



# A Critical Study on Legal and Social Aspects of Surrogacy in India

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**Abstract:** Children serve as a form of long-term care insurance, especially within the societal environment of India. In India, parenting is a personal choice shaped by cultural obligations and customs like those around marriage. At the very least, refusing to have children is encouraged and rarely a choice. In the absence of the next generation, pressure from family and concerns about inheritance has been paramount to some exploring alternative ways of carrying their bloodlines on. The childless couple may pursue surrogacy for support. Surrogacy was introduced in India in the late 1990s. The initial indications of its presence were observed in urban centers. As India's economy and culture advanced, it evolved into a substantial economic sector. Surrogacy is a multifaceted subject that necessitates discourse across various dimensions, including social, ethical, legal, and moral considerations. This study aims to examine the social, legal, and judicial aspects of surrogacy in India.

**IndexTerms - Legal, Reproduction, Surrogacy, Technologies.**

## I. INTRODUCTION

Traditional surrogacy agreements, which include the services of a third party to carry and deliver a child, have their roots in the Bible. The "industry" of international surrogacy, which looks to be thriving in recent years, appears to have developed fast during the last decade or so (Rajpal). Factors in the fields of science, demography, law, and society have all come together to cause this. Firstly, advances in technology like "artificial insemination and in vitro fertilization (IVF)" have greatly increased the desirability of surrogacy as a method of having children. Particularly via the use of in vitro fertilization (IVF), "the so-called genetic connection between the surrogate mother and the kid" may be severed, occasionally allowing a genetic bond to establish between the intended mother and the child.

Second, the growing number of people who can't have children has made more people want to use surrogates (Galundia).

"Surrogacy or Surrogate means SUBSTITUTE" (Karkal, 1997). The word "surrogate", derived from the Latin word "surrogatus", the past participle of the verb "surrogare", means "a substitute", which is a perfect description of what a surrogate is: someone who is tasked with performing the duties of another. When a woman agrees to carry a kid to term and deliver it for a man who cannot or does not want to father a child himself, this is known as surrogacy. "A woman who carries a child for the purpose of another woman, whether using her own eggs or the fertilized egg of another woman, is known as a surrogate mother" (Banerjee, 2014).

When a woman who is not the biological mother carries and gives birth to a child, this practise is known as surrogacy. As an assisted reproductive technology "surrogate mother" refers to a woman who carries a child for another couple. In other words, when people talk about "surrogacy," they're referring to a situation in which a woman voluntarily becomes pregnant in order to carry and give birth to a child for another couple or family. Depending on the arrangement, she may or may not be the child's genetic mother. Some couples or single men may choose to pay a woman to carry their child when the mother is unable to do so for any reason (medical, genetic, or societal). Surrogacy, in this definition, is the selfless act of a woman having a child for another person or couple with the intention of giving the kid back to her or his birth parents. That settles the matter, period. In exchange for financial compensation, "surrogate mothers" offer to bear babies for other families. Both scenarios are viable options.

Typically, a surrogate is a woman whose egg is fertilised with a father's sperm via an IVF procedure. "An embryo created by the combination of an egg from the intended mother and sperm from the intended father" is carried by the surrogate mother in gestational surrogacy. No surrogate mother's egg was used in this procedure.

## History of Surrogacy

Marriage marks a major transition in every person's life. The concept of rebirth is used to describe this phenomenon in Hinduism. Every person's existence revolves mostly around it. As a person reaches adulthood, conversations naturally turn to that individual. One day, he or she will tie the knot. After some time has passed, the "child" becomes the focal point rather than the initial issue. Indian writers like "YAJNAVALKYA and MANU" and the Vedas make it abundantly clear that a variety of methods were used to achieve male progeny.

They claimed that Aurasa was a man-made baby, born to a man and his legally wed wife. There were other sons, KSHETRAJA, "Husband's Appointed Son by Another Man". Son of a hidden adulterous liaison, or GUDHAJA. A son was born to an unwed

mother in Kanina, although her father didn't know about it. SAHODHAJA "A son is conceived when a man weds a pregnant woman, whether he knows it or not". A man and a woman who have been married twice are known as Pounarbhava. DATTAK meant "son of the same caste presented as a gift to a man" and referred to adopted sons. KRITA: "A son is sold to a man by its parent." Adoption of an Orphaned Son: KRTRIMA SVAYAMDATTA, or "Abandoned Son Adopted, means just that. Adopted son from the desert" (APDVIDDHA)

The rising prevalence of infertility has rendered this categorization obsolete. Having a child of one's own, whether a girl or a boy, is now the top goal for any marriage. According to estimates, 15 percent of couples worldwide are unable to have children. It means infertility is among the most common health issues worldwide.

The societal ramifications of the infertility crisis's scale are staggering. Although every married couple has the right to start a family, in India there is a significant social shame attached to infertility. For Indian parents in particular, their offspring represent a kind of retirement insurance. To increase their chances of having a healthy baby, infertile couples often investigate assisted reproductive technologies (ARTs). Carrying a kid for another spouse allows infertile couples to have a child with their own genetic makeup or an individual using assisted reproductive technologies (ARTs) in exchange for financial compensation has garnered a great deal of attention in this context (Rao & Mazumdar, 2017).

The United States, the United Kingdom, and other developed countries have mostly recognized surrogacy. In addition, the projected compensation for a surrogate mother in the United States is somewhere in the neighborhood of \$60,000 to \$80,000. In contrast, open acceptance of it is seldom heard outside of undeveloped and third-world nations, where many couples embrace it despite a social taboo.

In the Indian setting, the following are very beneficial to the development of the industry:

- lack of regulation;
- more affordable than the "US, Canada, and the UK"
- cut down on the amount of time people had to wait;
- the ability for commissioning parents to monitor their surrogates closely;
- Possessing a sizable population of women considering surrogacy;
- Possessing medical facilities and staff on par with those found in industrialized nations.

As a result, the idea of a surrogate mother has changed a lot over the years as surrogacy has grown. There has been a long journey, marked by many miracles and tribulations, from the secretive traditional surrogacy of ages ago to the contemporary practice of using commercial surrogates and family members can act as surrogate mothers. Who knows what the next 20, 50, or 100 years of surrogacy history will bring? (Malhotra, 2010)

### Socio-Legislative Developments in Surrogacy in India

Like in other countries, the Indian government has taken action to regulate surrogacy arrangements and address concerns raised by the practice. Unfortunately, no legislation has been passed to regulate surrogacy as of yet. The outlook for Indian progress in this area is not promising. The sole law in effect in India regarding AI is the 1995 Delhi Artificial Insemination (Human) Act. The United Kingdom does not have an equivalent to the Veterinary Laboratory Agency (VLA), and Indian infertility specialists have been generally resistant to efforts to regulate the industry. Surrogacy has become popular in India in the recent decade. While the "first surrogate baby was born in India on June 23, 1994", it wasn't until 2004, when an Indian mother gave birth to a child for her daughter in the United Kingdom, that the practice gained considerable worldwide attention.

In 2007, when an American couple decided to have a baby through surrogacy in India, Oprah talked about them on her daytime talk show. Moreover, the surrogacy sector has been in a tailspin for the last several years. When the number of reported incidents increased, the Indian government took action to curb the problem.

Concerns about the quality of care provided at "Assisted reproductive technology (ART)" clinics in India were addressed in 2005 when the government adopted and implemented "National Guidelines for Accreditation, Supervision, and Regulation of ART Clinics". These standards were established by the "Indian Ministry of Health and Family Welfare's (MoHFW) research arm, the Indian Council of Medical Research (ICMR)" (Ministry of Women and Child Development, 2008).

In accordance with these policies, a woman who is not married or in a domestic partnership is free to use ART, and the resulting child is entitled to the same protections as a child born to a married couple. When discussing best practises, ART clinics often refer to the "Indian Council for Medical Research," which recommends that "the surrogate mother must sign a contract with the childless couple." despite the fact that these recommendations are not legally binding. Yet, contrary legal counsel maintains that it is unclear whether or not such a contract has any binding legal effect.

The "National Guidelines for Accreditation, Supervision, and Regulation of ART Clinics in India were written by a Committee of Experts consisting of biologists, gynaecologists, social and legal representatives, and representatives from ART clinics" in collaboration with "The Indian Council of Medical Research, New Delhi, and the National Academy of Medical Sciences, New Delhi". Important concerns impacting scientists, physicians, and patients are addressed in this code of conduct. Key aspects of this proposal are as follows (<http://www.medicalindiatourism.com/surrogacy-in-india/surrogacy-laws-in-india.html>):

- "All financial transactions associated with a donor program or gestational surrogacy must be handled by the ART Center.
- The spouse's consent is required for every assisted reproductive technology procedure.
- No stage of pregnancy, including fertilization and abortion, is permitted for the purpose of determining the sex of the developing foetus. Preimplantation genetic diagnosis and genetic testing of potential parents are the only two ways to ensure that no genetic abnormalities will be passed on to the child.
- No one who is not the husband or wife of the couple may donate sperm. It is the responsibility of the ART clinic to get sperm from the relevant banks.
- The Semen Bank is the sole source of semen authorized by the Committee, and no other source is tolerated. In addition, this semen bank needs to operate autonomously.
- Surrogate mothers can't be friends or family members of the intended parents.
- Patients who cannot carry a child to term for medical or physical reasons might consider surrogacy via assisted conception.
- Legally, the genetic parents of a child born through surrogacy must adopt that child.



- Embryos have a shelf life of around 5 years, during which time they may be used by other couples or in research. Yet, this cannot happen without first receiving approval from the worried couple.
- Human gametes and embryos should not be exported from India or sold in any way.
- Cloning human beings should be illegal.
- Embryos younger than 15 days should be used for stem cell research and cloning.
- Every kid born via the use of ART is legally the offspring of the parents, regardless of whether or not the parents were married at the time of the child's conception.
- Although it is not against the law for a single or unmarried woman to choose AID, it is generally recommended that AID be performed only on married women with the consent of the lady's husband.
- More than ever, infertility must be addressed in the same way as other medical conditions. However, even if there is only one child, the ART facility must be able to reimburse the cost, either whole or in part, via the employee's employer, the government, or the health insurance provider”.

Thus, the Indian government has considered releasing some fundamental rules for the moral practice of surrogacy in India in light of the rising popularity of these reproductive technologies, both among Indian citizens and those from other countries.

“The Indian Council of Medical Research” established the ART Guidelines, which served as a blueprint for the country's IVF and surrogacy centers. As these recommendations are not legally binding, whether or not clinics continue to adhere to them rests only on their goodwill.

### Assisted Reproductive Technologies (Regulation) Act of 2008

Due to the complexity and difficulty of the issues surrounding surrogacy, the world's most popular “surrogacy destination”, India, needs regulations to support the surrogacy and IVF industries. Before a specific legal provision regarding surrogacy was introduced in 2008, the issue of regulating “the rights and interests of the surrogate mother, the child, or the commissioning parents had to be dealt with informally. Years of speculation culminated in the introduction of the Indian Council of Medical Research (ICMR) had produced a draft Assisted Reproductive Technology (Regulation) Bill and Rules 2008” before Parliament as part of the government's push to legalize commercial surrogacy.

“The Draft ART bill, 2008 was made available for public comment on the Indian Council for Medical Research (ICMR) and the Ministry of Health and Family Welfare websites” (Sharma, 2013). In doing so, it adopted and drew on the ICMR's 2005 set of national standards for assisted reproductive technologies (ARTs) in terms of both their practicality and their ethical propriety.

There were a total of fifty provisions spread over nine chapters in the proposed Bill's text. The Bill recognises the validity and enforceability of surrogacy agreements and states that the “Principles of the Indian Contract Act 1872” and other laws shall apply to such arrangements on an equal footing with other contracts. The Law also made Surrogacy arrangements available to single people.

The proposed legislation mandates that the commissioning parents pay for the surrogate mother's health care, including insurance, during the duration of her pregnancy.

As part of a surrogacy arrangement, a woman “may earn monetary compensation from the couple or person, as the case may be, but she must abandon all parental rights over the child after she gives birth and hands the child back to the commissioning parents”. A requirement requiring the names of both biological parents to appear on the birth certificate is also included (Rao, 2008). The minimum age a woman must be to become a surrogate mother is spelled out. The law specifies that she must be at least 21 and no more than 45 years old. She has to be in good health to be a surrogate, and she may only do so a maximum of three times. Additionally, state and national advisory groups, as well as a licensing authority for ART clinics, are planned components of a regulatory framework. The media has reported that the law was meant to protect couples from predatory doctors and ART clinic owners. It also tries to enforce restrictions on surrogacy and address the social and ethical challenges relating to parenting that are highlighted by the use of ARTs (Mukhopadhyay, 2008).

Yet, it is ironic that the draft law was heavily attacked, with claims that it was just intended to find a middle ground between commercialization and the role of mothers. A review of the bill's language reveals that its primary purpose is not to safeguard the legal rights of surrogates or the children they carry. Instead, it appears that clinics will be shielded from legal action in social conflicts over issues like who the “real parent” of a kid really is. It does little to safeguard women against potentially harmful devices. The article spends a lot of time on the facilities that clinics need but gives little attention to the risks associated with the treatments themselves. It lays out who can get their hands on the technologies, although it's not quite apparent whether any of them are legitimate infertility treatments. In addition, it aims to protect the “commissioning couple's” interests. After hearing the feedback, the Ministry of Law and Justice made certain changes to the 2008 draft ART laws (Rajpal Shah, 2009).

The Indian Supreme Court upheld the legality of surrogacy in the case *Manji v. Japanese Infant* in 2008, ordering the Indian Parliament to establish a legislation governing the procedure. Assisted reproductive technology (ART) law was still in the works in 2008. Seeing the gravity of the problem, the Law Commission of India revised the Surrogacy Code with the fact that India is a popular place for international surrogacy in mind.

The 228th report from India's Law Commission made following suggestions.

- Contract law will continue to apply to surrogacy agreements between intended parents and surrogate caregivers. Nonetheless, the partnership should not be used for financial gain. It will outline the compensation to be given, the method to be followed, whether or not the surrogate's husband and other family members must give their approval, and other such details.
- If the intended parents break up and are no longer prepared to take custody of the child after the birth, or if the commissioning couple or individual dies before the child is born, the surrogate child shall get financial support under the surrogacy agreement.
- The cost of a surrogate mother's life insurance policy is one of the many expenses that should be covered under the surrogacy agreement.
- As a child's biological connection is the primary source of love and affection, one of the intended parents should also be a donor. Adoptions have been linked to a decrease in the rates of child maltreatment of different sorts. In the event of a single intended parent, he or she must be a donor in order to have a child via a surrogate. If the intended parents and the biological parents are not the same people, adoption is the next best alternative.

- A surrogate child should be legally recognized as the legal child of the commissioning parents without any further legal action being required, such as adoption or a declaration of guardianship.
- The child's surrogate mother and father's names should appear alone on the birth certificate.
- Both the donor and the surrogate mother need to be treated with privacy and discretion.
- The practice of sex-selective surrogacy must be outlawed.
- It is imperative that the Medical Termination of Pregnancy Act of 1971 be the exclusive legal framework for abortions.
- While it has generally sided with surrogacy in India, the Law Commission has taken a firm stance against commercial surrogacy.

Surrogacy and how to legally practice it in India are only two of the topics covered. The abuse of a surrogate mother is another area of interest for the Law Commission (<http://www.progressivehealth.in/surrogacy-law-in-India.html>).

### **The Assisted Reproductive Technology (ART) Regulation Bill, 2010**

Considering the prominence of the practice as well as the challenges and arguments surrounding it, the government of India assembled an expert panel to draft new legislation for surrogacy and "Assisted reproductive technology (ART)" in India. This group of experts provided the government with a proposed Assisted Reproductive Technologies (ART) Regulation Bill for 2008. The committee made an effort to address all relevant and timely issues concerning surrogacy. The administration was still considering this law, so it was never introduced to Parliament. Surrogacy was conducted in a transparent and morally sound way, in accordance with the ICMR's standards, despite the absence of any laws governing the practice. After considering the rising number of surrogacy cases, legislators changed the legislation. The updated law was written by the "Ministry of Health and Family Welfare of the Government of India" (<http://www.medicalindiatourism.com/surrogacy-in-india/surrogacy-laws-in-india.html>).

### **The Assisted Reproductive Technologies (Regulation) Bill, 2010**

It was first brought up in 2008, and its goal is to set up a national system for overseeing and regulating "assisted reproductive technology (ART)". Commercial surrogacy will now be permitted for singles, married couples, and unmarried couples. The minor amendments made by the government to this law are as follows:

- The proposed law states that the surrogate must be between the ages of 21 and 35 and that she must not have delivered more than five healthy babies (including her own) in her lifetime.
- To make sure her unborn child is healthy, the woman should get STD and other infectious disease tests before she gives birth.
- She also needs to confirm in writing that she has not received any blood or blood products in the prior six months.
- Any woman in India, whether a known relative or a complete stranger, is legally allowed to serve as a surrogate for another couple. A surrogate mother might be a family member, but she must be of the same generation as the commissioning mother.
- The legislation would prohibit the simultaneous transfer of the intended mother and the surrogate, as well as make it unlawful at the same time to take the services of more than one surrogate. Three embryo transfer attempts are the most that a woman and her partner may make.
- It said that a valid surrogacy agreement must be signed by the surrogate mother.
- Foreigners or NRIs renting an Indian surrogate mother's womb must prove that their home country allows for, and will grant citizenship to, surrogate children. Consider the two-year legal fight between German parents Two of Jan Balaz and Susan Lohlad's children, Nikolas and Leonard, were born through surrogacy. In Jan 2008, the child was born to an Indian surrogate mother, but neither the German nor the Indian governments recognized their birth. As a result, the apex court granted them exit permits in May of 2010.
- A local guardian must be chosen by the foreign couples who will have legal custody of the surrogate and the child until they are given to the commissioning parents. The local guardian is expected to care for the child if the couple decides they cannot.

As a result, the measure set out certain regulations for both surrogate mothers and intended parents to follow. For NRI and foreigners couples considering surrogacy in India, it recommended rigorous requirements (Nigam & Ahmed, 2013). Several examples made headlines, pressuring the government to make changes to the law. One of these examples is the gay Israeli couple. In May 2010, a DNA paternity test confirmed that the father of Itai and Liron was homosexual Dan Goldberg who were born to a surrogate mother in Bombay, and the Israeli government finally issued passports to the gay Israeli pair. After much discussion in the Knesset (Israel's parliament), the Jerusalem District Court determined on appeal that a paternity test should be conducted (Malhotra, 2010).

Proposed by the Government of India in 2010, "The new ART Regulation Bill and Rules of 2010" seeks to ensure the safety of all involved parties by making agreements between all parties involved legally obligatory made infringement a cognizable offense punishable by prison time and a fine. The passing of this measure was supposed to strengthen surrogacy legislation in India and provide for more equitable procedures all around. The first measure was heavily criticized on the grounds that it insufficiently protected the rights and welfare of surrogates; the new version had to be changed again.

### **The Assisted Reproductive Technology (ART) Regulation Bill, 2013**

The practice of surrogacy in India is rapidly expanding, but the legislation to govern it is still in its early stages of development. In light of the initial recommendations established by the ICMR the current set of standards has evolved (Bhanj, 2014). They, however, are not legally enforceable and have no weight.

The 2010 law was updated in 2013 with the "ART Bill". Considering that the measure was written in response to calls for the regulation of the surrogacy sector, the fact that there has been no hint of legislation five years after the initial draught is ludicrous. In addition, the problem worsens since new irregularities appear every time the draft law is circulated in an effort to fix the ones that are already there.

One hundred distinct sections of the 2013 draft legislation address various facets of ART. Public notices of the proposed legislation and 2010 and 2008 rules were disseminated widely, with copies given to "institutions, state governments, NGOs, medical experts, other stakeholders statutory organizations". The bill of 2013 was never released to the public or even shared among

legislators. The Center has been urged to delay passing the "Assisted Reproductive Technologies (Regulation) Bill, 2013" by groups campaigning for legal rights, human rights, women's rights, LGBT rights from all across the nation in order to allow for more debate.

The 2013 ART law was changed to include many new provisions.

- “It provides guidelines for the maximum number of pregnancies that a surrogate may carry.
- It details the appropriate payment for a surrogate's services.
- It also tells about the age of the surrogate.
- It also sets the context for the legalization of surrogacy between international couples and Indian women.
- It also includes instructions about the surrogate's health and her spouse's approval.
- The bill also recommends and details punishments for those who break the law”(<http://www.medicalindiatourism.com/surrogacy-in-india/surrogacy-laws-in-india.html>).

After reading the Draft Bill, several public-spirited lawyers and medical experts voiced their opinion that the bill should contain measures to control and monitor the various participants in surrogacy arrangements. It has also been said that it fails to establish standards for medical practice and fails to regulate the key third parties involved in arranging surrogates, such as, tourism companies, surrogacy agencies and surrogacy homes (Dhar, 2013).

While acknowledging the “Union Ministry of Health and Family Welfare and the ICMR's efforts to draft the ART (Regulation) Bill, 2013”, a number of activists have stated that they think certain provisions in the bill promote the interests of private-sector technology providers rather than regulating providers and safeguarding surrogate mothers rights and interests. The measure as written does not go far enough to protect surrogate mothers from harm; it should have made providers accountable to both the surrogates and the law.

Ultimately, a proposal to significantly amend the draft ART 2013 bill emerged from the meetings of Government of India departments and ministries on March 6 and 7, 2014. The most important proposal would limit surrogacy in India to infertile Indian couples alone, with no exceptions made for foreigners unless they are married to an Indian citizen. Nevertheless, those who are considered OCI and NRI are included. The goal here is to protect Indian women from being exploited when they are at their most financially vulnerable. Now, we are waiting for the ART Draft Bill to be revised (Malhotra, 2014)

### **The Surrogacy (Regulation) Bill, 2014**

One member of the Lok Sabha (the lower house of Parliament) has taken the initiative to draft legislation to regulate surrogacy. According to the Lok Sabha website, “Bill No. 61 of 2014, titled The Surrogacy (Regulation) Bill, 2014” was presented on August 8, 2014. Dr. Kirit Premjibhai Solanki, a politician from Gujarat, proposed this legislation. Statistics and Information Regarding the bill:

- The government is not the primary sponsor of the bill; rather, an individual Member of Parliament is responsible for its introduction.
- In contrast to other pieces of legislation, this one specifically addresses surrogacy agreements.
- With a designated guardian in India, the law allows for commercial surrogacy agreements between international spouses.
- The bill does not address ART banks, which are used to locate surrogate mothers and egg donors.
- The commissioning couple is legally responsible for providing health insurance for the surrogate mother, as stipulated by the bill.
- Once same-sex unions are legalized in India, the bill would enable homosexual couples to use surrogacy (Ramasubramanian, 2014).

### **The Surrogacy Regulation Bill, 2019**

The bill bans altruistic surrogacy but allows commercial surrogacy. Surrogate mothers in altruistic surrogacy for their services do not get any financial compensation. Commercial surrogacy refers to the practice of having a third party carry a child in exchange for financial compensation, covering the surrogate's legal and medical obligations.

The competent authorities should provide both a "certificate of essentiality" and an "eligibility certificate" to the prospective spouses. To get a certificate of essentiality, the following requirements must be met:

- “One or both members of the couple seeking to conceive must receive an infertility certificate issued by a district medical board to establish that they are unable to conceive.
- A custody order for the surrogate child must be issued by the magistrate court.
- Postpartum difficulties might arise after the child birth; thus, the surrogate mother should have health insurance for 16 months”.
- Infractions that would be punishable under the Act include
- “Commercialization or promotion of surrogacy
- The intended parents take advantage of the surrogate mother.
- The biological family of a child born through surrogacy does not care for, hurts, or rejects the child.
- Bringing in or selling human gametes or embryos”.

The maximum sentence for such a crime is 10 years in jail and a fine of up to 10 million Indian rupees (<https://prsindia.org/billtrack/the-surrogacy-regulation-bill-2019>).

### **The Assisted Reproductive Technology Act, 2021**

In India, surrogacy between married citizens who are Indian nationals is permitted. The Assisted Reproductive Technologies Act (ART), on the other hand, is available to women of any age and nationality, regardless of whether or not they are married. As a result of this legislation, a National Board under the Code of Civil Procedure will be established with the same authority as a civil court. Our health minister estimates that there are less than a thousand surrogacy facilities in the nation, compared to over forty thousand clinics offering assisted reproductive technology.



India is seeing an increase in medical tourists because of the country's ART clinics. Pre-implantation genetic testing, sperm donation, IVF, IUI, ICSI, and iUI are all options for couples trying to start a family.

Existing ART clinics in India are few and far between at the moment. Notwithstanding ethical, medical, and legal issues, the Lok Sabha has passed a law that governs and oversees ART clinics and ART banks.

According to the proposed law, ART would include all the steps a woman needs to take to try to get pregnant. Procedures that include transferring an embryo or gamete into a female reproductive system from an external source.

Banks that furnish and provide ART have been defined under the Act. Men and women above the age of marriageable age but under the age of fifty and fifty-five, respectively, would be eligible for these services.

The ART banks and other facilities are just the beginning. The Act also sets up groups to keep an eye on how they are used (<https://egazette.nic.in/WriteReadData/2021/232025.pdf>).

### **The Surrogacy (Regulation) Act, 2021**

This Act was finally approved in the early days of December 2021. A few of the act's more notable provisions are as follows:

- Those who work in clinics that provide surrogacy services must meet the conditions outlined in this legislation, and the clinics themselves must be licensed under the Act.
- All surrogacy treatment centers must send in an application to get registered within sixty days of the appointment of the competent authority. Renewal of registration is required every three years.
- Commercial surrogacy is illegal in all forms and cannot be practiced by any clinic providing surrogacy services, embryologist, gynecologist, or other medical practitioners. According to the Act of 2021, surrogacy may only be performed for humanitarian reasons.
- The "intending couple," or future parents, must be legally married in India. All female candidates must be under the age of 50, and all male candidates must be under the age of 55. They cannot have any more children, whether by surrogate or natural means, and this is an essential need.
- The surrogate mother, or the mother offering this service, must be between the ages of 35 and 45. At most, a woman may only serve as a surrogate mother once in her lifetime.
- Any couple interested in surrogacy for medical reasons must first receive the "Certificate of Essentiality or Infertility" from the appropriate national or state assisted reproductive technology and surrogacy boards.
- It is imperative that the surrogate mother be made aware of any and all potential risks associated with the procedure. In addition, documented informed consent in the surrogate mother's native language is required.
- If passed, the measure would require the institution providing surrogacy services to register with the National Assisted Reproductive Technology Registry.

Any couple found to have participated in commercial surrogacy may be subject to a fine of up to 50,000 rupees and/or up to five years in jail. In addition, a fine of one lakh rupees and imprisonment for ten years shall be imposed for repeat offenders. It is illegal in India for anybody to exploit surrogate mothers or children born via surrogacy, and doing so carries a maximum punishment of 10 years in prison and a fine of Rs 10 lakh.

### **India's Judicial perspective on the surrogacy**

*Union of India v. Baby Manjhi Yamada* (2008) (Brantsch et al., 2008)

In this specific instance, a Japanese couple was interested in surrogacy and hence traveled to India. As surrogate motherhood was common in Gujarat, they were able to find a local lady to function as the surrogate. As a result of disagreements throughout their marriages, both couples eventually separated and divorced. The father was now seeking custody of his daughter. It is illegal for a single male parent in India to adopt a female child. The Supreme Court ruled in favor of the child's grandmother in this case. The highest court in the land recognized the necessity for surrogacy legislation.

*Jan Balaz v. Anand Municipality* (2008) (AIR 2010 Gul 21)

This German couple was living in the UK because of their jobs, and their twins needed to get Indian passports so they could go to India. While the operation was being challenged in court, passport authorities declined to give passports to the twins since they did not have citizenship. The German legislation made no mention of surrogacy. The SC ordered that the children be permitted to leave the country, and the German government authorized the adoptions and subsequent legal battles for the children's rights.

*Suchita Srivastava v. Chandigarh Administration* (2009) ((2009) 14 SCR 989, (2009) 9 SCC 1)

Here, a lady with the cognitive maturity of a 9-year-old was raped and became pregnant. They found out she was pregnant in the ninth week of her stay at a government facility where she had been incarcerated. In a landmark decision, the Supreme Court upheld a woman's freedom to decide for herself whether or not to have a family, to have an abortion if they so choose, and to be treated with respect and privacy during the whole process of becoming a mother (Article 21 of the Constitution).

*Union of India v. Judge K.S. Puttaswamy and Others* (2018) ((2017) 10 SCC 1, AIR 2017 SC 4161)

The court ruled that this right must be protected by due process because obtaining and displaying a certificate of infertility violates the right to privacy and because requiring a certificate of infertility from the district medical board goes against moral and ethical standards in society.

### **Current scenario and way ahead of surrogacy in India**

The rise of IVF clinics in India has created favorable conditions for the development of reproductive tourism. Commercial surrogacy proponents see the practice as a marketable good. But the truth is a little different. The practice of commercial surrogacy raises a number of ethical and policy concerns.

Yet, the lack of rules in the surrogacy industry and the abuse of human rights, problems with citizenship, health policy, and other problems that come with it should be the most controversial issue in India.

In today's enlightened age, the conversation around surrogacy must center on the interests and rights of the woman. Surrogacy, in the eyes of certain campaigners, has enormous profit potential. In their view, the capacity of women to have children is a weapon against the oppression they face in today's society. Why shouldn't women get compensation for sperm donation if males do?

Some people object to the commercialization of surrogacy on ethical and social grounds, and they also believe that the women involved are underpaid for their services.

Women who have trouble getting pregnant more than once may have to go through invasive clinical treatments like embryo transfer, which can cause miscarriages or other problems. It's important to think about the potential risks associated with several embryo transfers, hormone medication, and STIs. Some of the other problems that can come up during the surrogacy process include not getting enough money, the risk of being trafficked, confusion over the terms of the contract, limits on parental rights, worries about the surrogate's health after giving birth, and psychological problems. But the costs to surrogates' quality of life must be calculated before a prohibition can be justified.

If we really want to stop human trafficking and underground markets from flourishing, we shouldn't just outlaw them. Instead, we should think about how to regulate it effectively so that neither of those things can happen. The moment has come to wake up from this slumber and chart a new course based on rigorous oversight and enforcement.

The legislation has to be drafted in a way that supports the feminist movement. An altruistic paradigm, in which the surrogate mother makes all the sacrifices necessary to carry out the procedure out of pure kindness, doesn't make a lot of sense. In this light, we will look at the so-called "compensatory surrogacy model," in which the prospective parents pay for the surrogate's medical expenses, lost income, pain, and even death.

## II. CONCLUSION

Surrogate motherhood is a difficult path to take in India. There are a number of prerequisites that must be met legally before beginning the process. Yet, there is also a societal stigma attached to the practice of using a surrogate mother. We still discover a paucity of utilization of such procedures among the general population, with the exception of a small number of high-profile individuals. Although surrogacy is a wonderful option for helping such couples have families, it has to gain greater public support before it can really take off. Accepting a woman's inability to give birth is to accept reality.

Further education and clarification of the relevant legislation are required to advance this area. Commercial surrogacy should not be illegalized immediately. More consideration should be given to gay couples and lone parents under the legislation. More stringent regulations are needed to protect the health of the surrogate mother and the child. If you or someone you know would like to experience the joys of motherhood, surrogacy is a wonderful option.

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