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# **SURROGACY- ISSUES AND CHALLENGES IN INDIA**

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## **ABSTRACT**

The recent inclusion of surrogacy regulations in India has expanded the scope of this activity and allowed for talks about the partners' contractual duties. This article discusses how the laws governing surrogacy evolved in India following independence. It also emphasises the partners' rights as outlined in the Surrogacy Regulation Bill, 2020. Furthermore, it focusses on surrogacy contracts, as well as the concerns and obstacles associated with them, taking into account contract breaches. Although surrogacy is widely acknowledged as a method of assisted reproduction for people who would otherwise be unable to have children, it can elicit strong feelings, especially when there is a risk of exploitation. As a result, there is dispute on how it should be governed. Surrogacy is illegal in several nations, yet people nonetheless use it. In others, it's uncontrolled but nonetheless practiced.

In certain countries, it is governed under either a 'commercial' or a 'altruistic' paradigm. This review article examines the potential regulatory future of surrogacy, first from a UK perspective, taking into account a recent review of the legal framework in a country where surrogacy works well (though some cross borders to access it), and then through an assessment of global trends and other national perspectives. It finds that, while international surrogacy legislation may be desirable, it is improbable.

As a result, it would be better for different countries to regulate surrogacy in order to ensure that it is carried out in a safe, ethical, and protective manner of the best interests of children, surrogates, intended parents and families.

## **INTRODUCTION**

The rising global prevalence of infertility due to mental and psychological stress creates a demand for assisted reproductive treatments (ART). Surrogacy is one approach that can aid childless parents.

Surrogacy is a technique in which a surrogate mother gives birth to a child and then provides the infant to a couple who is unable to conceive. In vitro fertilisation, or IVF, is a method used in the surrogacy process. There are some fundamental terminology related to surrogacy that can help you comprehend the concept better. These are discussed as follows:-

**Surrogate:** A woman who carries a kid to birth and then provides it to the intended parents.

**Intended Parents:** A couple that is unable to have a child owing to a biological condition and hires a surrogate woman for this purpose is referred to as the intended parents.

Surrogacy follows a standard procedure in which the intended parents' embryo is transferred to the surrogate mother. The surrogate mother bears the baby for the following nine months, and when the baby is delivered, it is handed to the intended parents.

There are several sorts of surrogacy in society, including altruistic, gestational, commercial, and traditional. Some of these are acceptable, but others are not authorised and are deemed objectionable by society or the law.

Surrogacy contracts are a crucial element of the whole process, and it is critical to understand the protocol and laws governing these contracts. These contracts essentially guarantee the interests of all parties participating in the process.

The contractual responsibility exists in both altruistic and commercial surrogacy, with the distinction that commercial surrogacy involves money in addition to medical expenditures and insurance, whereas altruistic surrogacy does not. To better comprehend these contracts, it is necessary to first understand how the notion of surrogacy arose, how these contracts emerged, and the legal concepts involved in this process.

Although the Surrogacy Bill has been enacted by parliament, it still needs some measures to address the concerns surrounding surrogacy contracts. As a result, it becomes critical to comprehend these difficulties and attempt to evaluate the ramifications of these laws and regulations.

## **BACKGROUND- EVOLUTION OF SURROGACY LAWS**

Indian surrogacy dates back to 1978, when India's first IVF kid, Kanupriya Alias Durga, was born in Kolkata. Surrogacy is a century-old technique, but the development of associated regulations has remained in its early stages for a very long time. In 2002, commercial surrogacy was legalised with the aim of promoting medical tourism in India<sup>1</sup>. The low cost of facilities in India and the lack of strict legislation led to an increase in the count of the intended parents, as a result of which India's surrogacy industry expanded rapidly, and India became the much sought after surrogacy destination, but the unregulated business of surrogacy raised some serious issues, such as exploitation of surrogate mothers, embryo.

In 2005, the Indian Council of Medical Research produced guidelines to govern surrogacy, although they lacked formal authority<sup>2</sup>. A watershed moment occurred in 2008 with the Supreme Court's decision in *Baby Manji Yamada v. Union of India*<sup>3</sup>, which prompted the government to adopt a surrogacy statute and also ruled that surrogacy would be legal in India. A draft ART bill was introduced in 2010, but it did not become law. The bill enumerated certain conditions and procedures for surrogacy, the bill also allowed the single parents to have a child through surrogacy, however it failed to protect the rights of the surrogate mother and also did not allow homosexuals and single foreign nationals to opt for surrogacy in India.

To protect surrogate mothers from long-term exploitation, the surrogacy regulation bill was introduced in Lok Sabha on November 21, 2016. One of the primary goals of this measure was to eliminate commercial surrogacy and allow only altruistic surrogacy. The bill established various eligibility conditions for the intended couple and the surrogate mother, including the need that the intending couple obtain a 'Certificate of Essentiality' and a 'Certificate of Eligibility' before proceeding with surrogacy.

The surrogate mother must also have a 'Certificate of Eligibility', be a close relative of the intending couple, be a married woman with her own kid, be between the ages of 25 and 35, and have not previously been a surrogate mother. The measure also made some behaviours illegal, such as exploiting surrogate mothers, commercial surrogacy, and embryo sales. The bill was

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<sup>1</sup> Surrogacy in India: History, Impact on poor and facts, Aug. 17, 2020 17:19 IST. <https://www.jagranjosh.com/general-knowledge/surrogacy-in-india-1597665040-1>.

<sup>2</sup> Surrogacy Laws in India – Past Experiences and Emerging Facets, Chinmoy Pradip Sharma, Nov. 23, 2019. <https://www.barandbench.com/columns/surrogacy-laws-in-india-past-experiences-and-emerging-facets>.

<sup>3</sup> <https://indiankanoon.org/doc/854968/>

subsequently submitted to a standing committee in 2017. Based on the committee's report, the Lok Sabha passed the bill on December 19, 2018; however, the measure expired and was reintroduced in Lok Sabha in 2019.

## **LEGAL POSITION OF SURROGACY IN INDIA**

### **(Contractual obligation and the rights of both the parties):-**

The surrogacy procedure encompasses both the rights and interests of the surrogate mother and the intended parents; therefore, it is critical to guarantee that both parties' needs are addressed and that no miscarriage of justice occurs. After numerous attempts to pass a surrogacy law, a new bill, the Surrogacy (Regulation) Bill, 2019, was introduced and passed in the Lok Sabha on August 5, 2019. It was then referred to a select committee, which drafted the Surrogacy (Regulation) Bill, 2020, which was approved by the union cabinet on February 26, 2020.<sup>4</sup>

Some of the notable features of this proposed legislation are as follows:-

1. It intends to establish regulatory authorities by establishing the National Surrogacy Board and the State Surrogacy Board at the national and state levels, respectively, tasked with advising and supervising different entities established under the bill.
2. The measure prohibits commercial surrogacy and only authorises altruistic surrogacy, thereby ending the fast burgeoning rent-a-womb sector.
3. The measure allows for altruistic surrogacy, but it also limits it. Only Indian married couples aged 23 to 50 for women and 26 to 55 for males, as well as non-resident Indians, people of Indian descent, and Indian citizens living abroad, are eligible for surrogacy. Furthermore, a couple opting for surrogacy cannot have their own child unless their child has a physical or mental disability, and the Intended Parents must also have a certificate of medical indication from the district medical board requiring surrogacy.
4. The surrogacy law of 2020 further expanded the scope of the prior proposed 2019 bill, which only permitted married Indian couples to choose for surrogacy; today, an Indian woman who is a widow or divorcee aged 35 to 45 years can also opt for surrogacy.
5. The 2019 bill described infertility as the inability to conceive after five years of unprotected coitus or other established medical condition preventing a couple from conceiving; the current law substitutes the word infertility and shortens the five-year

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<sup>4</sup> Surrogacy (Regulation) Bill of 2020: Balancing Interests, Sidak Singh Kalra, Oct. 1, 2020. <https://www.latestlaws.com/articles/surrogacy-regulation-bill-of-2020-balancing-interests/>.

period to one year. The condition prior has now been established as a medical reason for gestational surrogacy.

6. The measure also requires that the surrogate mother be genetically unrelated to the kid. She should not contribute her own gametes for surrogacy, and a woman can only serve as a surrogate once in her lifetime.

### **SURROGACY CONTRACT**

A surrogacy contract is required to clearly define the rights and duties of the parties engaged in the surrogacy process. The agreement to use another woman's womb for gestation is known as the 'Surrogacy Contract'.

The contract comprises two parties: the surrogate mother and the intended parents.

The intended couple has certain rights during the surrogacy process: (i) the right to choose their own surrogate mother, (ii) the right to impose reasonable restrictions on the surrogate mother for the proper development of the child, (iii) the right to know everything about the child's development and the right to visit the surrogate mother, and (iv) the right to custody of the child after birth.<sup>5</sup>

Surrogate mothers and children born through surrogacy have various rights that protect them from exploitation. The surrogate mother's rights include: (i) the entitlement to insurance coverage and to collect all medical expenditures from the intended parents. (ii) If the continuation of the pregnancy endangers the surrogate woman's life, the foetus can be aborted and claimed as a matter of right; however, aborting the foetus without the consent of the intended parents cannot be taken as a matter of right. The child born through surrogacy is considered the Intended Parents' biological child, with all of the same rights and advantages as a natural-born kid. Giving birth to a surrogate kid for the purpose of sale, prostitution, or disownment is likewise prohibited, as is any other type of exploitation.

The Obligations of the Intended parents are as follows:-

1. Paying the required charges to the surrogate mother, which include medical expenses for treatment during the gestation period, the cost of purchasing medications or doing

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<sup>5</sup> PM Arathi, Report of a study to understand the legal rights and challenges of surrogates at 54.

any tests in laboratories and medical centres, the cost of child labour, and other associated costs.

2. After giving birth to the baby at the time specified in the surrogacy contract, the surrogate woman relinquishes all rights to the intended parents. The legal parents are then required to take the kid with them within the timeframe specified in the contract, which might be shortly after the births or a few days following the nursing period.
3. The legal parents may not choose more than one surrogate lady at a time.
4. The intended parents should also get insurance coverage for the surrogate mother for 36 months from a firm or agent recognised by the Insurance Regulatory and Development Authority.

Issues of the Surrogate Mother are as follows:-

1. The surrogate mother's primary responsibility is to receive the infertile couple's embryo in her womb, to hold and nourish the baby during the gestation period, and to eventually give birth to the kid.
2. The surrogate mother should not purposefully injure the kid in the pregnancy.
3. Upon birth, the surrogate mother relinquishes all parental rights and hands over the child to the legal parents.

### **ISSUES AND CHALLENGES:-**

Surrogacy contracts play an important role throughout the surrogacy process, however there are several financial and legal difficulties that frequently lead to controversy and disagreement about the legal, social, and ethical implications of such arrangements. A key gap is the lack of law providing legal support for surrogacy contracts; yet, in such cases, the Indian Contract Act, 1872<sup>6</sup>, comes into effect, regulating such transactions.

The first and most frequently posed question is whether a surrogacy arrangement results in the sale of a kid. Taking into account the issue of infant sale, the present measure attempts to prohibit commercial surrogacy while promoting altruistic surrogacy. Keeping the child's welfare in mind, the measure also states that a surrogate kid shall be considered the Intended Parents' biological child.

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<sup>6</sup> Aneesh V. Pillai, Surrogacy Contracts: Issues and Challenges (April 2020). [https://www.researchgate.net/publication/340755352\\_SURROGACY\\_CONTRACTS\\_ISSUES\\_AND\\_CHALLENGES](https://www.researchgate.net/publication/340755352_SURROGACY_CONTRACTS_ISSUES_AND_CHALLENGES)

Another contentious topic that frequently arises in modern times is whether surrogacy contracts should be made enforceable or not.

To be enforceable in a court of law, a contract must satisfy all the prerequisites of a valid contract mentioned under Section 10 of the Indian Contract Act, 1872, which states that 'All agreements are contracts if they are made by free consent of the parties, competent to contract, for a lawful consideration and with a lawful object and not hereby expressly declared to be void,' as surrogacy contracts are also regulated by the Indian Contract Act, therefore.

A common legal question with surrogacy contracts is whether or not they violate public policy? According to Section 23 of the Indian Contract Act, a contract that is immoral and contrary to public policy is void and unenforceable. All sorts of surrogacy contracts are often criticised for being contrary to public policy. The phrase 'public policy' is not defined under the Indian Contract Act; nonetheless, in general, public policy comprises all concepts designed to preserve people's welfare. Supporters of surrogacy contracts argue that these contracts do not harm public welfare or public interest; rather, surrogacy serves as a boon to those who are unable to bear children for a variety of medical reasons. To declare a contract unlawful, there must be solid grounds. Simply restricting people's rights to freely join into contracts on the basis of public policy is unjustified.

### **CONCLUSION**

Many changes to human existence have occurred as a result of the advancement of science and technology. The introduction of cutting-edge reproductive technologies, such as in vitro fertilisation and embryo transfer, has provided a glimmer of hope for couples who are unable to have children owing to medical reasons. Surrogacy is a fast increasing market in India, but due to a lack of particular regulation, it remains unexplored terrain. The unique character of the surrogacy contract, as well as the complexities of the surrogacy procedure, demand the establishment of surrogacy legislation. Although Indian Contract law applies to surrogacy contracts in the event of a disagreement, the rights and interests of both parties are jeopardised owing to the lack of particular laws.

The proposed bill, the Surrogacy (Regulation) Bill, 2020, is on its way to becoming legislation; nevertheless, the draft must still be thoroughly studied in order to ensure that no issues are left

ignored. The measure prohibits commercial surrogacy and solely supports altruistic surrogacy, but it fails to address concerns such as black marketing or surrogate mothers collecting more money from the wallets of the intended parents, which might lead to a court dispute between the parties. With the rise of the female workforce, where the majority of women now work, the existing law fails to compensate the surrogate woman for pay losses sustained throughout the surrogacy procedure.

