



Status of Surrogacy in India: A Critical Study

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KEYWORDS

Infertility, Reproductive techniques, surrogacy, Socio-legal issues and Law Commission Reports, Indian culture,

ABSTRACT

Marriage is a social institution. Couples may have their own children via procreation, in the standard course of nature. Unfortunately, infertile couples are unable to have children. The infertility may be either medical or social. There is an underlying urge in every human being to produce biological descendants who will carry on their lineage in society. Although, a barren couple has the task of learning to cope with their lack of children both internally and externally. As a result, they believe they must turn to artificial insemination, in vitro fertilization, test tube babies, as well as surrogacy, amongst other methods, in order to ensure their survival in society. These methods brighten their eyes and satisfy their yearning for a genetically identical offspring. These advancements have aided infertile couples and adults in overcoming reproduction difficulties caused by infertility, such as medical reasons, the loss of a spouse, being separated, homosexual couples, or gay couples, among other things. Through this paper I would like to enlighten on surrogacy. Here we would discuss various aspects like meaning, method, types, socio-legal, ethical issues and various reproductive techniques. In modern age surrogacy is very popular in the whole world. Therefore, surrogacy is a highly sensitive and delicate issue. Indeed, it is high time to enact the law to regulate surrogacy in India. The present paper is totally based on secondary source of data such as legal journal, books, magazines, newspapers and websites sources etc.

Introduction

As we know surrogacy, a method of assisted reproduction, means to fulfil the desire of intended parents, where by a woman agrees to become pregnant for another woman and give birth a child to her. Advance science technologies give birth different method or process for reproduction. Surrogacy is one of them. In addition to allowing infertile couples to realize their own goals, having a child is critical for the survival of society as a whole. Couples all across the world want children, and it's a universal desire. The institution of the family has long had a prominent place in the cultural fabric of every culture on the planet. When it comes to the continuance of a family's lineage, having offspring is regarded as a must.¹

Historical Background

Jeremy Bentham saw "law" as a tool for ensuring the greatest benefit for the maximum number of people.² The origins of Indian surrogacy may be traced back to the nineteenth century, and there is evidence that the technique has been around for more than a century. As on Oct 3, 1978, Kanupriya, aka Durga, was born in Calcutta, she became the world's second IVF baby and India's first IVF baby, and the process became a successful practice in India. The treatment gained widespread acceptance. Since that day, the field of "assisted reproductive technology", commonly referred as ART for short, has had the most rapid advancements. Surrogacy has been practiced in India for a long time, although the practice is still not recognized by the government. Up until now, only gestational surrogacy has been promoted, furthermore, this is still in its initial phases of evolution. In addition to this, the regulations governing surrogacy are still in the early stages of development. The guiding factor between both parties, i.e., the surrogate and the intended parents, is simply the ART rules that have been in place for quite some time. There are no codified laws in the country. They have not yet been adopted and put into effect. With the recent increase in the number of intended parents choosing surrogacy in India, the country has risen to the top of the list of the most popular surrogacy destinations.

Surrogacy has long been a contentious issue in India, with debates centered on the legal, social, and ethical implications of the practice throughout the years. When an effort to perform the process failed, there have been incidents that have resulted in both favor and, in some circumstances, opposition to the

practice of the surgery. Commercial surrogacy, on the other hand, was declared legal in India in 2002 following extensive lobbying. India has proven to be the most predominant surrogacy locations around the globe, with many people choosing it over other countries.

In recent decades, there has been a remarkable rise in the number of reproductive treatments available in India, including "novel in-door insemination techniques, in vitro fertilization techniques", and embryology techniques, among others. There is a great deal more that has offered hope to childless couples, as well as a great deal more that has supplied hope to childless individuals. On the one hand, intended parents are overjoyed that such a treatment is now accessible to them; on the other hand, there are certain groups in India that are opposed to the practice of surrogacy.³

Meaning and Definitions of Surrogacy

The word "surrogacy" has been derived from the Latin word "surrogatus"⁴ which means substitute, in the absence of another, a person who has been designated to perform. When a woman decides to get pregnant with the aim of giving birth to a kid who will be raised by her intended parents, it is a well-known form of reproduction. It is referred to as a "substitute mother" in medical terminology. A surrogate mother is a woman who takes the place of a biological mother who is genetically related. In the medical field, surrogate mothers are women who gestate, or carry a baby in their uterus on behalf of another woman.

Purpose of surrogacy

The Main Purpose of Surrogacy is to help infertile couple who cannot become mother and is unable to fulfil her desire to become mother in this creative world. Surrogacy has become a popular choice for young couples who want to avoid the challenges of adopting children as well as, in doing so, help to reduce the high infertility rates.

Definition

Surrogacy, as per Black's legal dictionary, implies "the process of carrying and delivering a child for another person".⁵ The Warnock Report defines "surrogacy as the practice whereby one woman carries a child for another with the intention that the child should be handed over after birth."⁶

The **Oxford Dictionary** defines "surrogacy mother as a woman who bears a child on behalf of another woman, either from her own egg fertilized by the

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DOI: <https://doi.org/10.53724/lrd/v5n1.02>


Received 05th Sep. 2020; Accepted 16th Sep. 2020

Available online 30th Sep. 2020

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other woman's partner or from the implantation in her womb of a fertilized egg from the other woman.⁷

According to Sec 2(t) of the Draft Assisted Reproductive Technologies regulation Act, 2008 defines "Surrogacy as an agreement in which a woman agrees a pregnancy achieved through an Assisted Reproductive Technology in which neither of the gametes belong to her or her husband, with the intention to carry it till term and hand over the child to the person or persons for whom she is acting as a surrogate."⁸

Requirements of the party's involved in surrogacy

- Surrogate mother
- Commissioning parents
- Gamete Donor

Generally, there are two parties which one is surrogate mother one who seeks another woman for bear pregnancy for her is called commissioning parents.

The delivering mother (also known as the surrogate mother) is the woman who agrees to carry the child in her uterus. Who provides for care and upbringing of the child, is called the social mother? According to the aforementioned information, there are three sorts of mothers: the genetic mother, the gestational mother, as well as the social mother. Who donates her eggs and his sperm is called Gamete Donor?⁹

Kinds of Surrogacy

There are four types of surrogacies which detailed in below-

- **Traditional surrogacy:** Typically, conventional surrogacy has been the most widely utilized and historically dominant technique of obtaining a surrogate pregnancy. An artificial insemination process using the husband's sperm from the genetic pair is used to create a child for the couple. Surrogate mothers are biologically related to the foetus they carry since it is her own egg that is fertilised during the process of surrogacy. Therefore, any child born will be genetically connected to the male partner of the commissioning couple, but not to the female spouse of that pair. Therefore, This is also referred to as direct, partial, as well as natural surrogacy as a result of this. When a woman undergoes conventional surrogacy, her eggs are replaced with sperm from either the proposed father or an anonymous donor via an artificial insemination process. As a result, the surrogate's own eggs are utilized, resulting in her being recognized as a biological mother for the baby, as those eggs were fertilized by the spermatozoa of the proposed father or a donor to the intended parents throughout the course of IVF or IUI treatment. Sperm.
- **Gestational Surrogacy:** As her own eggs aren't used in this case, the mother isn't genetically linked to the baby. In this she just rent her womb to the intended parents. In this procedure, eggs are harvested either from the intending mother or from any other eggs donor and then are in vitro fertilized either through the sperm of the intended father or with the spermatozoa of another sperm giver and then transplanted in to the surrogate's uterus. This is oftentimes referred to as host; total full method and the mother is called as the gestational carrier.
- **Altruistic Surrogacy:** This is a situation wherein the surrogate mother receives no monetary compensation for her pregnancy or for the surrender of the child, yet the intended parents are normally responsible for any and all expenses associated with the pregnancy and deliver. It is also known as gratuitous or philanthropic surrogacy.
- **Commercial Surrogacy:** Commercial surrogacy is often stated to as "wombs for rent," "outsourced pregnancies," or "baby farms," which are all words that could be hurtful.¹⁰ Commercial surrogacy means the surrogate is compensated beyond expenses associated with pregnancy. Here, a gestational carrier is compensated for her services in bearing a child to maturation in her womb, and many rich and childless couples who can manage the high cost of in vitro fertilisation and people who have saved and borrowed in order to achieve their dream of becoming parents choose this method to become parents. A number of nations, including India, where all these medical procedures are practised, have legalised and approved them. Following the Baby Manji decision in 2002, the Apex Court declared that commercial surrogacy is legal in India.

Responsible Factors of Surrogacy:

Medical Problems: some women on account of her medical condition are unable to conceive a child, they opt to surrogacy. Due to repeated

miscarriage or some diseases like high blood pressure heart, liver, or kidney disease, she is unable to conceive. In all such situation, Surrogacy is the most suitable alternative for the couples.

- **Age Factor:** Age relating factor plays an important role for people to opt for surrogacy. In modern age marriages are solemnized late. As a result, women are not in a position to conceive or it is not possible without risk. Therefore, people have option only surrogacy.
- **Genetic Problem:** Generally Genetic challenges are transferred generation to generation. Who suffers from genetic diseases like to surrogacy?
- **Intensification of Infertility:** Due to infertility and availability of assisted reproductive technologies, many people are opting for surrogacy where they can get their dreams fulfilled. In modernity, infertility is common in new generation.
- **Homosexuality:** Homosexuality is the main factor to opt surrogacy. We can see that homosexuality is legalized in almost countries included India. People who are gays go for surrogacy because of the obvious reasons.
- **Uterus less women:** Due to some emergent condition, the uterus has removed to save the life. In this case, it is not possible to conceive a child. Surrogacy is the best way to the couples.
- **Uterine structural Problem:** Due to Uterine structural problem, it is not possible to conceive a child due to defect in uterus and by which the child may not be carried to its full term. This is very grave menace to conceive so the couple prefers to surrogacy.
- **No Desire for Adoption:** For childless parents, adoption is the best potion to survive with dignity in the society. But nowadays parents have no desire to adopt the child. They choose to surrogacy because biologically child relates with commissioning parents. In place of adoption parents prefers surrogacy process for genetic relation.¹¹

Position of surrogacy in India

Surrogacy has been employed in India since ancient times. The child is the marriage's gift. A barren woman is embarrassed by herself. Then there's surrogacy, which makes her eyes sparkle. Because everyone has the right to live in society with dignity. A barren woman in Indian society is subjected to a great deal of violence. Everyone has the right to a dignified life. An infertile couple has given up all chance of realising their ambitions. Surrogacy is the greatest option in this situation. As a result, the surrogacy policy offers a glimpse of hope to every infertile couple around the world globe.

Surrogacy's appeal as a technique of having a genetically connected baby has skyrocketed across the globe. In some nations, the expense of surrogacy arrangements is extremely expensive, and surrogacy activities are outright prohibited. As a result, intended parents and individuals seeking to conceive a child through surrogacy

According to the Law Commission of India's 228th report, surrogacy expenses in India range from \$2500 to \$30,000, which is around one-third of the costs in industrialized nations such as the United States, the United Kingdom, and others. According to a research report published by the Centre for Social Research in New Delhi in the year 2001, the expenses for surrogacy agreements might vary anywhere from \$10,000 to \$35,000. In conclusion, Surrogacy arrangement in India are quite affordable especially compared to other developed nations, and that the country provides the advantages of surrogacy, For example, highly trained and experienced medical professionals as well as world-class private healthcare, and most importantly, easy access to surrogate women. This is the primary reason why, as compared to foreign women, Indian women lead a more systematic lifestyle, with the majority of them abstaining from alcohol, smoking, and the use of drugs and narcotics, which are the causes of difficulties during pregnancy. As a consequence, the surrogacy tourism industry in India has become highly established. This is the main cause to opt India for surrogacy. Surrogacy is becoming more common in India and is fast growing as an industry, but the government has been reluctant to respond to the changing circumstances. The Indian Council for Research set ethical principles for regulating Assisted Human Reproductive Technologies and surrogacy in the absence of legislation. The ICMR proposed national regulations for "accreditation, supervision, and management of ART clinics to the Ministry of Health and Family Welfare".¹² Nevertheless, because the Indian

government did not formally accept this Draft in 2002, In actuality, after consultation with the “National Academy of Medical Sciences, ART practitioners, and the Ministry of Health and Family Welfare, the ICMR updated and officially endorsed this Draft in 2005.”¹³ In this regard, the ICMR has issued a number of guidelines for regulating ART clinics as well as specific provisions for dealing with surrogacy.

The surrogate mother’s intentions are also protected by the guidelines, which require the couple to cover all of the surrogate mother's prenatal and postnatal care costs. For consenting to act as a surrogate, the couple would be obligated to compensate the surrogate mother financially. The exact volume of compensation should be distributed after the couple and the surrogate mother have discussed it. This monetary aspect should not be handled by the artist. The standards also provide that the surrogate child's birth certificate must be in the “genetic parents” name; the clinic, on the other hand, is required to provide the genetic parents with a certificate that includes the surrogate mother's contact information. Surrogacy results in the birth of a baby who must be adopted by the genetic biological parents unless the genetic biological parents can prove the child's existence using genetic DNA fingerprinting, the results of which will be kept on file in the clinic.¹⁴

No doubts ICMR made good efforts to protect surrogacy. However, the recommendations are quiet on critical concerns such as the minimum age, legal and social challenges facing a single woman, as well as the connected use of surrogacy, which is restricted to those who are physically and medically incapable of having children. From the above descriptive study, it is clear that ICMR guidelines suffered from many defects. Despite the fact that the ICMR standards attempt to regulate ART practices, including surrogacy, they are insufficient to safeguard the interests and rights of each party engaged in surrogacy. These guidelines are only document, they have no legal force.

In August 2009, the Law commission made public its report on the need for regulating surrogacy. The Law commission was of the view that there must a legislation that regulates surrogacy as it affects the very fabric of society. The commission was in favour of promoting altruistic surrogacy and prohibited commercial surrogacy. It is clear that the main objection that the law commission has against commercial surrogacy. The problems concerning surrogacy are very complicated and still need thorough laws to be handled. However, the time has come to take a practical approach by allowing altruistic surrogacy agreements while prohibiting commercial surrogacy agreements. The below recommendations were made by the Law Commission of India in its findings after taking into account the various factors connected to surrogacy procedures and regulations in India:¹⁵

1. Surrogacy arrangement should be governed by contract and necessarily take care of life insurance cover for surrogate mother low commissioner post monetary exchange.
2. The most important thing to remember is that surrogacy agreements should not be used for commercial gain. Surrogacy for profit should be prohibited. The commission was adamant about supporting altruistic surrogacy and prohibiting commercial surrogacy.
3. The child should be gently related to at least one of the commissioning parents in order to develop a closer correlation of love and affection between the parent and the baby.
4. The Law Commission proposed that legislation recognise a surrogate child as the intended parent's legitimate child. Moreover, a surrogate child's double certificate shall only contain the names of the commissioning parents
5. Additional considerations include the right to privacy for both a donor and a surrogate mother, as well as the prohibition on sex-relative surrogacy.
6. The Medical Termination of Pregnancy Act of 1971, will be the only source of regulation for abortion cases.
7. If the intended parents are not married, one of them should be a surrogate child donor in order to be allowed to have a surrogate baby.

The “Assisted Reproductive Technology Regulation Bill, 2010”

Following guidelines relating to surrogacy in India recommended the ART regulation bill 2010 surrogacy which are:

1. The ART Regulation bill proposes that the laws and regulations governing assisted ART be made accessible to every person, including singles, wedded couples, and unmarried couples, so that anyone can

find a surrogate mother through an ART Bank. Sex relative surrogacy should be forbidden

2. Using assisted reproductive technologies, intending parents and individuals may pursue surrogacy in India. The prospective parents as well as the surrogate mother, couple, or person must enter into a surrogacy agreement that is legally binding. It legalizes the process of surrogacy in India. With the passage of this legislation, surrogacy has become legal in India. It allows people who want to be parents to use assisted reproductive technologies to find a surrogate mother, and the surrogate mother must agree to a legally binding surrogacy relationship.
3. The ART Regulation Bill 2010 provides two boards, one for the nation and one for each state, as you can see in the diagram below. These boards will be able to exercise their power and carry out their responsibilities and functions as a result of the passage of this legislation.
4. Fourth, the Bill establishes age requirements for surrogate mothers in need. This act further states that no woman under the age of 21 and no woman over the age of 35 will be allowed to be involved as the surrogate mother. It further specifies that under no conditions should a woman work as a surrogate mother for more than five five-word phrases throughout her life, including for her own children.
5. In addition, only Indian citizens will be permitted to act as surrogates, and no permission will be granted to an ART bank or clinic that will accept or process Indians for surrogacy abroad. However, any relative known or unknown to the couple or individual will be permitted to act as a surrogate mother for the couple or individual.
6. Under the requirements of the bill, the surrogate mother should make clear that she or he is a surrogate mother when requesting any medical treatment or operation for the baby at a hospital, medical centre, or similar healthcare centre.
7. The Bill also establishes some rights and obligations for the commissioning parents, which are detailed below. It is the intended parents' or persons' right to acquire a birth certificate that indicates that the couple and individual are the parents who have taken advantage of this service.
8. The surrogate mother and the child would be covered by insurance until the child is turned over to them and the surrogate woman is clear of all health issues originating from the surrogacy process.
9. Most crucially, anyone who has used the services of a surrogate mother is legally obligated to assume custody of the surrogate child Furthermore, unwillingness to do so in the event of any abnormality that the child or children shall be an offence.

The Surrogacy Regulation Bill, 2016

In the instance of “**Baby Manji Yamada v. Union of India**”¹⁶, Surrogacy laws were legalized for the very first time in India by the Supreme Court. In India, the lack of surrogacy regulation was causing issues. Commercial surrogacy is gaining popularity in India. According to the law committee, foreign nationals were drawn since surrogate mothers were accessible at reduced costs owing to poverty, resulting in the exploitation of a large number of impoverished women. The Law Commission rules that altruistic surrogacy is preferable to commercial surrogacy.

In another case “**Jan Balaz v. Anand Municipality and Ors.**”¹⁷, A point to highlight is how the surrogacy agreement was signed by the intended father as well as “the second respondent, the surrogate mother, whose name is listed as the intending father's wife, which resulted in vexatious legal difficulties when the surrogate child's birth certificate” was issued. Although there are some differences between the two instances, the unifying thread is that a surrogacy agreement was made with the express aim of assuring that the surrogate kid would be handed over to the intended pair in return for a specified sum of money and that the surrogate child would receive the whole biological parents' estate from the intending parent.

In both of these cases, the court found that there was no law in place to deal with problems and concerns that came from or were linked to surrogacy in India. Given India's large-scale business activity, the Court ordered the enactment of a statute as soon as possible. The ICMR, under the “Ministry of Health & Family Welfare, Government of India,” formed the “Assisted Reproductive Technologies (Regulations), ART Bill, 2008”¹⁸ in response to

the Court's directive. To be sure, the practise of surrogacy was not governed by any pre-existing regulation. However, the ICMR guidelines were in conflict with the current Surrogacy Regulation Bill 2016 in the sense that they provided for financial compensation to the surrogate mother, which was determined by a memorandum of understanding between both the intending couple and the surrogate mother.

There is following suggestion recommending regulating surrogacy:

1. Surrogacy for commercial purposes is prohibited under the 2016 Bill. The argument for prohibiting surrogacy has been to prevent women from profiting from the sale of their wombs. The persistence of severe poverty is the primary reason for the high number of surrogate moms in this industry, and even if a prohibition is implemented, social and economic insecurity would persist.
2. The recommended surrogacy bill 2016 permits couples who are legally married Indian men and women who are above the ages of 21 and 18 years, respectively, to become surrogate parents.
3. The Bill of 2016 mandates that surrogacy clinics be registered in a specific location. It is expressly prohibited for any clinic or anyone to promote, advertise, or promote commercial surrogacy in any form.
4. According to the 2016 Bill, surrogate mothers will be required to get an eligibility certificate from the proper authorities, as they must be close family members of the prospective couple and be aged between 25 and 35 years old. In addition, there should be a certificate of physical and medical fitness. A signed agreement from the surrogate mother is required; she has the right to be informed of all of the adverse effects of the pregnancy. According to the Bill of 2016, an appropriate authority will provide an eligibility certificate for a surrogate mother, who must be a close relative of the intending couple and be between the ages of 25 and 35. A medical and physical fitness certificate should be included. Surrogate mother's written agreement is required; she has the right to know all of the birth's side effects.
5. According to the Bill of 2016, due to any defect abnormality and gender of the surrogate child intending parents shall not be abandoned. They must accept the celebrate child, and the kid born by stated woman would be recognized to be a natural child by the court of law. The kid born via surrogacy will be treated as if it were a biological child.
6. There are functions of the National board, which include advising the central government on surrogacy issues and observing performance of organizations that are costly to operate. The bill establishes the national surrogacy board and outlines the term of office of members, as well as disqualifications for appointment as board members as well as eligibility for re-appointment as members of the board, among other things.

Due to the dissolution of the Lok Sabha, the 2016 bill expired, and thus the surrogacy regulatory bill of 2019 was submitted to replace it. The law was approved by the Lok Sabha in August 2019, but not passed from Rajya Sabha till date. Following are the salient elements of the "Surrogacy Regulation Bill, 2019":¹⁹

- The "Bill prohibits commercial surrogacy, but allows altruistic surrogacy to the intending couple between age of 23-50 years for female and 26-55 years for male.
- The Bill only allows the surrogacy method to Indian couples who have been legally married for at least five years
- Surrogate mother must be married and between the age of 25 to 35 years not have been surrogate earlier and also must be certifiably mentally and physically fit. It's mandatory to her that the fitness certificate from registered surrogacy clinic.
- It states that the legal status of a surrogate child shall be the biological child of the intending couple in this way any child born out of a surrogacy process procedure shall be entitled to all rights and privileges as a natural child.
- The Bill leaves out a lot of people who might want to have a baby through surrogacy including unmarried couples and single man and woman.
- The Bill also gives provision to regulate fashioning of surrogacy clinic all surrogacy clinics in India need to be registered by the appropriate

authority.

- The Bill provides facilities for constitution of Surrogacy Boards at the national as well as state level to ensure effective regulation.
- The Bill clarifies the person providing a womb for surrogacy must be secured with a contract ensuring proper insurance medical" check and other essential requirements.
- The Bill provides for the protection of the "right to privacy of donor as well as surrogate mother."

Concluding Remarks

From this study, we can draw a conclusion that surrogacy is the method of reproductive of child for infertility couple which is used in India as well as all over the world on the other hand surrogacy is the alternative option to those couple whether married or single who have desire to become parents after the judgement of Baby Manji case the Supreme Court legalised the commercial surrogacy in India. So, India became hub of surrogacy for foreigners due to chief medical facility, qualified staff, easily availability of the surrogate mother advanced technology absence of regulatory laws legislature. A number of bills have been introduced in India to address the concerns, but there is currently no law in place to handle Surrogacy. Surrogacy regulatory Bill 2019 has been introduced, which addresses many elements of surrogacy. The bill's doors are barred to homosexuals, single parents, and live-in couples. Without a doubt, the Bill 2019 has many excellent aspects, but it also has certain drawbacks. I would like to submit the following suggestions:

1. There should be enactment to regulate the surrogacy in India at the earliest.
2. Only the child's intended parents should be donors to maintain the child's bond of love and affection as well as the biological relationship.
3. Establishment of special court to decide on hearing the issues of surrogacy.
4. There should also be some parameters so that criminals like child abusers traffickers are not able to have children through surrogacy
5. There should be the surrogacy rights to be extended to the homo sexual and gay community.
6. Sex selective surrogacy must be prohibited.

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