

Critical Analysis of Commercialization of Surrogacy in India

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Abstract

The paper is centred on "Commercialization of surrogacy in India". This topic clarifies surrogate parents and their child's meaning, concept, and legal status. After that, it put forth various definitions of surrogacy. In the past two decades, India has emerged as a surrogacy capital and destination for couples from different countries. Fertility clinics operating across India and offering artificial insemination, IVF and surrogacy services to Indian citizens and foreign couples have increased dramatically. With the boom in surrogacy, complex legal and ethical issues are raised. Surrogacy is governed by diverse regulations worldwide, but such law generally has not been shaped by the perspectives of those involved. The incidence of surrogacy at national and international levels is increasing. Although infertility treatment is an excellent choice if the couple wants their genetic baby, it still requires more thought and different motions related to surrogacy worldwide. This paper deals with how surrogacy, medical technology, and at times a commercial operation also practices that establish kinship. It highlights various regulations brought by the government of India to regulate surrogate services. Different guidelines and rules brought across the period have been discussed with some regulation acts. This paper thus concludes after putting forth concluding observation followed by some suggestions and recommendations on the topic of surrogacy.

Keywords: Surrogacy, Surrogate mother, Artificial insemination, Medical technology, Infertility treatment, In- Vitro fertilisation.

INTRODUCTION

¹ Nature has bestowed the beautiful capacity to propagate a life within women, and a man wishes to experience the phase of fatherhood. The right to reproduction is an individual right to exist. The desire for children among couples is a universal circumstance. Parenting is a life-changing and eternally satisfying experience. The pain and agony of not fulfilling the dream of parenting are bottomless. Every society worldwide has given primary significance to the institution of family, which the child considers necessary for the durability of the family lineage and a source of happiness for the parents. Research has stated that one in six couples has similar problems. But a sizable portion of the population cannot have children, which is considered a smirch to the family. There are numerous cases where the incapability to

¹ <https://www.thehindu.com/news/national/expained-surrogacy-assisted-reproduction-in-india-laws-offence-problems/article65443258.ece>

have a child leads to marital breakdown, the inability to have a child,² which is known as infertility in medical terms and as a global problem. According to the WHO report, the prevalence of infertility across the globe, including India, is around 10- 15 per cent. Surrogacy is a promising treatment for infertility. It can break numerous intolerable difficulties that infertile couples and their families face. Infertility affects 15 reproductive teams globally. Around 50- 80 million people worldwide may witness infertility. Since the birth of the first test tube baby, Louise Brown, in 1978, supported reproductive technology (ART) has elicited great interest amongst the public. ART, including egg or sperm donation or a surrogacy arrangement, encourages infertile couples, giving a means of an immense stopgap. But this new type of treatment for infertility has created legal and ethical debate among societies and followers of various persuasions worldwide.

In December 2018, after nearly two times of debate, a surrogacy Bill was passed in India, and it further allows for surrogacy to be available only to infertile Indian wedded couples. The cost of surrogacy is roughly 14 to 16 lakhs depending on the type. In a heterosexual couple, if the women are suitable to propagate but unfit to carry a child, the embryo is conceived from the gamete of the intended parents. However, if the intended parents are a manly couple, in the maturity of presently known cases, the embryo is conceived from bestowed egg if the women are unfit to propagate. Although not new, the practice of surrogate fatherhood gained wide recognition in the middle of the 1970s when more minor children were available for relinquishment. More advanced mortal embryology ways made similar styles a seductive violation to dropout and uncertain relinquishment processes or childlessness. Using a surrogate mama has raised several questions, including how much should be paid for the service(which, if pushed too far, might be interpreted as treating children as a commodity) and who's entitled to what if a thing goes wrong in the process.

TYPES OF SURROGACIES

There are mainly two types of surrogacies: “traditional surrogacy” and “gestational surrogacy”. And two types are “altruistic” and “commercial”.

3Traditional surrogacy: Involves a surrogate and intended parent. The surrogate uses her egg to fertilise the sperm, shares DNA with the baby and has a biological connection to the child. The parentage presents more legal complexity and less security. The lesser practised type of surrogacy today. Typically it costs less than gestational surrogacy. The surrogate undergoes IUI, Intrauterine insemination, where the sperm cells are placed in the surrogate uterus. It offers a viable alternative to adoption but comes with some risks. And the legal process is a little complicated and has specific legal issues.

4Gestational surrogacy: Involves a gestational surrogate and intended parents. The surrogate does not use her egg to fertilise sperm, does not share DNA with the baby, and has no biological connection to the child. Parentage presents less legal complexity and more security. The more widely practised types of

² <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6262674/>

³ <https://www.legalserviceindia.com/legal/article-782-surrogacy-in-india.html>

⁴ <https://fertilityworld.in/blog/types-of-surrogacy-in-india/>

surrogacy today typically cost more than traditional surrogacy, which may require careful financial planning. IVF (In- Vitro fertilisation) is used where the egg is harvested from the intended mother or donor and fertilised with the father's sperm outside the womb.

In Altruistic surrogacy, financial compensation is not given to the surrogate mother. The commission parent may provide fees and costs to the surrogate mother in bringing an embryo to the term. This type of surrogacy is primarily common among family members or close friends. While in the other hand, commercial surrogacy is financially compensated beyond expenses associated with the pregnancy. That is, the surrogate is paid for her gestational services.

INDIAN HISTORY OF SURROGACY

Instances of surrogacy are also found in Hindu mythology, which partly illustrates the continued secrecy surrounding the practice. In India, "renting a womb" or commercial surrogacy was legal in 2002. It was done to encourage medical tourism to India, and as a result, India became known as "the hub of surrogacy." The key factors are the low cost in India compared to the U.S., which would cost approximately \$100,000, and the lack of stringent regulations. The Indian surrogacy market was worth \$2 billion annually, according to CII research from 2012. And it was estimated that around 3,000 fertility clinics nationwide were involved in this. Concerns about unethical activities, intermediaries and commercial organisations profiting the most from the uncontrolled surrogacy industry, exploitation of surrogate mothers, abandonment of children born through surrogacy, and rackets including organ, trade, and embryo. India legalised commercial surrogacy in 2002. The drastic growth of surrogacy in India led to an impeccable development of several commercial firms and firms claiming special in surrogacy law, guiding and assisting foreign tourists with a rule, and advising and assisting foreign tourists with an Indian mother renting her womb for the blessing of a child. The world's second and India's first IVF baby, *Kanupriya*, alias *Durga*, was born 67 days later on October 3, 1978, through the efforts of Dr *Subhas Mukherjee* and his two colleagues in Kolkata.

COMMERCIALISATION AND LAW RELATING TO SURROGACY IN INDIA

It is challenging to picture the child as a commodity. After all, babies are conceived distant from any commercial activity and result from love, not money. In every era and location, poor parents have seen their children as potential financial assets, comparing the costs of raising them against their potential future economic output in the manor, factory, or rice field. In nations like India, surrogacy has also become a lucrative industry, raising numerous issues that have sparked political controversy. Legal experts have looked into the contractual and jurisdictional difficulties while feminists have debated the alienability of women's bodies. Due to the relative ease with which foreigners can find surrogate moms, India has seen significant demand for surrogates. The absence of legal action has made surrogacy in India a complex problem. India's \$445 billion surrogate motherhood industry is under intense criticism from various social issues. The only nation in the world that has approved commercial surrogacy is India. After being made legal in India in 2002, the sector currently generates half a billion dollars annually, with at least 350 facilities providing surrogacy services.

Most Indian surrogate moms receive payment in nine monthly instalments on average. Surprisingly, surrogate hiring of wombs exists in India even though the Transplantation of Human Organs Act, 1994,

bans the sale of human organs, loaning of organs and commercialisation of trade of human organs. The urge to have a biological child of one's flesh, blood and DNA, aided by technology and purchasing power of money coupled with the Indian entrepreneurial spirit, has generated this flourishing Indian reproductive tourism industry. Even though same-sex relationships are illegal in India, surrogates are accessible to single parents, homosexual people, and unmarried partners there. An article titled "Moms on the Market" was published on 13 March 2011 in a renowned Indian national newspaper, The Hindustan Times, published simultaneously in many major cities in India.

Only in India is surrogacy neither outright prohibited nor fully controlled. India currently has no laws that govern surrogacy. It is assumed to be enforceable and utterly valid because it is not expressly stated by law as unenforceable. The Ministry of Health and Family Welfare published the non-binding National Guidelines for Accreditation, Supervision & Regulation of ART Clinics in India in 2005 following several years of discussion and debate, primarily among the ICMR, the National Academy of Medical Sciences, and practitioners of ART.⁵

Countries where surrogacy is legal

From one nation to another, it differs.

All types of surrogacy are forbidden in nations like France, Germany, Italy, Spain, Portugal, and Bulgaria.

Surrogacy is legal in nations including the UK,⁶ Denmark, and Belgium as long as the intended mother is not compensated or is only reimbursed for reasonable costs.

⁷Russia

The commercial and altruistic uses of surrogacy are explicitly and comprehensively regulated by law in Russia. It's a country that provides comprehensive medical guarantees in addition to legal security. Patients receive a premium and individualised level of care at these clinics due to their high quality. Legal restrictions on surrogacy exist, and this area of law has consistent, calm jurisprudence.

To access the programme, it is helpful but not strictly necessary to be able to prove infertility.

Foreigners can use gestational surrogacy as well as Russian citizens.

Since 2014, there have been multiple judgements from some Russian courts that recognise the parentage to single men in order to uphold the concept of equality and non-discrimination between the sexes, despite the fact that the law only ⁸permits this practise to heterosexual couples and single women, with a resultant exclusion for single men and same-sex couples.

United States of America

Some states in the USA, but not all, have legalised surrogacy. A judge recognises the child's parentage while the surrogate mother is pregnant in most of these states since no surrogacy law is in place (usually

⁵ <https://www.jagranjosh.com/general-knowledge/surrogacy-in-india-1597665040-1>

⁶ <https://www.bbc.com/news/world-28679020>

⁷ <https://intraius.com/en/countries-2/#:~:text=Russia,an%20exclusive%20and%20personalized%20treatment>

⁸ <https://www.ivfconceptions.com/international-surrogacy-countries/>

during the sixth month). The judge bases their ruling on the parties' understanding and the precedents established by US Courts (according to the Anglo-Saxon Common Law system). ⁹This makes picking the state where the surrogacy procedure will occur extremely important.

One of the first nations to legalise surrogacy was the USA. In actuality, it was the first nation to recognise intended paternity in the context of a surrogate pregnancy.

This means that it was the first nation to modify the traditional notion of recognition (traditionally in favour of the birth mother), recognising legal parenthood in favour of the parents who will raise the kid and who will, in the end, be responsible for providing for, educating, and caring for the child.

Every type of customer can use a surrogate, including heterosexual couples, homosexual couples, single men or women, and unmarried couples; no genetic material contribution is required.

Australia

One of the rare nations where surrogacy is permitted is Australia. But, in the case of Australia, only altruistic surrogacy is allowed.

This implies that you are exempt from paying the surrogate's remuneration. Nonetheless, you are required to cover the costs associated with the surrogacy procedure.

Also, it is prohibited to advertise for surrogacy in Australia under the surrogacy statute. Moreover, the donor must be identified in the case of a donation. In some cases, the ethics committee's clearance is also necessary.

Australian surrogacy is not available to foreign parents. In Australia, it is also the law that, in cases of domestic surrogacy, the parentage transfer must be completed within 4 to 6 months of the child's birth without compensation

Greece

In Greece, surrogacy has been permitted for a while. Originally only Greeks were permitted to use this form of assisted reproduction, but today anybody can participate. According to Greek law, surrogacy is only permitted for women. Only heterosexual couples and single mothers are granted this privilege, not single men. Genetic material contribution is not required.

Greece is one of the rare nations where a judge makes the judgement on parentage, therefore either both intended parents or simply the commissioning mother's parentage can be recognised.

United Kingdom

In the UK, surrogacy was first made acceptable in 1985. In accordance with the legislation, homosexual parents in the UK are also permitted to become intended parents.

Both gestational surrogacy and conventional surrogacy are legal in the UK. Advertising and commercialization of surrogacy are prohibited in the UK.

The UK only permits charitable surrogacy. In the UK, this entails that you only need to pay the reimbursement amount to the surrogate.

¹⁰**Surrogacy Regulation Bill, 2016.**

⁹ <https://tebmedtourism.com/legal-and-illegal-countries-for-surrogacy/>

¹⁰ https://www.dhr.gov.in/sites/default/files/surrogacyregbill_0.pdf

The aim of the new legislation, which will now have to pass by the Parliament, is to a draft bill to control and create a system for commissioning surrogacy in India has been approved by the Union Cabinet.

- Safeguard the rights of surrogate mothers.
- Make legal and open declarations of surrogate parentage.
- Evolve a statutory system for the commissioning of surrogacy.
- Prohibit foreigners from commissioning surrogacy in India.

¹¹According to the Surrogacy Regulation Bill 2016, the surrogate must be married and have her child. The Act places an age restriction on the couple, stating that the husband must be between the ages of 26 and 55 and the wife between the ages of 23 and 50, therefore restricting altruistic surrogacy to lawfully wed infertile Indian couples.

The central provision of this bill

The bill establishes the National Surrogacy Board and State Surrogacy Board. The statement covers all of India's states—aside from Jammu and Kashmir.

Bill solely permits surrogacy for Indian citizens. Foreigners, NRIs, and PIOs are prohibited.

Bill stipulates that women may only surrogate once in their lifetime and must be between 25 and 35.

Couples intending to use surrogacy must be between the ages of 23 and 50 and have been married for at least five years.

Homosexuals and single parents are also prohibited from doing so, as are couples who already have children.

Legislation also makes provisions for the child's future custody.

In the case Baby Manji Yamada Vs Union of India

Baby Manji¹² Yamada was a kid born to an Indian surrogate mother for a Japanese couple who divorced before the child's first month, leaving the child's future uncertain. The child's biological father, Ikufumi Yamada, wanted to transfer the child to Japan, but neither the Japanese government nor the legal system had any provisions for such a situation. The girl was eventually permitted to leave the country with her grandmother after the Supreme Court of India had to step in. The Baby Manji Yamada ruling influenced India's government to pass the surrogacy law. The Supreme Court held that surrogacy was permissible in India after the Manji case, which increased international confidence in going for surrogacy.

¹³Jan Balaz Vs Anand Municipality

The Gujarat High Court decided that the surrogate mother had to give the child to the German couple who had applied for the services of an Indian surrogate mother for the birth certificate of the child born through surrogacy to bear the name of the surrogate mother rather than the biological mother and for the child to be granted an Indian passport, which certifies him as an Indian citizen.

¹¹ <https://pib.gov.in/newsite/PrintRelease.aspx?relid=177806>

¹² Baby Manji Yamada vs Union Of India & Anr 2008, Baby Balaz v Anand Municipality & Ors 2009

¹³ Jan Balaz Vs Anand Municipality AIR 2010 Guj 21

The Supreme Court is still considering an appeal against this ruling. During the hearing, it saw a pressing need to address the issue, which allowed for the introduction of the proposed measure from Parliament.

¹⁴Assisted Reproductive Technology (ART) Act

In September 2020, the ¹⁵ART Act was presented in Lok Sabha and was referred to a standing committee for amendments. Later, along with the surrogacy act, it was passed in both houses during the winter session of Parliament in December 2021. This law, too, came into force in Jan 2022.

Rules for ART banks and clinics

Every ART clinic and bank must be registered with the National Registry of Banks and Clinics of India, which will keep an extensive database of information about these organisations. Banks and clinics can renew their registration for five years after it expires. If the institution breaks the Act's rules, it could have it suspended or cancelled. ¹⁶Before implanting an embryo into a woman's body, clinics must test the embryo for genetic disorders. They are also prohibited from providing children of a predetermined sex.

Condition for sperm donation and ART Act

Men between the ages of 21 and 55 can submit their semen to an ART bank registered with the government. The Act requires that female donors be married and have a child of their own who is at least three years old. A woman can only give up to seven eggs once in her lifetime. A bank cannot provide more than one couple with a donor's semen.

Such ART methods demand the informed consent of the donor and the couple. The couple pursuing an ART operation cannot proceed until the female donor has insurance coverage for loss, harm, or death. As previously stated, clinics and banks cannot promote or provide sex-selective ART. A fine of 10 to 25 lakh rupees or 5 to 10 years in prison is the possible penalty for this infraction. All legal rights and privileges will be accorded to a kid born by ART, who will be regarded as the couple's biological child. No parental rights remain with the donor regarding the child.

Offences and penalties under this Act

The bill prohibits the following actions:

- ✓ Abandoning or abusing ART-born children
- ✓ Importing, purchasing, trading, or selling human embryos or gametes
- ✓ Employing intermediaries to find donors
- ✓ Harming the commissioning couple, the woman, or the gamete donor in any way¹⁷

¹⁴ *The Assisted Reproductive Technology (Regulation) Bill, 2020*, PRS Legislative Research, <https://prsindia.org/billtrack/the-assisted-reproductive-technology-regulation-bill-2020>

¹⁵ <https://www.drishtias.com/daily-updates/daily-news-analysis/assisted-reproductive-technology-regulation-bill-2021>

¹⁶ <https://www.livelaw.in/news-updates/assisted-reproductive-technology-regulations-act-2021-imposition-of-age-restriction-without-a-transitional-provision-is-irrational-and-arbitrary-kerala-hc-217950>

¹⁷ <https://www.thehindu.com/news/national/explained-surrogacy-assisted-reproduction-in-india-laws-offence-problems/article65443258.ece>

- ✓ They were transplanting the human embryo into a male or an animal. For the first violation, these offences will carry a fine ranging from five to ten lakh rupees. Following violations will result in a sentence of eight to twelve years in jail and a fine of between ten and twenty lakh rupees. Any clinic or bank that promotes or provides sex-selective ART will be fined up to Rupees 10 lakhs or imprisoned for five to ten years.

Vinitha Antony VS the Commissioner of Police

It is pertinent to mention Section 22 of the Assisted Reproductive Technology (Regulation) Act, which states that banks are not permitted to cryopreserve any human embryos or gametes, even if a source dies, without receiving the express written consent of all parties seeking assisted reproductive technology. Banks are also not permitted to use human embryos created in vitro for any purpose without obtaining the express written permission of all parties to whom the assisted reproductive technology is related.

Surrogacy Regulation Act, 2021

The Act places an age restriction on the couple, stating that the husband must be between the ages of 26 and 55 and the wife between the ages of 23 and 50, therefore restricting altruistic surrogacy to lawfully wed infertile Indian couples. The bill was described as "progressive" and intended to "curb the exploitation of women" by the health minister. After getting the presidential assent, the Surrogacy (Regulation) Bill, 2020—which forbids commercial surrogacy but permits altruistic surrogacy—was signed into law on Saturday, December 25. The President authorised its execution, and it became effective in January 2022. As a result of the new law, only altruistic surrogacy is permitted, and commercial surrogacy is now illegal. The surrogate must be a married woman between 25 and 35 with her kid and be genetically related to the intended parents.

¹⁸An essential provision of the Act

¹⁹Sec 3 states:

1. Surrogacy clinics must be registered.
2. Surrogacy is prohibited anywhere other than a licensed clinic
3. No specialist or medical professional will practice commercial surrogacy.
4. Commercial surrogacy may not be promoted, assisted, or advertised by a clinic or other party that encourages a woman to become a surrogate mother, seeks a woman to serve as a surrogate, or implies a woman's desire to serve as a surrogate.
5. No abortions without the mother's permission and the necessary authorities (such authorisation should comply with the provisions of the Medical Termination of Pregnancy Act, 1971).
6. No human embryo or gamete storage is permitted for surrogacy purposes.

²⁰Sec 37 & 38: Punishment for initiation of commercial surrogacy

<https://www.casemine.com/judgement/in/62c09149b50db96bc1b5f33a>

¹⁸ <https://egazette.nic.in/WriteReadData/2021/232118.pdf>

¹⁹ <https://www.legalserviceindia.com/legal/article-782-surrogacy-in-india.html>

²⁰ <https://prsindia.org/billtrack/prs-products/issues-for-consideration-3864>

- ²¹For the first offence, anyone seeking commercial surrogacy faces a minimum sentence of five years in prison and a fine that can reach five lakh rupees; for any future violations, the maximum penalty is ten years in jail a fine can earn ten lakh rupees.
- For violations of Act or regulation provisions for which there is no specified penalty, the penalty is three years in prison plus five lakhs in additional fines, plus 10,000 every day of continued violation.

Regulating bodies of surrogacy

The National Surrogacy Board (NSB) and State Surrogacy Boards are created by the central and state governments, respectively (SSBs).

The NSB's duties include (i) advising the central government on surrogacy policy; (ii) establishing the code of conduct for surrogacy clinics; and (iii) monitoring the operation of SSBs.

The SSBs' duties include: (i) keeping tabs on how the Act's requirements are being carried out; and (ii) examining the actions taken by the relevant agencies at the state and union territory levels

²²Need of Surrogacy Regulation Act

- ✓ The Act aimed to control surrogacy in India.
- ✓ According to the Act, "surrogacy" refers to a practice where a woman agrees to carry a child for another couple and then give it to them after birth.
- ✓ ²³Due to ongoing socio-economic injustices, disadvantaged women found a way to "rent their wombs" and earn money to cover their bills. As a result, India has become a global centre for infertility treatment.
- ✓ By 2012, India had established itself as the "capital of surrogacy," with an estimated \$500 million in yearly surrogacy tourism sales.
- ✓ Regulating surrogacy in the nation is now necessary
- ✓ To stop unethical behaviour: Commercial surrogacy services had grown out of control due to a lack of particular legislation. Therefore, specific regulation was needed to prevent corrupt practices relating to problems with sex selection and surrogate exploitation.
- ✓ To stop women from being exploited: Surrogate mothers faced numerous difficulties due to the lack of legal guidelines and their poor implementation; there had been countless surrogacy-related deaths for which neither the commissioning parents nor the medical professionals were prepared to assume responsibility.
- ✓ Sometimes, regulations governing adoption in India or the citizenship of some other nations also cause issues. For instance, Germany grants citizenship through the mother, making determining the child's nationality difficult.
- ✓ A Japanese couple started the process with a Gujarati surrogate mother in 2008; they split up before the baby was born, and the infant had no adoptive parents.

²¹ , <https://www.thehindu.com/news/national/cabinet-clears-surrogacy-regulation-bill/article30921456.ece>

²² <https://www.legalserviceindia.com/legal/article-10336-relevance-of-the-surrogacy-regulation-act-2021.html>

²³ <https://www.lawrbit.com/article/analytical-study-on-surrogacy-regulation-rules-2022/>

- ✓ An Australian couple hired a surrogate mother in 2012 and arbitrarily picked one of the twins to be born. Sometimes, regulations governing adoption in India or the citizenship of some other nations also cause issues. For instance, Germany grants citizenship through the mother, making determining the child's nationality difficult.
- ✓ A Japanese couple started the process with a Gujarati surrogate mother in 2008; they split up before the baby was born, and the infant had no adoptive parents.
- ✓ An Australian couple hired a surrogate mother in 2012 and arbitrarily picked one of the twins to be born.²⁴

Different nations have varying opinions on commercial surrogacy and have been back and forth. Commercial surrogacy is accepted in some places in the United States but is outlawed in others. Where in Britain, the first case of commercial surrogacy was in 1985, *Re C (A Minor)*, the "best interests of the child" were taken into account by the courts where commercial surrogacy was involved. The Supreme Court of New Jersey in the United States later used the exact phrase, but for a different opinion in 1988, holding that the "best interest of the child" lay with the commissioning parents even though it deemed surrogacy contracts to be against public policy.

In the case of *Johnson VS Calver*²⁵, in response to the contractual issue, the California Supreme Court in the U.S. stated that "surrogacy does not turn children into commodities even though they are effectively the subject of a contract." The choice was made with the parties to the lawsuit's intentions in mind. Therefore, when drafting the contract conditions between the intended person and the surrogate, care must be taken to ensure that none of the two parties will be adversely affected and that all provisions are created with the unborn child's best interests in mind. Commercial surrogacy cannot be utilised as a source of income or be abused in any way because Section 4(iii) (b) (IV) ²⁶already forbids a woman from serving as a surrogate mother more than once.

²⁷Eligibility criteria for couples intending to commission surrogacy

²⁸Indian spouses typically stay together for five years or more. Both an eligibility certificate and an essential certificate must be provided. Additionally, they must promise to keep the surrogate child they have carried for them. Under the law, willing women between 25 & 35 years who had one child can be a surrogate. Intending couple should have a medical condition certified by a district board, which makes surrogacy necessary. The procedure should be undertaken only by registered clinics.

²⁴ [https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4345743\](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4345743/)

²⁵ <https://www.casebriefs.com/blog/law/health-law/health-law-keyed-to-furrow/reproduction-and-birth/johnson-v-calvert/>

²⁶ S.4(iii)c(I) the age of the intending couple is between 23 to 50 years in case of female and between 26 to 55 years in case of male on the day of certification; 8 S.4(iii)c(II) of the Bill

²⁷ <https://unacademy.com/content/daily-news-analysis/surrogacy-act/>

²⁸ <https://www.indiatoday.in/india/story/rajya-sabha-members-seek-changes-in-surrogacy-bill-over-age-eligibility-5-years-marriagenorms-1621014-2019-11-21>, , last accessed on 28/11/2019

- ✓ ²⁹Must be a close relative of the surrogate mother. But the law does not define the term a close relative.
- ✓ Should be an Indian citizen married for at least five years.
- ✓ The female partner should be between 23 and 50 years old, and the male 26 and 55 years old.
- ✓ A medical certificate stating that either or both partners are infertile.
- ✓ They do not have any surviving child except if the surviving child is mentally or physically challenged or suffers from a fatal illness.
- ✓ A court order concerning the child's parentage to be born through surrogacy.
- ✓ Insurance coverage for surrogate mother.

Issue in gaining eligibility certificate

No surrogacy treatment shall be carried out unless the intended couple obtains a certificate of infertility for both of them or either, according to ³⁰Section 4 of the Bill. It also stipulates that the surrogate mother must be a close relative without indicating how to do so. Is some sort of genetic testing to be used to determine this, or will a straightforward declaration by the intended pair suffice? This feature is not made clear in ³¹Section 4(iii) (b) (II) of the Bill.

One member of the congress party stated that “The complicated rules, regulation and procedures have been brought here and make it practically impossible to use surrogacy to be used effectively as a tool for those who want to”

He raises a very reasonable point because it is unclear how to demonstrate that someone is a close relative. The bill's current form suggests that the choice will be made based on the whims and caprices of the bureaucracy, which will add red tape and open a door for corruption

³²Eligibility to be a Surrogate mother

- ✓ The surrogate mother was or is married and has a child.
- ✓ She is 25 to 35 and has not been a surrogate mother.
- ✓ She needs a medical certificate attesting to her surrogacy fitness.
- ✓ Should have a stable home life with emotional and childcare support.
- ✓ It does not smoke, abuse alcohol or prescription meds, or use illicit drugs.
- ✓ Should have a body mass index of no more than 32.
- ✓ Should have had no more than three deliveries via C Section.
- ✓ Can be a surrogate mother only once.

What is not allowed in Surrogacy

They offer and promote commercial surrogacy in any form, including providing any remuneration or monetary incentive to the surrogate and having multiple children via surrogacy.

²⁹ *Surrogate mother need not be a close relative, Rajya Sabha Committee recommends, The Hindu*, <https://www.thehindu.com/news/national/surrogate-mother-need-not-be-a-close-relative-rajya-sabha-committee-recommends/article30744022.ece>

³¹ S.4(iii)c(I) the age of the intending couple is between 23 to 50 years in case of female and between 26 to 55 years in case of male on the day of certification

³² <https://internationalfertilitycentre.com/become-surrogate-mother/>

LGBTQ couples and single men cannot choose surrogacy to have a biological child. \$2 billion estimate of India's surrogate motherhood industry by CII in 2012. 15-20 lakh cost of having a child via surrogacy in 2021, according to industry estimates.

In the case of Suchita Srivasa VS Chandigarh, according to a Supreme Court decision, "a woman's right to choose her reproductive options is also a component of 'personal liberty' as conceived under Article 21 of the Indian Constitution. As a result of judicial history, it is evident that the Constitution protects and upholds reproductive decisions as a component of the person's unalienable right to personal liberty. The strict eligibility requirements outlined in the bill invade the privacy of intending parents and surrogates, taking away their right to choose their reproductive methods.

Issues and drawbacks raised against these bills/Acts

Only those infertile women for whom it would be physically impossible or unpleasant to carry a baby to term should be considered for surrogacy via ART. The surrogate mother and the commissioning couple should sign a contract that binds both parties legally. Her husband's written consent is necessary before she may sign the contract. A woman who wants to be a surrogate or who agrees to do so must submit to medical examinations and must declare in writing that she has not recently received a blood transfusion or blood product, as well as any other communicable diseases that could endanger the health of the intended child or children.

Ethical issues

Since its ³³inception, in vitro fertilisation has generated disagreements on morality, ethics, and religion. Even though people from all religious backgrounds can be found on both sides of the debate, the Roman Catholic Church has been the primary opponent. In a 1987 doctrinal statement, the church stated that it opposed IVF on three grounds: the destruction of human embryos not intended for implantation, the possibility of in vitro fertilisation by a donor other than the husband, which would remove reproduction from the context of marriage; and the severing of an essential link between the conjugal and reproductive systems.

- Due to poverty or other financial constraints, most Indian women use surrogates. However, surrogacy technology may have some issues which could harm the surrogate mother's health and life. It raises the crucial subject of a surrogate mother's legal responsibility for any harm she causes or experiences. It would be challenging to establish culpability and compensate the surrogate mother for her loss if the doctors and other medical workers did not exhibit medical negligence.
- ³⁴For the surrogate mother to deliver and transfer the kid over to the commissioning parents, surrogacy typically entails payment of money. It is condemned for being akin to buying and selling children. According to the argument, designer kids would be produced by choosing a child's sex and qualities. Therefore, using a surrogate would amount to treating a child like a product, which is immoral and ethically wrong. Additionally, it has been noted that in vitro fertilisation used in

³³ <https://www.legalservicesindia.com/article/2310/Problems-And-Issues-of-Surrogate-Mother-and-Her-Child.html>

³⁴ <https://www.mapsofindia.com/my-india/social-issues/surrogacy-pros-and-cons-misconception>

surrogacy frequently produces triplets or quadruplets. The commissioning parents might not care for children born against their will, which could harm the child's best interests.³⁵

³⁶Conclusion and Suggestion

Ironically, even though over 12 million Indian children are orphans, surrogacy is still a thing. Adopting a kid in India is a complex and lengthy process for childless couples who desire to provide these children with a home. To ensure that the services offered by ART clinics and ART Banks are ethical and that the medical, social, and legal rights of all those involved, including surrogate mothers, are protected with the most significant possible benefit to all the stakeholders within a recognised framework, the draft Assisted Reproductive Technology (Regulation) Bill proposes to establish a National Board, State Boards, and National Registry of Assisted Reproductive Technology (ART) in India.

- Before ³⁷approving and signing a contract, both the surrogate and the infertile couple should get legal assistance.
- Intensive care and regular medical examinations of the surrogate mother's reproductive organs throughout the months are advised because, according to The Surrogacy (Regulation) Act of 2021, "a procedure whereby one woman conceives and bears a child for an intending couple, intending to hand the kid over to them after the delivery". Additionally, it permits only infertile Indian married couples to use surrogacy.
- It is usual for surrogacy procedures to require 2 to 3 transfer attempts, but unusual cases have needed six or more shots.
- Maintaining and overseeing the surrogate mothers' anonymity is of utmost importance.
- The necessity of passing legislation to control business surrogacy was made clear. The 208th report's LCI made a recommendation to outlaw commercial cloning. The following were the causes: -
Prevalent use of surrogacy by immigrants.
- A lack of appropriate law protections
- Surrogate mothers may have been coerced into becoming surrogates because of their lack of resources and schooling.

³⁸Therefore, surrogacy can provide a viable alternative to adoption, a complex process that takes years to complete. It also makes it possible for some women to have a child and avoid the pain of childbirth for the intended mother. Many couples choose to form a lifelong bond with their surrogate mother. These bonds can provide rich and lasting relationships for the whole family. Surrogacy would be a dream for an infertile couple who cannot create a baby.

³⁵<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3531011/#:~:text=Surrogacy%20is%20an%20arrangement%20where,carries%20and%20delivers%20the%20baby>

³⁶<https://www.advocatekhaj.com/library/lawreports/needforlegislation/12.php?Title=Need%20for%20Legislation%20to%20Regulate%20assisted%20Reproductive%20Technology%20Clinics%20as%20well%20as%20Rights%20and%20Obligations%20of%20Parties%20to%20Surrogacy&STitle=Conclusion%20and%20Recommendation#:~:text=In%20case%20the%20intended%20parent.and%20adoptive%20parents%20are%20different>

³⁷ <https://www.springerprofessional.de/en/conclusion-and-suggestions/19703218>

³⁸ <https://www.mondaq.com/india/constitutional--administrative-law/1126150/surrogacy-regulations-in-india>

³⁹Contrary to other adoption procedures, surrogacy enables intended parents to be involved in their child's growth from conception. While it is not always possible with adoptions, you can be present for milestones like doctor's visits and your kid's birth. Even though it is a progressive step for future generations, it also has some lacuna in that this Act only permits a man and a woman legally married in India to use surrogacy services, which is illustrative of the gender bias still in our society. ⁴⁰It prevents same-sex and non-binary couples from sharing the joy of parenthood. It is imperative to recognise the LGBTQ community.

Devika Biswas v. Union of India

⁴¹ Article 21 defined the "Right to Life" as include the "Right to Reproduce" as a fundamental aspect. The right for women to have a child, give birth, and raise it to adulthood is a part of their reproductive rights. Hence, it is clear that confining surrogacy to just heterosexual couples and those under a certain age range while denying reproductive options to the LGBT population, single people, and elderly couples also constitutes a clear breach of Articles 21 and 14.

⁴²*B.K. Parthasarthi v. Government of A.P.*

It was decided that the right to decide whether or not to have children is primarily a personal choice and that the state's involvement in such a process must be closely examined. Thus, it is a grave breach of their right to privacy that obtaining certificates of fertility is necessary to qualify for surrogacy.

The 2021 Act prohibits commercial surrogacy, and only altruistic surrogacy is permitted. Altruistic surrogacy refers to using a surrogate without receiving payment other than any costs that may be required or incurred because of insurance or medical expenses. If detected engaging in the same crime again, the punishment may increase to ten years in prison and a fine of up to ten lakh rupees. ⁴³Anybody pursuing commercial surrogacy is also subject to a five-year maximum sentence of imprisonment and a five-lakh rupee fine. Because of the frequent socio-economic disparity between intended parents and surrogate mothers, as well as the rent-a-womb model, commercial surrogates may be exposed to exploitation. Still, they can receive a payment that could be applied to future goals in exchange for your year-long dedication to the intended parents. ⁴⁴The pregnancy's numerous physical and emotional demands can be significantly more difficult when carrying someone else's baby due to the physical and mental imbalance. ⁴⁵Giving those surrogate mothers a certain fixed amount is like honour and respect for their yearlong commitment.

³⁹ <https://blogs.lse.ac.uk/humanrights/2021/04/21/indias-new-surrogacy-regulation-bill-falls-short-of-protecting-bodily-autonomy-and-guaranteeing-reproductive-liberty/>

⁴⁰ <https://theleaflet.in/lacunae-in-the-surrogacy-regulation-act-2021/>

⁴¹ Devika Biswas v. Union of India - (2016) 10 SCC 726

⁴² *B.K. Parthasarthi v. Government of A.P.*- 2000 (1) ALD 199

⁴³ <https://www.drishtias.com/daily-updates/daily-news-analysis/surrogacy-4>

⁴⁴ <https://www.indialawjournal.org/analysis-of-the-surrogacy-regulation-bill.php>

⁴⁵ India's Proposed Commercial Surrogacy Ban Is an Assault on Women's Rights, The Wire, <https://thewire.in/law/surrogacy-ban-assault>