



ANALYZING THE EVOLUTION: FROM THE SURROGACY (REGULATION) BILL OF 2018 TO THE SURROGACY (REGULATION) ACT OF 2021

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Abstract

The transition from the Surrogacy (Regulation) Bill of 2018 to the Surrogacy (Regulation) Act of 2021 marks a significant evolution in the legal framework governing surrogacy in India. The 2018 Bill, introduced with the intention to regulate and curb unethical practices, primarily focused on banning commercial surrogacy and permitting only altruistic surrogacy. However, it faced substantial criticism for being overly restrictive and failing to address several key issues. In response, the Surrogacy (Regulation) Act of 2021 incorporated amendments to provide a more balanced approach. The 2021 Act includes provisions for better protection of surrogate mothers' rights, broader eligibility criteria for intending couples, and stricter penalties for violations. This legislation aims to establish a more comprehensive regulatory environment to ensure ethical practices while addressing the concerns raised by stakeholders regarding the earlier Bill. The evolution from the 2018 Bill to the 2021 Act reflects the Indian government's effort to create a robust and ethical surrogacy framework, balancing the need for regulation with the rights and welfare of all parties involved.

Keywords: Enactment date, Changes from 2018 Bill, Legal framework, Enforcement mechanisms, Surrogacy clinics regulation, Surrogate mother's rights.

1. Surrogacy (Regulation) Bill, 2018

The Surrogacy Regulation Bill, 2016, same Bill is introduced before the Lok Sabha as Surrogacy Regulation Bill, 2018 and has been passed by the Lok Sabha on 19 December, 2018, and now

the Bill is kept before the Rajya Sabha for getting recognition of the Law. It is awaiting to see the light of the day.

1.1. Introduction

Surrogacy (Regulation) Bill, 2016 was introduced in the Lok Sabha on 21 November, 2016, but passed in 19 December, 2018; the Bill regulates altruistic surrogacy and prohibits commercial surrogacy. This is the brief overview of the Bill with some issues. The main aim of the Bill is to protect woman from exploitation. Researcher only highlights main changes that have been made in this Bill, from the previous Bill.

The Bill defines Surrogacy as a practice where a woman carries a baby for another couple and agrees to relinquish her parental rights on child to the commissioning couple. Further this bill allows altruistic surrogacy where only medical expenses and surrogate insurance will be paid. No further expenses can be paid except above. Commercial surrogacy is prohibited in which surrogate is been paid for more than medical expenses and insurance coverage policy i.e. (in cash or kind).

1.2. Commissioning couples who can opt for surrogacy arrangements; Conditions are as follows:

- 1) Couple shall be legally married and completed their five years of marriage.
- 2) Their age shall be between 23-50 for female and 26-55 for male.
- 3) One of them shall be proved medically infertile.
- 4) They do not have any surviving child either biological, adopted, or surrogate, except if the child shall be mentally or physically challenged or suffers any fatal illness.

- 5) A court orders concerning the parental and custody of the child born out of surrogacy.
- 6) Insurance coverage of the surrogate mother.
- 7) Only 'close relative' can perform surrogacy.

1.3. Eligibility for the surrogate mother

- 1) She should be 'close relative' of the couple,
- 2) She was married and has her own biological child.
- 3) She will be 25-35 years of age
- 4) She has not been the surrogate mother ever before.
- 5) She should possess a medical certificate of fitness for surrogacy.

1.4. Legal status of surrogate child:

Any child born out of surrogacy arrangement should have all rights of a biological child of an intending couple or natural child and entitled for all rights and privileges.

1.5. Punishments for the following offences:

- 1) Any couple who takes the advantage of any doctor of surrogacy clinic in order to conduct commercial surrogacy will be liable for punishment with minimum imprisonment term for 5 years and fine that may extend to five lakh rupees.
- 2) If any couple undertake or advertise commercial surrogacy or exploiting or abandoning surrogate mother or surrogate child or selling and importing human embryo or gametes for surrogacy, will be imprisonment for 10 years and fine up to 10 lakhs

The above Bill has no more changes as compare to the previous Bill. It is passed by Lock Sabha with few changes brought into the Bill.

2. The Surrogacy (Regulation) Bill, 2019

The Surrogacy (Regulation) Bill, 2019 was introduced by the Minister of Health and Family Welfare Dr. Harsh Vardhan in the Lok Sabha on 15th July 2019, and for appointment of appropriate authority to regulate surrogacy practice in India and to constitute National Surrogacy Board and State Surrogacy Board for controlling the misuse and unethical practices of Surrogacy in India.

Bill Defines "Surrogacy is a practice where woman carry a child for intending couple with

the intention to relinquish all her rights over the baby and hand over the baby to the intended couple". This Bill banned commercial surrogacy from India and allows only altruistic surrogacy with some major changes in the Bill. This Bill allows only couples with 'proven infertility'. Intending couples should have the certificate of essentiality and certificate of eligibility issued by the appropriate authority. It should be for the altruistic purpose and not for commercial purpose. Not for producing children for sale, prostitution or other forms of exploitation. Surrogacy is allowed only when the condition or disease may be specified the regulatory authorities.

2.1. The Certificate of essentiality will be issued to those couples

- Couple shall have a certificate of proven infertility either one or both the members by District Medical Board.
- A couple shall have parental and custody orders passed by Magistrate court;
- Couple shall have to provide insurance coverage of 16 months postpartum delivery complication for the surrogate.

2.2. Couples who eligible for surrogacy procedures

- A couple shall be an Indian citizen and married for atleast five years,
- They must be between the age group of 23 to 50 year old female and 26-55 years old male
- They shall not have any surviving child of their own (either biological, adopted or surrogate); this would not include the child who is mentally ill, physically challenged or suffers from any life threatening disease or illness.
- For the purpose of any other condition or any disease due to which couple could not conceive their own child

2.3. Eligibility criteria of surrogate mother

- Surrogate mother should be the close relative of the commissioning couple.
- A married woman having her own living children
- She should be of the age between the 25 to 35 years old
- She should act as surrogate only once in her life time

- She should possess the certificate of medical fitness and psychological fitness for surrogacy
- And the surrogate mother cannot provide her own gametes for surrogacy arrangements.

2.4. Appropriate authority

- The central and the state government shall appoint one or more appropriate authorities within the period of 90 days of the Bill becoming an Act.
- Appropriate authority may any time grant, suspend or cancel the registration of surrogacy clinics as he deems fit.
- Appropriate authority can enforce standards for surrogacy clinics.
- Appropriate authorities can investigate and take any action against the breaching of the provisions of the Bill.
- Appropriate authorities can recommend modifications to the rules and regulations.

2.5. Registration of surrogacy clinics

- Surrogacy clinics cannot take surrogacy related procedures until and unless they are registered by the appropriate authority.
- Clinics must apply for registration within the period of 60 days from the date of appointment of the appropriate authority.

2.6. Functions of National and State Surrogacy Boards

- The Central and State Governments shall constitute the National Surrogacy Board at central level and State Surrogacy Board at state level.
- National Surrogacy Board has to advice the Central government on the policy matters which are related to the surrogacy.
- National Surrogacy Board has to laying down the code of conduct of surrogacy clinics.
- National Surrogacy Board has to supervise the functions of State Surrogacy Boards.

2.7. Parentage of surrogate child

- A child born out of surrogacy procedures will be deemed to be the biological child of the intending parent.
- Child shall be considered as a natural child of the intending parents.

- Child born out of surrogacy has same rights over the properties as the natural children.

2.8. In case of abortions

- If surrogate mother wants to abort a child due to some complications then she must have to sign written consent form and with the authorization permission of appropriate authority.
- An appropriate authority shall have the authorization complaints with the Medical Termination of Pregnancy Act, 1971.
- Surrogate mother has right to withdraw her consent from surrogacy procedures before the embryo is implanted into her womb.

2.9. Offences and punishments

- Any person or clinic shall be liable for punishment, which undertake or advertise the commercial surrogacy;
- Any person or clinic shall be liable for the punishment, who exploits the surrogate woman/mother;
- Any person or clinic or intending couples who abandoning, exploiting or disowning the surrogate child shall be liable for the punishments;
- Any person or clinics that caught in selling or importing human embryo or gametes for surrogacy purposes;
- Shall be liable for such offences with imprisonment upto 10 years and fine upto 10 lakh rupees.

3. The Surrogacy (Regulation) Bill, 2020

After taking into account the recommendations of the 23-member Rajya Sabha Select Committee on November 21, 2019, the Union Cabinet passed the Surrogacy (Regulation) Bill, 2020, on February 26, 2020. The Bill's modification is a revised version of the legislation's draught that the Lok Sabha approved on August 5, 2019. Additionally, this bill proposes to regulate surrogacy by creating a State Surrogacy Board at the state level, a National Surrogacy Board at the federal level, and the appropriate authorities in each state and union territory. This will help to prevent the abuse and unethical use of surrogacy in India. According to Cabinet Minister Prakash Javedekar, the bill aims to ensure effective

regulation of surrogacy services while prohibiting commercial surrogacy and permitting altruistic surrogacy. It also aims to limit unethical practises like the exploitation of surrogate mothers, abandoning children born through surrogacy, and importing and exporting embryos and gametes.

The Bill proposes some changes are as follows:

The major changes which have been adopted by the Surrogacy (Regulation) Bill, 2020 are as follows:

- 1) “Abandoned child”: means a child born out of surrogacy procedure who has been deserted by his intending parents or guardian and declared as abandoned by the appropriate authority after due enquiry.
- 2) “Altruistic surrogacy”: “means the surrogacy in which no charges, expenses fees, remuneration or monetary incentive of whatever nature, except the medical expenses and such other prescribed expenses incurred on surrogate mother, are given to the surrogate mother or her dependents or her representative;”
- 3) “Embryologist”: “means a person who possesses any post graduate medical qualification or doctoral degree in the field of (**) embryology or clinical embryology (**) from a recognized University with not less than two years of clinical experience;”
- 4) “Insurance”: “means an arrangement by which a company, individual or intending couple undertake to provide a guarantee of compensation for medical expenses, health issues, specified loss, damage, illness or death of surrogate mother and such other prescribed expenses incurred on such surrogate mother during the process of surrogacy;”
- 5) “Intending couple”: means a couple who have (**) a medical indication necessitating gestational surrogacy and who intend to become parents through surrogacy.
- 6) Intending woman”: “means an Indian woman who is a widow or divorcee between the age of 35 to 45 years and who intends to avail the surrogacy.

7) Surrogate mother”: “means a woman who agrees to bear a child who is genetically related to the intending couple or intending woman through surrogacy from the implantation of embryo in her womb and fulfills the conditions as provided in sub-clause (b) of clause (iii) of section 4.

- The term "infertility" has been eliminated from the 2020 definition on the grounds that waiting five years for an unprotected foetus to conceive was too long for the intended parents to wait for a child through surrogacy treatments.
- This Bill removes the requirement that the surrogate mother be a "near relative" and instead permits any willing woman to operate in that capacity for the intended parents.
- This bill also permits Indian women who are unmarried (only widows and divorcees between the ages of 35 and 45 are permitted to complete the requirements.)
- With the completion of specific requirements, this Bill also permits Indian married couples and married couples of Indian descent to choose "ethical altruistic surrogacy."
- Another proposal in this bill was to govern the State Surrogacy Board at the state level, the National Surrogacy Board at the federal level, and the appropriate authorities in the various states and union territories.
- This Bill also prohibits or outlaws commercial surrogacy, including the sale and purchase of human embryos and gametes.
- This Bill also recommends that the insurance coverage of the surrogate mother has been raised from 16 months to 36 months for the benefit of the surrogate mother.

4. The Surrogacy (Regulation) Act, 2021

The Surrogacy (Regulation) Act, 2021, which established the National Assisted Reproductive Technology and Surrogacy Board and State Assisted Reproductive Technology and Surrogacy Boards, was approved by the President on December 25, 2021.

Key points are:**4.1. Prohibition and regulation of surrogacy clinics:**

- Unless registered under this Act, no surrogacy clinic may engage in, associate with or otherwise support surrogacy and surrogacy procedures, or retain any person's services, whether on an honorarium basis or for payment, who does not fulfill the conditions that may be imposed.
- Except for storage for IVF, sperm banks, or medical research, no surrogacy centre, paediatrician, gynaecologist, embryologist, registered medical practitioner, or other individual shall engage in, offer, undertake, promote, or use commercial surrogacy in any way. They also may not carry out or cause to be carried out sex selection for surrogacy.
- Where a potential couple's medical condition necessitates gestational surrogacy, provided that a potential couple of Indian ancestry or a potential surrogate woman must acquire a certificate of recommendation from the Board.
- It should be noted that "gestational surrogacy refers to a procedure where a surrogate mother carries an embryo in her womb for an intended partner; the child is not genetically connected to the surrogate mother".
- If it is solely for charitable surrogacy reasons.
- When there are no business motives, commercial surrogacy practises, or commercial surrogacy methods.
- When it isn't done to breed children for the purpose of prostitution, child labour, or any other kind of exploitation.
- No surrogacy clinics may they hire any individual who does not meet the requirements outlined in the Act.
- Within sixty days after the appointment of the authorised

authority, each clinic that performs surrogacy treatments must submit an application for clinic registration. Every three years, registration must be renewed.

- The prospective parents must be an Indian couple who are legally married, between the ages of 25 and 50, have never had a biological, adoptive, or surrogate child previously. There is just one opportunity in a woman's lifetime to use a surrogate mother.
- When a couple plans to use a surrogate because they are in need of one because of a medical problem, the National/State Assisted Reproductive Technology and Surrogacy Board must provide a "Certificate of Essentiality/Infertility."
- The surrogate mother must also give her written, fully informed consent in a language she can understand.
- Every State and Union Territory shall create a comparable type of Board for surrogacy-related matters, along with the Centre.

Any couple that engages in commercial surrogacy will be penalised under the Surrogacy (Regulation) Act of 2021 with up to five years in prison and a punishment of up to Rs. 50,000, and up to ten years in prison and a fine of up to Rs. 1,000,000 for a subsequent offence. Any individual, group, or facility involved in the exploitation of surrogate mothers.

4.2. Constitutional Scrutiny of the Surrogacy (Regulation) Act, 2021

Balancing the various interests of both parties is the main barrier to surrogacy in India. The state has a responsibility to safeguard the rights of the unborn child and prevent the exploitation of surrogate mothers, but it also has a responsibility to preserve the reproductive freedom of women and the rights of the intended parents. India's surrogacy laws are still working to strike the correct balance between these competing interests.

In *Devika Biswas v. Union of India*, the Apex Court determined that the "Right to Life" guaranteed by Article 21 of the Indian Constitution included the "Right to

Reproduction" as a fundamental aspect. The capacity to get pregnant, give birth, and rear children is a part of the right to reproduction. Hence, limiting surrogacy to a particular age bracket of heterosexual couples only creates a partial imbalance. Communities, including single people and old couples, are all categorically denied the right to access reproductive alternatives, which may violate both Article 21 and Article 14 of the Indian Constitution.

According to experts, the Surrogacy (Regulation) Act, 2021's conflicting sections won't be able to safeguard the rights and interests of intended parents and surrogate mothers. It has been feared that these flaws may encourage the growth of an unauthorised industry for surrogacy services. As surrogacy should be acknowledged as a reproductive right available to all persons regardless of their standing in the community, concerns have been expressed about hurdles like age restrictions and barring gay couples, not helping in the advancement of society. There is doubt regarding the existing surrogacy laws when it comes to the advancement of Indian society because India is going through a revolutionary period where the mindset of the populace is drastically shifting from patriarchal norms to a more feministic ethos.

5. Assisted Reproductive Technology (Regulation) Act, 2021

The Parliament passed the Assisted Reproductive Technology (Regulation) Act, 2021 on December 18, 2021.

5.1. Key points are:

- The Act aims to “control and oversee assisted reproductive technology clinics and banks, prevent misuse, ensure safe and ethical assisted reproductive technology practises and address issues of reproductive health where assisted reproductive technology is necessary for becoming a parent or for freezing gametes, embryos, or embryonic tissues for use in the future due to infertility, disease, or social or medical concerns”.
- The Act mandates that every ART bank and clinic be registered with the National Registry of Banks and Clinics of India. To streamline the registration process, state governments choose

relevant authorities in their respective states.

- The Registration is valid for five years and is subject to cancellation or suspension if an entity violates the Act's rules.
- For the purposes of this Act, the National Board will establish the National Assisted Reproductive Technology and Surrogacy Board.
- The Act details the registration process for assisted technology clinics and banks, including guidelines for granting registration, renewing it, suspending it, or cancelling it.

The clinics and banks shall perform the following duties:

- The banks will deliver donor gametes to the clinics after making sure that the donor has undergone any appropriate medical testing. The clinics will provide the commissioning couple or woman with legal information on a child born via the use of assisted reproductive technologies.
- The clinics are required to provide a discharge certificate to the commissioning couple or woman that details the assisted reproductive technology procedure that was performed on them.

5.2. Offences and Penalties

1. No advertisement for sex-selective assisted reproductive technology facilities may be issued, published, distributed, or transmitted by the clinic, its bank, or any of their agents in any medium, including the internet.
2. Violations of the law are penalised by a five-year sentence that can be extended to ten years in prison, a fine that must be at least ten lakh .
 - a. Abandon, or exploited the kid or children conceived via assisted reproductive technology.
 - b. Operate an organisation or racket for buying, selling, or trading human embryos or gametes, or sell human embryos or gametes.
 - c. importing human gametes or embryos, or aiding in their importation in any way

- d. taking advantage of the commissioning couple, the woman, or the gamete donor
- e. transferring human gametes or embryos into male or animal recipients
- f. selling any human gametes or embryos for research
- g. Using any intermediaries to find gamete donors.

Any breach of the terms of clauses (a) to (g) is punishable by up to 8 years in prison and a fine of not less than 10 lakh rupees but as much as 20 lakh rupees for a first offence, and not less than 5 lakh rupees but as much as 10 lakh rupees for successive offences.

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