

ISSN 2063-5346



# SURROGACY (REGULATION) AMENDMENT RULES, 2023: MEDICAL, LEGAL AND ETHICAL CONCERNS IN INDIA

Ms. Kiran Kumari<sup>1</sup>, Dr. Rashmi Gupta<sup>2</sup>, Dr. Rohit Soni<sup>3</sup>,  
Dr. Sunita Verma<sup>4</sup>, Ms. Meha Khiria<sup>5</sup>

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**Article History: Received: 10.05.2023****Revised: 29.05.2023****Accepted: 09.06.2023**

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## Abstract

This paper aims to investigate the new Surrogacy (Regulation) Amendment Rules, 2023, wherein live-in partners and the same-sex couples are not allowed to avail of services under the surrogacy law. The Ministry of Health and Family Welfare notified the Surrogacy (Regulation) Amendment Rules on 8th June, 2023 and these Amendment Rules are effective from such date. The Amendment Rules further amend the Surrogacy (Regulation) Rules, 2022. The government is making it more complicated. Speaking about the same, advocate Mohini Priya said, “The SC dismissed all our prayers saying that it has no societal acceptance. This cannot be a reason to introduce a law by saying that it has no social acceptance. Surrogacy Right of Assisted Reproduction is a reproductive right that is guaranteed under Article 21 of the Constitution. No legislation can take away from anybody. The government is making it complicated, not just for the same-sex couple but also for the needy couple who have been provided surrogacy under this act. They banned third-party donor eggs and made the upper limit of women 50 years of age. After this, there’s no meaning of surrogacy. This was expected but its okay, we are ready to fight against it.” (Priya, 2023). The Government has formulated various draft Bills to regulate surrogacy over the years in 2008, 2010, 2014 and latest draft is the current draft Bill: “Surrogacy (Regulation) Bill, 2016” (2016 Bill). So this paper aims to analyse the socio-legal implication of new Surrogacy (Regulation) Amendment Rules, 2023.

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**KEYWORDS:** Surrogacy Bill, Surrogacy, IVF, Gestational Carrier, Infertility.

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<sup>1</sup>Assistant Professor, School of Law, Mody University of Science & Technology, Lakshmangarh, Dist. Sikar (Rajasthan), [kirantiwari410@gmail.com](mailto:kirantiwari410@gmail.com)

<sup>2</sup>Assistant Professor, School of Law, Mody University of Science & Technology, Lakshmangarh, Dist. Sikar (Rajasthan), [rashmig7911@gmail.com](mailto:rashmig7911@gmail.com)

<sup>3</sup>Assistant Professor, School of Law, Mody University of Science & Technology, Lakshmangarh, Dist. Sikar (Rajasthan), [rohitsonichuru@gmail.com](mailto:rohitsonichuru@gmail.com)

<sup>4</sup>Associate Professor, School of Business, Mody University of Science & Technology, Lakshmangarh, Dist. Sikar (Rajasthan), [dr.sunitaverma11@gmail.com](mailto:dr.sunitaverma11@gmail.com)

<sup>5</sup>Assistant Professor, School of Law, Maharaja Ganga Singh University, Bikaner (Rajasthan), [mehakhiria@gmail.com](mailto:mehakhiria@gmail.com)

**DOI:10.48047/ecb/2023.12.9.54**

## Introduction:

Infertility is generally known as a social stigma in India. It is considered that infertile couples themselves can express the pain and tragedy of infertility the most effectively.

Countless women, men and couples in India, and, around the world, yearn to become parents and nurture a new life. But good fortune might not favor everyone, and it might not be possible for every man, woman or couple to conceive the usual way. This is why; surrogacy is considered a brilliant solution to the problem. It is an agreement where a woman allows herself to become pregnant and delivers a child to a couple who will eventually be known as the child's parents. However, going for surrogacy comes with many risks and complications. For this reason, the Indian Government has come up with new surrogacy laws to protect the interests of surrogate mothers. The new laws mandate couples who are opting for surrogacy to take general health insurance plans with 36 months of coverage in favor of the surrogate mother. In addition, the insurance amount needs to adequately cover any complications that may arise during or after the pregnancy. Surrogacy is a practice that entails a woman carrying and giving birth to a baby for a couple who cannot do so. As part of surrogacy, the eggs of a woman and the sperm of the father or a donor are fertilized *via* medical procedures to produce an embryo. The next step entails implanting the embryo in the uterus of the surrogate mother; she carries and finally delivers the baby. Men, women, and couples who want to have a baby can go for the surrogacy option.

## EVOLUTION IN SURROGACY LAW- LEGAL INSIGHTS:

### 1. Assisted Reproductive Technology Bill, 2013:

Assisted Reproductive Technology Bill of 2013, prohibited commercial surrogacy, which involves the exchange of money for

purposes other than covering the mother's and the child's medical costs. The measure also outlawed surrogacy for married couples already having child, for foreigners and holders of Overseas Citizenship of India (OCI), as well as live-in partners, unmarried person, gays, and widows.

### 2. Surrogacy (Regulation) Bill, 2016 and 2019:

A Surrogacy (Regulation) Bill was introduced and passed in Lok Sabha, the lower house of the Indian Parliament in 2016, which allowed Indian heterosexual couples who have been married for at least five years and are experiencing infertility issues to access altruistic surrogacy while outlawing commercial surrogacy. This Bill lapsed due to the adjournment of the parliament session in the year 2016. In the year 2019 this Bill was again introduced and passed by Lower House of the Indian Parliament (Lok Sabha).

### 3. Surrogacy (Regulation) Act, 2021

As per this Act, a couple is allowed to opt surrogacy only when they are unable to conceive a child of their own due to infertility or any other illness. This Act permits only altruistic surrogacy; not commercial surrogacy.

### The Situation of Surrogate Mothers in India:

The surrogacy issue has sparked raging debates around the world. More so because surrogacy laws vary from country to country. Even discussions on the social, legal, and moral concerns of surrogacy are ongoing. As far as India is concerned, surrogate mothers often end up bearing the brunt of insufficient laws that cover their rights. That said, they cannot assert their rights in courts or any other governing bodies. And they need to rely on the decisions made by the Supreme Court or the recommendations of the Indian Council of Medical Research (ICMR). However, they can now avail the benefits

of new health insurance plans that provide coverage throughout the surrogacy period.

### **Who can go for Surrogacy?**

As per the Surrogacy Regulation Bill that came into effect on 25th January 2022, a surrogate mother needs to be healthy and between the age of 25 and 35 years. In addition, she needs to be married at least once and have her child. Other than that, she needs to be a close relative of the couple for whom she is undergoing surrogacy. Another important point to remember is that a woman can become a surrogate only once in her lifetime as per the new Indian surrogacy laws; whereas under previous laws she could become a surrogate thrice. She also must have to receive a psychiatrist's certification of mental fitness.

The couple and the surrogate can go to an Assisted Reproductive Technology (ART) center for the embryo transfer once they acquire their eligibility certificates.

The surrogate and the couple must also link their Aadhaar cards, according to the law, which will help make everyone involved in the arrangement's biometrics traceable and considerably lessen the possibility of malpractice.

### **How does the law address the commercialization of surrogacy?**

1. By law, surrogacy must be performed with charitable intentions. So, it forbids the commercialization of surrogacy.
2. Human gametes and embryos cannot be purchased or sold.
3. No one may sell or purchase a surrogate's services.
4. In addition, the surrogate, her dependents, or her representative cannot get any kind of payment, incentive, benefit, fee, remuneration, or inducement.
5. The law also prohibits the export of embryos to other nations. Even moving embryos between laboratories or ART facilities needs clearance from the relevant authorities. Those who are discovered

breaking the law face fines and up to 10 years in prison.

### **Some of the other nuances of the law are:**

1. The Indian Marriage Act exclusively recognizes unions of heterosexual people. Consequently, gay or lesbian couples are unable to use surrogacy to conceive a child.
2. The surrogate cannot refuse to carry the pregnancy to term after signing the contract. Without the authorized authority's authorization, she cannot end her pregnancy.
3. According to the law, the embryo must share genetic ties with the couple—either the man and woman or both—either by blood or DNA. Surrogacy does not permit the donation of embryos.
4. Under the condition that she is between 35 and 45 years old, the law permits a divorcee or widow to offer her eggs for surrogacy.
5. The child born as a result of an Indian couple using a surrogate outside of India will not be regarded as an Indian citizen.
6. If the commissioning couple passes away before the infant is born, the nominees of the couple named at the time of signing the surrogacy contract are responsible for parenting the child. The duty of the newborn kid would fall on the nominees. The nominees may, though, later decide to give the kid up for adoption or to an orphanage if they so want.
7. When they turn 18, the aforementioned children have the legal right to know that they were born through surrogacy. They can also make use of their right to find out the surrogate mother's identity. (Radhakrishna, Mohanram, & Mansrad, 2023)

### **Surrogacy Provisions in India:**

There are two forms of surrogacy: traditional surrogacy and gestational or host surrogacy. This is important to keep in mind before we continue to examine the surrogacy laws in India.

### 1. Traditional surrogacy:

It involves artificially inseminating a surrogate with the sperm of the father. Thereafter, the surrogate carries the baby through the full term; and after delivery, she hands over the child to the couple. That means the surrogate mother is the biological mother of the child. Also, as part of traditional surrogacy, a donor's sperm can be used instead of the father's sperm.

### 2. Gestational surrogacy:

It involves creating an embryo via in-vitro fertilization (IVF) and inserting the embryo inside the surrogate mother. Here again, the surrogate carries and delivers the baby; she then gives the child to the intended parents. Gestational surrogacy is considered less complex when compared to traditional surrogacy. That's because both commissioning parents have genetic ties to the child. Hence, gestational surrogacy has become more common than traditional surrogacy. In fact, in India, IVF centers are reporting higher cases of gestational surrogacy.

However, the latest surrogacy regulation Bill that came into effect on 25th January 2022 prohibits commercial surrogacy but allows altruistic surrogacy.

When a surrogate volunteers to carry the child of the commissioning couple in her womb out of genuine love and compassion for their need to have a child, surrogacy is regarded as philanthropic. Under philanthropic surrogacy, the commissioning parents are required to bear only the medical fees and cost of the health insurance plans of the surrogate. Previously, only commercial surrogacy was allowed in India as per the laws that came into effect in the year 2002; under commercial surrogacy, a surrogate mother is paid for bearing the child. (ERGO, 2023)

### Indications for surrogacy treatment:

Surrogacy treatment may be considered an option for various medical and non-medical indications. The specific indications for surrogacy can vary based on individual circumstances and local regulations. Here are some common indications for surrogacy treatment:

**1. Infertility:** Surrogacy may be considered when a woman is unable to conceive or carry a pregnancy to term due to factors such as uterine abnormalities, repeated pregnancy loss, or medical conditions that make pregnancy unsafe.

**2. Absence of a Uterus:** Women who were born without a uterus or have had their uterus surgically removed (such as in a hysterectomy) may opt for surrogacy to have a biological child.

**3. Medical Conditions:** Certain medical conditions or treatments, such as severe heart or kidney disease, cancer treatments that render the uterus non-functional, or conditions where pregnancy poses significant risks to the mother's health, may necessitate surrogacy.

**4. Recurrent Pregnancy Loss:** Couples experiencing repeated miscarriages may choose surrogacy as a means to increase the chances of a successful pregnancy and the birth of a healthy child.

**5. Same-Sex Couples:** Surrogacy provides an option for same-sex male couples or individuals to have a genetically related child. In such cases, gestational surrogacy is typically utilized, involving an egg donor and a surrogate mother.

**6. Genetic Disorders:** In cases where there is a high risk of passing on inheritable genetic disorders to the offspring, surrogacy with pre-implantation genetic testing (PGT) can be considered to ensure a healthy pregnancy and the birth of a child free from the genetic condition.

### Methods of Treatment revised vide Surrogacy (Regulation) Amendment Rules, 2023:

On 14-03-2023, the Ministry of Health and Family Welfare notified the Surrogacy (Regulation) Amendment Rules, 2023 to amend the Surrogacy (Regulation) Rules, 2022. The provisions came into force on 14-3-2023.

Form 2, Rule 7, Para 1 (d) relating to Methods of Treatment has been revised-

Sr. N.	Previous Laws	Latest Laws
1.	The fertilization of a donor oocyte by the sperm of the husband was allowed.	The couple undergoing surrogacy should have both gametes from the intending couple and donor gametes are not allowed. In case of a single woman (widow/divorcee) undergoing surrogacy must use self-eggs and donor sperms to avail surrogacy procedure (Kriti, 2023)

### Commercial vs. Altruistic Surrogacy:

Countries have different approaches to commercial and altruistic surrogacy. Some countries permit both forms, while others may only allow altruistic surrogacy where the surrogate mother receives no financial compensation beyond reimbursement for medical expenses. Some countries have completely banned commercial surrogacy.

**Permissive Countries:** Several countries have established legal frameworks that permit surrogacy and have favorable regulations. These countries include the United States (specifically certain states), Ukraine, Russia, Georgia, and some states in Australia.

**Restrictive Countries:** Some countries have restrictive laws and regulations on surrogacy. These countries may prohibit surrogacy altogether or restrict it to only certain circumstances or individuals. Examples of countries with restrictive laws include Germany, France, Spain, Italy, and most countries in the Middle East.

**Regulation and Enforcement:** Countries that permit surrogacy often have regulations in place to protect the rights and interests of all parties involved, including the surrogate mother, intending parents, and the child. These regulations may include requirements for legal contracts, medical screenings, and oversight by regulatory bodies.

**International Surrogacy:** International surrogacy involves individuals or couples travelling to a different country for surrogacy arrangements. However, not all countries allow their citizens to engage in surrogacy abroad, and legal recognition of parental rights and citizenship for children born through international surrogacy can be complex.

**Evolving Legislation:** Surrogacy laws are continuously evolving, and countries may amend or update their legislation over time. This is often in response to ethical, legal, and social considerations surrounding surrogacy, including issues related to exploitation, the rights of surrogate mothers, and the protection of children's rights.

It is crucial to reiterate that surrogacy laws can change, and the legal status of surrogacy varies from country to country. It is recommended to consult the most recent laws and regulations or seek legal advice specific to the country of interest to obtain accurate and up-to-date information on surrogacy laws.

The Insurance Regulatory and Development Authority of India (IRDAI) is the regulatory body responsible for overseeing the insurance sector in India. We cannot provide the most up-to-date

information beyond my knowledge cutoff in September 2021; we can give you some general insights on the topic.

Regarding the coverage of surrogacy under health insurance policies, it is important to note that insurance coverage is subject to the policies and guidelines set by the IRDAI and the individual insurance companies. As per our knowledge, the IRDAI has not mandated the inclusion of surrogacy coverage in health insurance policies.

However, insurance companies have the discretion to offer coverage for specific medical procedures, including surrogacy, under their health insurance policies. Some insurance companies may provide coverage for surrogacy as an additional benefit or as part of a specific plan. It is advisable to review the policy terms and conditions of individual insurance companies to determine if they provide coverage for surrogacy or related medical expenses.

It's worth noting that the insurance industry is subject to continuous regulatory changes and updates. Therefore, it is essential to consult the latest guidelines and regulations issued by the IRDAI or consult with insurance providers for the most accurate and up-to-date information regarding coverage for surrogacy under health insurance policies.

As per our knowledge cut-off in September 2021, the surrogacy laws in India are governed by the *Surrogacy (Regulation) Bill, 2020*. However, please note that laws and regulations are subject to change, and it is crucial to consult the most recent legislation or seek legal advice for up-to-date information. Here are some key provisions of the *Surrogacy (Regulation) Bill, of 2020*:

**Eligibility:** The Bill allows only Indian married couples (heterosexual) who have been married for at least five years to opt for altruistic surrogacy. It prohibits foreigners, single individuals, unmarried

couples, same-sex couples, and people in a live-in relationship from availing of surrogacy services.

**Altruistic Surrogacy:** The Bill allows only altruistic surrogacy, where the surrogate mother cannot receive any monetary compensation except for medical expenses and insurance coverage related to the surrogacy.

**Eligibility of Surrogate Mother:** The surrogate mother must be a close relative of the intending couple, between the ages of 25 and 35 years, have a child of her own, and can act as a surrogate only once in her lifetime.

**Surrogacy Clinics and Regulation:** The Bill establishes National and State Surrogacy Boards to regulate surrogacy services. It mandates the registration and accreditation of surrogacy clinics, and they must adhere to the prescribed standards and guidelines.

**Ethical Considerations:** The Bill emphasizes the need for informed consent of all parties involved, including the surrogate mother, intending couple, and sperm or egg donor, if applicable. It also includes provisions for the protection and welfare of the surrogate mother and the child born through surrogacy.

**Prohibition of Commercial Surrogacy:** The Bill aims to ban commercial surrogacy, which involves monetary compensation for surrogacy services. The intention is to prevent the exploitation of women and protect the rights of surrogate mothers.

It is important to note that the *Surrogacy (Regulation) Bill, 2020* has not been enacted into law at the time of my knowledge cutoff. The Bill was pending approval and may have changed since then. Therefore, it is advisable to consult the most recent legislation or seek legal advice to understand the current surrogacy laws in India.

*“An insurance coverage of such amount as may be prescribed for 12 months in favor of the oocyte donor by the commissioning*

*couple or woman from an insurance company or an agent recognized by the IRDAI,”*

According to the IRDAI, the intending woman or couple can purchase general health insurance coverage in favor of a surrogate mother for 36 months from an insurance company.

Amit Goel, *Director & Principal Officer*, of Raghall Insurance, said, “As the insurance industry evolves to meet the changing needs of society, it is important for insurers to recognize the increasing demand for surrogacy and fertility treatments.

The recent circular from IRDAI is a positive step towards providing comprehensive coverage for intending parents and surrogate mothers.”

“We believe that this move will help promote the accessibility of surrogacy as a viable option for couples seeking to start a family, while also ensuring that all stakeholders are adequately covered,” Goel said. (AGENCY, 2023)

### **Insurers to Comply with Surrogacy & ART Act:**

As per the latest circular, the IRDAI has directed all health insurance providers in India to comply with the *Surrogacy Act, 2012* and *Assisted Reproductive Technology (ART) Act, 2021*, with immediate effect. The move is expected to cover the surrogacy expenses of individuals and families who cannot conceive or start a family due to medical conditions.

The insurance regulator has also directed the insurers to ensure the availability of suitable health insurance products to offer coverage for surrogacy expenses.

As per Section 4 (iii) (a) (III) of the *Surrogacy Act, 2021*, the surrogate mother is entitled to insurance coverage for an amount covering post-partum delivery complications for 36 months from an IRDAI-recognized insurer or agent.

According to Rule 5 of the *Surrogacy (Regulation) Rules, 2022*, the intending couple or woman should buy health insurance for the surrogate mother for 36 months from an IRDAI-recognized insurer or agent for an amount that sufficiently covers the cost of all pregnancy-related expenses and post-partum delivery complications.

Moreover, Section 22(1) (b) of the *ART Act, 2021* also prescribes an insurance coverage of 12 months to the oocyte donor by the commissioning woman or couple from an IRDAI-recognized insurer or agent. (Bazar, 2023)

### **Concern about Surrogacy Agreements in India:**

Here are some specific concerns that have been raised regarding surrogacy agreements in India:

1. **Exploitation and Trafficking:** There have been instances of exploitation and potential trafficking of women involved in surrogacy arrangements. Critics argue that vulnerable women may be coerced or forced into becoming surrogate mothers without proper consent or adequate compensation.
2. **Lack of Legal Protection:** In the absence of comprehensive regulations, there have been cases where the rights and interests of surrogate mothers, intending parents, and the child have not been adequately protected. Ambiguities in legal frameworks have sometimes led to disputes and uncertainties surrounding parental rights and responsibilities.
3. **Commercialization and Commodification:** Critics of surrogacy argue that the commercial aspect of surrogacy arrangements can lead to the commodification of reproductive services and the potential exploitation of women's bodies for financial gain.
4. **Ethical Considerations:** Surrogacy raises various ethical dilemmas, including concerns about the well-being and autonomy of the surrogate mother, the

potential emotional impact on all parties involved, and the potential long-term consequences for the child born through surrogacy.

### Legislation in Different Countries:

Surrogacy legislation varies widely across different countries. Here is a general overview of surrogacy legislation in different countries:

1. **United States:** Surrogacy laws in the United States vary by state. Some states have favourable legal frameworks that permit and regulate surrogacy, while others have more restrictive or ambiguous laws. Certain states, such as California, have well-established legal systems for surrogacy and offer protections for intended parents and surrogate mothers.

2. **Canada:** Surrogacy laws in Canada prohibit commercial surrogacy, allowing only altruistic surrogacy where surrogates can be reimbursed for certain reasonable expenses. The Canadian legal system focuses on the well-being and best interests of the child and requires intended parents to go through a court process to establish legal parentage.

3. **United Kingdom:** Surrogacy in the United Kingdom is governed by the Surrogacy Arrangements Act 1985. The law allows for altruistic surrogacy, where surrogates can only receive reasonable expenses. The intended parents are legally recognized as the child's parents, but commercial surrogacy is prohibited. The United Kingdom, like Canada, prohibits commercial, but not voluntary-altruistic surrogacy agencies, and forbids advertising for or about surrogacy. Only the commissioning couples and the host surrogate may initiate, negotiate or compile information to make surrogacy arrangements. Surrogacy agreements are unenforceable. Although the law around parentage in surrogacy is far clearer and more uniform in the UK than in Canada, the rules respecting legal parenthood can vary. Assisted reproduction in the UK is

governed by the provisions of the Human Fertilization and Embryology Act (HFE Act) and regulation is handled by the Human Fertilization and Embryology Authority (HFEA). Parentage in gestational surrogacy is determined based on the status provisions of the HFE Act. These provisions provide that the birth mother and her consenting spouse or same-sex civil partner are the legal parents of the child, whether or not they are genetically related to the child. If there is no father under the status rules — where, for example, the surrogate mother is single or where her spouse or partner does not consent to the assisted conception treatment —, the intended father can be considered the legal father of the child. It is clear that in gestational surrogacy, the intended parents are not the parents of the child at birth. Intended parents can seek what is called a Parental Order for the adoption of the child. Until the Parental Order is approved, the future parents have no parental status and cannot make decisions regarding the child's welfare. To achieve a Parental Order, intended parents must meet several conditions: the application must be made at least six weeks but less than six months after the child is born; the birth mother and her spouse or partner must consent to the Order; at least one intended parent must be domiciled in the UK; the child must be in the care of the intended parents; at least one intended parent must be genetically related to the child and the intended parents must be a couple (either married or civil partners). Finally, and very significantly in the international surrogacy context, the court must be satisfied that “no money or other benefit (other than for expenses reasonably incurred) has been given or received by either of the applicants for or in consideration of the agreement, handing over the child or making arrangements with a view to the making of the Order, unless the payment is authorized by the court”.



4. **Australia:** Surrogacy laws in Australia vary by state and territory. All jurisdictions in Australia permit altruistic surrogacy, but commercial surrogacy is prohibited. The legal processes and requirements for surrogacy arrangements vary between states and involve court approval and counseling.

5. **India:** Surrogacy in India was previously known for being more permissive, attracting international surrogacy arrangements. However, *the Surrogacy (Regulation) Bill, 2020* aims to regulate surrogacy and prohibit commercial surrogacy. The Bill emphasizes altruistic surrogacy, limiting eligibility to Indian-married heterosexual couples who have been married for at least five years.

6. **Ukraine:** Ukraine has become a popular destination for international surrogacy. The country has established legal frameworks that permit surrogacy, allowing intended parents to obtain legal parentage rights. Commercial surrogacy is legal and regulated.

These are just a few examples, and surrogacy laws can differ significantly in other countries. It is essential to research and consult specific country-specific legislation, as well as seek legal advice from professionals well-versed in reproductive law or family law in the relevant jurisdiction, to obtain accurate and up-to-date information on surrogacy laws. (Ellenbogen, Feldberg, & Lokshin, 2021)

### **Case Laws:**

#### **1) Baby Manji Yamada vs Union of India (AIR 2009 SC Page 84)**

The destiny of Baby Manji Yamada, who was born to an Indian surrogate mother on behalf of a Japanese couple who had already separated before the baby was even a month old, was unknown. Ikufumi Yamada, the child's biological father, sought to bring the child to Japan, but neither the Japanese government nor the

legal system allowed for such a situation. In the end, the Supreme Court of India had to step in, and her grandmother was permitted to leave the country. The Baby Manji Yamada ruling had the most effect in that it prompted the Indian government to pass legislation governing surrogacy.

Following the Manji case, the Supreme Court of India declared surrogacy legal in India in 2008, which gave prospective surrogates from around the world more confidence.

#### **2) Jan Balaz vs Anand Municipality**

According to a decision of the Gujarat High Court, the surrogate mother's name will be listed on the birth certificate of a child born via surrogacy rather than the biological mother's. Additionally, the youngster will receive an Indian passport, which attests to his citizenship. It will then be necessary for the surrogate mother to deliver the child to the German couple who engaged the Indian surrogate mother for adoption.

The Supreme Court is still considering an appeal against this ruling, and during the hearing, it became clear that there was a pressing need for legislation from Parliament in this area.

Due to the scholarly curiosity sparked by all of these cases, a Bill banning surrogacy that prohibits foreigners from seeking Indian mothers for surrogacy has been passed.

The prohibition is already in effect according to a letter from the ICMR dated September 28, 2015, which is addressed to all clinics in India and instructs them not to help international couples have children through an Indian surrogate mother.

#### **The Surrogacy Bill:**

On November 21, 2016, *the Surrogacy (Regulation) Bill, 2016*, was introduced in the Lok Sabha, and on January 12, 2017, it was referred to a standing committee. The committee then presented its report to the Lok Sabha on August 10, 2017, and based

on that report, the Lok Sabha enacted the Bill on December 19, 2018.

*The Surrogacy Bill of 2016* is primarily concerned with discouraging for-profit surrogacy and promoting philanthropic surrogacy. Additionally, the Bill protects the surrogate mother and child from being exploited. With the aid of a surrogate mother who is qualified under the Bill's provisions, an infertile married couple who meets the Bill's eligibility requirements can now have a child. Except for her pregnancy-related medical and insurance costs, the surrogate mother will not receive any financial remuneration for lending the intended couple access to her womb.

The proposed legislation provides for the registration of surrogacy clinics and the establishment of the National and State Surrogacy Board and Appropriate Authorities.

### **Significant Provisions of Bill:**

Section 3 of the Act provides for:

- 1) Registration at the surrogacy clinic is compulsory.
- 2) No specialist or medical professional may do commercial surrogacy outside of a certified facility.
- 3) No specialist or medical professional may practice without a license.
- 4) Any encouragement for a woman to become a surrogate mother by a clinic or another individual is prohibited,
  - a. as is any promotion, assistance, or advertisement of commercial surrogacy,
  - b. Requests women to serve as surrogates
  - c. Suggests that women are willing to serve as surrogates.
- 5) No abortion may be performed without the mother's agreement and the approval of the appropriate authority; this authorization must adhere to the

requirements of the Medical Termination of Pregnancy Act of 1971.

6) No human embryo or gamete storage is permitted for surrogacy purposes.

### **Regulation of Surrogacy and Surrogacy Procedures:**

Section 4 - Under the following purposes surrogacy is permitted-

Infertile, Philanthropic (unselfish) purpose, no commercial surrogacy, no prostitution or sale of a born surrogate child, for any other purpose or disease for which regulation made by the Board allows.

Section 4 (3) provides that the clinic's director or in-charge and a specialist there are satisfied that the following conditions have been fulfilled: -

The certificate is issued by a competent Authority after confirming the following requirements-

- 1) Certificate of infertility issued to the surrogate couple by the District Medical Board,
- 2) A court order about the child's custody and paternity that was issued by a Magistrate of the First Class or higher.
- 3) A surrogate mother and child are insured.

### **Eligibility certificate of surrogate mother by Appropriate Authority-**

- 1) Previously married woman (25 to 35 years old) with a child.
- 2) Close relative (Not mentioned in the Act)
- 3) She will only ever have one surrogate birth (but there is no cap on tries)
- 4) Certificate of physical and mental fitness for the intended surrogate mother.

### **Eligibility of Intending Couple Appropriate Authority**

- 1) Women aged between 23 to 50 and men aged between 26 and 55,

- 2) 5 years of marriage,
- 3) Indian citizen,
- 4) No child has ever existed before in any way (except a child with a district medical board-issued certificate and a life-threatening illness or ailment with no known cure).

**Section 6:** The surrogate mother must be informed of all birth-related risks before giving her consent in writing.

**Section 7:** No child shall be abandoned by the intending parents after birth for whatever reason or defect or gender (as defined in Section 2(a) of the Act). (A surrogate-born child is treated the same as one born naturally.)

**Section 9:** No one has the right to force a surrogate mother into having an abortion in any way.

**Section 35:** Prohibition of commercial surrogacy and exploitation of surrogate mother, child born.

1. No individual or organization shall engage in commercial surrogacy or offer any associated services.
2. No commercial surrogacy advertisements or publications are allowed.
3. No one is allowed to abandon or exploit a child in any way.
4. No person shall feat the surrogate mother
5. No person shall sell a human embryo or gamete for surrogacy
6. No person shall import or help in the import of human embryo or gamete for surrogacy

These offences are punishable by a minimum of 10 years in prison and a maximum fine of Rupees.10 lakhs.

**Section 36:** Penalties for violating any of the Act's provisions. Minimum sentence of 5 years with a maximum fine of Rupees 10 lakhs.

**Section 37:** Punishment for initiation of commercial surrogacy

For the first offence, anyone who seeks commercial surrogacy faces a minimum sentence of five years in prison and a fine that can reach five lakh rupees; for any subsequent offences, the maximum sentence is ten years in prison and a fine that can reach ten lakh rupees.

**Section 38:** A violation of an Act's provision or rule for which there is no explicit punishment is punishable with a sentence of three years plus five lakhs and a daily fine of 10,000.

**Section 39:** Despite the Indian Evidence Act of 1872, the court shall presume, unless the contrary is proven, that the woman or surrogate mother was forced to perform surrogacy services, procedures, or donate gametes for the purpose other than those specified in clause (ii) of Section 4, and such person shall be liable for aiding and abetting such offence under Section 37 and shall be punished for the offence. The presumption in the case of surrogacy.

The Bill will become an Act after receiving the President's approval and is still to be introduced in the Rajya Sabha.

**Provisions of Surrogacy (Regulation) Bill 2016:**

- 1) Except for Jammu and Kashmir, the Bill applies to all the states in India. To regulate the surrogacy procedure, the Bill stipulates the constitutions of the National Surrogacy Board and State Surrogacy Board.
- 2) Only Indian citizens are eligible for surrogacy under this Bill. No NRIs, PIOs, or foreigners are permitted.
- 3) Couples with children already are prohibited from using surrogates, as are homosexuals and single parents.
- 4) According to the proposed law, a woman may only become a surrogate once in her lifetime, and she must be between the ages of 25 and 35.

5) The intended parents should be at least five years married and between the ages of 23 and 50.

6) The Bill contains provisions for penalties and imprisonment if someone violates the legislation, as well as provisions for the custody of the unborn child.

#### **National Surrogacy Board:**

The composition of the Board is as follows:

- Chairperson -Minister in charge of the Ministry of Health and Family Welfare.
- Vice Chairperson -Secretary to the Government of India *in charge* of the Department dealing with surrogacy matters.
- Members -Three female members of Parliament, three Central Government officials from the Ministries of Women and Children Development, Law and Justice, and Home Affairs respectively who are not below the rank of Joint Secretary. Director-General of Central Government Health Services.

#### **National and State Surrogacy Boards:**

The National Surrogacy Board (NSB) and State Surrogacy Boards (SSBs) are respectively made up of the federal and state governments. The NSB's duties include (i) advising the federal government on surrogacy policy, (ii) establishing the surrogacy clinics' code of conduct, and (iii) overseeing the operation of SSBs.

Functions of the SSBs include:

- (i) Keeping track of how the Act's rules are being applied.
- (ii) Reviewing the activities of the appropriate authorities functioning at the state/union territory level.

#### **Authorization for the Termination of Pregnancy:**

Approval for termination of pregnancy from the appropriate authority-According to the Bill, it is necessary to obtain the proper authority's permission before

having an abortion during the surrogacy period. The Medical Termination of Pregnancy (MTP) Act of 1971, which outlines the legal justifications for ending a pregnancy, must also be complied with for the authorization to be valid. The Bill does not, however, outline the deadline by which such authorization for an abortion must be provided.

#### **Intending couple has no say in the consent to abort a surrogate child:**

The surrogate mother's written agreement and the proper authority's authorization are required for the abortion of the surrogate kid. The Bill also prohibits anyone from compelling the surrogate mother to abort the foetus. After the birth, the child is, however, regarded as the biological child of the intended parents, and it is their responsibility to raise the child. Only the surrogate mother's agreement will be necessary under the Bill to terminate a child if the kid is in danger of physical or mental problems during pregnancy. The intended pair won't be involved in making this choice. According to the MTP Act's rules, abortion is permitted in these situations with the 'pregnant woman's agreement.

The fact that the intended parents and the surrogate mother bearing the child are two different people adds complexity to a surrogacy situation.

The possibility that the surrogate mother was coerced into serving as a surrogate

If a surrogate mother performs surrogacy services that are not authorized by the Bill, it will be assumed that she was coerced into doing so by one of the following:

- 1) Her husband;
- 2) The intended parents; or a family member.
- 3) They will be held accountable for helping to start commercial surrogacy, which is an infraction. These parties have the duty of proving that they did not coerce the surrogate mother. Furthermore,

"relative" is not defined in the Bill for this context.

The Bill's motivation for shifting the burden of proof from the prosecution to the defendants is unknown.

In most cases, the prosecution has the duty of proving that the defendant committed a specific unlawful act, not the defendant, who has the burden of proving his innocence.

There are usually some circumstantial circumstances that the prosecution needs to prove for the court to presume that the defendant has committed the offence in some statutes where the burden of evidence is reversed.

### **Storage of embryo or gamete for surrogacy not allowed:**

The Bill forbids the preservation of gametes (unfertilized egg and sperm) and embryos for use in surrogacy. Contrary to the ICMR's 2005 recommendations, which permit embryo preservation for a five-year period, this is different. The infertile woman's health may suffer as a result of the preservation of eggs or sperm being prohibited.

The intended mother's eggs are often extracted during a surrogacy procedure and put in the surrogate mother's uterus. Due to the low success rate of one implantation (less than 30%), many attempts may be required.

Extra eggs are extracted and kept in order to guarantee that there will be enough for numerous tries. Keep in mind that this extraction necessitates considerable hormonal treatment for the intended mother.

The prospective mother runs the risk of developing *Ovarian Hyper Stimulation Syndrome* (OHSS) as a result of repeated stimulation for egg harvest. Rarely, problems from OHSS include blood clots and kidney failure may develop.

### **Disadvantages of the Bill:**

1) Although the Bill's benefits are few, it also has a wide range of drawbacks. According to Article 21 of the Constitution, the right to life includes the freedom to choose one's reproductive path, including the right to procreation and parenthood. Interfering with rights that make up fundamental rights is not the province of the state. The choice of whether to have a child naturally or through surrogacy is entirely within the rights of the parties involved.

2) The Bill criminalizes the expression of reproductive autonomy in this area by limiting surrogacy to married couples and, as a result, excluding members of the LGBTQ community, live-in couples, and single, divorced, and widowed parents.

3) A fundamental right to equality is guaranteed by Article 14 of the Constitution. The Bill only allows married Indian couples to use limited and conditional surrogacy, and it further excludes other people based on their nationality, sexual orientation, marital status, and/or age. This will not pass the article's equality test or the reasonable classification test.

4) The Bill conflicts with Indian adoption law. For unmarried and divorced parents, conditional adoption is permitted under Sections 7 and 8 of the Hindu Adoption and Maintenance Act of 1956 and Section 57 of the Juvenile Justice Act of 2015.

5) By imposing strict standards and calling for eligibility certifications, the Bill severely restricts the autonomy of married couples and potential surrogates. The stringent requirements, which include having no children, waiting five years for intended parents to conceive, and using a close relative as a surrogate, among others, are subject to criticism. In addition, the Bill flagrantly ignores the fact that women who choose to be surrogate mothers typically come from economically disadvantaged families and that surrogacy is a means of support for them. They would lose their source of income if

commercial surrogacy were outlawed completely, and would be forced to perform reproductive work for free instead.

### **Conclusion:**

In conclusion, the *Surrogacy Amendment Bill* is a significant step in the direction of developing a thorough legal framework for surrogacy. The measure intends to safeguard the rights and well-being of all parties involved—the intended parents, surrogate mothers, and the children born through surrogacy—by addressing the myriad ethical, social, and legal considerations surrounding surrogacy. It tries to strike a balance between respecting the autonomy and consent of surrogate mothers and safeguarding against the exploitation and commercialization of the practice. The Bill provides a method for responsible and moral surrogacy arrangements with its provisions for stringent regulation, appropriate screening, and enforceable agreements. Overall, the *Surrogacy Amendment Bill* is a big step forward for family planning and reproductive rights, but before criticizing it, it's vital to take into account any potential drawbacks or issues that might result from its implementation. Despite the fact that the measure seeks to address the ethical, social, and legal concerns surrounding surrogacy, there are a few points that demand close examination.

First off, the Bill's stringent guidelines and requirements may unintentionally restrict access to surrogacy for people or couples who sincerely want to start a family this way. The stringent qualifying requirements and screening procedures could erect unnecessary obstacles and prevent qualified people from considering surrogacy as a feasible option.

Furthermore, the measure may neglect the interests of the children born through surrogacy due to its emphasis on defending the rights and well-being of

intended parents and surrogate moms. The law should give more consideration to safeguarding the rights and long-term welfare of these kids, including making provisions for their legal recognition, granting them access to knowledge about their ancestry, and providing for their mental and emotional health.

Despite the Bill's efforts to regulate the practice, another worry is the possibility of surrogacy being exploited and turned into a commodity. There is a chance that despite the limitations, the business side of surrogacy could continue, with openings that shady people or organizations looking to profit from the practice might use.

Additionally, there are other instances where the measure might use more clarification and detail. Inconsistencies and legal concerns may arise in the future as a result of ambiguities around topics like payment, consent, and the legal standing of surrogacy agreements.

In conclusion, despite the *Surrogacy Amendment Bill's* efforts to address a variety of surrogacy-related issues, several issues remain, including the possible impact on access, children's rights, the possibility of exploitation, and the need for more clarification in some areas. To ensure a fair and morally upright approach to surrogacy legislation, it is essential to critically assess and revise the Bill.

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