



SURROGACY IN INDIA: ETHICAL AND LEGAL ASPECTS

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ABSTRACT

In the last twenty years, India has become a surrogacy hub and a popular destination for international couples. There are now a disproportionately large number of fertility clinics operating throughout India that provide IVF, surrogacy, and artificial insemination services to Indian and foreign couples. Increasingly difficult legal and ethical problems are occurring as surrogacy is on the rise. There have been more instances of unethical behaviour such as using surrogate mothers for profit, selective breeding, and abandoning kids. In order to regulate surrogacy services, the Indian government has introduced a number of regulations over time. This paper highlights the various case studies in India and the timeline of those regulations. Simple tables have been used to discuss various policies and legislation over time, including the most recent surrogacy legislation of 2019. The practise of surrogacy was first made public in 1980 and was made legal in India in 2002. But as the year went on, the GOI became aware of some shortcomings and abuses in commercial surgery. Observing this ICMR created various measures to prevent the exploitation of surrogacy. Several changes were made to the bill over the years. The Government of India outlawed the practise of commercial surgery in 2015 and also prohibited NRIs from engaging. India was named the "World Capital of Surrogacy" and was referred to as the Cradle of the World in 2012, according to a UN survey.

KEYWORDS: Surrogacy, Surrogate mother, Gestational surrogacy, Artificial insemination, IVF, Commercial Surrogacy, Surrogate mothers.

INTRODUCTION

The practise of medically assisted reproduction (MAP) is one that has become increasingly common and is ingrained in contemporary culture. Couples struggling with infertility have access to a variety of techniques that significantly aid in natural fertilisation. A woman agrees to become pregnant as part of the surrogacy process, which is an assisted reproductive technique, in exchange for bearing a child who will be raised by someone else.² The Latin term "Subrogare," which means "appointed to act in the place of," is the origin of the English word "surrogate." Traditional surrogacy and gestational surrogacy are two different types of the practise. In the former, the intended father or a donor's sperm is used to artificially inseminate the surrogate mother using his or her own egg; in gestational surrogacy, an embryo developed through an IVF procedure is used and implanted.

Indian History of Surrogacy

Hindu mythology has references to surrogacy as well, which is another reflection of the practice's ongoing concealment. Vasude begged Kansa not to murder any new sons in the Bhagavata Purana, and Vishnu heard

him. When Vishnu heard these requests, he ordered Devaki to give an embryo to Rohini, another Vasudev bride. Rohini gave birth to Balaram, Krishna's sibling, and she nurtured him in secret while Devki and Vasudev informed Kansa the child was dead at birth. In the Mahabharata, Gandhari didn't give birth to a human being; rather, she gave birth to a semi-solid material that Maharishi Vyas divided into 100 pieces and put in separate pans. This made the 100 Kauravas born.

In a similar way, Maharishi Bhardwaj witnessed a divine nymph emerge from the river after taking a bath. Upon witnessing such a lovely woman, he felt guided to place his semen in a yagna pot called a Darona. This is where Dronacharya, who was named after the vessel, was born. The 24th Trithankar, Mahavira, was born following the transfer of an embryo from one woman's womb to another, thousands of years after the biblical events in 599 AD. He is a significant person in Jain mythology. He was conceived by Rishabdeva's Brahmin wife, Devananda. Ingeniously, the gods moved the embryo into Trishala's womb.

Types of Surrogacy

When the intended mothers or a donors eggs are utilised in full surrogacy, sometimes referred to as host or gestational surrogacy, there is no genetic link between the child and the surrogate. In partial surrogacy, the intended father's sperm is used to fertilise the surrogate's egg, which is also referred to as straight or traditional surrogacy.

Traditional surrogacy

In this kind of surrogacy, the surrogate mother must undergo artificial insemination with the sperm of the intended father. Here, the intended father's sperm fertilises the surrogate's eggs. She thus has a genetic connection to the child she gives birth to. As you can expect, this surrogacy can be quite challenging, both emotionally and legally. As a result, modern surrogacy is increasingly being phased out.

Because her egg is used to fertilise an embryo with the intended father's or donor's sperm in a typical surrogacy, she is the child's biological mother. This kind of surrogacy has been used most frequently. Before advances in technology made it possible to create embryos outside of the womb, using a surrogate mother was the only way to conceive. Traditional surrogacy is far less common now that the methods are available to use the intended mother's or a donor's egg. There is no protection to prevent a typical surrogate from claiming the kid as her own or for a surrogate to be left accountable for medical expenditures for herself; the possible legal and emotional repercussions are frequently enough of a deterrent.

Gestational surrogacy

The majority of surrogacy service providers today only use the gestational surrogacy approach, which is more recently suggested. In this gestational surrogacy, fertility specialists may use the In-Vitro Fertilisation (IVF) method to fertilise the intended mother's eggs with the intended father's sperm. Donors may also provide the sperm and eggs needed for fertilisation. The surrogate is just used as a carrier because the fertilised eggs are subsequently placed into her uterus. As a result, the surrogate is not biologically related to the surrogate child. Because of advances in medical science, it is now possible for a surrogate mother to bear the embryo of another intended couple. She is referred to as a gestational surrogate or gestational carrier and is not the biological mother of the kid. This type of surrogacy is the most typical and offers the surrogate and intended parents the best level of legal protection.

Altruistic surrogacy

The surrogate moms who participate in an altruistic surrogacy arrangement are not paid for their time, risk, or work. However, both gestational and conventional surrogacy are covered by this altruistic form of reproduction. In certain nations, this kind of surrogacy is the only one that is permitted. A woman consents to be a

surrogate in this form of charitable surrogacy without receiving payment. The majority of surrogacy agreements include pay for the surrogate's time and labour in addition to normal pregnancy-related expenses. Altruistic surrogates often assist a friend or family member they know and are likely to only be compensated for medical expenses.

Independent surrogacy

Women who choose to act as independent surrogates in this type of surrogacy typically do it without the assistance of a surrogacy service company. However, because there aren't any protection screenings in place, this kind of surrogacy relationship is one of the riskiest. Similar to conventional surrogacy, independent surrogacy involves numerous legal pitfalls. An independent surrogate performs the procedure for a known individual without the aid of a professional. And even if it can seem logical to disregard the reproductive specialists' advice. The expert serves as an additional layer of support and safety for both parties when the situation becomes challenging and emotions are running high.

Commercial surrogacy

Commercial surrogacy has no association with any form of surrogacy. Simply put, any of the above mentioned surrogacy arrangements aside from altruistic surrogacy, in which surrogate volunteers bear a pregnancy for intended couples without payment can be classified as commercial surrogacy only if the surrogate mother receives financial compensation in addition to reimbursement for her medical expenses.

Surrogacy law in India

The Lok Sabha has received the Surrogacy (Regulation) Bill, 2019 for consideration. It is the goal of the Bill to outlaw commercial surrogacy in India. In order to promote medical tourism, commercial surrogacy, commonly known as "Rent a Womb," was legalised in India in 2002. India quickly emerged as the centre of surrogacy. Commercial surrogacy developed into a big industry in the nation due to factors including low cost and lax regulations. A 2012 Confederation of Indian Industry survey estimated that India's surrogate motherhood market was worth \$2 billion annually.

The Surrogacy (Regulation Bill) 2019 Features

In order to ensure effective regulation, it provides for the creation of surrogacy boards at both the national and state levels.

- It aims to permit morally righteous altruistic surrogacy for infertile Indian married couples between the ages of 26 and 55 for men and 23 to 50 for women.
- The only Indian couples eligible to choose surrogacy must have been legally wed for at least five years.
- Before moving forward with surrogacy, it becomes required for the couple to get a certificate of eligibility as well as a certificate of essentiality.

- Additionally, it states that intended couples must never, under any circumstances, leave the child delivered through surrogacy.
- The surrogate mother's eligibility is specified separately as well.
- The surrogate must have a kid of her own, be married, and be a close relative of the intended parents.
- She must be between the ages of 25 and 35, have never been a surrogate before, and be in overall good health.
- The Bill specifies that any child born as a result of a surrogacy process shall be the biological child of the intending couple with regard to legal status.
- All privileges and rights accorded to a natural child apply to the newborn kid as well.
- Additionally, the Bill aims to control how surrogacy clinics operate.
- Additionally, it states that no sex selection shall be made when it

The Minister for Health and Family Welfare Dr. Harsh Vardhan introduced the Surrogacy Bill, 2019 in the Lok Sabha on 15 July 2019. The bill defines surrogacy as the practice of a woman giving birth to a child for an intended purpose. A couple whose purpose is to hand over the child to a future couple after birth.

Substitution is allowed if it is: i) intended for couples suffering from proven infertility; (ii) altruistic; (iii) not for commercial purposes; (iv) may not produce children for sale, prostitution or other exploitation; and (v) any illness or disease as defined in the Rule.

Current Scenario in India

In India, the idea of surrogacy is not new. In India, the sector of commercial surrogacy, sometimes known as "Womb for rent," is expanding. In India, a setting where English is spoken and less expensive services draw in willing customers. Future scenarios for the surrogacy industry range from opportunity to exploitation, from rural Indian women being lifted out of poverty to the dystopian nightmare of a baby farm in a developing nation. 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. Surrogacy opponents contend that because of its resemblance to prostitution, the practise should be prohibited.

The surrogate mother makes an effort to avoid forming a personal attachment with the child growing inside of her and sees the pregnancy as nothing more than a means of making much-needed money. The surrogate mother is used for the wealthy's personal gain and her reproductive organs are dehumanised by being paid for her physical services. Actually, India engages in an unethical practise of outsourcing surrogacy. The surrogate mother is not yet protected by law in the event of a difficult delivery, a

forced abortion, etc. Since 2002, commercial surrogacy has practically been made legal in India, and the country has taken the lead in this area. This is the justification given by detractors who claim that the surrogacy industry takes advantage of underprivileged women in nations like India, where the rate of maternal mortality is already high.

Legal experts claim that if surrogacy turns into a method for women from wealthier nations to choose less fortunate women in our nation to carry their children, it is economically exploitative and akin to biological colonisation. In order to propose complete legislation, the Ministry of Women and Child Development in India is investigating the problem of surrogate motherhood. The Indian Council of Medical Research (ICMR) has advocated strong penalties for violators and strict regulation of Assisted Reproductive Techniques (ART) in a draught law on surrogacy.

Legal Analysis of Surrogacy's Morality and Legality in India

India is become a top destination for surrogacy for couples throughout the world thanks to factors including skilled labour, specialised medical facilities, affordable healthcare, and widespread poverty that increases the supply of willing surrogates. In India, the development of commercial and cross-border surrogacy has also been aided by the original lack of legislation on the practise and the permissive and unenforceable nature of those that were enacted later. 15-17 the claim that article 21 of the Indian Constitution encompasses the freedom to procreate and the legal protections given to "reproductive rights" have raised concerns about the moral and ethical limits of these rights.

Numerous surrogacy-related lawsuits have compelled the legal system to consider issues related to privacy and dignity rights the legality of surrogacy agreements, the necessity for therapy for both intended parents and surrogates, the transfer of parental rights, mental health issues, economic exploitation, the right to procreation, and safe guarding the best interests of the child.

Reasons for the Prohibition of Indian Surrogacy

There were no laws in place when Indian surrogacy initially started to grow in popularity, which led to hazardous and unethical practises. Due to the demand from foreign intended parents, Indian surrogacy companies essentially operated "baby factories" where surrogate mothers were exposed to unethical treatment, subpar living circumstances, and abuse. Here, pregnant Indian women were made to live without support from their families until they gave birth to the intended parents' children.

It is also claimed that surrogates in India only received a small portion of the \$4000 to \$5000 in compensation that intended parents gave the surrogacy firm. Their lack of education and poverty continually pushed them into the

surrogacy procedure for the financial benefit. Their health thus suffered as a result of effectively turning into "baby-making machines" year after year.

Circumstances of Opting Surrogacy

- A woman's uterus may be absent, malformed, or absent from birth. It may also have been surgically removed.
- The inability to become pregnant after multiple attempts at in vitro fertilisation or intracytoplasmic sperm injection.
- If a woman has a string of miscarriages without a clear medical reason.
- Surrogacy is an option for females who are unable to conceive due to infertility or other medical conditions, such as heart diseases, liver disorders, and high blood pressure, which make the process risky for both the mother and the child. This allows the couple to experience the joy of parenthood.
- A single parent might achieve their dream of having a child by using surrogacy.

CONCLUSION

Since the ancient ages, surrogacy has been a means for begetting a child. But with the progress in science and technology, this approach is being employed for begetting a child not only by the infertile couples but also by anyone who chooses to have a child. A technology made contraception easier and less expensive; a market arose to meet this desire. As a result the expanding use of surrogacy has created legal, ethical, moral and religious debates all around the world. Due to the fact that surrogacy agreements involve more than two people, each of whom is able to assert parental rights to the child, this situation is legally complex. The question of who should take on the parental rights and obligations towards the child can thus give rise to conflict.

Motherhood has been considered a blessing from God in India from ancient eras and is adjudged any woman's life as the most priceless experience. Being a mother is also referred to as a second maternity for a woman. Being a surrogate mother is dangerous and carries a high risk of experiencing severe despite the mother receiving unusual medical help and attention, there are still issues. In their natural pregnancies, it was accessible or affordable. Numerous advocates for women's rights and Feminist groups in India has been against commercial surrogacy, yet it remains an undying fact, that many women from financially struggling backgrounds relied on it as a major source of income ingrown.

It's time for India to assess the situation, gather data, make inquiries, and make a decision about the surrogacy's future. A clear cut law on surrogacy must be passed by the Parliament. The medical community must help and support the government in developing a new surrogacy law framework that includes the necessary safeguards, safety measures, and precautions to ward off

the negative effects of surrogacy's commercial overtones. No longer should foreign nationals be misled. A proper law must rein in everybody concerned.

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