



# **SURROGACY: IMPACT OF THE NEW LAWS IN INDIA**

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## **Abstract:**

The recently proposed law has made surrogacy a pressing topic in India. A surrogate mother gives birth to a newborn for a woman who is infertile. She is referred to as the birth provider if she conceives, gestates, and gives birth to the infant on behalf of another woman. Before 2015, India was a major centre for surrogacy, but there were no rules governing the practice.

**Keywords:** Surrogacy, Commercial Surrogacy, Cross Border Surrogacy, Surrogacy Regulation Bill.

## **Introduction**

Examining thousands of years ancient records of Indian Vedic literature and current scientific findings dealing with molecules, genes, and DNA, it suggests that motherhood is a physiological phenomenon driven by instinct.<sup>1</sup> The motherhood instinct is the most powerful urge that occurs in all living species, including humans and all animals. According to ancient Indian philosophy, the biological objective of existence is to pass on one's own characteristics (genes) to future generations, and all living creatures are in the process of doing so. Because reproduction is every species' ultimate objective, the birth of a child is always dependent on conditions that boost the offspring's chances of survival. Birds, for example, will travel hundreds of kilometers to find a favorable spot where their young will have a good chance of survival.

In India, infertility is frequently regarded as a social disgrace. Infertile couples, it is said, feel and portray the anguish and sorrow of infertility the best. Though infertility does not end a person's life, it has a devastating impact because he or she is unable to fulfil the biological duty of parenting due to no fault of his or her own. Indian society in general has a pretty solid family structure, with a strong desire for offspring, particularly sons, to carry on the Vansh bloodline. Infertility can now be addressed with medical techniques known as Assisted Reproductive Technology (ART), such as in vitro fertilisation (IVF) or intracytoplasmic sperm injection, thanks to substantial breakthroughs in medicine (ICSI).

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<sup>1</sup> "Hrdy SB. Texas, USA: Ballantine Books; 2000. Mother Nature: maternal instincts and how they shape the human species".

The birth of the world's first child, Louise Brown, by in vitro fertilisation on July 25, 1978, was a watershed moment in the treatment of infertility and is regarded as one of the twentieth century's most significant medical achievements.<sup>2</sup> "Dr. Subhash Mukherjee of Kolkata" announced the birth of India's first test tube baby, Kanupriya, aka Durga, in October 1978.<sup>3</sup> The cryopreserved embryo was used by Dr. Mukherjee and his colleagues. There are several forms of infertility,<sup>4</sup> and in certain circumstances, it would be physically or medically impossible/desirable to carry a kid to term; hence, surrogacy becomes a vital alternative to satisfy the goal of such infertile couple to have a child.

### CONCEPT OF SURROGACY

In Latin, "surrogatus" refers to a substitute, or someone assigned to act in the place of another.<sup>5</sup> According to "Black's Law Dictionary," surrogacy is the procedure of bearing and delivering a child for another person.<sup>6</sup> Surrogacy is defined in the "New Encyclopedia Britannica" as a process in which a woman has a child for a couple who are unable to have children naturally.<sup>7</sup> Surrogacy, according to the Warnock Report (1984) HF&E, is the practise where one woman carries a child in her womb for another woman with the purpose of handing the child over after birth.<sup>8</sup>

### INDIAN HISTORY OF SURROGACY

Surrogacy is often featured in Hindu mythology, reflecting the enigmatic nature of the practise. Vasudev urged Kansa not to kill every son born in the Bhagavata Purana, and Vishnu listened. Vishnu had Rohini, Vasudev's second wife, accept an embryo from Devaki's womb after hearing their screams. Balaram, Krishna's younger brother, was born to Rohini, who reared the child discreetly while Vasudev and Devki informed Kansa that the baby had died.<sup>9</sup>

In the Mahabharata, Queen Gandhari gave birth to a semisolid substance, which Maharishi Vyas split into 100 pieces and sowed in various pans. As a result, the 100 Kauravas emerged from the pans. Similarly, Maharishi Bhardwaj watched a damsel emerge from the water after taking a bath, and seeing such a lovely beauty, he felt discern and deposited his sperm in "Darona," a yagna pot. Dronacharya was born in this manner, and he was named after the pot. Thousands of years later, in 599 A.D., the 24th Trithankar, Mahavira, was born

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<sup>2</sup> "Steptoe PC, Edwards RG. Birth after the re-implantation of a human embryo. *Lancet*. 1978";

<sup>3</sup> "Mukherjee S, Bhattacharya SK. The feasibility of long-term cryogenic freezing of viable human embryos - a brief pilot study report. *Indian J Cryog*. 1978".

<sup>4</sup> Singh BK, Sharma RS, Mathur A. Infertility - causes, prevalence and current scenario. *Embryo Talk*.

<sup>5</sup> "Surrogacy in Latin. accessed on October 10, 2014 from: <http://www.latindictionary.org/surrogatus>, <http://en.wiktionary.org/wiki/surrogatus>".

<sup>6</sup> "Surrogacy in Black law dictionary, family law; p. 349 Oliphant RE. New York: Aspen Publishers"; 2007

<sup>7</sup> "Surrogacy in New Encyclopedia, Britannica.accessed on October 10, 2014 from: <http://www.britannica.com/EBchecked/topic/575390/surrogate-motherhood>".

<sup>8</sup> "Warnock DM. London: Command of Her Majesty; 1984. Report of the committee of inquiry into human fertilisation and embryology; p. 42".

<sup>9</sup> Jasdeep Kaur, "Surrogacy: A paradox regarding Motherhood rights with Special Reference to India", Vol. II No. 1, 2012 The Legal Analyst (113 to 121) at 114

when an embryo was transferred from one woman's womb to another. He is a pivotal person in Jain mythology. He was conceived by Rishabdeva, a Brahmin, and his wife Devananda. The embryo was skillfully delivered to Trishala's womb by the Gods.<sup>10</sup>

## **SURROGACY IN MODERN INDIA**

Basically two types of surrogacy practices<sup>11</sup> are prevalent in India:

- (i) Traditional/Natural/Partial surrogacy
- (ii) Gestational surrogacy

and like in other countries, these two forms of surrogacy agreements are used.<sup>12</sup>

**Atruistic Surrogacy:** Except for essential medical expenditures, the surrogate mother gets no financial compensation for her pregnancy or the return of the child to the original parents.

**Commercial Surrogacy:** When the surrogate mother is paid more than the requisite medical expenses. Surrogacy is the product of a partnership between science, society, services, and individuals. Surrogacy benefits both the infertile couple and the surrogate mother. The infertile couple fulfils their primary goal, and the surrogate mother is generously compensated.

Renting your womb is nurturing another spouse's fertilised egg in your womb and giving birth to the child for a specific reason, which could be money, service, or altruism. Surrogacy is a high-level social act that is both scientific and compassionate.<sup>13</sup> A person's perspective should not be harmful to others because of a lack of facts. Surrogacy is a therapy strategy similar to how medication is provided for the treatment of an illness.

## **COMMERCIAL SURROGACY**

Commercial surrogacy is defined in Section 2(f) of the Surrogacy (Regulation) Bill, 2019 as "commercialization of surrogacy services or procedures or its component services or component procedures, including selling or buying human embryo or trading in the sale or purchase of human embryo or trading the services of surrogate motherhood by way of giving payment, reward, benefit, fees, remuneration, or monetary incentive, except medical expenses incurred on the surrogate motherhood."<sup>14</sup>

Due to the high cost and difficulty of surrogacy in the West, a large number of foreign couples have been drawn to India. However, due to the lack of legal regulations and adequate medical care in India, the practise is both economical and painless. Surrogacy generates 2.2 billion dollars every year, with some of the most well-known surrogacy institutions in Bhopal, Surat, and other locations.

Commercial surrogacy was legalised in India in 2002 in order to capitalise on the booming surrogacy industry. The Central Ethics Committee on Human Research of the Indian Council of Medical Research set recommendations for assisted reproductive technologies. A 15-member committee led by Baidya Nath Chakrabarty introduced the bill. The draughts

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<sup>10</sup> Available at: [http://www.indiaparenting.com/infertility-treatments-and-solutions/479\\_4466/surrogacy-the-history-and-today.html](http://www.indiaparenting.com/infertility-treatments-and-solutions/479_4466/surrogacy-the-history-and-today.html)

<sup>11</sup> "Saxena P, Mishra A, Malik S. Surrogacy: ethical and legal issues. *Indian J Community Med.* 2012"

<sup>12</sup> Steven J. Mt. Royal, New Jersey: International Federation of Fertility Societies; 2013. Ory: IFFS surveillance report.

<sup>13</sup> Bhadaraka K. India: Anand Surrogate Trust; 2009. The last ray of hope: surrogate mother - The reality.

<sup>14</sup> SURROGACY (REGULATION) BILL, 2019

cover the guidelines for accreditation, monitoring, and control of Assisted Reproductive Technologies Clinics in India. It also suggests the creation of a legal entity to oversee the accreditation, regulation, and oversight of ART clinics in India. However, because these rules were not legally binding, they were rendered ineffective.

Looking at the math behind the surrogacy operation in India, an Indian surrogate mother gets paid in nine-month increments, and if the pregnancy does not succeed, she is sometimes not compensated at all. For the entire package, which includes everything from fertilisation to hospital birth, Indian fertility clinics charge between \$10,000 and \$28,000 USD. At the same time, Indian fertility clinics are becoming more competitive in terms of surrogate retention as well as pricing. Surrogate mothers come from places like Anand in Gujarat, Indore in Madhya Pradesh, Pune, Mumbai, Delhi, Kolkata, and Thiruvananthapuram, to name a few. Some of India's most reputable clinics also have a substantial number of international surrogate mothers on their books. Surrogacy contracts are drafted without regard for the rights of surrogate mothers, who are not legally represented since they come from the poorer parts of society. These contracts are exploitative in nature since they do not provide surrogate women with a grace time to alter their minds and have no compensation clauses if the surrogate mother fails to conceive a child. Surrogacy procedures are governed differently in each nation. With the legalisation of commercial surrogacy in 2002, India joined nations such as Ukraine, Georgia, Russia, and a few states in the USA in allowing surrogacy. Countries like France and the UK have outright prohibited surrogacy. Similarly, nations such as Belgium and the Netherlands have solely permitted altruistic surrogacy.<sup>15</sup>

Article 17/6 of the French Civil Code declares any arrangement on gestation with a third party null and void. In a landmark ruling, France's highest court, the Cour de Cassation, ruled that agreements linked to offshore surrogacy were illegal. Surrogacy contracts are unenforceable under German civil law, and they also contravene the Article 1 of the constitution of Germany.<sup>16</sup>

Both Belgium and the Netherlands have comparable commercial surrogacy laws that allow only altruistic surrogacy, which is limited to a few institutions in each nation. Because there are fewer hospitals available, most intended parents seek surrogacy from abroad.<sup>17</sup>

Surrogacy is prohibited in the United Kingdom, according to the Surrogacy Arrangements Act of 1985. Surrogacy agreements are not binding, and the surrogate mother retains the legal guardian of the child until the intended parents adopt the kid or a parental order is issued.<sup>18</sup>

California, for example, allows commercial surrogacy and has one of the most comprehensive surrogacy laws in the country. Some states permit only altruistic surrogacy, while others outright forbid it.

### **CROSS BORDER SURROGACY**

Surrogacy is not legal in Austria, Bulgaria, Denmark, Finland, France, Germany, Italy, Spain, or Sweden. Belgium, Greece, the Netherlands, Australia, Canada, New Zealand, and the United Kingdom all permit altruistic surrogacy.<sup>19</sup> Commercial surrogacy is permitted in

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<sup>15</sup> "Shabeer Allh & Dr Asha Sundaram, Commercialization of surrogacy in India & its legal context: A critical study with regard to baby Manji Yamada's case"

<sup>16</sup> Ibid

<sup>17</sup> Ibid

<sup>18</sup> Ibid

<sup>19</sup> "Brunet L, Carruthers J, Davaki K, King D, Marzo C, Mccandless JA, A Comparative Study on Regime of Surrogacy in EU Member States, 2013". "from:

Georgia, Israel, Ukraine, Russia, India, and California, USA, however in many other jurisdictions, only altruistic surrogacy is permitted.

When foreign nationals use surrogacy services, questions about parent-child connections, immigration, and citizenship emerge. By legalising surrogacy, legal and immigration concerns in cross-border surrogacy agreements can be avoided.<sup>20</sup> There has been doubt and expectation of legal issues since India has become a popular site for surrogacy. Surrogacy clinics, government officials, potential overseas couples, and surrogate children encountered a number of citizenship and immigration complications.<sup>21</sup>

## **CASE STUDY**

### **1. BABY MANJI YAMADA CASE<sup>22</sup>**

A Japanese couple, Dr. Yuki Yamada and Dr. Ikufumi Yamada, travelled to India in 2007 to seek surrogacy services. The biological parents/intending couples and the surrogate mother signed a surrogacy agreement after visiting a surrogacy facility and selecting a surrogate mother in "Anand Gujarat." The couple divorced, and the biological father, Dr. Ikufumi Yamada, returned to Japan once his visa expired. On July 25, 2008, the infant was born and was nursed and cared for at the clinic. The "Anand Municipality" produced a birth certificate that listed the genetic father's name. The infant's grandmother, Ms. Emiko Yamada, obtained a "Certificate of Identification" from the Regional Passport Authority in order to send the baby to Japan. Her request was denied, however, because in India, children must be formally adopted before leaving the country, and single males are not permitted to adopt. Manji's father was denied travel permits for the newborn, causing him to petition the Supreme Court. Following Supreme Court rulings, the regional Passport Authority, Rajasthan, issued a Certificate of Identification instead of a passport to allow passage out of Indian territory.

### **2. JAN BALAZ CASE<sup>23</sup>**

Twins were born to Mr. Jan Balaz and his wife, Mrs. Susanne Anna Lohle, both German nationals. 'Balaz Nikolas' and 'Balaz Leonard' were born when a donated egg was fertilised with Jan Balaz's sperm via a surrogate mother, M/s. Marthaben Immanuel Khristi, an Indian citizen. The twins' birth certificates, however, listed Jan Balaz as the father and Marthaben, the surrogate mother's name, rather than Susanne Anna Lohle, Jan Balaz's wife. The spouses requested a passport in order to return the twin children, and the passport was issued in their names. Mr Jan Balaz, on the other hand, was served with a notice asking him to surrender his passports. Following that, a petition regarding the nationality of twins born to an Indian surrogate mother was filed at Gujarat's High Court. The court ordered passport officials to issue a Certificate of Identification after a

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<http://www.europarl.europa.eu/studies>"

<sup>20</sup> "Ekberg ME. Ethical, legal and social issues to consider when designing a surrogacy laws. J Law Med 2014";

<sup>21</sup> "Jaiswal S. 2012 Commercial surrogacy in India: An ethical assessment of existing legal scenario from the perspective of women's autonomy and reproductive rights. Gender, Technology and Development",

<sup>22</sup> " Surrogacy in India: Wikipedia, the free encyclopedia". from: [https://en.wikipedia.org/wiki/Surrogacy\\_in\\_India](https://en.wikipedia.org/wiki/Surrogacy_in_India)

<sup>23</sup> Ibid

comprehensive inquiry and precedent with the infant Manji case.

These two instances emphasised the necessity for surrogacy regulation and supervision, which was extensively reported in Indian and international media regarding legal and diplomatic crises, paving the path for numerous legislations that went into action.

## **SURROGACY LAWS IN INDIA**

Following are some of the legal regulations that exist in India at the current time:

### **THE INDIAN COUNCIL OF MEDICAL RESEARCH GUIDELINES, 2005**

These standards <sup>24</sup> were created to govern the operations of Assisted Reproductive Technology facilities in India that offer surrogacy services. This policy detailed how fertility clinics should use Assisted Reproductive Technology (ART) procedures or treatments. Although these Guidelines were issued prior to the ART Bill, they are just advisory and are not legally obligatory.

### **THE SURROGACY REGULATION BILL, 2019**

The Bill forbids commercial surrogacy while allowing altruistic surrogacy.<sup>25</sup> In altruistic surrogacy, the surrogate mother receives no monetary compensation other than medical expenses and insurance coverage during the pregnancy. Commercial surrogacy is defined as surrogacy undertaken for a monetary benefit or reward (in cash or kind) in addition to necessary medical expenses and insurance coverage.

The competent authorities should issue the prospective couple a "certificate of essentiality" and a "certificate of eligibility."

There are a few conditions that need to be fulfilled to get a certificate of essentiality, which are as follows:

1. A certificate of infertility is needed to prove that one or both members of the couple wanting to have the baby are infertile or unable to conceive a baby from a District Medical Board.
2. The Magistrate Court needs to pass an order regarding the custody of the surrogate child.
3. Insurance for 16 months in the name of the surrogate mother is needed after delivery of the baby covering the postpartum complications.

The offenses included under the Bill are

1. Advertising surrogacy or commercialization of surrogacy.
2. The exploitation of the surrogate mother by the intending parents.
3. A surrogate kid is abandoned, exploited, or disowned.
4. Selling or importing human embryos or gametes.

The punishment for such a crime is up to ten years in jail and a fine of ten lakh rupees.

### **THE ASSISTED REPRODUCTIVE TECHNOLOGY ACT, 2021**

Surrogacy is legal in India for married couples with Indian citizenship. In the case of the Assisted Reproductive Technology Act (ART)<sup>26</sup> however, it is open to all married couples, live-in partners, single women, and foreigners. This bill establishes a National Board with

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<sup>24</sup> Available from: <https://main.icmr.nic.in/sites/default/files/guidelines/b.pdf>

<sup>25</sup> Available from: <https://prsindia.org/billtrack/the-surrogacy-regulation-bill-2019>

<sup>26</sup> Available from: <https://egazette.nic.in/WriteReadData/2021/232025.pdf>

the jurisdiction accorded to a civil court under the Code of Civil Procedure.<sup>27</sup> According to our country's health ministry, there are fewer than 1000 clinics<sup>28</sup> for surrogacy and more than 40,000 for ART.<sup>29</sup>

ART has become a source of medical tourism in India, with the number of clinics offering this treatment growing by the day. There are options for gamete donation, intrauterine insemination, in-vitro fertilisation,<sup>30</sup> intracytoplasmic sperm injection, and pre-implantation genetic testing.

In India, there are currently no established ART clinics. Despite worries about its ethical, medical, and legal implications, the Lok Sabha approved a Bill to administer and monitor ART facilities and ART banks.

According to the Bill's provisions,<sup>31</sup> ART would include all of the treatments necessary for a woman to get pregnant. From implanting a gamete or embryo into a woman's reproductive system to working with sperm or oocytes outside of the human body.

The Act establishes ART banks to supply and supply critical commodities. These services would be available to women over the legal marriage age but under 50, as well as men over the legal marriage age but under 55.

The act not only allows for ART banks and other facilities, but it also creates bodies to supervise the Act's execution.

### **NATIONAL BOARD**

This Board was established to make policy recommendations and advise the government on a wide range of topics. This Board proposes the essential and minimal criteria for infrastructure laboratories and clinic and bank personnel, such as physicians and nurses. These would monitor how well the law was being implemented and propose changes as time passed.

### **NATIONAL REGISTRY**

It will include a single database including information on all clinics and banks around the nation, as well as the nature and sorts of services provided, as well as the consequences of those services. The information will be sent to the National Board, which will utilise it to set norms and standards.

### **REGISTRATION AUTHORITY**

These would include a chairman who would be a higher-ranking health department official than the joint secretary. A health department vice-chairman, a woman with a prominent position in a women's organisation, a law officer from the law department, and a trained medical practitioner with a notable position in the field.

The registration authority will be responsible for: granting, suspending, or cancelling ART centre registration; enforcing standards and overseeing the law's implementation;

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<sup>27</sup> Available from: <https://legislative.gov.in/sites/default/files/A1908-05.pdf>

<sup>28</sup> Available from: <https://indianexpress.com/article/explained/explained-whats-in-art-surrogacy-bills-7653374/>

<sup>29</sup> Available from: <https://indianexpress.com/article/explained/explained-whats-in-art-surrogacy-bills-7653374/>

<sup>30</sup> Available from: <https://www.reproductivefacts.org/news-and-publications/patient-fact-sheets-and-booklets/documents/fact-sheets-and-info-booklets/what-is-intracytoplasmic-sperm-injection-icsi/>

<sup>31</sup> Ibid 23

receiving complaints and feedback on any violations of provisions, pursuing legal action against misapplication of ART and initiating investigations; and advising the National and State Boards on how to change the rules in light of technological and social changes.

### **NEED FOR REGULATION RELATING TO SURROGACY**

- **Low Cost:** When compared to other affluent nations such as the United States, the cost of surrogacy is fairly low. Many foreigners find India to be a relatively affordable country for surrogacy, with few rules restricting the practise and an easier road to having children. Because of its superb facilities and inexpensive treatment costs, India has long been a favourite destination for medical tourists. However, the government outlawed the practise in 2015. The kid was considered as a commodity, and women were financially and sexually abused by such couples.<sup>32</sup>
- **Middlemen and Clinic:** There have been numerous incidents of middlemen and clinic physicians taking advantage of mothers by delivering babies at a low cost while paying little attention to their post-delivery health. In such cases, the agents urged the couples to consider surrogacy, and they had certain ladies on their panel who could supply the services. Mothers were generally the hardest hit. Surrogate moms were not given appropriate nourishment and high-quality food, which is essential throughout pregnancy and after childbirth.

### **THE SURROGACY (REGULATION) BILL, 2020**

The Surrogacy Act<sup>33</sup> has brought significant changes in the regulation of the surrogacy which are as follows:

- “The Bill has led in deletion of the predefined infertility which the inability to conceive even after five years of unprotected intercourse;
- It was observed by the drafting committee that stating a period of 5 years for waiting for the couple to deliver the baby is too long and unreasonable, and it is directly in contradiction with the stated objects of this particular Act;
- It has banned commercial surrogacy totally, and a woman who is a close relative of the couple is only allowed to be the surrogate mother of the child with her consent;
- The bill has allowed altruistic surrogacy and has placed a blanket ban on commercial surrogacy, including the sale and purchase of human embryos/gametes, to ensure that the women is not doing this for financial reasons or any kind of perks. However, the Act has ensured that proper medical facilities will be provided to her, and a full medical insurance for a period of 36 months will be provided to her.
- Registration of the clinics where surrogacy take place has been made mandatory under the Act, so that they can be regulated timely
- The Act allows couples between the ages of 23 and 55 to choose ethical surrogacy. However, in all situations, such a couple's nationality should be Indian. The Act is sufficiently progressive in that it allows single mothers aged 35-45 to choose surrogacy and have a baby.
- The Act has made it mandatory to obtain certificate of essentiality along with a certificate of eligibility for the couple before proceeding with the treatment of surrogacy:

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<sup>32</sup> Drishti IAS, Surrogacy (Regulation) Bill 2019, Available from: <https://www.drishtias.com/daily-updates/dailynews-editorials/surrogacy-regulation-bill-2019>

<sup>33</sup> Ayush Verma, Surrogacy (Regulation) Bill, 2020: The Way Forward, IP Leaders, <https://blog.ipleaders.in/surrogacy-regulation-bill-2020-way-forward/>



- The couples trying for surrogacy are not allowed to abandon the baby for any reason, and the baby will be entitled to all the privileges and the rights which are granted to a natural born child, plus sex selection has been completely banned under the Act."

The culprit risks penalties of up to Rs 10,000,000/- and imprisonment for up to ten years under the legislation. The Act proposes the formation of a national and state regulatory organisation known as the National Surrogacy Board (NSB) and the State Surrogacy Board (SSB), as well as the appointment of appropriate federal and state authorities. Its primary responsibility would be to assist the government in developing policies and to monitor the operation of surrogacy clinics.

### **THE SURROGACY (REGULATION) ACT, 2021**

This Bill<sup>34</sup> was passed in early December of 2021. Some of the key features of the Act include the following-

- All clinics offering surrogacy treatment and services must be registered under this Act, and anyone working in those clinics must meet the standards outlined in the bill.
- Every facility that provides surrogacy treatments must apply for registration within sixty days of the appointment of the competent authority. Registration must be renewed every three years.
- Any surrogacy clinic, gynaecologist, embryologist, or other medical practitioner is prohibited from engaging in commercial surrogacy in any way. The 2021 Act allows for only altruistic surrogacy.
- The intending pair, or the couple wishing to have a child, must be legally married in accordance with Indian laws. The female should be between the ages of 25 and 50, while the male should be between the ages of 26 and 55. Another key criteria is that they do not have any other adopted or naturally conceived children, whether through surrogacy or otherwise.
- The surrogate mother must be between the ages of 35 and 45 when giving this service. Any woman can only be a surrogate mother once in her lifetime.
- A 'Certificate of Essentiality/Infertility' must be issued by the National/State Assisted Reproductive Technology and Surrogacy Board to an intended couple who has a medical need for surrogacy.
- All known harmful consequences and aftereffects of the procedure must be disclosed to the surrogate mother. Furthermore, the surrogate mother must offer written informed consent in a language she understands.
- According to this Bill, a registry called the National Assisted Reproductive Technology Registry would be established to handle the registration of the facility providing surrogacy treatment.

This Act punishes any couple who obtains a child through commercial surrogacy with a fine of up to 50,000 rupees and a 5-year prison sentence. Furthermore, if the same infraction is repeated multiple times, the fine will be increased to one lakh rupees and the prison term to ten years. Anyone found engaging in the exploitation of surrogate mothers or children born through surrogacy faces up to ten years in prison and a Rs ten lakh fine.

### **LACUNAE IN THE SURROGACY (REGULATION) ACT, 2021**

#### **BENEFICIARIES OF THE ACT**

The Act applies solely to two groups of people: intended couples who are legally married

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<sup>34</sup> Available from: <https://egazette.nic.in/WriteReadData/2021/232118.pdf>

and have a certificate of infertility, and intended couples who are not legally married and do not have a certificate of infertility. Females must be between the ages of 25 and 50, and men must be between the ages of 26 and 55. This technique may be chosen by a targeted lady who is either a widow or a divorcee between the ages of 35 and 45.

This demographic group includes unmarried women who want to be moms but are unable to conceive. The irony is that, despite purportedly embracing modernity, this law maintains the historic taboo against childbirth without marriage. If a woman wants to have a child but is unable to do so for a variety of reasons, she is not permitted to use surrogacy services.

Not only are married couples of legal marriage age barred from using the phrase pair, but so are any man and woman in a live-in relationship. This promotes marriage as a social institution. This Act also prohibits couples from participating if one or both partners have a chronic illness and there is a risk of passing it on to their child.

Although Section 4(ii)(e)<sup>35</sup> authorises surrogacy when the National Assisted Reproductive Technology and Surrogacy Board<sup>36</sup> recognises a condition or illness, the Act's ambiguity on the conditions or diseases under which it is authorised remains and is up to the Board's interpretation.

### **LGBTQIA+ COMMUNITY EXCLUSION**

In keeping with the gender prejudice that still exists in our culture, this Act only enables a legally married man and woman in India to have a kid via this procedure, therefore non-binary and same-sex couples cannot experience parenting even if they choose to. Though the Supreme Court decriminalised homosexuality in the case of *Navtej Singh v. Union of India* in 2018,<sup>37</sup> same-sex marriage is still illegal in India, hence gay couples are not covered by this Act. In addition, the Sections only depict a man and a woman, hinting that this service is only available to heterosexual couples. They must recognise the importance of the LGBTQ community in encouraging social equality, which every Indian citizen is entitled to under the Indian Constitution's basic rights. The Supreme Court had to consider the subject of surrogacy for the first time in the case of *Baby Manji Yamada v. Union of India* (2008).<sup>38</sup> Surrogacy was recognised by the court as a technique of acceptable parenting, and the parent might be a single parent or a homosexual couple. The Act's implementation rendered the latter utterly impotent. As a result, not just heterosexual couples, but also homosexual couples and non-binary individuals, must be accorded the status and privilege of bearing children.

### **DEMERITS OF COMMERCIAL SURROGACY BEING PROHIBITED**

Surrogacy of this type became legal in India in 2002. However, due to a lack of norms and governing agencies for the commercialization of this procedure, the mother and infant were exploited and forced to live in filthy and unclean conditions. The Law Commission of India acknowledged exploitation in 2009 and emphasised the necessity for the government to adopt legislation to protect the interests of the people. According to the 228th report<sup>39</sup> a lady or a wife in an Indian family is appreciated only when she can bear a kid, confirming her husband's manhood and potency. Because of India's poverty, surrogates were inexpensive, which led to their abuse at numerous levels.

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<sup>35</sup> Available from: <https://egazette.nic.in/WriteReadData/2021/232025.pdf>

<sup>36</sup> Ibid

<sup>37</sup> Available from: <https://indiankanoon.org/doc/168671544/>

<sup>38</sup> Available from: <https://indiankanoon.org/doc/854968/>

<sup>39</sup> Available from: <https://indiankanoon.org/doc/168220859/>

Altruistic surrogacy happens when the surrogate receives no monetary compensation other than any expenses imposed or incurred as a result of insurance coverage or medical bills. In the meantime, commercial surrogacy happens when the surrogate's services are advertised and she receives a "payment, reward, benefit, fees, compensation, or monetary incentive in cash or kind" in addition to the medical bills and other specified expenses and insurance coverage.

While it is critical to regulate surrogacy to prevent exploitation, absolute prohibition is not the answer. To avoid exploitation, the government should strive to supervise and monitor the rules governing intended parents' citizenship and surrogate mother pay.

Another difficulty with the commercialization of this is that the surrogacy contract's object of consideration is a life, i.e. a person or a kid. Thus, while forming a contract between the intended parent and the surrogate, the clauses must be constructed such that neither party is disadvantaged and with the best interests of the unborn child in mind. Commercial surrogacy cannot be utilised as a source of revenue or misused in any way because Section 4(iii)(b)(IV) already bans a woman from becoming a surrogate mother more than once. When a surrogate registers on an internet platform accessible to all certified surrogacy clinics, appropriate restrictions may be placed on her to prohibit her from acting as a surrogate more than once in her lifetime.

Many nations like Israel<sup>40</sup>, South Africa<sup>41</sup>, and Russia<sup>42</sup> have strict commercial surrogacy regulations that are enforced by governmental officials. The legalisation of commercial surrogacy would assist to eliminate the large illicit surrogacy business, which puts both the surrogate and the child at risk. While there may be disagreements concerning a woman's dignity when she is compensated in return for her baby, these issues have previously been resolved in the case of *Johnson v. Calvert*.<sup>43</sup>

As a result, commercial surrogacy should be legalised because it not only helps to improve the living conditions of the economically disadvantaged, but it also helps to prevent unlawful surrogacy from occurring as a result of a complete prohibition on commercial surrogacy rather than regulation and control.

## **TRADITIONAL SURROGACY MUST BE INCLUDED**

There are two forms of surrogacy, as explained in the preceding sections. The 2021 legislation, on the other hand, exclusively permits for gestational surrogacy. Section 4(iii)(b) prohibits any woman from providing her gametes as a surrogate.<sup>44</sup> The surrogate child is considered as the biological child of the intended couple or intended woman, as the case may be, and has the same rights and privileges as a natural child under the laws in place at the time, according to Section 8 of the Act.<sup>45</sup>

The traditional method is an extremely successful way for the LGBTQI+ people to have a child or for women who are unable to generate viable eggs for reproduction. This type of

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<sup>40</sup> Available from: <https://pubmed.ncbi.nlm.nih.gov/11817392/#:~:text=The%20Israeli%20Law%20on%20surrogate,The%20Law%20causes%20many%20problems.>

<sup>41</sup> Available from: <https://www.fertilitylaw.co.za/information-hub/surrogacy/>

<sup>42</sup> Available from: <https://globalsurrogacy.baby/surrogacy-countries/russia/>

<sup>43</sup> Available from: <https://www.lexisnexis.com/community/casebrief/p/casebrief-johnson-v-calvert>

<sup>44</sup> Available from: <https://egazette.nic.in/WriteReadData/2021/232025.pdf>

<sup>45</sup> Ibid

surrogacy is advantageous since it lowers the overall cost of the procedure. When compared to gestational surrogacy, the amount of medical treatments that the surrogate mother must through is also reduced. If the intended mother's egg does not fertilise, no need to find another donor because the surrogate's egg can be used instead. Furthermore, because the egg and sperm do not need to be recovered outside the womb, the intended father's (or donor's) sperm is simply artificially inseminated using intrauterine or intra cervical insemination, making the treatment less expensive.

Because the surrogate mother and the child have a biological relationship in this procedure, the surrogate mother may be chosen from among the intending parents' line relatives or close friends. In order for the intended couple to raise the kid jointly, the egg donor must waive her parental rights. Furthermore, in order to enforce the parental rights of the intending parents, the non-biological intended parent may be required to sign and complete the adoption formalities for the child after birth.

### **IMPORTANCE OF CHANGES**

Surrogacy has been performed in India for a very long time, and we have heard many examples when a sister has given birth to her own sister who is either unable to conceive or has other challenges. Previously, it was done among families, and there was no legal structure to deal with it. Though there were some arbitrary and ambiguous laws to manage surrogacy, there were few rights for the biological mother of the child. Where the surrogate mother is not connected to the parents who need a child, the rights of the women who were exploited had to be preserved. The couple who travelled from overseas to find a surrogate mother have been completely barred from doing so in order to ensure that commercial surrogacy is completely prohibited. This Act is required to reduce malpractice and to supervise surrogacy. Now that commercial surrogacy has been prohibited, it will ensure that impoverished women are not exploited, and the mother will be given with medical health insurance for 36 months. The children were abandoned after delivery, and this will now be monitored as well.

### **COUNTRIES THAT HAVE STRONG SURROGACY LAWS**

#### **AUSTRALIA**

Commercial surrogacy is prohibited in this part of the globe. There are no surrogacy laws in the northern area. However, altruistic surrogacy is permitted in this country.

#### **UNITED KINGDOM**

Commercial surrogacy is not allowed in the United States, as it is in India, but the other variety is.

#### **SPAIN**

They have incredibly tight rules that restrict all types of surrogacy..

#### **UNITED STATES OF AMERICA**

In the United States, there is no federal surrogacy statute. However, several states in this country have commercial surrogacy rules.

### **CONCLUSION**

In India, surrogacy has been practised for a very long time, and we have heard of several instances in where a woman has given birth to a child for her own sister/ or her sister-in law who is unable to conceive or has other difficulties during their pregnancies. Historically, it was conducted within families, and there was no legal framework to address it. Although there were arbitrary and vague regulations governing surrogacy, the child's biological mother had minimal rights. When the surrogate mother is unrelated to the

childless parents, it was necessary to protect the rights of the surrogated women and not make her a part of “baby producing factory”.

To guarantee that commercial surrogacy is totally forbidden, couples who travelled internationally to obtain a surrogate mother from India have been prevented from doing so. This Act is necessary to prevent malpractice and regulate surrogacy. Now that commercial surrogacy has been forbidden, vulnerable women will not be exploited. The children who were abandoned after birth because they did not meet the required looks of his/her new parents, will now be stopped

.Most countries have stringent surrogacy laws, that forbids commercial surrogacy and India is no exception. What is different in India is that even the laws governing altruistic surrogacy are not LGBTQIA+ friendly. On one hand the members of the trans community does not have the legal right to marry. This makes them stay together as live-in partner only. On the other hand, the new surrogacy (regulation) Act 2021 says that a couple wishing to have a child by surrogacy, must be lawfully married according to Indian law. In other words it means that this Act permits only legally married man and woman in India to have a child via this process Secondly the women should be between 25 and 50 years old, while the man should be between 26 and 55 years old. Here lies the dilemma. Therefore non-binary and same-sex couples are unable to experience parenthood even if they so choose.

In spite of the Supreme Court's 2018 decision in Navtej Singh v. Union of India decriminalising homosexuality, same-sex marriage remains illegal in India; hence, this Act does not apply to gay couples. Additionally, the Sections only depict a man and a woman, emphasising that this service is confined to heterosexual couples. The country and the law makers must recognise the significance of the LGBTQ community in promoting social equality, to which every Indian citizen is entitled under the Indian Constitution's fundamental rights.