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**REPRODUCTIVE HEALTH AND SURROGACY IN INDIA: LAW POLICY AND PRACTICE**

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**ABSTRACT:**

Women have rights in Article 21 of the Indian Constitution, if she wants to continue her pregnancy then no one stops and if she doesn't want pregnancy then abort but if she sells her womb to the childless couple that couple has the right because they give money for carrying their child until that child not handover to the couple but sometime they both parties are fighting for child because that surrogacy mother is emotional touch to the child and she doesn't want to give, that why that law made for that condition, surrogacy law give the limitation right also, but that law not solve the problem between these both parties. we need strict laws related to surrogacy. Now this day so many couples have problems reproductively and they go to IVF centers for child and they facing their problem they go to surrogacy centers for children not only Indians but foreigners and NRI people also go for surrogacy children because they give very few amounts to the surrogacy mothers and after giving birth so many problems came with surrogacy mother mentally and physically. This time no one cares about the surrogate mother and she doesn't have money that is why the government banned commercial surrogacy and surrogacy mothers facing reproductive health problems, these are the duties foe everyone who follows the rule.

**Keywords:** Reproductive Health, Surrogacy, Surrogate mother, ART, ICMR, Reproductive Rights, Womb, Conceive, Biological colonization, Embryo.

**INTRODUCTION:**

The human body is a wonderful of which is still an enigma. Now this day every couple has a problem with reproductive health and if a single person wants to child, they don't give birth without a partner, so now this time surrogacy is needed for most people, who want a child. Reproductive health is a big problem because so many rules are there but treatment is very costly and sometimes successes but it takes a lot of money and time. Now surrogacy law came in 2016 but this law has some limitations because they're confused about giving the right to a

surrogate mother then is against couple rights and sometimes this is against to rights of children, that is needed here balances every person's right.

Surrogacy raises complex ethical, moral, and legal questions. surrogacy must be legal in India for it to have developed into an industry, what does it mean and how has it come to be? It is currently estimated to be a 2 billion industry.<sup>1</sup> Before November 2015 when the government imposed a ban, on foreigners accounted for 80 percent of surrogacy births in the country. This is because most countries, barring a few such as Russia, Ukraine, and some U.S. states, do not permit commercial surrogacy. Many countries in Europe have completely prohibited surrogacy arrangements both to protect the reproductive health of the surrogate mother as well as the future of the newborn child.<sup>2</sup>

### **Types of surrogacy in India:**

There are two types of surrogacy that are in practice in India. They are:

- Subrogation in the traditional sense
- Gestational Surrogacy<sup>3</sup>

### **Reproductive health and surrogacy in India, connect each other:**

Surrogacy has been part of the legal policy on ART since 2005, there have been several guidelines for the regulation and supervision of ART, successively drafted by the Indian Council of Medical Research (ICMR) and successively reviewed by the government (2005, 2008 and 2010). These documents are only guidelines that have no authority or contract. They are not mandatory and ART is therefore submitted to the ethics and judgment of the physicians and clinics. Commercialized surrogacy has been permitted in India since 2002. The last ART Bill defined who is able to be a surrogate: a woman aged between 21 and 35, having her own children, with no more than 5 live babies (successful live births) over the course of her life, including her own children. It also defines the condition of agreement between the intended parent, Surrogacy clinic, and surrogate: traditional surrogacy (when the surrogate is

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<sup>1</sup> iima.ac.in, <https://www.iima.ac.in/sites/default/files/rnpfiles/1717570592016-01-01.pdf>, (last visited Mar. 6, 2024).

<sup>2</sup> Dr. Santosh Kumar, MR. TUSHAR VED SAXENA, Surrogacy: How far new laws successful in combating issues in regards to surrogate mother and the child, amity.edu, (Feb. 01, 2024, 4:19 PM), <https://www.amity.edu/UserFiles/Journal/sant.pdf>

<sup>3</sup> restthecase.com, <https://restthecase.com/knowledge-bank/surrogacy-in-india>, (last visited Mar. 6, 2024).

also the oocyte donor) is no longer accepted: surrogates are to remain anonymous; their identity will never be advertised and no more than three embryos shall be transferred.

### **Surrogacy and Women's right to health in India:**

The concept of surrogacy in India is not new commercial surrogacy or "Womb for rent" is a growing business in India. If a surrogacy woman is conceiving a child for another couple then in conceive period she has so many problems, this is physical as well as mental, so in the future after delivery no one cares for the surrogacy woman, and that lady is poor so she needs some money, if she is taking money so that not wrong, because after conceive and delivery so many complications come with surrogacy mother because her financial condition is not good and she has her own children. In fact, outsourcing is an exploitation practice in India. Currently, no law exists to protect the surrogate mother in case of birth complications, forced abortion, etc. Only poorer women bear other couples' children but no women bear poorer women's children, so it is economic exploitation, a kind of biological colonization.

The Ministry of Women and Child Development is examining the issue of surrogate motherhood in India to bring up comprehensive legislation. A draft legislation on surrogacy prepared by the India Council of Medical Research (ICMR) has recommended strict penalties for offenders and a tight regulation on Assisted Reproductive Techniques (ART). The draft law restricts the number of embryo transfers a mother can go through to 3 times for the same couple if the first two attempts fail and it also adds that no woman should act as a surrogate for more than three live births in her life.<sup>4</sup> In fact, these are the only guidelines framed by the ICMR and the Ministry of Health and Family Welfare in 2005. ICMR guidelines, state, "A relative, a known person as well as a person unknown to the couple may act as a surrogate mother for the couple. In case of a relative acting as a surrogate, the relative should belong to the same generation as the woman desiring the surrogate." The experts believe that surrogate people childless couples needlessly toward commercial surrogacy. Section 3, 10, 5 of the guidelines state that "a surrogacy should be less than 45 years" being the upper age without mentioning the minimum age to be surrogate. So does that mean an 18-year-old or someone even younger,

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<sup>4</sup> Anu, 1; Kumar, Pawan2.; Inder, Deep3; Sharma, Nandini4. Surrogacy and Women's Right to Health in India: Issues and Perspective. Indian Journal of Public Health 57(2):p 65-70, Apr–Jun 2013. | DOI: 10.4103/0019-557X.114984

can become a surrogate mother? Before accepting a woman as a possible surrogate for a particular couple, the testable criteria are to go through a successful full-term pregnancy.

1. Law related to surrogacy in India

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

2. The Indian Council of Medical Research Guidelines, 2005

These guidelines were drafted to regulate the conduct of the Assisted Reproductive Technology clinics that provide surrogacy treatment in India. This guideline outlined how fertility clinics should employ Assisted Reproductive Technology (ART) operations or treatments. Although this was before the ART Bill, these Guidelines are solely advisory and are not legally binding.

### **The Surrogacy Regulation Bill 2019:**

Commercial surrogacy is prohibited by the Bill, however altruistic surrogacy is permitted. Other than medical expenditures and insurance coverage throughout the pregnancy, there is no monetary remuneration for the surrogate mother in altruistic surrogacy. Surrogacy performed for a monetary gain or reward (in cash or kind) along with essential medical expenditures and insurance coverage is referred to as commercial surrogacy.<sup>5</sup> A 'certificate of essentiality' and a 'certificate of eligibility' should be granted by the competent authority to the intended couple. There are a few conditions that need to be fulfilled to get a certificate of essentiality, which are as follows:

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

The offenses included under the bill are

- a. Advertising surrogacy or commercialization of surrogacy.
- b. The exploitation of the surrogate mother by the intending parents.
- c. A surrogate kid is abandoned, exploited, or disowned
- d. Selling or importing human embryos or gametes.

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<sup>5</sup> drishtiiias, <https://www.drishtiiias.com/daily-updates/daily-news-analysis/surrogacy-law#:~:text=It%20also%20bans%20commercial%20surrogacy,to%20those%20seeking%20a%20child.> (last visited Mar. 6, 2024).

The penalty for such an offense ranges from up to 10 years of imprisonment and up to 10 lakhs rupees fine.

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

In India, Surrogacy is allowed for married couples who have Indian citizenship. However, in the case of Assisted Reproductive Technology Act (ART), it is available to all married couples, live-in partners, single women, and foreigners. This bill has the provision for a National Board, having the authority granted by the Code of Civil Procedure to a civil court. According to the Health Ministry of our country, there are less than 1000 clinics for surrogacy while there are more than 40,000 for ART.

ART has become a source of medical tourism in India and the growth of clinics providing this service is increasing day by day. Gamete donation, intrauterine insemination, in-vitro fertilization, intracytoplasmic sperm injection, and pre-implantation genetic testing are all available.<sup>6</sup> India currently lacks established ART-practicing clinics. The Lok Sabha enacted a Bill that regulates and supervises ART facilities and ART banks, despite concerns about their ethical, medical, and legal elements. Under the provisions of the Bill, ART would consist of all the techniques that are required for an attempt to get a woman pregnant. From putting the gamete or embryo into a woman's reproductive system to handling sperm or oocytes outside the human body. The Act defines ART bank that would provide and supply the necessary. These services would be available to women above the legal age for marriage but below the age of 50 and also to the man above the legal marriage age and below the age of 55 years. Not only does the act provide for the ART banks and other facilities it all sets up boards for the regulation of the Act.

### **NATIONAL BOARD:**

This Board has been formed to suggest and advise the government on various policy matters. This Board recommends the necessary and minimum standard for the infrastructure labs, and manpower like doctors and nurses to be employed in the clinics and banks. These would see if the bill is being implemented properly as well as recommend changes with time.

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<sup>6</sup> Malhotra, Narendra et al. "Assisted reproductive technology in India: A 3 year retrospective data analysis." *Journal of human reproductive sciences* vol. 6,4 (2013): 235-40. doi:10.4103/0974-1208.126286

**NATIONAL REGISTRY:**

It will feature a single database with information on all clinics and banks around the country, as well as the nature and types of services offered and the outcome of those services.<sup>7</sup> The register will submit the information to the National Board, which will use it to develop regulations and standards.

**REGISTRATION AUTHORITY:**

These would consist of a chairperson, who has to be an officer of the health department ranking above the joint secretary. A vice chairman ranks above the joint secretary. A vice-chairman ranking above the joint director in the health department, a woman who holds an eminent position in a woman's organization, a law officer from the department of law, and a registered medical practitioner who holds an eminent position in the field.

The registration authority's responsibilities will include: granting, suspending, or canceling the registration of ART centers; enforcing the standards and overseeing the law's execution; complaints and feedback of any violation of provisions, pursuing legal action against the misapplication of ART, and initiating investigations; and suggesting to the National and State Boards on how to alter the rules in light of technological and changes.

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

This Bill was passed in early December of 2021. Some of the key features of the Act include the following-

- All the clinics providing the surrogacy treatment and facilities need to be registered under this Act and people practicing in those clinics need to qualify as per the criteria given in this bill.
- Every facility that performs surrogacy treatments must apply for registration within sixty days after the competent authority's appointment. Every three years, registration must be renewed.<sup>8</sup>

<sup>7</sup> indianexpress, <https://indianexpress.com/article/explained/explained-whats-in-art-surrogacy-bills-7653374/>, (last visited Mar. 6, 2024).

<sup>8</sup> Ms. Shilpi Sharma, An overview of Surrogacy Laws in India, aishwaryasandeeep, (Feb. 01, 2024, 4:19 PM), <https://aishwaryasandeeep.in/an-overview-of-surrogacy-laws-in-india/>,

- Commercial surrogacy is prohibited in any form by any surrogacy clinic, gynecologist, embryologist, or other medical practitioner. Only altruistic surrogacy is permissible under the 2021 Act.
- The intending couple i.e. the couple wanting to have the baby must be legally married in line with the laws of India. The age of the female should be between 25-50 years and that of the male should be 26-55 years. Also, another important condition is that they shouldn't be having any other adopted or conceived a child through surrogacy or naturally.
- The mother providing this service that is the surrogate mother needs to be between the age of 35-45 years. Any woman cannot be a surrogate mother more than once in her entire lifetime.<sup>910</sup>
- The National/state Assisted Reproductive Technology and Surrogacy Board must provide a 'Certificate of Essentiality/Infertility' to an intended couple who has a medical need for surrogacy.<sup>11</sup>
- The surrogate mother must be informed of all known negative effects of the operation. In addition, the surrogate mother must provide written informed permission in the language she understands.
- According to this bill, there would be a Registry being installed called the National Assisted Reproductive technology that would handle the registration of the clinic providing the surrogacy treatment.<sup>12</sup>

According to this Act, any couple who takes a baby through commercial surrogacy shall be held liable to pay a fine of up to 50000 rupees as well as imprisonment of 5 years. Moreover, in case the same offense is committed multiple times, the fine shall go up to 1 lakh and the jail time to 10 years. Any individual, organization, or clinic found to be involved in the exploitation of surrogate mothers or children born via surrogacy faces a maximum penalty of ten years in jail and a fine of Rs. ten lakhs.<sup>13</sup>

### **Traditional surrogacy must be included:**

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<sup>9</sup> *Id*, at 1442.

<sup>10</sup> Ananya Bose, Is surrogacy legal in India, blog.ipleaders, (Feb. 01, 2024, 4:19 PM), <https://blog.ipleaders.in/is-surrogacy-legal-in-india/>

<sup>11</sup> *Id*, at 1442.

<sup>12</sup> *Id*, at 1442.

<sup>13</sup> Restthecase, *Supra* note 03, at 1442.



As discussed in the section above, two types of surrogacy exist. However, the 2021 Act only allows for gestational surrogacy. Any woman who provides her gametes as a surrogate is prohibited under section 4 (ii)(b)(III). According to section 8 of the Act, the surrogate child is treated as the biological child of the intended couple or intended woman, as the case may be, and has the same rights and privileges as a natural child under the legislation in effect at the time.<sup>14</sup> Judgment related to surrogacy in India

Some cases giving in down related to surrogacy law-

**Baby Manjhi Yamada v. Union of India:**

Here, in this case, a Japanese couple came to India to have a baby through surrogacy.<sup>15</sup> Now, they hired a woman from Gujrat who practices as a surrogate mother. Some marital problems arose between the couple and they got divorced. Now the father of the child wanted custody of the child who was a girl. In India, a single father cannot adopt a girl child in this case, the Supreme Court gave the right to the grandmother of the child.<sup>16</sup> The Supreme Court realized the need for regulated law for surrogacy.

**Jan Balaz v. Anand Municipality (2008)<sup>17</sup>:**

In this case, a German couple, the intended parents hired a surrogate mother who gave birth to twins. This German couple worked in the United Kingdom, and their twins now required an Indian passport to travel.<sup>18</sup> The passport officials refused to issue passports to the twins since they did not have citizenship because the procedure was being litigated in court. There were no laws regarding surrogacy in Germany. The Children were granted departure permission i.e., permission for them to leave the country, by the Supreme Court, and German authorities allowed them to adopt the children and fight for their rights.

**Suchita Srivastava v. Chandigarh Administration (2009):**

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<sup>14</sup> DIKSHA TEKRIWAL, Lacunae in the Surrogacy (Regulation) Act, 2021, theleaflet, (Feb. 01, 2024, 4:19 PM), <https://theleaflet.in/lacunae-in-the-surrogacy-regulation-act-2021/>

<sup>15</sup> Baby Manjhi Yamada v. Union of India

<sup>16</sup> Ananya Bose, *Supra* note 07, at 1443.

<sup>17</sup> Suchita Srivastava v. Chandigarh Administration (2009)

<sup>18</sup> Samridhi M, Surrogacy Law in India: Present Framework and Limitations, 2021, lawctopus, (Feb. 01, 2024, 4:19 PM), <https://lawctopus.com/clatalogue/clat-pg/surrogacy-law-in-india-present-framework-and-limitations/>

In this case, a woman having the mental age of 9 years old was raped and impregnated. She was living in a government institution and they came to know about the pregnancy in the 9th week of the gestation.<sup>19</sup> Article 21 of the Constitution, covers the rights of women regarding their reproductive choice and also other rights like carrying the baby for a full term i.e. 9 months, to give birth to the child, and her right to dignity, and privacy, the court held.

**Justice K.S. Puttaswamy and Anr. V. Union of India (2018):**

In this case, held that “privacy is protected as an intrinsic part of the right to life and personal liberty under Article 21 and as a part of the freedoms guaranteed by part III of the Constitution.”<sup>20</sup> It explicitly overrules previous judgments of the Supreme Court in *Kharak Singh Vs. State of UP* and *MP Sharma vs. Union of India*, which held that there is no fundamental right to privacy under the Indian Constitution.

This judgment settled this position of law and clarified that the Right to Privacy could be infringed upon only when there was a compelling state interest for doing so. This position was the same as with the other fundamental rights

**CONCLUSION:**

Reproduction is a right of women and women make the decision when they use it or not, but nowadays surrogacy clinics and hospitals buy the right and give a very small amount for that right. Most foreigners are coming to India and they purchase the right means they giving money vary less amount for surrogacy mothers. Now this time so many laws related to surrogacy but that does not help that much because ICMR, ART SURROGACY (regulation) Act, 2021, this law bans commercial surrogacy because in India so many complications happen with women, so no one come that time, but in India so many law of surrogacy but these agencies and clinic doing illegal because in India this is commercial surrogacy ban, so that why reproductive health problem is very big problem.

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<sup>19</sup> *Suchita Srivastava v. Chandigarh Administration* (2009)

<sup>20</sup> *Justice K.S. Puttaswamy and Anr. V. Union of India* (2018)

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