenge before the SC on the grounds that the definition of single women excluding unmarried women is arbitrary and violative of Articles 14 and 21 of the Constitution.

The SC has not taken up this issue in the current batch of petitions for adjudication.

Court's questions

The government has defended the age restrictions on grounds of medical safety. It has said that the statutory age caps are based on recommendations from medical experts, and align with practices in reproductive health.

Additional Solicitor General (ASG) Aishwarya Bhati argued that the age limits align with natural reproductive timelines, which she said is necessary for protecting the welfare of the child.

When the ASG mentioned the risks associated with geriatric pregnancies, Justice Nagarathna pointed out that some couples “will take the risk” anyway. Essentially, the Bench asked why surrogacy as an option must be outlawed for an older couple when natural geriatric pregnancies are not outlawed.

The ASG responded that advanced parental age influences both an unborn child's health through genetic and epigenetic changes, and also the filial love that a child requires for 20 years of their life.

“Rational nexus to the object of the Act is absent by having this age bar, especially as there is a void regarding not taking care of the couples who have already commenced. Genuine intending couples who had commenced surrogacy, the Act doesn't care for them and puts an embargo. Stop, no children! Look how harsh it is,” Justice Nagarathna said, emphasising that the Surrogacy Act's intent is to prevent commercial surrogacy, not genuine parenthood.

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