

“Imperative Role of Surrogacy in India: Current Issues and Development”

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Abstract

Surrogacy in India has faced many challenges during the past few years. Earlier surrogacy has no separate laws for surrogacy the only way to deal in surrogacy is the “guidelines issued by MEDICAL COUNCIL OF INDIA”¹. Renting a womb was presumed to be legal in India but there were no such laws at that time to regulate surrogacy. But now the bill of Assisted Reproductive Technology (Regulation) Act², which tells the various rules and regulation, procedure, age limit and the penalty provisions regarding the surrogacy.

Further the research work focus on the various issues faced by the surrogate mother, such as socio-psychological issues, health issues, and religious issues. Furthermore, it tells about the recent legal changes made in Indian laws.

Keywords: Surrogacy, Surrogate Mother, ART, Commercial, issues and Regulation.

Introduction

When a surrogate offers to carry the child of the couple who request it in her womb out of pure love and compassion for them and their need to have a child, the act of surrogacy is regarded as altruistic. The surrogate receiving payment for her services is viewed as engaging in commercialization. Such commercialization has been causing incalculable grief to Indian for a long. It is to be noted that money countries around the world do not allow the practice of surrogacy. The surrogacy law, which was passed in 2022 to put a stop to the hiring of "wombs" in India³, is still a mystery to many people. It includes a wide range of topics, some of which are novel and controversial. The requirement that intending couples now have to go through court for hiring a surrogate,

However, is at the heart of the statute. The court intervention may put an end to the profiteering and racketeering rampant in surrogacy and also an end to cheating and exploitation of the participants that take place in the arrangements.

¹ The Indian Medical Council Rules, 1957.

² 2022

³ The World Health Organization estimates that India has a 3% infertility rate. According to the most recent National Family Health Survey in India, 3.8% of women between the ages of 40 and 44 have never been married, and 3.5% of those who are already married are considered barren. Additionally, it is believed that 15% of couples worldwide are infertile, according to the information found at: <http://libdoc.who.int/HQ/2002/9241590300.pdf>.

Incidentally, the Indian Council of Medical Research created a set of guidelines for the surrogacy procedure in 2005. The government further restricted the Assisted Reproductive Technology (Regulations) Bills later in 2010. The law passed in 2022 actually covers both topics:

Dealing with surrogacy's commercialisation

According to the law, surrogacy must be performed for charitable purposes. As a result, it forbids the marketing of surrogacy.

No one may sell or purchase human embryos or gametes, nor may anyone purchase a surrogate's services. In addition, the surrogate, her dependents, or her representative may not receive any money, benefits, or other inducements.

Additionally, exporting embryos abroad is prohibited by law. Even transferring embryos between laboratories or ART⁴ facilities needs approval from the relevant authorities. Those who are discovered breaking the law face fines and up to 10 years imprisonment.

Some other aspects:

- The Hindu marriage Act recognizes only marriage between heterosexual individuals. Hence, gay couple cannot employ surrogacy to have a child.
- The surrogate cannot refuse to carry the pregnancy to term after signing the contract.
- The legislation states that the embryo should be genetically related to the pair, either to the man or to the woman, or to both, and that she cannot end her pregnancy without the consent of the competent authority. Donating embryos is not permitted in surrogacy.
- The legal requirement that a divorcee or widow be between the ages of 35 and 45 before offering her eggs for surrogacy.
- The child born as a result of an Indian couple using a surrogate outside of India will not be recognised as an Indian citizen.
- The commissioning couple's nominees, who were chosen at the time the surrogacy contract was signed, will be responsible for raising the child if they pass away before it is born. The duty of the newborn kid would fall on the nominees. However, the nominees would later be required to take up the child's obligations if they so chose. The nominees may, however, eventually give the child up for adoption or to an orphanage.
- When they turn 18, the offspring can assert their right to know they were conceived through surrogacy. They can also make use of their right to find out the surrogate mother's identity.

⁴ Assisted Reproductive Technology

ISSUES OF SURROGACY IN INDIA

Socio-Psychological Issues

Attachment and disclosure to surrogate children, experiences, traits, and motivations of surrogate moms, as well as changes in the profiles of the commissioning/intended mothers, have all been the subject of research.

Abortion-seeking women continue to fall outside of what is acceptable. Normal population surveys, on the other hand, are less tolerant of third-party reproduction since they are not personally compelled to change and can continue to think normally. Psychological issues involved in surrogate motherhood triads:

Relinquishment of the child at or shortly after birth by the surrogate mother (or couple). The mother (or couple) who will receive the commissioned child and any children⁵.

More than 50% of participants in Ciccarelli's study reported interpersonal difficulty as a result of becoming a surrogate mother, and more than 40% said they had lost a relationship as a result. The majority of pregnancy side effects are universal and involve physical discomfort for all delivery mothers⁶. Surrogate mothers typically have good reason to anticipate that their pregnancies would be routine and manageable, but all women go through regular aches and pains, and some encounter difficulties that could make the pregnancy challenging. And when the child's mother is not his wife, the father feels uncomfortable and uneasy when a child is delivered via surrogacy. From the viewpoint of the child, the methods used to get pregnant would be a minor psychological concern in comparison to the decision of the birth mother to keep the child.⁷

Surrogates publicly acknowledged their desire for financial gain as one of their objectives in India. Surrogate mothers anticipated the commissioning parents to be open about the child's origins because they had already told all of their own kids that the surrogate baby was a member of the intended couple's family and not their own. Most surrogate mothers intended some sort of contact to continue after the baby was relinquished in order to maintain their new connections and permit their children to continue seeing the surrogate child. Throughout the nine-month gestation period, the biological mother forms an emotional bond with and attachment to the child growing inside of her.

⁵ O. B. A. V. D. Akker. (July 7, 2006). Psychosocial aspects of surrogate motherhood. *Oxford Journals Medicine and Health Update*.

⁶ 1997

⁷ Andrews, L. B. (1988). Surrogate motherhood: The challenge for feminists, *Law, Medicine and Health Care*, 16(1-2), 72-80

Legal Issues

Only the birth mother is recognized under the Indian system. As far as the Indian legal system is concerned, there is no idea of DNA testing for confirming paternity; instead, the names on the child's birth certificate must be those of the birth mother and her husband. In the Manji's case (Japanese Baby) in 2008, the Supreme Court of India ruled that commercial surrogacy is legal in India. This decision has enhanced foreign confidence in choosing India as a location for surrogacy once more. The 35-page bill seeks.

The 35-page bill incorporates a multitude of rules, from clinic oversight to restrictions on ART access, in an effort to control India's mainly market-driven infertility business. The Indian Surrogacy Bill officially includes the following things that are noteworthy:

1. Surrogacy agreements must be upheld by the law.
2. Patients "for whom it would normally be possible to carry a baby to term" are not eligible for surrogacy.
3. Married women cannot become surrogates without their husbands' approval.
4. No more than three embryo transfers for the same couple may be performed on surrogates.
5. The identity of egg donors must be kept completely private.
6. The Department of Health Research is responsible for creating and maintaining a "national ART registry."
7. The only "couples" that qualify for ART must be "having a sexual relationship that is legal in India." This ostensibly excludes gay couples.
8. Foreigners who wish to use a surrogate must provide written proof that their home nation "permits surrogacy, and the child born through a surrogate in India will be permitted entry into the country." This would reportedly exclude residents of Canada and other European nations that expressly forbid commercial surrogacy, and it would also disqualify residents of nations that do not expressly permit it.)
9. The legislation also requires the establishment of regional and federal advisory groups that are made up of representatives from the health department, corporate executives, academics, and other members of civil society. These boards are in charge of carrying out and implementing the numerous regulations mentioned in the bill.
10. The ICMR's 2010⁸ ART Bill has implemented a number of significant provisions. It states that a woman in India who is functioning as a surrogate mother cannot be younger than 21 or older than 35. She is also limited to five live births, including those of her own offspring.
11. A bill introduced by a single member of parliament that is not supported by the government.
12. This bill only addresses surrogacy agreements; it does not address assisted reproduction technology as a whole. The Bill mandates the appointment of a local guardian in cases when a

⁸ Indian Council of Medical Research

couple living outside of India participates in a surrogacy arrangement. This local guardian will be compelled by law to raise the kid born via the surrogacy agreement if the intended couple chooses not to.⁹

13. The Bill allows foreign couples who have a guardian designated in India to engage in commercial surrogacy arrangements.
14. Bill makes no mention of ART Banks, which allow for the identification of egg donors and surrogate mothers.
15. The commissioning couple must sponsor the surrogate mother's insurance, according to the bill.
16. Following India's legalization of same-sex unions, the bill permits gay couples to employ surrogates.

Health Issues

Every woman thinking about being a surrogate should be informed that IVF¹⁰, fertility drugs, pregnancy, and childbirth all include significant risks. Here is a detailed summary of all the risks, challenges, and side effects that surrogate moms face.

Pregnancy side effects include fatigue (tiredness is common from the first weeks), altered taste and smell sensations, nausea and vomiting (first trimester for 50% of women), bloating, swelling, fluid retention, hemorrhoids, constipation, weight gain, lightheadedness, and heartburn. The concept of surrogacy is not new in India.

Commercial surrogacy, also known as "Womb for rent," is a growing industry. In India, a setting where English is spoken and less expensive services draw in willing customers. Future surrogacy industry scenarios include lifting rural Indian women out of poverty to the dystopian nightmare of a baby farm in a developing country. They also include opportunity and exploitation. When women use surrogacy in India, it might be difficult to determine if they are doing it voluntarily or because their mother-in-law or husband feels compelled to do so in order to meet material and financial requirements.

Detractors of surrogacy argue that the practice should be prohibited because it is morally immoral and is similar to prostitution. Contracts for surrogacy are "dehumanizing and alienating" because they invalidate the surrogate's perspective on her pregnancy. In an effort to avoid developing a personal bond with the kid she is carrying, the surrogate mother views pregnancy as nothing more than a way to earn much-needed money. The surrogate mother is dehumanized, and the wealthy use the payment for physical services to profit from the use of her reproductive organs and capabilities.

⁹ A. Aberg and F. Mitelman. Surrogacy, Mumbai Indian surrogates, Rent-a-womb, Outsourcing Surrogacy in India, Surrogacy bills in India. (2015).

¹⁰ In vitro fertilization

Religious Issues

Across all cultures, surrogacy is a complex and divisive moral and ethical issue. Religions naturally have opinions on reproduction because they are concerned with the spiritual rules that govern human life. Religious perspectives on surrogacy range from outright condemnation to support. The conflict over religion and law has taken on a political dimension as Westerners increasingly use Indian surrogate moms.

Since religions are interested in the spiritual laws that govern human life, they must have opinions on reproduction. Children are a gift, not a right, according to some interpretations of the Christian religion's Bible.¹¹ If a couple doesn't have children, it may be God's choice. God decides whether or not people have children. When individuals or couples are unable to become parents naturally, they have a number of other options for doing so. There are many people who want to witness a child through conception, pregnancy, birth, and upbringing, even though adoption is one option.

INDIAN JUDICIAL PERSPECTIVE ON SURROGACY

Baby Manjhi Yamada v. Union of India (2008)¹²

In this case, a Japanese couple traveled to India in order to conceive their kid with the assistance of a surrogate mother. They employed a woman from Gujrat to function as the surrogate mother because the practice was now well-known there. The couples' divorce was caused by a number of marital problems. The child's father now demanded custody of the daughter child. In India, a girl child cannot be adopted by a single parent. In this case, the Supreme Court granted rights to the grandmother of the kid. The Supreme Court agreed that there should be a surrogacy act with regulations.

Jan Balaz v. Anand Municipality and Ors. High Court of Gujarat (2008)¹³

In this instance, a German couple recruited a surrogate mother who gave birth to twins on their behalf. The German twins of this British-based couple were now required to travel using an Indian passport. The passport office refused the twins' request for passports because they lacked citizenship and the procedure was the subject of a court case. There were no surrogacy laws in Germany.

The children were given permission to leave the country by the Supreme Court, and German authorities allowed them to adopt the children and defend their rights.

¹¹ Modern Family surrogacy Center, Christian Surrogacy. (2016)

¹² WRIT PETITION (C) NO. 369 OF 2008

¹³ L.P.A. No. 2151 of 2009

Suchita Srivastava v. Chandigarh Administration (2009)^{14 15}

In one case, a pregnant woman who had a mental age of 9 was raped. The government facility where she was living was informed of her pregnancy in the ninth week of the pregnancy. According to the court, Article 21 of the Constitution safeguards women's rights to confidentiality and dignity as well as other reproductive liberties, such as the right to carry a child to term, or nine months, and give birth.

Justice K.S. Puttaswamy and anr. v. Union of India (2018)¹⁶

According to the court, the district medical board's certificate of infertility requirement is against society's moral and ethical norms, and this basic right needs to be preserved. The court also determined that it is against the individual's right to privacy to obtain and show the certificate of infertility.

RECENT DEVELOPMENT IN SURROGACY IN INDIA

Surrogacy has been both a blessing and a curse for infertile couples around the world due to ethical, legal, and medical considerations. Using a surrogate mother to bear a child for another person—who could be a couple (parents) or a single woman—is known as surrogacy, to put it simply. In real actuality, the procedure might be as complicated as including three different classes of individuals:

- The surrogate mother,
- The commissioning or intending parent(s),
- And the genetic or donor mother or father.

The difficulty occurs, among other things, when gaining each person's agreement, maintaining secrecy or anonymity, and figuring out residence when nationalities are different.

The Surrogacy (Regulation) Act¹⁷ and the Surrogacy (Regulation) Rules¹⁸, are the main India gained a bad reputation for surrogacy farming, exploiting surrogate mothers, and having surrogacy laws in India as of this writing. The laws were put in place after relatively lower procedure costs because there was hardly any legislation aside from the rules established by the Indian Council of Medical Research. After numerous bills were submitted to Parliament between 2016 and 2019, the Act itself was finally passed.

¹⁴ CIVIL APPEAL NO.5845 OF 2009

¹⁵ S.L.P. (C) No. 17985 of 2009

¹⁶ ((2017) 10 SCC 1)

¹⁷ 2021 (Act)

¹⁸ 2022 (Rules)

Commercial surrogacy has been outlawed and punished by the Act, which has also brought about a number of laws on the needs for the intended couple, intended woman, and surrogate mother, as well as the documentation needed to start the procedure. The Rules, on the other hand, specify templates for the affidavit that must be signed by the intended couple or woman, the certificate that medical personnel must get, the permission format, etc.

The Act and the Rules, taken together, have changed the surrogacy scene in India, making it a regulated and, maybe, more effective process—even if it is contended that it is also restricting. There have been two modifications to the Rules since the start of the Indian surrogacy law. According to a previous requirement, this affidavit must be sworn by signing an affidavit in front of the Metropolitan Magistrate or Judicial Magistrate of the First Class. It could be sworn in front of either of the two extra classes of authorities, either an Executive Magistrate or a Notary Public, thanks to the 2022 Amendment. Thus, the 2022 Amendment gave the intended pair options and sped up the application process for surrogacy.

The Rules have just undergone a second Amendment as of a notification dated March 14, 2023 ("2023 Amendment"). This Amendment significantly alters the substantive law since it forbids intending parents from using donor gametes in a surrogacy arrangement. In accordance with Rule 7 of the Rules, Paragraph 1(d) of Form 2 (Consent of the Surrogate Mother and Agreement for Surrogacy) is replaced by the 2023 Amendment.

The former rule said that the technique of treatment "may include:... (d) the fertilisation of donor oocyte by the sperm of the husband," which may have been interpreted broadly to mean that surrogacy using donor gametes was permissible. The 2023 Amendment, however, has replaced this provision with a restrictive language that reads as follows:

"(d)(I) Couple undergoing Surrogacy must have both the intended couple's gametes, and donor gametes are not permitted;

(II) A single lady (a widow or divorcee) who wishes to become pregnant through surrogacy must use her own eggs and donor sperms.

This makes it illegal to use donor sperm or eggs for intended couples as well as donor eggs for women who are supposed to be single (widows or divorcees). It was previously against the law for the surrogate mother to donate her own gametes, as permitted by Section 4(iii)(b)(III) of the Act.

As a result, the 2023 Amendment restricts the range of candidates for surrogacy. In addition to restrictions on age, marital status, and medical requirements, prospective parents must donate their own gametes in order to choose surrogacy in India. In the case of a widow, it will also need to be decided whether the term "donor sperm" would include the sperm of the deceased spouse (if any is still available).

Although the Amendment clarifies a previously unclear situation, intending parents who choose surrogacy and have a medical condition that prevents them from using their own gametes and must utilise donor gametes to conceive may find it challenging.

Conclusion

In India, surrogacy is a challenging process. Even before the treatment begins, certain legal requirements must be met. Additionally, there is a societal stigma associated with surrogacy. We continue to witness a lack of general public use of this treatment, which is still mostly used by Indian superstars like Priyanka Chopra and Nick Jonas, Shilpa Shetty, and Raj, among many others. Although surrogacy is a fantastic opportunity for these couples to have children, more people need to accept it. The fact that a woman is unable to give birth must be accepted.

Along with some clarification of the relevant law, there is a need to raise awareness in this area. The decision to forbid commercial surrogacy has to be reviewed. Additionally, single parents and heterosexual couples need to be better represented in the laws. Laws governing the surrogate mothers and the child's health as well as their living arrangements need to be more stringent. For a couple or an individual who wants to experience parenthood, surrogacy is a blessing.

APPENDIX

- **A.R.T.** - Artificial Reproductive Technology
- **I.V.F.** - In Vitro Fertilization
- **I.C.M.R.** - Indian Council for Medical Research
- **I.C.S.I.** - Intra Cytoplasmic Sperm Injection