
SURROGACY (REGULATION BILL): A LEGAL AND SOCIAL BLUNDER

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ABSTRACT

The Indian Laws have generally been contradicting, making the rise of Supreme Court cases that prompt the other turbulent cycle and loss of the cash, times, feelings and the nation philosophy. On 6th September 2019, the Supreme Court of India decriminalised Section 377. On 26th November 2013, the apex court recognised live-in relationships as legally valid relationships. Yet in 2019 the public authority concocted a sweeping boycott of business surrogacy under the shadow of abused poor.

In this paper, a detailed study on various problems associated with commercial surrogacy bill have been discussed. A comprehensive study of using one's body in conducting a trade is used to explain the roots of businesses like commercial surrogacy and prostitution in the country. The business surrogacy bill is not only violative of social and moral norms yet also to the bedrock of our constitution i.e., part III of Indian constitution. It outfits the actual idea of balance, citizenship, honourable life to those youngsters who born out of such agreements and to those women who are being the surrogate mothers.

The other side of the coin which is misuse of commercial surrogacy to reproduce youngsters to submit offences like constrained prostitution, double-dealing of human body is extremely upsetting. The obligation of law is not just to shield the residents of its country from abuse and violations yet in addition to defend the interest of individuals. By totally forbidding the public authority is attempting to flee with the obligation of making a reasonable law for the nation which not only safeguards the citizens against the offences but also protects the interests of them.

This paper establishes a balance in law by suggesting some methods and measures for commercial surrogacy. A blanket ban to commercial surrogacy is not the answer to the question.

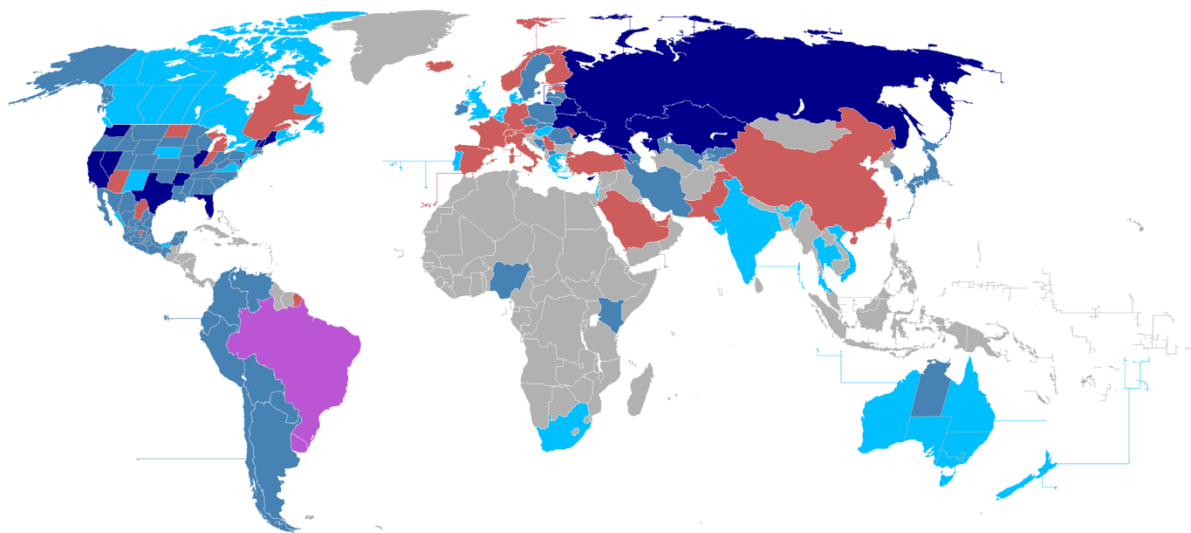
INTRODUCTION

Surrogacy is a method of assisted reproduction where the intended parents are not physically/psychologically/socially capable to bear a child in the mother's womb. The woman whose womb is used is referred to as 'Surrogate Mother' and the couple intending to be the parents of the child is referred to as 'Intending Couple'. The child born out of such arrangement is referred to as 'Surrogate Child'. Based on the gametes used, surrogacy can be Traditional Surrogacy or Gestational Surrogacy. Traditional Surrogacy, where the gamete used are of the surrogate mother. Gestational Surrogacy, where the gametes used are not of the Surrogate mother but of the intending parents. Based on the compensation received by the mother, Surrogacy can be Commercial Surrogacy or Altruistic Surrogacy. Commercial Surrogacy is the practice of surrogacy carried out when the surrogate mother receives remuneration/compensation in-terms of money or gifts by the intending couple other than the amount/things necessary for the welfare of the surrogate mother while altruistic surrogacy is when the surrogate mother does not receive anything other than what is necessary for the welfare of the surrogate mother at the time of pregnancy.

While the history of surrogacy dates to 1980's in the modern world but there have been dialogues in the holy scriptures of various religions about its validity and various concerns related to it. In Hinduism, it is regarded as Krishna, one of the greatest gods of Hindu mythology was himself a surrogate child born out of the womb of *Rohini* but his mother being *Devaki*¹. In Islam, several scholars have argued over the issue of surrogacy and its validity in the Islamic law. While a few Islamic researchers contends, surrogacy as an invalid practise where no mother is permitted to acknowledge the gametes of a man other than her husband, which several Islamic scholars believe is akin to zina (adultery), the Shariah Law talks about '*Hifz al-nasl*', the practice which talks about the preservation of race or preservation of lineage. In Buddhism, surrogacy out of compassion is regarded as valid while surrogacy when born out of a greed for compensation/interest is held to be immoral. Subsequently, allowing benevolent surrogacy and not business surrogacy. The Catholics have viewed the act of surrogacy as

¹ Pratibha Ganesh Chavan, "Psychological and Legal Aspects of Surrogate Motherhood" AIR 2008 Jour 103

exceptionally unethical and invalid. In 1884, the first successful artificial insemination of a woman was completed, which later paved the way of surrogacy in this world². The first surrogacy agreement was carried out in the year 1980. But the case which lead to various stringent laws in USA was in the year 1984-1986, the famous Baby M. case. Today, several countries in the world allow surrogacy but only to the extend of altruistic surrogacy, while there are still countries which do not have any proper legal stand on the issue of surrogacy. In India, the issue of surrogacy came into light by the case of '*Baby Manji*' in the year 2008 which paved the way for barring Commercial Surrogacy in the country.



Legitimate guidelines of surrogacy on the planet: ■ Both beneficial and philanthropic structures are lawful ■ No lawful guidelines ■ altruistic is legal ■ Allowed between relatives up to second degree of consanguinity ■ Banned ■ Unregulated/uncertain situation³

The above map of the world shows the parts of the world where Altruistic Surrogacy is legal and where Commercial Surrogacy is legal.

² <https://surrogate.com/about-surrogacy/surrogacy-101/history-of-surrogacy/>

³ https://en.wikipedia.org/wiki/Surrogacy_laws_by_country#/media/File:Maternidad_subrogada_situaci%C3%B3n_legal.PNG

There are several clauses that have been found violative of the precedents set by the Supreme Court as well as the Constitution of India. The major watershed provisions of the Surrogacy (Regulation) Bill are: -

- **Section 4⁴:** On and from the date of commencement of this Act-
- (i) No place including a surrogacy clinic shall be used or caused to be used by any person for conducting surrogacy procedures, except for the purposes specified in clause (ii) and after satisfying all the conditions specified in clause (ii) and after satisfying all the conditions specified in clause (iii).
 - (ii) No surrogacy or surrogacy strategies will be lead, embraced, performed or profited of, with the exception of the accompanying purposes , to be specific
 - a. When either or both the members of the couple is suffering from proven infertility.
 - b. When it is only for altruistic surrogacy purposes;
 - c. When it is not for commercial purposes or for commercialisation of surrogacy or surrogacy systems.
 - d. When it is not for creating youngsters available to be purchased; prostitution or some other type of abuse and
 - e. Any other condition or disease as may be specified by the regulations made by the Board.
 - (iii) Be led, embraced performed or started, except if the director or accountable for the surrogacy centre and the individuals to such as are fulfilled. For motivations to be regarded as a hard copy, that the accompanying conditions have been satisfied to be specific -
 - a. The planning couple is in control of an authentication of vitality gave by the proper power, in the wake of fulfilling for itself for the motivations to be recorded as a hard copy, about the satisfaction of the following conditions to be specific-
 - I. A declaration of demonstrated fruitlessness for one or the other or the two individuals from the meaning couple from a District Medical Board.
 - II. An order concerning the parent age and custody of the child to be born through surrogacy, have been passed by a court of magistrate of the first class or above, on an application made by the intending couple and surrogate mother.
 - III. An insurance coverage of such amount as may be prescribed in the favour of the surrogate mother for a time of 16 months covering post partem conveyance confusions,

⁴ Surrogacy (regulation) Bill, 2019.

from an insurance agency or an agent recognised by the insurance regulatory and development authority established under the insurance regulatory and development authority act, 1999.

- IV. The substitute mother is in control of a qualification testament gave by the suitable expert on suitable expert on satisfaction of the accompanying conditions specifically,
- V. No women, other than an ever-married woman having a child of her own and between the age of 25 and 35 years on the day of implantation will be a substitute mother or help in surrogacy by giving her egg or oocyte or in any case.
- VI. No individuals, other than close relation of an intending couple, shall act as a surrogate mother and be permitted to undergo surrogacy procedures as per the provision of this act;
- VII. No woman shall act as a surrogate mother by providing her own gametes;
- VIII. No woman shall act as a surrogate mother other than once in her lifetime:
Provided that the number of attempts for surrogacy procedures on the surrogate mother shall be such as may be prescribed;
- IX. A certificate of medical and Mental qualification for surrogacy and surrogacy methods from an enrolled clinical specialist.
 - b. A qualification endorsement for expecting couple is given independently by the fitting position on fulfilment of the following conditions, namely: -
 - I. Age of the aiming couple is between 23 to 50 years if there should be occurrence of female and between 26 to 55 years on the off chance that of male on the day of certification;
 - II. The aiming couple are married for at least 5 years and are Indian citizens;
 - III. The aiming couple have not had any enduring youngsters naturally or through surrogacy prior; provided that nothing contained in this things will affect the intending couple who have a child and who is mentally or physically suffered or suffers from a life-threatening illness or fatal illness with no permanent cure and approved by the appropriate authority with due medical certificate from a district medical board;
 - IV. Such other conditions as may be specified by the regulations.

The concept of using one's body in a trade has been considered highly immoral and unethical by the Indian society and thereby the Indian Laws. The base of forming Indian laws is based on the culture of the society. Professions like prostitution have been considered immoral by the

Indian society and the lack of implementation of measures by the executive has been the base of forming such policies and laws by the Indian Legislature. On the other hand, countries like Sweden, where prostitution has been legal is far more progressive than countries like India which have been a hypocrite through its inception. Profession like prostitution and commercial surrogacy and practices like pornography have been imbedded in the holy scriptures and yet the Indian laws have been against it. India is a country where 'Kaama Sutra' was written. Another nail in the coffin was the introduction of Surrogacy (Regulation) Bill. The concept of using one's body as a part of trade has been accepted by the Indian Laws and the society in different forms. One can use his brain or physical strength to earn his share of wealth. But the problem arises when a poor woman uses her womb or body to earn money. The way in which one can use his brain should have a right to use his/her body to earn.

This basic right guaranteed to a citizen of India inscribed under Article 19(1) (g) i.e., to rehearse any calling, or to continue any occupation, exchange or business has been abused. Article 19(6) says Nothing in sub-clause (g) of the said clause shall affect the operation of any existing law in so far as it forces, or keeps the state from making any law forcing, in light of a legitimate concern for the overall population, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particular, nothing in the said sub-clause will influence the activity of any current law to the extent that it identifies with, or keeps the state from making

Article 19(6) talks about reasonable restrictions but the Surrogacy (Regulation) Bill does not put any reasonable restrictions on commercial surrogacy but completely bars one from practicing commercial surrogacy. The Immoral Traffic (prevention) Act, 1956 does not abolish prostitution but puts only reasonable restrictions. Why there cannot be reasonable restrictions rather than completely banning Commercial Surrogacy? The state has the power to completely ban the trade if the trade is of immoral nature or against the welfare of the society.⁵ But the practice of commercial surrogacy cannot be considered immoral as it provides an opportunity to an infertile couple to become parents nor it is against the welfare of the people. The ban on commercial surrogacy is not only violative of Article 19 of the constitution but also limits the welfare of the poor. The woman who are in dire need of money, can use commercial surrogacy as a cure to the poor life and lack of opportunities. The blanket ban of commercial surrogacy will not only harm the individual poor but the country. Surrogacy produces 2 billion dollars

⁵ In *Shri Cooverjee B. Bharucha v. Excise Commissioner and The Chief Commissioner, Ajmer and others*

yearly in India. If commercial surrogacy is banned India will lose the growing market of Commercial surrogacy, which in-turn will be loss of an opportunity.

Permitting Altruistic Surrogacy, the surrogate mother bearing the child of the induced parents can be equivalent to “Forced Labour”. Endorsing Altruistic Surrogacy without a fair compensation/remuneration will induce emotional and social pressure on the females being the surrogate mothers. In *People's Union for Democratic Rights and others. Vs. Union of India and others*⁶, While interpreting the provisions of article 23 of the constitution of India, the Apex Court held that it is not merely “beggar” which is constitutionally prohibited by Article 23 but also other similar forms of “forced labour”. The Apex Court further held that, Article 23 strikes at “forced labour” in whatever form it may manifest itself. It was further observed that where a person provides labour or services to another for remuneration which less than the lowest pay permitted by law, the work or administration given by him obviously falls inside the degree and ambit of the words “constrained work”. Since, Surrogate mothers will not be receiving any remuneration or compensation for the service that will be provided by them, her service should be equal to forced labour. Banning Commercial Surrogacy and permitting altruistic surrogacy implies that a woman is obliged to produce babies. The very nature of paternalistic society is highlighted through the said bill. The amount earned by the woman during a compensated surrogacy can be regarded as the compensation received by her for the time, she was not able to earn due to pregnancy.

S. 4 (ii) (a) permits only the couples who have proven infertility to undergo surrogacy. However, the conditions in which the woman is not infertile but is advised by the doctor not to conceive, has been left out. S.4 (ii) (b) violates the interpretation of Article 21 set by the Supreme Court of India in *Suchita Srivastava & Anr vs Chandigarh Administration*⁷. The court held, “ There is no doubt that a woman's right to make reproductive choices is also a dimension of ‘personal liberty’ ” as understood under Article 21 of the Constitution of India. It perceives those conceptive decisions can be practised to multiply just as to swear off reproducing. The pivotal thought is that a woman rights to protection, nobility and real honesty ought to be regarded. This implies that there ought to be no limitation at all on the activity of regenerative decisions, for example a woman's right to refuse participation in sexual activity or alternatively the insistence on use of contraceptive methods”. This bill grossly violates one’s Right to

⁶ A.I.R. 1982 SC 147

⁷ 14 SCR 989

Reproductive Autonomy. The strategy for reproduction and parenthood lies outside the space of the state, what's more, any obstruction in this decision will warrant an encroachment of this fundamental Right. S.4 (iii) (c) (II) requires the intending couple to be married for a period of 5 years in order to go through altruistic surrogacy. This clause violates the arbitrary power of a couple to decide when they are ready to start a family and puts an unreasonable restriction on the couple to wait for at least a period of 5 years before undergoing surrogacy, after marriage. This clause also asks the couple to be a married couple and refuses to recognise living-in relationships as valid relationships which is in direct violation with the judgement of Supreme Court in *Badri prasad v. dy. Director of Consolidation, 1978*. This bill in an implied manner specifies to not recognise the children born out of live-in relationships which is again in violation with the precedent set by the apex court in *Tulsa & Ors v. Durghatiya & Ors, 2008*. There is no specific mention about the process of surrogacy to a couple who is in live-in relationship. It also restricts the intending couple to be Indian citizens, however, CARRA permits the Foreign Nationals to adopt a child in India. The restriction is unjustified on foreign individuals. Confining it to just Indian wedded couples is unfair and violative of the right of the life, personal liberty, reproductive autonomy and right to equality guaranteed to all persons under the Constitution of India. S. 4 (iii) (c) (III) restricts the couple with a child to undergo surrogacy and allows only to those couple whose child is suffering from the mentioned disorders. This clause neglects such people those who have become infertile after the birth of a child. It highlights only about the male infertility, but the secondary female infertility is ignored and neglected. S.4 (iii) (b) (II) permits only a close relative of the intended couple to be the surrogate mother. However, this bill fails to recognise the emotional and social stigmas when one is a surrogate mother as well as the close relative of the surrogate child. This may lead to various family disputes as the surrogate mother and the surrogate child may develop an emotional support due to proximity. Restricting the act of surrogacy to direct relation is not just non- realistic and impossible yet likewise has no associate with the item to stop double-dealing of proxies conceived in the proposed legislation.

Another strike that Surrogacy (Regulation) Bill hits on the Indian society is it is violative of Article 21 of the constitution, Right to Dignified Life and Personal Liberty. Under Article 21 is the Right to privacy. S.4 (iii)(a)(I) of the Surrogacy (regulation) Bill asks the inducing parents to declare the infertility. Sex in India is still considered to be a secretive matter of the couple and talking about sexual disorders is a taboo. The Supreme Court held, A citizen has a right to safeguard the privacy by his own, his family, marriage, procreation, motherhood, childbearing

and education among other issues or matters⁸. The matter concerning the fertility of an individual is a matter related to his own and his procreation. Thus, A certificate demanding the acceptance of a personal matter is in ultra vires with Article 21. Asking for a certificate is also violative of Article 12 of the Universal Declaration of Human Rights⁹ (1948) and Article 17 of the International Covenant on Civil and Political Rights¹⁰. A certificate can act as a proof of infertility in the eyes of the society and thereby can also act as a reason for divorce.

The Supreme Court in *Navtej Singh Johar v. Union of India*¹¹, recognised gays sex. However, the Central Adoption Resource Authority, under its eligibility criteria states that no single man can adopt a child¹². The only resolve available to a gay couple and a transgender couple to procreate would have been Commercial Surrogacy (since gays are not openly accepted in the Indian society and thereby reducing the chances of altruistic surrogacy) which through Surrogacy (Regulation) Act has been banned. It violates the principle of Article 21 which provides the Right to Procreate and Article 14 i.e., Correspondence under the steady gaze of the law i.e. equality. It puts up an unreasonable restriction on the members of LGBTQ community by not providing them equal opportunity to procreate or have a family which is against the basic principle of Article 14 and Article 21 of the Indian Constitution. The proposed law is also in violation of Article 16(1) of Universal Declaration of Human Rights which states “every individual has a right to marry and found a family, whether men or women”.

One of the major challenges in front of the legislature is the citizenship of the surrogate child, if they allow commercial surrogacy. The question of defining the nationality of the surrogate child was put in front of the apex court in case of *Baby Manji*. The Supreme Court arranged the travel documents for *Baby Manji*¹³, however these documents did not have any mention about the nationality of the surrogate child. India can borrow Surrogacy Laws from Russia in this respect where the birth certificate of the child bears the name of intending parents after an agreement between the intending parents and the surrogate mother. However, there should be no mention of the surrogate mother on the birth certificate. Citizenship Act defines that only a

⁸ *R. Rajagopal vs. State of Tamil Nadu*

⁹ No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks

¹⁰ No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home and correspondence, nor to unlawful attacks on his honour and reputation

¹¹ *W. P. (Crl.) No. 76 of 2016*

¹² http://cara.nic.in/Parents/eg_ri.html

¹³ *Baby Manji v. Union of India* [13 SCC 518]

person who is born in India and has any one of the parents an Indian National will be the citizen of India. However, in case of *Baby Manji*, none of the inducing parents were Indian Nationals and he was not able to adopt his genetic baby due to the Guardians and Wards Act 1890 which does not allow single men to adopt baby girls.

The major reason for banning Commercial Surrogacy is prevention of exploitation of the poor. But, the sad reality of illegal commercial surrogacy will lead to over- exploitation of the poor rather than protecting them. The poor women will not be compensated and used illegally by the people who are involved in the practice. This bill fails to categories the state of the poor women, who does not have proper say in the matters of the family. The Indian society is still a patriarchal society where the majority decision is taken by the males of the family. Merely changing the form of surrogacy will not protect the people from exploitation but will expose them to more illegal activities which can thereby anguish the fear of doing an illegal activity from the minds of poor. The proposed law is a clear case of homophobia, majoritarian enforcement of cultural norms, and discrimination against non- heteronormative relationships. Proper and stringent laws can only help in protecting the individuals as well as their interests.

The following are some of the suggestions that would help in formulating laws with respect to Surrogacy: -

- I. Commercial surrogacy should be permitted.
Provided that the commercial surrogacy should not be carried out for any illegal practice.
- II. No certificate of infertility should be asked for the intended couple, in case the couple is of Indian Nationality.
- III. The intending couple, should, however, present reasons in writing for the surrogacy, to the appropriate authority.
Provided that if the officer of the appropriate authority finds any reasonable doubt, the officer with the permission of Judicial Magistrate of Ist Class, can ask to verify the reasons stated.
- IV. Couples should have the option of undergoing surrogacy without any restriction of 5 years of marriage.
- V. Unmarried couple, in a live-in relationship, should be allowed to be intending couple to surrogate.

Provided that one of the parents should take complete responsibility of the surrogate child, in case the couple ceases to be in a live-in relationship.

Further provided that, the preference to take the responsibility should be given to the parent who has the proper means to cater to the needs of the surrogate child.

- VI. Homosexual couple should be allowed to undergo any type of surrogacy.
- VII. Government should make sure the surrogate mother's rights are protected and they are compensated fairly.
- VIII. A board should be formed for dealing with the matters related to surrogacy.
- IX. A consent form should be signed by the surrogate mother as well as the intending parents before undergoing surrogacy, of any nature.

Provided that the consent form should be signed in the presence of the appropriate authority.

- X. In order to avoid corruption in matter of consent form, the consent form should be signed in the presence of appropriate authority, on 3 different occasions and in the presence of different officers of the appropriate authority.

Provided that the time limit of the 3 occasions should not exceed 6 months, in case the parents are Indian Nationals and 2 months, in case the parents are of Foreign Nationals.

- XI. If the surrogate mother has a family, as a caretaker should be present to take care of the surrogate mother. However, absence of caretaker should not harness once right to become surrogate mother.
- XII. Since, commercial surrogacy will be regarded as a matter of trade, subsequent taxes should be imposed.
Provided that the Indian Nationals being the intending parents should be granted concession in taxes.
- XIII. Foreign individuals should be allowed to undergo commercial surrogacy. Provided that the Foreign Nationals should be asked to provide an infertility certificate to the appropriate authority.
Provided that if the appropriate authority has any reasonable doubt about the authenticity of the certificate, the appropriate officer can demand for another fertility test.
- XIV. There should be no restriction with respect to the couple already having a child.
Provided that the couple has incurred some medical problem or has become infertile.

Further provided that the couple has proper means to cater to the needs of the child present and the surrogate child to be born.

- XV. There should be no restriction with respect to the number of times a woman can be a surrogate mother.

Provided that the surrogate mother should have a medical check-up after subsequent delivery.

Further provided that the surrogate mother is deemed fit in the medical certificate obtained and verified by the health authority.

- XVI. There should be a minimum time period in between the subsequent surrogacy, as prescribed by the appropriate health authorities.

- XVII. No age limit should be prescribed of the woman being surrogate mother.

Provided that she has obtained a medical certificate stating her capability to be a surrogate mother, from the appropriate health authorities.

Further provided that the surrogate mother has attained the age of 25 years.

- XVIII. The restriction of either or both the parents being infertile to undergo surrogacy should be removed.

- XIX. At the time of agreement of surrogacy, the intending couple, mentioned under V, VI, XIII and XIV should submit a security amount with the Government of India.

Provided that the appropriate authority should decide the security, amount based on the Nationality and income level of the inducing parents.

- XX. In case the intended parent(s) leave the surrogate child deserted, the Indian government should be liable to take care of the child as a parent.

Provided the first option of adoption of the child should be given to the surrogate mother.

Further provided that the surrogate mother should be capable of raising the child.

- XXI. In case any one of the intending parents deserts the child, the parent willing to raise the child, irrespective of the gender of the intending parent and the surrogate child, has the appropriate means to raise the surrogate child, should be allowed to be the single parent of the child.

Provided that the inducing parent is a male and the surrogate child is a female; the inducing parent should be given the status of the father of the surrogate child.

Provided further that the inducing parent who is a male may adopt the surrogate girl under special status, provided by this act.

Subject to the background check of the intending parent, in such a case, where the inducing parent is a male and the surrogate child is a female, by the appropriate authorities.

- XXII. In case the intending couple dies in an accident or after suffering from a disease, in the period of pregnancy of the surrogate mother, the options of adoption should be provided first to the surrogate mother, if she has the proper means.
- XXIII. In any of the case mentioned under XVIII and XX, the security amount submitted by the inducing parent mentioned under XVII, should be handed over to the person/authority adopting the surrogate child.
- XXIV. In any of the case mentioned under XVIII and XX, the security amount submitted by the inducing parents mentioned under XVII should be used entirely to raise the surrogate child.
- XXV. In case the surrogate mother dies, in course of pregnancy, notwithstanding anything in the suggestions, the security amount submitted by the intending couple should be granted to the close relative of the surrogate mother, mentioned under XI.
Provided if there are no close relative of the surrogate mother, the security amount, mentioned under XVII, should be donated to the welfare of such children mentioned under XVIII and XX.
- XXVI. In case the surrogate child born is suffering from any mental or physical disorder, the inducing parents have no right to deny the custody of the child.
- XXVII. In case the surrogate mother refuses to take any sought of remuneration for the service provided by her, she should not be forced to accept the remuneration.
Provided that the refusal by the surrogate mother should be on her will and without any coercion or undue influence.
- XXVIII. The security amount, mentioned under XVII, should be returned to the intending couple after the performance of the contract of surrogacy.