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# THE DEVELOPMENT OF SURROGACY LAWS IN INDIA: A CRITICAL REVIEW

AUTHORED BY - SANKRITI DWIVEDI & DR. BHAVNA SINGH

*“Be a rainbow in someone else’s cloud”*

- ‘Maya Angelou’

## **Abstract:**

*Motherhood is a condition of elation. Infertility and parenthood are no longer antagonistic because of scientific, medical, and technological developments. Numerous infertile couples have found happiness through treatments including surrogacy, IVF, and IUI (Intrauterine Insemination). Although infertile couples are legally permitted to pursue IUI and IVF, there are still legal restrictions on surrogacy. Only direct relatives may use surrogacy, according to the Surrogacy (Regulation) Bill. To lessen the difficulties experienced by infertile couples, a Rajya Sabha Select Committee has suggested that this provision be repealed. Did people in ancient India use surrogacy? Thousands of years ago, was artificial insemination common? Numerous instances of these sophisticated techniques may be found in Hindu texts and historical records. India exhibited remarkable sophistication across many fields throughout ancient times. It clarifies the position and development of surrogacy legislation from its legal acknowledgment to the present. It highlights issues with the stipulations in various proposed legislations and the discrepancies within the current laws and regulations. Surrogacy is a technique utilized by couples unable to conceive, including a third party who employs assisted reproductive technology or an oocyte after in vitro fertilization to carry the child, with custody transferred to the couple after delivery. Couples may employ surrogacy when artificial insemination is insufficient. Information Technology was first utilized in the 1980s and formalized in India in 2002; nevertheless, the government later recognized the technology's shortcomings and potential for abuse. In 2012, the UN recognized India as the "CAPITAL OF SURROGACY" following its assessment. The recent Surrogacy Regulation Bill highlighted several key elements, including an updated definition of infertility, the ban on commercial surrogacy, eligibility criteria limiting surrogate mothers to close relatives of the couple, and a mandated 36-month period following delivery for the couple to manage any medical complications resulting from the surrogate mother's pregnancy. Notwithstanding several*

*amendments to the legislation, India continues to require significant advancement in combating malpractices and the abuse of surrogacy.*

**Keywords:** Surrogacy, niyog pratha, artificial insemination, infertility, motherhood, commercial surrogacy, etc.

## INTRODUCTION

Surrogacy is defined as "an arrangement in which a woman agrees to carry a pregnancy that is genetically unrelated to her and her husband, intending to carry term and hand over the child to the genetic parents for whom she is acting as a surrogate," per guidelines published by the Indian Council of Medical Research (ICMR). One clinically referred to as "Assisted Reproductive Technology (ART)," surrogacy is being investigated for possible scientific applications.

Two main categories exist within the field of surrogacy: traditional and gestational. Additional categories might be gestational surrogacy and altruistic surrogacy under this umbrella.

The traditional approach to surrogacy is referred to as the straight method. The surrogate mother utilizes her ova and sperm of the intended father to conceive and deliver the child. Surrogate mother conceives the child in this method with the understanding that she would release the child to be reared by the father and his intended family. This resembles a procedure in Islam known as 'Nikah al-Istibda.'

In gestational surrogacy, the surrogate mother and child delivered via procedure are not related. It is because an embryo transfer occurs into the surrogate mother's body from the intended mother or banks. Additionally, akin to the traditional approach, the child is born by the surrogate mother in this process with the understanding that she will release the child to be reared by the intended family. This procedure is referred to as the host method, and the surrogate mother is designated as the gestational carrier.

Surrogacy can be categorized as either commercial or altruistic based on the financial arrangement between the involved parties. In all instances, the intending parents are responsible for covering all expenses associated with the conception of child via surrogate mother. In commercial surrogacy, surrogate moms get monetary remuneration for their role as

surrogates. Conversely, with altruistic surrogacy, the surrogate mother receives no financial remuneration. Commercial surrogacy is prohibited in several nations due to the potential commodification of women's reproductive capabilities.

## SURROGACY IN ANCIENT INDIA

In ancient time there was a practice referred to as Niyog Pratha in India. This technique was adopted by young widows without children during their husbands' lifetimes, as well as by infertile ladies and those with impotent spouses. The selected guy for the role is referred to as a surrogate father in contemporary society. An esteemed individual, maybe unrelated to the woman, was selected for surrogate fatherhood. Frequently, the woman's brother-in-law assumed the role of surrogate father. Clauses were related with the niyog procedure. The selected individual shall possess no entitlement to the offspring, the act shall solely serve the purpose of procreation rather than gratification, the individual shall be permitted a maximum of three attempts, both participants must refrain from being motivated by desire or fervour during the act, and neither party shall behold the other visage nor engage in foreplay throughout the sexual encounter. The Manusmriti and Mahabharata describe Niyog Pratha. In the Mahabharata, Ambalika bears Pandu by the practice of Niyog, whereas Ambika, the widow of Vichitravirya, gives birth to Dhritarashtra. Their brother-in-law, Ved Vyas, a Rishi, was the distinguished person chosen for the assignment. The identical technique used by Rishi Ved Vyas to conceive Vidura is used by one of the queen's maids.

Before the time of the Mahabharata, Niyog Pratha was practiced. The epic itself makes mention to this. In their reserve the book titled "The Evolution of Ideals of Womanhood in Indian Society." Candrabali Tripathi and Chandra Mauli Mani assert that "the Mahabharata provides examples that demonstrate the existence of niyoga before the Mahabharata era." At first, Kunti refused to conceive by niyoga although childless Pandu begged her to do so. Pandu then brought up a historical example of niyoga in which Ashmaka was born as a consequence of the union of Vasishtha and Damayanti, Queen of Saudasa.

Gandhari's motherhood exemplifies in vitro fertilization as depicted in the Mahabharata. Gandhari experienced an extended gestation and instead of a viable infant, she gave birth to mass fetus. Current medical records show prolonged gestation, which is categorized as pseudocyesis. After analysing the mass, Rishi Ved Vyas found 101 normal cells. He separated 101 cells and put them in clay pots with a nourishing mixture. Every pot was grown in vitro

until it reached adulthood. The incubation process worked well. Upon completion of the full pregnancy, the first of the 101 offspring to be born was Duryodhan, succeeded by 99 further sons and one daughter, Dushala. While the Mahabharata lacks a detailed account of the in vitro procedure, the successful conception and extramural birth provide insight into advanced scientific methodologies and efficacy of Ayurveda in ancient India. The events of the Mahabharata constitute historical occurrences rather than mythological narratives. Numerous historians have substantiated its historicity by establishing timeframes using astronomical calculations, oceanic investigations, and literary evidence. Nilesh Nilkanth Oak claims that the Mahabharata timeframe extends over 7500 years, whilst Vedveer Arya asserts it occurred 5200 years ago. According to these timeframes, in vitro fertilization practices were conducted around 5000 years ago. In vitro fertilization enables several gestations. Gandhari's situation involves in vitro fertilization and ectopic pregnancy. In vitro fertilization is a contemporary reality. In the future, advancements in scientific and medical technologies may make extra-uterine gestation feasible.

A story of embryo transplanting may be found in the Bhagavat Purana. Since it was predicted that he would be killed by one of their many children, Kansa put Devaki and Vasudev in a jail in Mathura. Another of Vasudev's wives, Rohini, lived at Nandaraja's home in Vrindavan. Soon after they were brought to the prison, Kansa put to death six babies who were successively born to Devaki. For Devaki and Vasudev's seventh child, an embryo transplant was done. Devaki's uterus was used to transfer and implant the fetus into Rohini's uterus. Balaram was the name given to this fetus at birth. Devaki had what appeared to be miscarriage-like bleeding, but the embryo transfer was really the cause.

## **EVOLUTION OF SURROGACY IN INDIA**

In year 2002, the birth of child through surrogacy became official in India. It was authorized for several reasons, one of which was that the laws that were in place at the time did neither ban nor permit surrogacy. The Indian government established guidelines, including the formulation of the National guidelines for Accreditation, Supervision, and Regulation of ART facilities, enabling the licensing of ART clinics. The legislation was finally enacted in 2005.

The nation has been given the title of "world capital of surrogacy" because of the rise in the number of surrogacy cases that have occurred in the country since that time. Nevertheless, because the rules are not legislative, it is impossible to make them legally binding. Moreover, there were a few scenarios that arose throughout the process of policy development that resulted

in problems in the legal sphere. The ART bill was created in 2010 with the intention of addressing these deficiencies to correct them. The dynamics of surrogacy in the nation were altered because of another notice issued by the Ministry of Home Affairs for a change in laws included within Visa policy. This notification included the introduction of a new type of visa known as the "medical visa." The government would be able to monitor international couples that travel to India for surrogacy to ensure that they use the system that has been created and is under the control of the government. This would be helpful to the government in certain ways. On the other hand, the measure had loopholes, which resulted in a significant amount of debate and discussion over the subject matter. To address these shortcomings, the bill underwent a lengthy process of revision and drafting. After almost ten years of debate, the ART bill was ultimately approved in 2021. The debate on the legal position of ART has been going on for quite some time.

## **SURROGACY REGULATIONS**

As a result of the prohibition that was implemented in 2015, Surrogacy (Regulation) Bill of 2016 was presented to Lok Sabha in 2016, and it was then forwarded to the Standing Committee for its view one year later. 2017 was the year that the Standing Committee returned its report to the Lok Sabha, which included revisions to the bill. The bill was approved by Lok Sabha in the year 2018. However, Rajya Sabha, which was serving at the time, was dissolved before bill was able to get approval of Rajya Sabha for its conversion into an Act of Parliament. As a result, the measure was left hanging in the balance.

The 2016 legislation prohibited commercial surrogacy for all Indian nationals, allowing only the reimbursement of essential medical and insurance costs for the surrogate mother. It mandated that prospective parents be a married, heterosexual couple with clinically verified fertility problems. The surrogate mother should be a "close relative" of the intended pair in order to improve the regulation of altruistic surrogacy. This metric does not define what is meant by "close relative." The surrogate mother must be married, own at least one biological kid, and be aged between 25 and 35 years. The surrogate mother is allowed to participate in surrogacy only a single time. Upon the birth of the infant, the legal guardians will be intended couple, rather than surrogate mother.

The 2016 bill mandates the creation of National and State Surrogacy boards, specifies membership criteria, delineates their responsibilities and operations, and establishes term

limits. The legislation aims to safeguard rights of surrogate mother and infants delivered via surrogacy, prescribing penalties for the exploitation of surrogate mothers in cases where intended parents leave the baby and for the promotion and advertisement of commercial surrogacy.

After the receipt of the Standing Committee's report in 2017-18, the Lok Sabha enacted the Surrogacy Bill including the revisions recommended by the Standing Committee. They incorporate stipulations to avert the choosing of the fetus's sex and forbid the surrogate mother from giving her ova. The modifications established a maximum period of 16 months for health insurance coverage for surrogate mother and mitigated penalties associated with commercial surrogacy. Prior to the bill's transmission to the Rajya Sabha for approval, the upper house was dissolved in February 2019, subsequently followed by the dissolution of the lower house later that year.

The bill was reintroduced in Lok Sabha in 2019 and referred to Standing Committee for its opinions. The bill was returned to the Lok Sabha after specific revisions, where it obtained final approval. Prior to this, the Standing Committee sent the revised version of the bill to the Rajya Sabha for its approval.

The 2019 legislation markedly diverged from the 2016 proposal. It established supplementary eligibility criteria for prospective surrogate couples; they are now required to secure certificates of essentiality, which necessitate evidence of medical infertility, and certificates of eligibility that delineate age restrictions for the husband, aged 26-55 years, and the wife, aged 23-50 years. The couple must have no surviving children, whether biological or adopted. Subsequent modifications were integrated when the Rajya Sabha approved this measure in 2021. Women, including widows and divorcees, can now pursue altruistic surrogacy. The age range for these women was 35 to 45 years.

The prospective parents were required to secure a letter of recommendation along with certificates of eligibility and essentiality. Additionally, the criteria for obtaining eligibility and essentiality certifications are straightforward: there is no necessity for documented medical infertility and no five-year waiting period following marriage. Extending the surrogate mother's health insurance coverage to three years is a suitable change. The periods of the governmental bodies' experts have also been extended to three years.

The Surrogacy Act is intended to operate in harmony with the Assisted Reproductive Technology Act of 2019. Like Surrogacy law, ART bill was presented in Lok Sabha in 2002, referred to a Standing Committee for approval, and thereafter submitted to the Rajya Sabha for recommendations; the bill obtained final approval from the Lok Sabha in December 2021, so becoming an act. The ART Act encompasses a wider scope than the Surrogacy Act, since it regulates other reproductive methods, gamete banks, and ovum retrieval.

## SURROGACY DEVELOPMENT



Period	Stakeholder	Rights	Duties/ Obligation	Legal Status
Pre-2002 (Unregulated)	Intended Parents	No legal recognition; contracts informal	Informal obligations only	No binding law
	Surrogate Mother	No formal rights; compensation possible	No clear duty Structure	Often vulnerable to exploitation
	Clinics	Operated without regulation	Ethical duties per ICMR (not enforced)	No oversight
2002-2015 (Commercial Allowed)	Intended Parents (Including foreigners)	Right to enter into commercial agreements; percentage via contract	Provide compensation, medical care	Regulated via ICMR Guidelines
	Surrogate Mother	Right to compensate & care	Bear child as per agreement; no parental claim	Risk of coercion, exploitation
	Clinics	Can legally facilitate agreements	Duty to ensure documentation and care	ICMR Guidelines followed loosely



2015-2021 (Draft Bill Era)	Indian Married Parents	Restricted right (5+ year marriage proposed)	Comply with proposed guidelines	Based on draft laws
	Foreigners/ Singles/ LGBTQ+	Banned from surrogacy	-	Disqualified
	Surrogate Mother	Right to limited altruistic role (proposed)	Must be a close relative (proposed)	Not legally enforced yet
2021- Present (Surrogacy Regulation Act, 2021)	Intended Parents (Indian citizens only)	Right to altruistic surrogacy if married (5+ yrs), or if widow/divorcee (with medical indication)	Must obtain eligibility certificate; no payment beyond medical expenses	Legally enforced
	Surrogate Mother	Right to insurance, medical support; no payment beyond medical expenses	Must be 25-35 yrs, married with 1 child; surrogate only once; medical/psychological fitness required	Heavily regulated; must be closed relative
	Clinics & ART Banks	Can operate only if registered; duty to follow medical protocols	keep detailed records; ensure medical/legal compliance	Penalties for violations under law

## LEGALISATION OF SURROGACY LAWS IN INDIA

Commercial surrogacy was allowed in India in 2002, which resulted in a surge in demand from infertile couples who were unable to conceive biologically. The surrogacy market was expanding at a rapid pace due to the demand from both Indian and foreigners. India became the world's surrogacy capital thanks to the right laws and regulations. A set of recommendations was created in 2005 by the "Indian Council for Medical Research" (ICMR). Nevertheless, no laws were in existence to supervise and control the same.

The case of "Baby Manjhi Yamada vs Union of India" concerned the obtaining of travel permits for a baby delivered in India to Japanese parents via commercial surrogacy. The Supreme Court of India ruled that commercial surrogacy is legal. In 2008, "Assisted Reproductive Technology Bill" was formulated in conjunction with this judgment. However, no actions were undertaken to draft the Bill of 2008 prior to its presentation in Parliament, so facilitating the "Law Commission of India to raise up the issue of surrogacy" for further research. In 2009, the Law Commission of India issued a report on laws to regulate surrogacy and address related concerns. The ICMR updated the rules in 2010 and suggested a contract that would be signed

before the surrogacy procedure started by the intended parents, surrogate, and ART clinic. Additionally, suggestions for improving the Act Bill draft were provided by the Ministry of Health and Family Welfare. "The economic scale of the Indian Surrogacy Industry which came out to be 400 million dollars a year with more than 3000 fertility clinics all over the country," according to 2012 UN research. Anand in Gujarat was referred as the "Cradle of the World," and India has earned the moniker "world capital for surrogacy."

The Indian government outlawed commercial surrogacy in its entirety in 2015 and prohibited foreigners and non-resident Indians from participating. In 2016, the Union Cabinet sanctioned the Surrogacy Regulation Bill, which restricted the utilization of surrogacy services to married infertile couples in India. The 2014 and 2016 legislation exhibited several distinctions.

However, it persisted in avoiding surrogacy laws, and the bill was never introduced in the Rajya Sabha. In order to protect women who are at risk of being exploited by couples due to their financial situation, the same form of the 2016 Bill was later reintroduced in the Lok Sabha as the Surrogacy (Regulation) Bill, 2019 and approved by the Union Cabinet.

On 25 December 2021, Government of India enacted two highly anticipated legislations concerning procreation: The Surrogacy (Regulation) Act, 2021 ("Surrogacy Act") and The Assisted Reproductive Technology (Regulation) Act, 2021 ("ART Act"). Initially, this appears to be progressive move towards governing and regulating surrogacy, a business that has flourished without any legal frameworks or oversight. However, a thorough analysis of the Acts shows that they invade rights of women that they are meant to protect. The fact that Acts ignore the real situation and actual difficulties encountered by barren couples and surrogates are even more concerning. According to a thorough examination of the Act, The Legislature's objective appears to be the imposition of further regulations on reproductive rights, therefore positioning adoption as the exclusive alternative for infertile couples.

In accordance with the 102nd Report, it is justifiable to extend the use of surrogacy services to those who are single, including single men, single women, and members of the LGBTQ community. This would acknowledge the fundamental rights that these individuals possess, such as the ability to have children.

Since it infringes on the couple's reproductive rights and ignores the issue of secondary

infertility, the clause that forbids couples from using Surrogacy should be prohibited for individuals who have a surviving child without mental or physical disabilities. The eligibility of a widow or divorcee with a biological kid to utilize surrogacy services for having an additional child remains ambiguous.

## CONCLUSION

The report examined the many initiatives undertaken by the Indian Government to regulate the surrogacy sector within the nation. India has developed its legislation throughout time to address numerous challenges, including commercial surrogacy, stateless babies born to foreign couples, and the regulation of all institutions providing ART services. The evolution of the legislation was a complex endeavour spanning over two decades, addressing several deficiencies and omissions during the period. Many feminist groups and women's rights activists in India are against commercial surrogacy despite the widespread malpractices in society. However, it is still indisputable that it has provided a substantial income for a large number of women from low-income families, who would thereafter lose their source of income. Reproductive autonomy and the freedom to procreate are inalienable rights that cannot be restricted by the government. People seek surrogacy because of necessity rather than choice. The Surrogacy Act discourages many individuals like single male and female, divorced and widowed male, and entire LGBTQ+ community who are having trouble conceiving naturally from pursuing surrogacy, forcing them to remain barren, instead of confronting the problem overseeing surrogacy. The ART Act increases the expenses for service seekers by placing laborious administrative requirements and additional charges on the IVF process. Ultimately, it is those yearning for a child who are forced to endure the anguish of witnessing others' aspirations materialize, while their own remains distant from realization.

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