

INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 6 | Issue 6

2023

© 2023 *International Journal of Law Management & Humanities*

Follow this and additional works at: <https://www.ijlmh.com/>

Under the aegis of VidhiAagaz – Inking Your Brain (<https://www.vidhiaagaz.com/>)

This article is brought to you for “free” and “open access” by the International Journal of Law Management & Humanities at VidhiAagaz. It has been accepted for inclusion in the International Journal of Law Management & Humanities after due review.

In case of **any suggestions or complaints**, kindly contact Gyan@vidhiaagaz.com.

To submit your Manuscript for Publication in the **International Journal of Law Management & Humanities**, kindly email your Manuscript to submission@ijlmh.com.

Surrogacy in India and Right of Women

AMIT RANJAN KUMAR¹

ABSTRACT

The human body is an amazing mechanism. Future reproductive technologies such as test tube babies, surrogate motherhood via novel reproductive techniques, and cloning will open up hitherto unimaginable sexual options. Surrogacy is an assisted reproductive technique in which a woman consents to get pregnant in order to carry and give birth to a child for the benefit of other people. Certain legal regimes have permitted surrogacy, and the intended parents could be acknowledged as the biological parents from the moment of birth. In India, the market for "womb for rent," or commercial surrogacy, is expanding. Reproductive tourism is a relatively new phenomena in our fast-globalising environment. In a nation like India, where the incidence of maternal deaths is already startlingly high, the surrogacy industry takes advantage of impoverished women. In the context of surrogacy, this study discusses concerns related to paternity and women's health rights. To safeguard and counsel couples considering this choice, the government of India should give careful thought to passing legislation regulating surrogacy. Patients will always mislead and surrogates will always be taken advantage of in the absence of a strong legal framework

Keywords: Maternal mortality, Paternity issues, Surrogacy, Women's right to health.

I. INTRODUCTION

The human body is an amazing mechanism, the workings of which are yet unknown. Unimaginable opportunities in the sexual sphere have been brought about by the future of childbirth in the shape of test tube babies and surrogate motherhood made possible by more advanced technology. Spouses can easily become objects of sex since any reproductive method that takes the place of the marital act violates the dignity of reproduction when it is separated from sexual relations. It becomes challenging to respect one another's dignity, particularly that of the unborn kid. Nonetheless, technology and science have greatly benefited civilization. But the truth is that it is contentious rather than morally correct.

II. SIGNIFICANCE AND MOTIVES OF SURROGACY

Through the assisted reproduction technique known as surrogacy, a woman consents to get pregnant in order to give birth to a child that will be raised by others. She may be implanted with an unrelated embryo or, in the more conventional type of surrogacy, be the child's genetic

¹ Author is a student at Amity University, Patna, India.

mother. In antiquity, having a different woman birth a kid for a couple to raise typically refers to the male half of the pair as the genetic father. For parents who want to have a biological child of their own, surrogacy may be their only viable alternative. The Latin verb "Subrogare" (to replace) means "appointed to act in the place of," and this is where the word "surrogate" originates. In altruistic surrogacy, a surrogate mother consents to carry a child for intended parents without receiving any form of financial payment. Put otherwise, this effectively amounts to a free surrogacy. On the other hand, a commercial surrogacy option involves an intended parent providing a financial incentive to find a willing surrogate. Because of the ethical concerns raised by individuals, governments, and religious organisations over the involvement of money in a child's birth, commercial surrogacy is a contentious technique of creation. The pregnancy of a surrogate can occur for several causes. In cases where a woman who wants to become a parent is infertile or unable to carry a pregnancy to term—for example, due to a hysterectomy, uterine malformation, a history of recurrent abortions, or any other medical condition that puts her pregnancy at risk for harm to her own health—intended parents may arrange for a surrogate pregnancy. It is also possible for a healthy, fertile woman who wants children to be hesitant to become pregnant. The organisations facilitating intended parents' surrogacy arrangements frequently assist them in handling the intricate legal and medical requirements of the procedure.

III. HEALTH RISKS RELATED TO BECOMING A SURROGATE

In India, surrogates are implanted with up to five embryos to boost the likelihood of conception, while in the US, surrogates are given no more than two embryos for their safety. Utilising so many embryos raises the mother's and the child's health risks. The likelihood of postpartum depression among surrogates is higher when compared to the kid born in the mother's womb. Complications from pregnancy, childbirth, and the postpartum phase include pulmonary embolism, haemorrhoids, urinary tract infections, stress incontinence, haemorrhoids, gestational diabetes, and potentially fatal bleeding. Pregnancy with several children raises the risk of needing a surgical delivery. The risk of perinatal mortality, perinatal death, intrauterine foetal death, and newborn death is higher in a surrogate host who is older than the mother. The mother is more susceptible to stroke, placental abruption, and hypertension brought on by pregnancy. All medications have adverse effects, whether the surrogate is taking hormones or other prescriptions. Many women receiving artificial insemination also get fertility medications, which raises the possibility of a negative reaction and the procedure's dangers.

Important factors to take into account in a surrogacy contract include things like infections that

cause a rise in the number of hospitalisations for the infant, genetic malformations, and preterm deliveries. In the initial hours after delivery, many surrogate mothers nurse their babies. In the event of surrogacy, however, parents find it difficult to start breastfeeding and to forge a link between mother and kid. One of the main disadvantages of forced lactation is that most adoptive moms or surrogates seldom produced the same amount of breast milk as a new mother in the first few days after giving birth. This poses a challenge for the nourishment of newborns.

IV. SURROGACY'S SOCIAL AND PSYCHOLOGICAL CONTEXT

The commercialization of surrogacy leads to a number of societal tensions. The financial benefit through surrogacy becomes a crucial push factor given the acute vulnerability of one-third of Indian women due to poverty, marginalisation and exclusion from the labour and employment markets, patriarchal social and familial structures, and poor educational levels. Because the majority of surrogate moms come from low-income backgrounds and have financial gain as their primary motivation, commissioning parents' agents may easily take advantage of them. An atmosphere of secrecy and anonymity is detrimental to interpersonal relationships both inside and outside of families.

Since surrogacy is associated with prostitution, it has a social stigma in society, and as such, there are many who say that it ought to be prohibited for moral reasons. Human rights are violated when surrogate moms are kept apart from families and permitted to visit them on the weekends. As a result, there are several moral, legal, social, and psychological concerns surrounding surrogacy, necessitating the prompt drafting and application of legislation.

V. INDIAN SCENARIO REGARDING SURROGACY AND WOMEN'S RIGHT TO HEALTH

In India, the idea of surrogacy is not new. In India, the market for "wombs for rent," or commercial surrogacy, is expanding. In India, a setting where English is spoken and less expensive services draw in eager customers.

Future predictions for the surrogacy industry range from potential for exploitation to a chance to help rural Indian women out of poverty to a dystopian vision of developing nation baby farms. When it comes to surrogacy in India, it might be difficult to determine if the women are using their rights as individuals or if their husbands or mother-in-laws are forcing them into the role in order to satisfy their material and financial demands.

Surrogacy's opponents contend that because the practise is related to prostitution, it ought to be prohibited for moral reasons. Contracts for surrogacy are "dehumanising and alienating because they undermine the validity of the surrogate's viewpoint on her pregnancy." The

surrogate mother sees the pregnancy as just another opportunity to get much needed money and attempts to avoid feeling any kind of emotional attachment to the kid. The payment for physical services dehumanises the surrogate mother and takes use of her capacity and reproductive organs for the wealthy's own benefit. Surrogacy outsourcing is actually a form of child labour in India. There isn't currently a statute protecting surrogate mothers against coerced abortions, difficult deliveries, and other situations.

Since 2002, India has taken the lead in commercial surrogacy and has nearly legalised it. This is the reason why some opponents claim that the surrogacy industry takes advantage of low-income women in nations like India, where the rate of maternal death is already high. Based on conservative estimates, the surrogacy industry in India is already valued at about \$445 million annually. The practise of surrogate motherhood, in which a woman does not acquire legal or moral ownership of the child delivered, has brought up moral, ethical, and societal issues about women and the "Commissioned baby."

In order to propose complete laws, the Ministry of Women and Child Development is now investigating the problem of surrogate motherhood in India. The Indian Council of Medical Research (ICMR) has created a draught surrogacy law that calls for stringent regulations on assisted reproductive technologies (ART) and harsh punishments for violators. The proposed rule stipulates that a mother may only undergo three embryo transfers for the same couple if the first two efforts are unsuccessful. It further states that a woman may not serve as a surrogate for more than three live births during her lifetime. In actuality, the ICMR and the Ministry of Health and Family Welfare's 2005 recommendations are the only ones available. According to ICMR rules, a couple may designate a family, a known individual, or an unknown individual as their surrogate mother. When a family member serves as a surrogate, they should be of the same generation as the lady seeking the surrogate. According to the experts, commercial surrogacy is pushed unduly towards childless families via surrogacy. The standards' Section 3.10.5 specifies that "a surrogate should be less than 45 years" as the maximum age, leaving out the minimum required to serve as a surrogate. Does that imply that a person who is 18 years old or younger can act as a surrogate mother? The ART Clinic has to confirm that a woman meets all the requirements for a successful full-term pregnancy before agreeing to serve as a potential surrogate for a specific couple. These rules are careless and biased. The divided role of women in surrogacy is leading to a reevaluation of what it means to be a mother and what constitutes a mother's right.

VI. RELEVANCE OF SURROGACY IN PUBLIC HEALTH

Infertility can be overcome with ART and surrogacy. The pressure to establish high-tech reproductive techniques within open markets and public sector service infrastructure without constructing the fundamental facilities that aid in preventing infertility distorts priorities in the organisation of health-care services. The impoverished are forced to sell their possessions in order to gain access to the facilities, or they can take advantage of the opportunity to make money by selling their own reproductive potential. The women who are forced into this practise face the greatest health risks. In our nation, the number of fertility clinics has increased dramatically within the last ten years or so. This has given rise to medical tourism, which ranks surrogacy highly among its draws as foreign couples travel there in search of convenient access to surrogate moms.

First-world amenities and quality are offered at third-world pricing at these Indian institutions, according to commercial suppliers. This is frequently accomplished by minimising the number of required tests and safety precautions for women. Many questions concerning the appropriateness of surrogacy in the current setting from the perspective of public health have been raised in light of the high rate of prevalence and inadequate implementation of the ART Regulatory Guidelines-2005. The majority of concerns and difficulties stem from completely unregulated private ART facilities in India, which prioritise profits over the epidemiological requirements of the majority population. These clinics have different pricing, standards, and methods. The government therefore ignores the need to avoid secondary infertility caused by subpar obstetric care, infections of the reproductive tract, and inadequate nutrition for women, as well as the necessity to provide basic services to address infertility therapy. The private sector is allowed complete latitude to grow ART clinics in order to support surrogacy and medical travel.

VII. SURROGACY: ISSUES AND PERSPECTIVE

Even though paternity may be established with a single, fast DNA test, the legal system finds this to be a complex and challenging matter. What would happen if a non-custodial father discovers after 15 years of being the child's "father" that he is not the child's biological father? Does the child support he has paid receive refunded to him? Or may a surrogate mother pursue the husband and wife customers for financial support of the kid that results from breaching her contract? Judges and legislators must consider these difficult legal issues. Only the birth mother is acknowledged by the Indian system. The Indian legal system does not recognise DNA testing as a means of confirming paternity; rather, the child's birth certificate must include the names

of the birth mother and her husband. International confidence in seeking surrogacy in India has once again surged since the Supreme Court of India ruled in the Manji case (Japanese Baby) in 2008 that commercial surrogacy is legal in India.

The 228th Report on "Need for Legislation to Regulate Assisted Reproductive Technology Clinics as well as Rights and Obligation of Parties to a Surrogacy" has been presented by the Indian Law Commission.³² The following are the primary findings of the Law Commission: Contracts between the involved parties will still control surrogacy agreements, but they shouldn't be used for profit. Financial assistance for the surrogate kid should be covered by a surrogacy agreement in the event that the commissioning couple or individual passes away before the child is delivered. Life insurance coverage for the surrogate mother must be included in a surrogacy agreement. Legislation should acknowledge surrogate children as legal children in and of themselves. The name(s) of the commissioning parent(s) alone should appear on the surrogate child's birth certificate. Both the surrogate mother's and donor's right to privacy should be upheld. Prohibition of sex-selective surrogacy is necessary. Abortion cases should solely be controlled under the Medical Termination of Pregnancy Act of 1971.

Kimbrell (1988) asserts that the majority of women who choose to be surrogates do so out of financial need. Because of their financial circumstances, surrogate moms frequently aren't aware of their legal rights and can't afford to hire attorneys. According to Horsburgh (1993), surrogates who sign contracts promising to bear children for customers are physically exploited. Even worse, the surrogates sometimes only get paid a small portion of the initial sum in the event that the pregnancy is really terminated. The contracts may also hold the mother accountable for risks such as illnesses brought on by pregnancy, fatalities, and difficulties following childbirth.

According to Foster (1987), a lot of surrogate moms experience emotional difficulties following the child's surrender. Nonetheless, a 2003 research by Jadva et al. revealed that surrogate moms don't seem to have psychological issues as a result of the surrogacy agreements. While it's true that some mothers had emotional difficulties when transferring their infant to them or because of other people's responses, these symptoms seemed to go away in the weeks that followed the birth.

VIII. CONCLUSION

In India, surrogacy is solely a contractual agreement between the parties; therefore, care must be taken when drafting the agreement to ensure that it does not violate any laws. Some examples of laws that may be violated include the reasons why the intended parents chose

surrogacy, the surrogate's details, the type of surrogacy, mentioning paternity in the agreement, the establishment of a registry for biological fathers of children in adoption cases, the guidelines governing the use of genetic testing to determine paternity, compensation clauses, unexpected events involving the surrogate mother, custody of the child, and the jurisdiction over disputes arising from the agreement. The Indian government began drafting laws in 2008 and eventually finished drafting a draught bill in 2010 for ART regulations. The measure has not yet been introduced in parliament and is currently waiting. It is necessary to properly analyse and debate the proposed law in light of its legal, social, and medical implications. I come to the conclusion that in order to safeguard and counsel Indian couples considering surrogacy, the government has to give significant consideration to passing legislation regulating the practise. In the absence of a perfect legal framework, couples will inevitably be duped and surrogates will be taken advantage.

IX. REFERENCES

- <http://www.jme.bmj.com.laneproxy.stanford.edu/cgi/content/full/26/5/404>
- Committee on Ethics. ACOG committee opinion number 397, February 2008: Surrogate motherhood. *Obstet Gynecol* 2008
- Göran H. “Surrogatmoderskap: Varför– och varför inte?” (in Swedish). *Läkartidningen*
- Kevin T. The ethics of surrogacy contracts and nebraska’s surrogacy law. Vol. 41. *Creighton Law Review*; 2008. p. 185-206.
- <https://web.duke.edu/kenanethics/CaseStudies/BabyManji.pdf>
- Jacobsson B, Ladfors L, Milsom I. Advanced maternal age and adverse perinatal outcome. *Obstet Gynecol* 2004
- <http://www.blog.indiansurrogacylaw.com/2009/01/few-basics-fromthe-icmr-guidelines>
- http://www.icmr.nic.in/art/art_clinics.htm.
- Law commission of India. Report 228. 2009. Available from <http://surrogacylawsindia.com/admin/userfiles/file/report228>
- Government of India, MOH&FW, ICMR: 2008, ART (Regulatory) Bill, Ch. II, V, VII., Part I. and Schedule I, Part 7 on Forms, 2008. p. 6-11, 20-2, 25-9, 81-135
- <http://www.andrewkimbrell.org/andrewkimbrell/doc/surrogacy>
- Surrogate Motherhood-Ethical or Commercial, Centre for Social Research (CSR) 2, Nelson Mandela Marg, Vasant Kunj– 110070. Available from: <http://www.womenleadership.in/Csr/SurrogacyReport>
- Singh KK. Human genome and human rights: An overview. *J Indian Law Inst* 2008
