

APPLICABILITY OF SURROGACY IN INDIA AND CHALLENGES FACED IN ITS IMPLEMENTATION

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ABSTRACT

Infertility is a major issue that affects the lives of married couples not just emotionally but also socially. However, thanks to modern technology, infertile couples now have access to a range of assisted reproductive technologies that were previously unavailable to them

KEYWORDS: *Applicability of Surrogacy in India*

INTRODUCTION

Infertility is a major issue that affects the lives of married couples not just emotionally but also socially. However, thanks to modern technology, infertile couples now have access to a range of assisted reproductive technologies that were previously unavailable to them. These include surrogacy, in-vitro fertilization, and artificial insemination, which have enabled them to have children despite their infertility.

Advanced reproductive technologies such as surrogacy and in-vitro fertilization are highly debated due to their ability to extend the natural capacity for reproduction. Surrogacy involves artificially inseminating a woman with a man's sperm, after which she carries the child in her womb and delivers it to the intended parents. In contrast, in-vitro fertilization entails fertilizing eggs and sperm outside the body, followed by the implantation of the resulting embryo into the woman's uterus.

The use of surrogacy as a means of having biologically related children has gained significant popularity among young couples who seek an alternative to adoption. This reproductive option has become increasingly accessible across the globe, particularly in countries such as India, where advancements in artificial insemination and in-vitro fertilization have made surrogacy a viable alternative for infertile couples. By utilizing modern technology, couples who previously had limited options can now experience the joys of parenthood and raise their own children.

Overall, these technologies provide an alternative means of reproduction for infertile couples who previously had limited options. With the help of modern technology, they can now experience the joys of parenthood and raise children of their own. This practice has been used for centuries, with evidence of surrogacy dating back to ancient times. However modern surrogacy practices have evolved with the advancement of assisted reproductive technologies (ART).

One of the main advantages of surrogacy over other forms of ART, such as adoption, is that the child is genetically related to at least one of the intended parents. This can be particularly important for couples who are unable to conceive naturally and wish to have a biological child. Surrogacy can also provide a solution for women who are unable to

carry a pregnancy to term due to medical reasons.

However, surrogacy also raises a number of legal and ethical concerns. For example, the question of whether a surrogate mother should have the right to decide whether to terminate a pregnancy or not is a controversial issue. There is also the risk of exploitation and abuse of surrogate mothers, particularly in countries where the practice is poorly regulated.

The legal framework for surrogacy varies widely between countries, with some prohibiting the practice altogether and others allowing it under certain conditions. In India, surrogacy was legalized in 2002, but the country has since implemented stricter regulations to prevent exploitation

Other Forms of ART

The desire to reproduce is an innate human drive that brings joy and a sense of fulfillment to many individuals. For childless couples, surrogacy offers a way to experience the joy of parenthood by providing them with the opportunity to have a child who is biologically related to them. Surrogacy is often seen as the ideal option for such couples as it allows them to realize their dream of having a family.

Compared to other forms of assisted reproductive technologies, surrogacy has several advantages. One of the primary benefits is that it enables couples to have a child that is genetically related to them. Surrogacy also offers a higher success rate compared to other ART methods, as the surrogate is carrying the embryo in her uterus. Additionally, surrogacy provides the intended parents with greater control over the pregnancy and childbirth process, allowing them to be involved in the development of their child from the very beginning.

Furthermore, surrogacy can be less emotionally and financially taxing on the intended parents, as they do not have to go through the lengthy and costly adoption process. Surrogacy also offers a unique experience for the surrogate mother, who is able to help create a family and make a significant contribution to society.

Despite these advantages, surrogacy is not without its challenges, and the legal and ethical issues surrounding surrogacy need to be carefully considered. However, for many childless couples, surrogacy offers a viable and fulfilling option for building a family.

- **Biological Connection:** The most significant benefit of surrogacy is the ability to conceive a child who is genetically related to at least one parent. Consequently, it helps to satisfy the instinctual desire and desire for a biological child. The longing to duplicate normally incorporates the craving to take part in pregnancy and birth as well as to give one's own hereditary legacy to the posterity. Consequently, it is preferable to traditional adoption for unmarried couples.
- **Hereditary Disease Prevention:** The prevention of a person passing on hereditary diseases to his biological child is the second major advantage of surrogacy. People who have a family history of genetic diseases or who have children with genetic diseases can find out if they may pass on a risky trait to their children with the help of genetic screening. In situations where individuals are at risk of passing harmful traits to their offspring, surrogacy provides a means to prevent such occurrences by choosing a surrogate mother and utilizing genetic material from a male or female donor as required.
- **Surrogacy as an Option for High-Risk Pregnancies:** It should be noted that pregnancies pose a high risk due to

the mother's health issues. They also run the risk of having untimely births that result in malformations in the child or, in some cases, could endanger the mother or the child's life or both. Likewise, considering a youngster for HIV-positive ladies might be unsafe and possibly destructive to the unborn kid.

- **To Satisfy the Desires of Single People, Divorced People, Gay People, And So On:** Through arrangements for surrogacy, it is possible to form a family outside of the norm. It's possible for gay and lesbian couples to have children as well as single men and women. For reproduction to take place, a male and a female must marry. However, due to biological limitations, transgender and lesbian couples cannot naturally reproduce. People who are single, divorced, or have lost a spouse are also denied the right to reproduce because of their social circumstances. In these circumstances, surrogacy can assist these individuals in satisfying their natural desire for a child.
- **An Option for Couples Living a Modern Lifestyle:** Couples and individuals who are able to conceive but are unable to do so for a variety of reasons can use surrogacy. The reasons could be related to their way of life, career prospects, and profession.

One might think that a miraculous process that gives birth to new life and makes so many people happy would be accepted without hesitation. Yet, that is false. Surrogacy is fraught with significant legal difficulties due to numerous social, ethical, and legal objections.

LEGAL AND ETHICAL CONCERNS OF SURROGACY

Surrogacy has been a topic of ongoing legal and ethical debates. While it offers a solution for childless couples to have a genetically related child, there are concerns about the welfare of the surrogate mother, the rights of the child, and the commercialization of reproduction.

The legal framework for surrogacy varies across countries, with some countries banning the practice altogether, while others regulate it. In countries where surrogacy is allowed, there are usually strict laws in place to protect the rights of all parties involved.

Ethical debates around surrogacy include concerns about exploitation of vulnerable women who may be coerced or financially motivated to become surrogates. There are also concerns about the commodification of reproduction and the potential for exploitation of children born through surrogacy.

The rights of the child born through surrogacy are also a concern, particularly in cases where the surrogate mother has a biological connection to the child. Questions about the child's right to know their biological origins and the potential for custody battles between the surrogate mother and intended parents are common.

The requirement that a woman be used as a surrogate is at the heart of the primary legal objection to surrogacy, which goes right to the heart of the procedure. Surrogate motherhood has been criticized by a number of academics because it poses unacceptable risks to women, including physical, psychological, and symbolic risks like objectification and commoditization. According to Carl Schneider, "some surrogate mothers will become ill or even die."

Commentators have compared the surrogate's psychological harm to that of birth mothers when they give up their children for adoption. There is a strong likelihood that the surrogate will experience psychological harm as a result of the

procedure. As proven by their choice to attempt to keep the kid, a substitutes truly do lament their choice to bear a youngster for another couple.

Critics of surrogacy argue that it reduces women to the value of their reproductive organs, which is a concern that has been raised by various organizations such as the Supreme Commission and the Quebec Social event for the Circumstance with Women in Canada. They have suggested that reproductive technologies have the potential to separate the reproductive process from women's bodies, which can lead to the alienation of women from their own reproductive capacities.

Surrogacy separates motherhood into distinct phases, including gestational, genetic, and intended motherhood. A surrogate mother is contractually obligated to follow all of the stipulations laid out in the agreement throughout the entire process. Additionally, she is required to relinquish all of her rights to the child after birth, which some argue is an unnatural and psychologically damaging experience since the reproduction process is an integral part of a woman's life.

Surrogacy has been criticized by some who argue that it can be seen as a form of child-selling, which is not acceptable in a civilized society. Some academics argue that surrogacy commodifies children, reducing them to mere products that can be bought and sold. The comparison is often drawn between surrogacy and the sale of organs for transplant, which is illegal in many countries. Others argue that surrogacy is akin to adultery, prostitution, or even slavery. There are those who believe that women who agree to become surrogates are being exploited, and that the entire process is dehumanizing and morally wrong.

Opponents of surrogacy contend that children born through surrogacy may be at risk of harm, as the intended parents may not have undergone the same rigorous screening and evaluation as adoptive parents. They also argue that surrogacy undermines a woman's inherent human dignity by reducing her to a mere vessel for reproduction. Another concern is that a child born through surrogacy may experience psychological harm later in life when they learn about their unconventional parentage. These critics suggest that surrogacy can have far-reaching and negative implications for all involved parties, including the child, surrogate, and intended parents.

SURROGACY IN INDIA AND THE LEGAL RESPONSE

The popularity of surrogacy as a means of having a genetically related child has grown significantly worldwide. However, the availability and legal regulations of surrogacy differ across countries. While some countries have strict laws against surrogacy, others offer surrogacy arrangements at a high cost. Therefore, individuals or couples seeking surrogacy may prefer countries that provide affordable surrogacy services with fewer legal complications. Among foreign nationals, India is considered the most favorable country for surrogacy due to its comparatively lower costs for surrogacy arrangements.

The Law Commission of India has reported that the cost of surrogacy in India is considerably lower than in developed countries such as the United States, ranging from \$25,000 to \$300,000. A study conducted by the Centre for Social Research in New Delhi in 2012 found that surrogacy fees in India are typically between \$2,500 and \$7,000, with total surrogacy arrangements costing between \$10,000 and \$35,000. These costs are significantly lower than the \$59,000 to \$80,000 typically paid by intended parents in the United States.

According to recent data, surrogacy arrangements that involve in vitro fertilization (IVF) are priced at around \$11,000, while surrogacy alone costs approximately \$15,000 in the United States. This does not include the fees for

assisted reproductive technology (ART). On the other hand, surrogacy costs in India are about \$5,000. In the United Kingdom, an IVF cycle costs about £7,000, and traditional surrogacy costs in Canada range from \$19,600 to \$68,500. In contrast, gestational surrogacy in Canada costs between \$29,600 and \$68,500. In Russia, surrogacy arrangements begin at approximately \$35,000.

Another factor that attracts foreign couples and individuals to pursue surrogacy in India is the availability of world-class private healthcare facilities, with highly skilled and experienced doctors and staff who are fluent in English to assist in the process. Another crucial factor is the easy access to surrogate mothers, which is one of the primary reasons why India is considered one of the most favorable destinations for surrogacy. Additionally, Indian surrogates have demonstrated a strong commitment to handing over their newborns to the intended parents as soon as possible after birth, and there have been no reported instances of surrogates refusing to relinquish custody of the child to the intended parents.³

Likewise, Indian ladies have a more deliberate way of life than unfamiliar ladies do, and the majority of them don't drink, smoke, or use medications or opiates. In addition, India has a low cost of living, and after the surrogacy arrangement has ended, foreign couples or individuals can visit world-famous tourist destinations in India before returning with the child. Lastly, India's surrogacy success rates are widely regarded as exceptionally high.

For all of the aforementioned reasons, India has emerged as a popular destination for foreign couples seeking a cost-effective surrogacy arrangement. The surrogacy practice has also spawned a whole subfield of medical tourism. As a result, India's surrogacy industry is established and generates an estimated 500,000 million dollars annually. The precise figures, which are not available, are difficult to confirm. On the other hand, according to one estimate, the reproductive tourism industry in India generates approximately \$400 million annually. The CSR Report estimates that the surrogacy industry is worth approximately \$500 million, and the number of cases is rapidly increasing. As a result, India's surrogacy prevalence is unknown. However, it is abundantly clear from the two aforementioned reports that the surrogacy industry generates between 400 and 500 million US dollars in annual revenue.

In addition, a draft national guideline for the accreditation, supervision, and regulation of ART clinics was provided to the Ministry of Health and Family Welfare by the ICMR in 2002. It is essential to keep in mind that numerous authors have interpreted this ICMR step as India's legalization of commercial surrogacy.

However, because the Government of India did not officially adopt this Draft in 2002 and because it was not a legislative step, it cannot be considered a step toward the legalization of surrogacy in India. In fact, after consulting with the National Academy of Medical Sciences, ART practitioners, and the Ministry of Health and Family Welfare, this draft was modified and officially adopted by the ICMR in 2005.

ICMR GUIDELINES OF 2005

The primary objective of the 2005 ICMR Guidelines was the development of ethical guidelines for the regulation of ART clinics in India. However, there are some surrogacy-related provisions in these guidelines. According to the guidelines, a surrogacy arrangement is one in which a woman agrees to carry a pregnancy that is genetically unrelated to her and her husband. The goal is to carry the pregnancy to term and transfer the child to the surrogate's biological parents. Typically, only patients for whom carrying a child to term would be physically or medically unfeasible or undesirable should consider surrogacy by assisted conception.

It is not adultery on the part of either the donor or the wife to give ART to a married woman with her husband's consent. On the other hand, using ART without the husband's permission could lead to a divorce or a judicial separation. The guidelines specify unambiguously the requirements that must be met by an intermediary mother. For example, a substitute mother must not be older than 45 years old, and no woman may serve as an intermediary more than three times in her lifetime.

The ART clinic must verify (and record) that the woman meets all testable requirements for a successful full-term pregnancy before accepting her as a potential surrogate.

The couple's proxy mother could be a family member, a notable individual, or an outsider. A relative who acts as a surrogate must be of the same generation as the woman seeking a surrogate. However, in addition to registering as a patient and surrogate in her own name, a surrogate mother must provide all necessary information about the genetic parents, including their names, addresses, and other details. The couple to whom the oocytes are being given cannot use an oocyte donor as a substitute mother. To avoid legal issues, especially in the unfortunate event of maternal death, she must not use or register in the name of the person for whom she is carrying the child. The informed consent of the surrogate needs to be witnessed by someone outside of the clinic.

Recognizing the need to regulate surrogacy and other assisted reproductive technology practices in India, the government took steps to develop a comprehensive legal framework. In 2008, a 15-member committee composed of ART experts, Ministry of Health and Family Welfare representatives, and ICMR experts drafted the Assisted Reproductive Technology (Regulation) Bill and Rules. However, despite the efforts, the Parliament has not yet adopted it as regulation.

In addition, the Law Commission of India has also acknowledged the importance of regulating ART, particularly surrogacy. In its report, the Commission emphasized the need for a legal framework to ensure that surrogacy practices are ethical, transparent, and safe for all parties involved.

The ART (Regulation) Bill, 2010 was drafted to address these concerns and establish guidelines for surrogacy arrangements. The bill sought to prohibit commercial surrogacy and only allow altruistic surrogacy, in which the surrogate mother does not receive any financial compensation beyond medical expenses and insurance coverage. The bill also aimed to protect the rights of the surrogate mother and the child born through surrogacy, including their right to health care, education, and inheritance.

However, the bill has faced criticism from various groups, including fertility clinics, surrogacy agencies, and intended parents. These groups argue that the bill's provisions are too restrictive and may hinder access to surrogacy services, which have become a popular option for couples struggling with infertility or medical conditions that prevent them from carrying a pregnancy to term.

Despite the ongoing debate, the need for comprehensive regulation of surrogacy and other ART practices remains critical. Effective regulation can ensure that surrogacy arrangements are conducted ethically and transparently, with the well-being of all parties involved as a top priority. It can also help prevent exploitative practices and protect the rights and interests of surrogate mothers and the children born through surrogacy.

In addition to addressing other issues that were either directly or indirectly related to assisted reproductive technology, the objectives of the bill included establishing a national framework for the accreditation, regulation, and

supervision of assisted reproductive technology clinics, preventing the misuse of assisted reproductive technology, ensuring the safe and ethical delivery of assisted reproductive technology services, and addressing other issues.

"An arrangement in which a woman agrees to a pregnancy, achieved through assisted reproductive technology, in which neither of the gametes belongs to her or her husband, with the intention of carrying it and handing over the child to the person or persons for whom she is acting as a surrogate," is the definition of surrogacy provided by the Bill. "exercise their jurisdiction and powers and carry out the functions and responsibilities entrusted to them by this Act," the Bill establishes State Boards and a National Advisory Board.

The Assisted Reproductive Technology (Regulation) Bill and Rules, 2008 aimed to regulate ART, including surrogacy, in India. The bill prohibits women under the age of 21 or over the age of 35 from serving as surrogate mothers, and outlines the criteria for becoming a surrogate. It states that no woman can be a surrogate for more than five live births, including her own children. The bill also prohibits ART banks or clinics in India from accepting or sending Indians for surrogacy abroad.

The bill allows any Indian citizen to become a surrogate, whether they are a relative, known person, or stranger to the intended parents. However, the woman seeking a surrogate must have a relative who is of the same generation. Additionally, any woman who wishes to become a surrogate must declare in writing that she has not received any blood products or other blood items in the past six months, and must undergo any approved clinical trials to exclude any physically transmitted or other communicable diseases that could harm the child's health.

Despite being drafted by a committee of experts and representatives from the Ministry of Health and Family Welfare, the bill has not been adopted by the Parliament as regulation. The Law Commission of India has also emphasized the importance of regulating ART, especially surrogacy, in the country. The ART (Regulation) Bill, 2010 addresses surrogacy and its regulations in India.

The Bill likewise says that the kid will be the couple's genuine kid assuming that a wedded or several separations or isolates subsequent to consenting to helped regenerative innovation treatment however before the youngster is conceived. A surrogate couple's or a foreigner's child born in India cannot become a citizen of India. The Bill also safeguards the child's right to know where he came from. It states that, with the exception of personal identification, a child can request any information about the donor or surrogate mother up until the age of 18. However, personal identification of the genetic parent(s) or surrogate mother cannot be released unless the condition is life-threatening and necessitates the use of samples or physical testing. However, these personal identifiers may be shared if the surrogate mother or genetic parents have informed consent.

Despite its flaws, the ART (Regulation) Bill and Rules, 2008 represent a sincere attempt to regulate surrogacy in India. However, the Bill alone is insufficient to address the complexities of the issue and protect the interests of all stakeholders. In 2012, Hari G Ramasubramanian, founder of a prominent fertility law firm in India, filed a Right to Information Act application to obtain information on the status of the 2008 Bill.

The Ministry of Law and Justice responded to the Center for Surrogacy Law in India (ISLC) on July 19, 2012, stating that the Ministry of Health and Family Welfare had submitted a revised proposal for regulation entitled "Assisted Reproductive Technology (Regulation), 2012." However, to date, the Bill has not been enacted into law, leaving the ICMR

Guidelines, 2005 as the only current regulatory framework for surrogacy in India.

INTERNATIONAL HUMAN RIGHTS LAW

When evaluating the potential effects of surrogacy on human rights, it is important to take into account and balance the interests of children, surrogates, intended parents, states, and intermediaries. At the moment, there are no international laws that specifically cover surrogacy. Nonetheless, specialists, judicial organisations, and interpretive treaty bodies have addressed the use of assisted reproductive technology and surrogacy more broadly in the context of the rights and interests stated by international law.

A number of important international treaties have been established to address a variety of issues that are relevant to both the surrogate mother and the child born through surrogacy. These include the International Covenant on Civil and Political Rights (ICCPR), the International Convention on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Convention on the Rights of the Child (CRC), and the Convention on the Rights of Persons with Disabilities (CRPD).

These agreements address a range of important topics, such as the best interests of the child, reproductive rights, and fair working conditions. They also protect the rights of intended parents, including the right to form a family without discrimination. Despite the fact that surrogacy is a relatively new practice, there has been considerable debate regarding its impact on international human rights..⁴ This section addresses the human rights law implications of the practice of surrogacy.

CONCLUSION

Surrogacy is a widely accepted method for having a biologically related child globally, with India being no exception. The practice of surrogacy has been viewed through different lenses, resulting in both praise and criticism. It has been labeled a "rent a womb," a "gift of love," or a "gift of life," depending on one's viewpoint. However, despite its advantages, surrogacy has also sparked significant debate regarding its legality, morality, and ethics. Due to the lack of clarity regarding its various aspects, surrogacy is often regarded as a legal and ethical gray area.

The use of surrogacy to form a family raises a number of questions, including the role of biology in the formation of a family, the rights of the child, and the responsibility of the surrogate mother. The involvement of third-party reproduction in creating a family, such as egg and sperm donors, further complicates these issues.

Additionally, the legal and social recognition of families formed through surrogacy varies greatly around the world. Some countries have banned or severely restricted surrogacy, while others have legalized it and established legal frameworks for its practice. In countries where surrogacy is legal, there may be different laws and regulations governing different aspects of the process, such as the use of surrogates from abroad, the compensation of surrogates, and the rights and responsibilities of intended parents.

Overall, the debate surrounding surrogacy highlights the importance of considering a wide range of social, cultural, legal, and ethical factors when examining issues related to family formation and reproductive rights..⁵ . The legal aspects of surrogacy, such as those pertaining to

- The surrogate mothers;
- Women in general (through surrogacy's spillover effects);
- The children born as a result of the deal;
- The siblings who witness or later learn of the child's transfer;
- The parents who hire;
- Children who are available for adoption and might be adopted but for transactions involving surrogacy⁶ ;
- Children who are available for adoption and might be adopted but for transactions involving surrogacy⁷.

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