



# The Indian Journal for Research in Law and Management

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## THE WOMB AND THE LAWS- SURROGACY IN MODERN INDIA

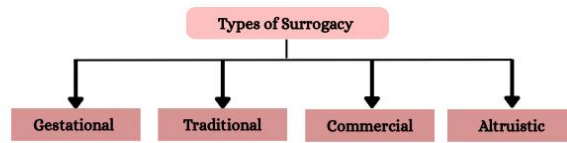
~ *Dakshita*

Surrogacy, a highly intersectional issue, which was once a private and uncontrolled practice, now sits at crossroads with not only the medical sphere, but also with law, gender rights and social stigma.

In a country like India, where being a third-gender is treated as an excluded part of the society, a drastic step such as surrogacy involving implantation of an embryo into another one's woman's body due to genetic, medical or personal reasons.

A new step as an alternative to parenthood, Surrogacy in India has emerged as an important avenue. There are a lot of reasons to pinpoint why in our country the discussions and implementations surrounding Surrogacy are rapidly increasing. As the maternal age increases and we observe unhealthy changes in our environment they've led to delayed parenthood and increment in infertility issues due to lifestyle have been very peculiar factors. Another, a noteworthy reason is that, in India the cost of all such treatments is far lower than other countries which makes it a Hub in what is called the "medical tourism"(it can be interpreted travelling to another country in order to fulfill their medical procedures such as elective procedures, complex surgeries.

A process like surrogacy, driven by dreams of parenthood, from a medical perspective is another viable substitute to adoption- since it is a legally, complex, socially stigmatized process. Another socially, the awareness and even conversation around such topics shows addressal to the changing reproductive norms as well.



## Types of Surrogacies

**Gestational surrogacy-** This form of surrogacy is the legal form of surrogacy and the surrogate does not have any direct link to the baby.

- The surrogate child is created via IVF by using the egg and sperm of the intended parents.
- The surrogate has no genetic connection with the baby.

**Traditional Surrogacy-** This type of surrogacy has been practiced for a long time in the Indian clinics but since the 2025 Amendments it has been restricted.

- This type of surrogacy involves using the egg of the surrogate mother and making her the biological mother while using the sperm of the intended male parent/donor.
- This often created ambiguity on the legal right over the child.
- This is a less commonly used practice.

According to the payment- there are two kinds of surrogacy- commercial and altruistic.

**Commercial** -This type includes a gestational surrogacy, and here

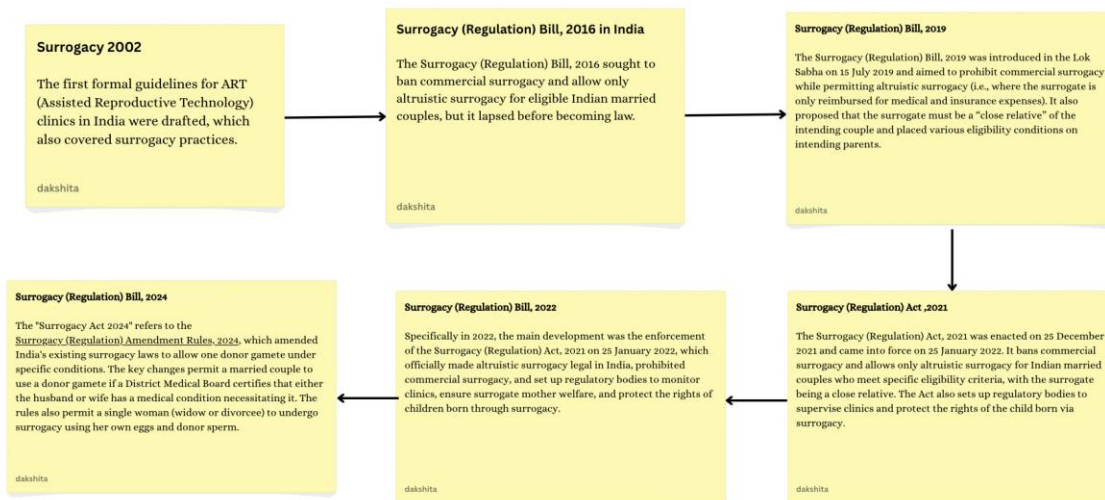
- The surrogate is being paid for carrying the baby for nine months-for her time, effort and risk along with medical expenses.
- This kind of surrogacy is illegal in India.

**Altruistic-** The altruistic surrogacy includes paying only the medicinal and insurance expenses and apart from this the intended parents are not liable to pay anything.

## The history of surrogacy

- The idea of a surrogate mother can be, at least allegorically portrayed in Mahabharata. To cite an instance, the birth of Balrama. As per the narrative, Kansa had sworn not to let any child live that is given birth by his sister, Devaki. To save the 7th child, the fetus was transferred from his sister’s womb to the womb of Vasudev’s wife, Rohini, who was residing in Gokul.
- During the early 1900s-2000s, the appearance of the first surrogate baby can be seen- In India-on 23 June 1994. Now a ray of hope came, around which debate and discussions were being built regarding the Alternative Reproductive Techniques (ART). Another significant thing which came was the onset of commercial surrogacy in India (wherein the surrogate mother is being paid). Since our country offered relatively better services with fewer regulatory biases and cheaper prices, India became a “fertility tourism spot”.

### Major Surrogacy Acts and Amendments



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- In 2002, the Indian Council of Medical Research (ICMR) introduced guidelines for Assisted Reproductive Technology (ART) clinics which covered surrogacy indirectly. Now these guidelines included, setting conditions for eligibility of the couples, compensation for the surrogate and also as the services will be provided to single

women. The guidelines also clearly specified that the surrogate mother cannot donate her own egg and has to relinquish all parental rights.

Through this act, it was mandated to have registration of the ART clinics, but despite all these guidelines, it lacked enforcement and legislation.

- During the first decade of the 21st century, In 2012, around half of India's surrogacy was commissioned by foreigners and another source describes how 25,000 children were born in India through surrogacy with, 50% of them being from international intended parents.
- A highlighted case from 2008, underscores the development of an additional critical issue- The Baby Yamada VS UOI Case. In this case, The Japanese couple- Dr. Yuki Yamada and his wife Ms. Ifumuki Yamada came to India during 2007. They were having a baby through gestational surrogacy when during the same, due to some problems in their married life, his biological mother went back to Japan and later on the biological father also headed back to Japan as his Visa expired. Since both the biological parents went back, the child was under care with his paternal grandmother where he was being breastfed by an Indian. Later, the baby had to be transferred to an Intensive Care Unit since he developed an infection. A habeas corpus was later filed against the Union of India- allegedly challenging surrogacy's legality and demanding for legal regulations.

### **Evaluating the Contemporary Legal Framework**

After the case of *Baby Manji Yamado Vs The Union of India*- an identification certificate was provided to the baby and he was transmitted out of India.

After this case, a notification came from the government in 2015. This set the ground forward for the Regulation Bill of 2016

This notification from the government officially banned surrogacy in India for foreign nationals.

### **The surrogacy regulation Bill, 2016**

- The bill permits surrogacy only to those in which the women cannot conceive.
- The Bill in itself projected inefficiencies. For instance, going for a procedure of surrogacy required the couple to collect certain required eligibility documents, but it didn't specify the timings as well as the process of re-application in case the appeal gets rejected.

- The absence of such explicit temporal details not only creates confusion but also gives room for lack of effective implementation.
- Some other key legal aspect highlighted was

the shift from commercial to altruistic surrogacy.

The practice of surrogacy was only permitted the following conditions-:

- (a) intending couple with proven infertility and married for 5 years
- (b) they are not producing children for purposes of sale, prostitution or any other form of exploitation.
- (c) not commercial surrogacy
- (d) altruistic surrogacy
- (e) for any other condition or disease specified through regulations

Conditions for abortion were also specified that it required a written consent of the surrogate mother and authorization from an appropriate authority. The termination of the pregnancy should also be done in accordance with the Medical Termination of Pregnancy Act, 1971.

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

- The Act passed in 2021 is way more comprehensive and structured articulating the provisions well.
- Firstly, the act specifies the ages of the intended parents- woman ageing 25-50 years and the man must be 26-55. They must be married for at least 5 years and must be citizens of India
- The surrogate mother- must be 25-35 years old on the date of implantation.
- She should be married and have at least one child of her own.
- The surrogate mother should also refrain from providing her own gametes and from acting as the surrogate mother more than once.
- The surrogacy shall not be performed until the intended parents obtain all the required documents.
- This act also specifies that the child born out of surrogacy procedure shall deem every right provided to a biological child and the intended parents shall provide the child with all rights and privileges provided to a natural child.

### **The 2022 Regulations Bill**

The 2022 Regulation bill focused more on implementation of the regulations and for that statutory bodies were set up regarding the legal oversight. Operational bodies were established- National and State Surrogacy Board were set up. This act also allowed the married couples to use the egg or sperm of a donor if any partner is medically unfit.

The legal ambiguity over the surrogate child was cleared up as well. Although there are some areas of contention as well. The legal framework addressed here has limited eligibility criteria. The intended parents- apart from the heterosexual couples married for 5 years, excludes single parents, LGBTQ+ couples and single unmarried individuals. Also the condition of having the “close relative” as a surrogate might push this scheme underground and lead to Illegal methods being chosen.

### **The 2024 (Regulation) Amendment Bill**

- This is the one which prioritizes altruistic surrogacy and completely bans the commercial one. This is the current legal framework we’re following.
- The surrogate must be a close relative, aging 25-30 years, having at least one biological child of her own. The permissibility for surrogacy is for NRIs, OCIs and Indian citizens only. Both the couple and surrogate must undergo medical and psychological screening and look after the 36-months post-delivery health insurance.

### **Conclusion**

Surrogacy in India still has a long way to go. Laying down the guidelines and regulations wasn’t just enough. The procedural fallacies, the social stigmatization where surrogacy is still seen as prostitution, the mentality and mindset is all that we talk about right now. The exploitation of the surrogates has been very well settled by the Indian legislative system yet, there’s a lot yet to achieve.

The broadening of our mindsets, inclusivity and kindness is what we foremostly not only should include in our systems but within us too.