

Surrogacy in India – Recent Advances

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ABSTRACT

Surrogacy arrangement comes into play when pregnancy is impossible or when it includes risks for the mother, which can threaten the life of the intended mother or in the case of a single male or a male couple who desires to have a child. The surrogacy market of India became well known among intending couples in developed nations because of the comparatively cost-effective process and easy access provided by Indian surrogacy agencies. This created a need for legislation that pertains to the smooth flow of the whole process of surrogacy. The bill was introduced and passed by the Lok Sabha and Rajya Sabha in 2019 and 2021, respectively. Then it got the assent of the President of India on December 25, 2021, and was published in the official Gazette of India. The legislation was constituted to form the National and State Assisted Reproductive Technology and Surrogacy Board as well as National Assisted Reproductive Technology and Surrogacy Registry and Appropriate Assisted Reproductive Technology and Surrogacy Authority

Keywords: Surrogacy; Surrogate mother; Surrogacy procedure.

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INTRODUCTION

It is an arrangement where a surrogate bears a child for another couple or person and delivers the child for another couple or person who will become the child's parent(s) after birth.¹ People may seek a surrogacy arrangement when pregnancy risks are dangerous to the life of the mother or when pregnancy is medically impossible. Involvement of monetary compensation may or may not be there in surrogacy. The cost and legality of surrogacy vary widely between interstate surrogacy arrangements or jurisdictions, sometimes resulting in problematic international issues.² Couples usually travel to the state of jurisdiction, which permits them to seek surrogacy treatment in a country where it is banned. In some countries, surrogacy is legal only because money does not exchange hands, making it a commercial process. In states where commercial surrogacy is legal, couples may use third-party agencies to assist surrogacy by finding an appropriate surrogate and arranging a surrogacy contract with her.³

Surrogacy in India

Indian surrogates, because of their relatively low cost and easy access, became increasingly popular amongst intended parents in industrialized nations, which agencies of Indian surrogacy offer. According to a report, a cost of around \$10,000 to \$28,000 was charged for the whole process of surrogacy, including fertilization to the delivery of the baby, along with the fee given to the surrogate mother.³ The government of India approved Supervision, Regulation, and National Guidelines for the Accreditation of ART Clinics in India in 2005. In 2012, a study by the United Nations claimed that the surrogacy business yielded more than \$400 million a year from around 3,000 fertility clinics in India. Surrogacy by foreign homosexual couples and from single parents was banned in

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India in 2013.⁴ In 2015, the government banned commercial surrogacy in India and permitted the entry of embryos only for research purposes. The surrogacy (Regulation) bill was introduced in India in 2016 and was passed by the Lok Sabha. This bill proposed surrogacy for only heterosexual Indian couples who were married for five years with the inability to conceive and banned commercial surrogacy altogether. The 2016 bill lapsed owing to the adjournment of the parliament session.⁵ The bill was reintroduced and passed by the Lok Sabha and Rajya Sabha in 2019 and 2021, respectively.⁶ Then it got the assent of the President of India on December 25, 2021, and was published in the official Gazette of India

The Act defined a “Surrogate mother” as a woman who agrees to bear a child, the child being genetically related to the intending couple or intending woman through surrogacy by implantation of the embryo in her womb. The definition of “Commercial surrogacy” is given as the commercialization of surrogacy services or procedures that includes selling or buying of human embryos, human gametes or trading the services of surrogate motherhood by giving monetary benefits to the surrogate mother or her dependents or representative except for the insurance coverage for surrogate mother.

The legislation was constituted to form the National and State Assisted Reproductive Technology and Surrogacy Board as well as National Assisted Reproductive Technology and Surrogacy Registry and Appropriate Assisted Reproductive Technology and Surrogacy Authority

Regulation of Surrogacy Clinics and Surrogacy Procedures

- Registration of clinics
- Commercial Surrogacy is prohibited.
- Not to employ unqualified personnel.
- Not to conduct MTP in surrogate without her consent and authorization of appropriate authority.
- Only Altruistic surrogacy is allowed.
- Not to produce children for prostitution, sale, or any other form of exploitation.

Appropriate Authority – Functions

- To grant, suspend or cancel the registration of a surrogacy clinic.
- To enforce the minimum standards for surrogacy clinics.
- The complaints of breach of the provisions of this Act are investigated, and take legal action as per the provision.
- Supervised the implementation of the provisions of the Act.
- After a proper investigation regarding the complaints against the surrogacy clinics, take required action.

Medical certificate in favour of either or both intending members that necessitates surrogacy from a District Medical Board which consists of 1) Chairperson: Chief Medical Officer or Joint Director of Health Services or Chief Civil Surgeon of the district 2) At least another two specialists, namely, the chief gynecologist or obstetrician and chief pediatrician of the district.

Intending couple shall fulfill the following criteria

- They should be married and be Indian citizens.
- Wife's age 23–50 years and husband's age 26–55 years.
- No surviving child (biological/adoption/surrogacy)
- If a child is disabled or suffering from a fatal illness, certified by the medical board and approved by the authority.

The surrogate mother should fulfill the following criteria

- A married woman who has a child of her own.
- Age of 25–35 years
- surrogate mother cannot use her gametes and be a surrogate simultaneously.
- Only a once-in-a-lifetime attempt for a surrogacy procedure on a surrogate mother is allowed.
- Medical and psychological fitness certificate.

Written informed consent of the surrogate mother must be taken only after explaining all known side effects and after-effects of such procedures to the surrogate mother concerned in a language she understands, and the surrogate mother shall have the option, before the implantation into her womb, to withdraw her consent for surrogacy.

Rights of Surrogate Child

A child who is born out of surrogacy shall be considered to be the biological child of the intending woman or intending couple, and a child shall be entitled to all the privileges and rights available to the natural child under any law. The intending woman or intending couple shall not abandon the child who is born out of surrogacy, whether within India or outside the country, for any reason. No one shall advertise to induce, seek, or aim a woman to act as a surrogate mother or promote commercial surrogacy in electronic media, print, or any other form.

For the custody and parentage of the child who is born through surrogacy, an order has been passed by the court of Magistrate of the first class or above. The application is moved by the intending woman or the couple and surrogate mother, and it will be considered a *birth affidavit* after the surrogate child is born. Regarding the insurance coverage, it will be in favor of the surrogate mother for 36 months.

The National ART and Surrogacy Board

- To advise the Central Govt. on policy matters relating to surrogacy.
- Implement the Act, rules, and regulations.
- To lay down the code of conduct of persons working in these clinics.
- The minimum standards of the laboratory, physical infrastructure, expert manpower to be employed, and diagnostic equipment are to be set up
- Supervised the functioning of State Assisted Reproductive Technology and Surrogacy Boards.

The State ART and Surrogacy Board

- The activities of the appropriate authority which are functioning in the state or Union Territory are reviewed
- Monitoring of the implementation of all the provisions, rules, and regulations of the Act.
- To send such consolidated reports to Central Govt.

National Registry of Surrogacy Clinics

- Registration of surrogacy clinics under this Act, the National Assisted Reproductive Technology and Surrogacy Registry has been established

Offenses and Penalties

Every offense under this Act is cognizable, non-compoundable, and nonbailable. The court shall presume that the surrogate mother or the woman was compelled by the intending couple, any relative, or her husband to donate gametes or to render the surrogacy services. There is imprisonment for five years and ten lakhs fine in case any person contravenes any of the provisions of this Act. In case someone does not follow altruistic surrogacy, the person is punished with five years imprisonment with 5 lakh rupees fine, while in subsequent offenses, the punishment is ten years imprisonment with 10 lakh rupees fine.



There are ten years imprisonment and a fine upto rs ten lakhs in case of

- Commercial surrogacy in any form
- Selling human embryos or gametes
- Advertisement
- Abandoning the child
- Exploiting the surrogate mother
- Importing ovum, embryo, or gamete
- Conducting sex selection

Maintenance of Records

The surrogacy clinic shall maintain all records and shall be preserved for 25 years. In case of any court proceedings, the records must be preserved until the final disposal of those court proceedings.⁷

Lacunae in the surrogacy (regulation) Act, 2021

- The Act is restricted to only two categories of people, i.e., the intending couple who are legally married and, according to the laws of India, and that has a certificate of infertility can use this facility.
- The couple needs to be between the age of 23 to 50 for the females and 26 to 55 years for the males. The other category is the intended woman who is either a widow or a divorcee between the ages of 35–45 and can opt for this treatment. This eliminates a segment of the population, such as unmarried women who want to be mothers but are unable to conceive.
- Though modernity is being embraced, legislation against childbirth without marriage still maintains the conventional taboo. The definition of a couple does not cover the live-in

relationship as well as the partner, or both of them suffer from a chronic or genetic disease, and chances are there for them to transfer to offspring.

- Surrogacy is allowed only in circumstances when the NARTAB identifies a condition or disease under which it is permissible to be subjected as per the board's view.
- Only allowed legally married couples in India. The non-binary, as well as homosexual couples, are not able to enjoy parenthood even if they wish .⁸

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