

**INTERNATIONAL JOURNAL OF LAW
MANAGEMENT & HUMANITIES**
[ISSN 2581-5369]

Volume 3 | Issue 2

2020

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Legal Rights of a Surrogate in India

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ABSTRACT

The most beautiful thing which the nature has bestowed on women is the privilege creating a new life within herself, giving life to a new human in this world. This privilege is not bestowed on some women by nature because of many reasons such as blockage in the fallopian tube, weak uterus, by birth defect, and many more reasons. The Twenty First Century with its advancement in the medical field, introduced many alternative options for the women who cannot naturally conceive, so that they too are not deprived the joy of motherhood. One of such form of invention was that of 'Surrogacy'. Surrogacy is a well-accepted method of reproduction in which a woman agrees to become pregnant for the gestation purpose and give birth to a child for a contracted party. Through this paper, the authors will discuss the evolution of surrogacy along with its birth in India. The main person who goes through the whole process of surrogacy along with the parents is the woman who agrees to be womb for the child of the couple to grow and nurture and therefore her conditions and role in the said process is a very important aspect to discuss. The paper will discuss in detail the rights and duties of a surrogate and also the legal rights which our law guarantees such surrogate women. The paper will also have a comparative study on the rights given to the surrogate mother in various other countries.

I. INTRODUCTION

In our society infertility has traditionally been visible as a hassle which deserves treatment. Surrogate motherhood provides a few couples with their simplest wish of raising a baby genetically associated to as a minimum one of them. Surrogate motherhood describes an arrangement wherein a girl (the surrogate mother) has the same opinion to emerge as pregnant and bear an infant for another character or persons (the commissioning dad and mom) to whom the custody of the child will be transferred at once after birth. It is most effective in the last 20 years that surrogate motherhood has increasingly come to be a trouble of national and worldwide public debate. Factors including the boom of infertility in modern society, coupled with the declining quantity of children available for adoption, the development of the surrogacy

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settlement and business surrogacy businesses and the introduction of latest technologies such as in vitro fertilization (IVF) which can be combined with surrogate motherhood, have resulted in increasing publicity and public interest inside the formation of such agreements between infertile couples. “Surrogacy is the arrangement in which a lady agrees to hold a pregnancy this is genetically unrelated to her and her husband in an effort to convey it to term and hand over the child to the genetic parents for whom she is performing as a surrogate”. India, surreptitiously, has become a booming center of a fertility market with its “reproductive tourism” enterprise reportedly predicted at Rs. 25,000 crores. Clinically called “Assisted Reproductive Technology” (ART), has been in trend in India since 1978 and these days an envisioned 2,00,000 clinics throughout the country provide Artificial Insemination, IVF and Surrogacy. Surrogate mothers received medical, nutritional and overall health care via surrogacy agreements. In 2005, the authorities approved the 2002 draft of the National Guidelines for the Accreditation, Supervision and Regulation of ART Clinics in India, in 2002. Before industrial surrogacy changed into banned in 2015, India became a famous vacation spot for surrogacy. The economic scale of surrogacy in India is unknown, but take a look at backed by means of the United Nations in July 2012 estimated the enterprise at more than \$four hundred million a year, with over 3,000 fertility clinics throughout India.

II. EVOLUTION OF SURROGACY IN INDIA

To understand surrogacy within the Indian context, one ought to begin with the fact that, even as the Transplantation of Human Organs Act, banned the sale of human organs, organ loaning— an equally hard and volatile venture—is being promoted through paid surrogacy. The incidence of overall infertility in India is 8-10 percent which is mainly caused because of bad lifestyle or genetic problems. Only approximately two per cent of Indian women suffer from “primary” infertility which. It is seen that most of the women who are unable to conceive opt for ART i.e. Alternative Reproduction Techniques, but surrogacy was not very well looked for. Surrogacy is the exercise of gestating a child for any other couple and could involve any of the numerous Assisted Reproductive Technologies (ARTs) like IVF (In Vitro Fertilization), IUI (Intra Uterine Insemination) etc. Surrogacy has gained interest of the people because of the boom in the wide variety of couples opting for surrogacy in addition to of the ladies performing as surrogates. The fertility market place is predicted at Rs. 25,000 crore today. The past two years have seen a rise in surrogacy cases in India. The Gujarat city of Anand, for example, is a hub of surrogate mothers. India has come to be the favourite vacation spot for infertile couples from across the globe due to the decrease cost, much less restrictive laws, lack of law of ART

clinics and availability of surrogate mothers. But surrogacy preparations are drawn up in a random style and may be exploitive, in particular given that surrogates are by and large from socioeconomically weaker sections. With India fast emerging as a favored destination for childless couples throughout the world, industrial surrogacy raises a bunch of moral, in addition to legal issues.

The foundations of Indian surrogacy have its follows in the history and gave confirmations of being extremely old procedure. The technique has become a fruitful practice in India with the introduction of world's 2d and India's first IVF infant Kanupriya nom de plume Durga who was conceived in Kolkata on Oct. 3, 1978. From that point forward the circle of helped regenerative age or called ART in a nutshell has indicated quickest turns of events. The technique of surrogacy started long back however has picked up energy of late. Till date best gestational surrogacy has been advanced that is likewise in its incipient stage. Notwithstanding it, the laws related with surrogacy are furthermore inside the early stage. The managing pressure between both the occasions i.E. The surrogate and the expected mother and father are basically the ART recommendations planned long back. With the ongoing increment of the check of Intended mother and father settling on surrogacy in India, the country has developed as the a decent looked for after surrogacy goal. In India, surrogacy has as a rule stayed a discussed point since it has continually been referenced upon lawful offense, social and moral angles. There have been cases which have brought about each the like and once in a while towards the act of the way while the endeavor did now not achieve achievement. In any case, after numerous endeavors business surrogacy become made jail in India in 2002. India has demonstrated itself to be one of the most notable surrogacy goals wanted globally. In past a couple of numerous years there has been significant blast in conceptive procedures in India that comprises of imaginative entryway insemination systems, in vitro treatment methodologies, undeveloped organism strategies and significantly more prominent that has offered would like to childless couples. At one hand where expected father and mother are a decent arrangement happy to have any such system to be had for them, there are a few networks, anyway who aren't inside the kindness preparing surrogacy in India.

Surrogacy and Law:

In America, in the late 1970's to mid 1980's an attorney named Noel Keane made the absolute first surrogacy office. He proceeded to make a lot more offices that complied with the surrogacy course of action laws. From that point forward, there have been in excess of 30,000 births because of the surrogacy game plan laws. Society clearly feels that surrogacy is a feasible

answer for fruitless ladies and gay men. There will consistently be the individuals who censure yet in the event that they could just glance at it from an alternate point, they might conceivably observe something other than what's expected and even end up with an alternate perspective.

An agreement between a lady and ordinarily infertile couple under which the lady gives her uterus to convey an undeveloped organism all through pregnancy; esp., an understanding between an individual (the purposeful parent) and a lady (the surrogate mother) giving that the surrogate mother will (1) bear a kid for the deliberate parent, and (2) give up all rights to her infant. On the off chance that the surrogate mother is married, her better half should likewise agree to the conditions of the surrogacy contract. The understanding for the most part gives that the lady will surrender to the couple any parental rights she may have upon the introduction of the kid. A surrogacy understanding is an understanding entered between the surrogate mother and the proposed parent/s, making their goals understood with respect to every one of their jobs for playing out the demonstration of surrogacy. The surrogacy understanding ought to contain all parts of their connection between the planned guardians, surrogate mother and the kid. The substance of the understanding incorporate the installment module to the surrogate mother. The agreement period of the surrogacy understanding settles the financial compensation to the surrogate to be paid by the proposed couple for the administration rendered by the surrogate. The understanding outlines the obligation of the surrogate and proposed parent whereupon both of the gatherings to the understanding has settled upon. The surrogate and the expected parent/s are required to consent to the surrogacy arrangement after plainly understanding the substance of the understanding. The gatherings to the surrogacy understanding are: (I) The planned guardians (ii) The surrogate mother Indian Surrogacy Law Center suggests that expected guardians and the surrogate mother as well as the mate of the surrogate mother additionally consents to the arrangement, in order to demonstrate his affirmation to the surrogacy understanding. Additionally, the planned guardians may select an individual who will be named in the understanding, who will take the responsibility of the kid, in case of anything happening to the parents.

III. LEGAL RIGHTS OF A SURROGATE MOTHER AND OF THE INTENDED PARENTS:

After discussing briefly about what surrogacy is, it is important to know what are the rights of a surrogate mother before pregnancy, during pregnancy and after the delivery of the surrogate child. A surrogate mother is someone who is the lead in this whole process it is also important

to understand the role of the intended parents (the commissioning dad & mom). Intended parents also have some rights in this whole process which will be discussed below.

Rights of a Surrogate Mother and Duties of the Intended Parents:

In legal terms, the law consists of certain types of rules regulating human conduct and the administration of justice is also concerned with enforcing the rights and duties created by law. It is first important to understand what 'rights' mean. Rights implies 'morality' and morality is nothing but difference between good and bad behaviour/ doings. 'Right' is derived from a Latin term 'jus' from which are derived words such as just, justify etc. Therefore, in this sense 'right' means that which is just, a just law, a just deed. Rights is something which is only in the context of society and social life and a person accordingly behaves. Each and every person is entitled to exercise his/her own rights so that there is no injustice that is done. Rights are so much broader in the sense that there are innumerable rights but when it comes to surrogacy we will be only dealing with legal rights.

Therefore, when, a surrogate mother has certain rights to be exercised by her against the intended parents, the intended parents also have certain duties to be exercised for the benefit of the surrogate mother. It is a duty of a surrogate mother to carry a child for nine months, in the same way, it is the right of intended parents to have a child. The rights and duties of the parties can be performed by legal means i.e. '**surrogacy agreement**' which is enforceable by law.

On the other hand, a 'duty', which is on the intended parents, is basically a duty which needs to be done (compulsion) but in a positive way. For example, a duty not to reveal the conception through IVF is a negative way of describing a positive duty to keep it secret. With duties we may contrast obligations.

Talking about surrogacy arrangement, legal rights will be discussed in a wider sense.

Legal rights from a larger perspective: - ³

- a) Rights (in the strict sense)
- b) Liberties
- c) Powers
- d) Immunities

Each of these rights are correlated to the following: - ⁴

³ Laksheyender Kumar, "Legal Rights", <http://www.legalservicesindia.com/article/520/Legal-Rights.html>

⁴ Laksheyender Kumar, "Legal Rights", <http://www.legalservicesindia.com/article/520/Legal-Rights.html>

- a) Duties
- b) No rights
- c) Liabilities
- d) Disabilities

Rights of the Surrogate Mother:⁵

The following are the rights of a surrogate mother: -

1. It is important to have consent of the surrogate mother's husband for surrogacy.
2. The surrogate mother has a right to choose a professional counsellor from the early stages of discussing surrogacy throughout the pregnancy period and beyond.
3. Surrogate mothers have a right to privacy.
4. Human rights of a surrogate mother.
5. Surrogate mother has a right to have legal advice before entering the surrogacy arrangement.
6. Right to resolve the disputes arising out of Surrogacy Arrangement at Pre-Litigation Stage.
7. Right to resolve the disputes arising out of Surrogacy Arrangement by Arbitration and Conciliation.
8. Right to companionship/visiting rights of surrogate mother to the child.
9. Surrogate mother has a right to have correct information about the intended parents before entering into the surrogacy arrangement.
10. Surrogate mother to retain part payment given to her on failure to conceive in spite of three IVF procedures.

Corresponding Duties of the Intended Parents:-⁶

There are some duties which are to be performed by the intended parents:-

1. The intended parents are obliged to bear all the expenses relating to surrogate mother and the surrogacy such as medical expenses etc.

⁵ N Behl, "Chapter: III; Implication of Rights in the Process of Surrogacy", shodhganga.inflibnet.ac.in, (2015)

⁶ N Behl, "Chapter: III; Implication of Rights in the Process of Surrogacy", shodhganga.inflibnet.ac.in, (2015)

2. Before undertaking the IVF procedure, the intended parents are obliged to undergo medical examination under the guidance of a medical expert in order to determine their health condition (HIV or AIDS etc.)
3. Duty of the parties not to interfere in each other's life after the delivery of the baby.
4. Duty of intended parents to get the life of the surrogate mother insured for a sum mentioned in the agreement.
5. It is the duty of the intended parents to bear the cost of miscarriage or abortion.
6. Duty of the intended parents to pay fair compensation to the surrogate mother and all the medical experts involved etc.
7. Duty of intended parents to confirm in writing their parentage after the pregnancy by signing a declaration or affidavit.
8. Duty of the parties not to disclose child's conception and birth.
9. Duty of the parties not to violate the surrogacy agreement and perform it systematically.
10. Duty of intended parents to get the life of the surrogate mother insured for a sum mentioned in the agreement.

Rights of the Intended Parents:-⁷

Below given are some of the rights of the intended parents:-

1. Right of the intended parents to have a child.
2. Right to hire a sperm.
3. Right to hire a womb.
4. Right to hire an egg.
5. Right of unmarried male or unmarried female to enter into a surrogacy arrangement.
6. Right of Gay person or Lesbians to enjoy the facility of surrogacy.
7. Right to have legal advise for entering into a surrogacy agreement.
8. Right of Commissioning Parents to have a Health Surrogate Mother capable of carrying and bearing healthy and normal children.
9. Right of Intended Parents to conceive a child by IVF into the Surrogate Mother.

⁷ N Behl, "Chapter: III; Implication of Rights in the Process of Surrogacy", shodhganga.inflibnet.ac.in, (2015)

10. Right of the Intended parents to have the child legally, morally and contractually.

Corresponding Duties of Surrogate Mother:-⁸

Following are the corresponding duties of a surrogate mother:-

1. Surrogate mother's obligation not to be legally parent of the child.
2. Duty of the surrogate mother not to interfere with the child's life after the birth.
3. Duty of the surrogate mother to surrender all her rights upon the surrogate child.
4. Obligation of the surrogate mother to carry the child for a period of 9 months and give birth to a child for Intended Parents.
5. Obligation of surrogate mother to relinquish parental rights, custody and/or control over the child.
6. Surrogate mother is obliged to go for a minimum of 3 IVF procedures for the child.
7. Obligation of the surrogate mother to comply with all the instructions and procedure given by the medical experts.
8. Obligation of surrogate mother to relinquish parental rights, custody and/or control over the child.
9. Duty of surrogate mother to take vitamins and to maintain a healthy diet as recommended by her obstetricians.
10. Duty of surrogate mother to execute and deliver a written consent form to administer any testing related to surrogacy.

These were few legal rights of a surrogate mother as well as of Intended parents and also their duties to perform/ oblige with the surrogacy procedure.

IV. AMENDMENTS RELATING TO SURROGACY

Due to the immense growth in surrogacy law in India, India now has a lot of commercial firms guiding people about surrogacy and also assisting foreign tourists to help them find a surrogate mother. Due to the huge demand for surrogate mother, India legalised commercial surrogacy in 2002. "Commercial surrogacy"⁹ is commercialization of surrogacy or procedure which includes buying and selling of human embryo or trading in the sale or purchase of human embryo embryo or gametes or selling or buying or trading the services of surrogate motherhood

⁸ N Behl, "Chapter: III; Implication of Rights in the Process of Surrogacy", shodhganga.inflibnet.ac.in, (2015)

⁹ Dev, "Surrogacy in India", <http://www.legalserviceindia.com/legal/article-782-surrogacy-in-india.html>

by way of giving payment, reward, benefit, fees, remuneration or monetary incentive in cash or kind, to the surrogate mother or her dependents or her representative, except the medical expenses incurred on the surrogate mother and the insurance coverage for the surrogate mother.

Later on, in 2005, the “Indian Council of Medical Research (ICMR)”, introduced certain guidelines for surrogacy. It issued guidelines to regulate surrogacy arrangements. The guidelines stated that the surrogate mother is entitled for monetary compensation by the Intended Parents and the value would be decided by the Intended Parents. The guidelines also stated that the surrogate mother cannot donate her egg and she should relinquish all the rights related to the surrogate child.¹⁰

Meanwhile, Commercial Surrogacy was banned in 2016 and “Surrogacy (Regulation) Bill” was introduced in the same year. It was introduced in Lok Sabha on 21st November, 2016 and on 12th January, 2017 it was referred to standing committee. Thereafter on 10th August 2017 the committee gave its report on the same to Lok Sabha and on the basis of that report Lok Sabha passed the bill on 19th December 2018. This bill basically banned commercial surrogacy and introduced altruistic surrogacy. “Altruistic Surrogacy” means no charges, fees or expenses are given to the surrogate mother except medical expenses of the surrogate mother, insurance coverage of the surrogate mother is provided. There were certain criteria which were to be met if the parties wanted to enter into a surrogacy arrangement: - ¹¹

1. Only Indian Couples who have been married for five years or more than that were eligible for surrogacy arrangement.
2. This bill allows ethical altruistic surrogacy to the Intending Infertile Indian married couples between the age group of 25-50 years and 26-55 years for female and male respectively.
3. A woman should be allowed to act as a surrogate mother only once and should be a close relative of the intending couple and she should be a married woman having a child of her own.
4. The Intended couple should be childless.
5. Should be Indian Citizen.

Before the introduction of Surrogacy (Regulation) Bill, 2016, there was one more Bill which

¹⁰ Indian Council for Medical Research (ICMR) Report, <https://www.icmr.nic.in/>

¹¹ Nayanika Sengupta, “Government introduces bill to ban Commercial Surrogacy”, Press Trust of India, (July 15, 2019, 3:44pm), <https://www.indiatoday.in/>

was introduced in the year 2013. This Bill was named as “Assisted Reproductive Technology Bill¹², 2013”. Commercial Surrogacy which involves exchange of money for anything and everything other than paying for the medical expenses of mother and child. This bill was basically to prohibit commercial surrogacy. Couples having already one child, foreigners or Overseas Citizens of India (OCI), holders as well as live-in-partners, single people, homosexuals and widows were not entitled to surrogacy under this Bill.

V. SURROGACY RISK IN INDIA

India is a country where surrogacy is less expensive than any other countries. The desperate poor woman who are ready to rent their womb for someone to have a child are in need of money and they do not understand the risks behind it. Though surrogacy is practiced in every part of the country, the Intended Parents usually prefer their surrogate mothers from India because India is less expensive. One of such cases is where a 30-year-old lady named Premila Vaghela who was acting as a surrogate mother for an American couple. She was eight months pregnant. She was waiting for a routine examination at a hospital in Ahmedabad. Suddenly, she had a convulsion and fell on the floor because of distress and she had to immediately undergo caesarean. The baby was born a month premature and the surrogate mother died¹³. Usually surrogate mothers sign contracts blindly without thinking the consequences because usually they are in need of money and the Intended Parents are not concerned about the surrogate mother once the baby is born. Already many malpractices are conducted in India in the name of Surrogacy and usually convenience of the Intended Parents is seen.

Dr. Malene Tanderup from Aarhus University in Denmark, interviewed some surrogate mothers where she figured that none of the surrogate mothers knew how many embryos have been transferred in them. They were clueless about such things. This clearly means that the Intended Parents and the doctor do not inform the Surrogate Mothers about such things and they take advantage of these things. When asked about these things to doctor they say, “Surrogate Mothers are usually the ones who are illiterate and they don’t understand these things.” Two-thirds of clinics do this process without the consent of the surrogate mother and sometimes without the consent of the Intended Parents. She came across one case where seven embryos were transplanted into a surrogate mother. One of the cases which she has discussed

¹² Prabha Raghavan, “Surrogacy Bill useless without ART Bill: Committee to Rajya Sabha”, ET Bureau, (August 11, 2017, 12:25AM), <https://economictimes.indiatimes.com/>

¹³ Kishwar Desai, “India’s surrogate mothers are risking their lives. They urgently need protection.”, Opinion Women, (Tuesday, 5th June, 2012, 20:30 PM), <https://www.theguardian.com/commentisfree/2012/jun/05/india-surrogates-impoverished-die>

was where a woman carrying twins wanted a reduction, the agent and doctor refused. Instead, they offered an additional 50,000 rupees (\$809) plus a C-section, which she accepted. As one doctor explained, if the commissioning parents get twins, “it is two in one shot, they don’t have to spend that money again.” These cases are basically violative of human rights and people usually take advantage of such situations.¹⁴

VI. PROBABLE SOLUTIONS TO SURROGACY PROBLEMS

Surrogacy is something which is recognized as a helpful practice for the Intended Parents so that they can have a child. Surrogate mothers with the intention to earn money and help someone put their life’s in risk without understanding the consequences. This usually happens when a desperate poor woman is in sheer need of money and blindly follows whatever is told to her. This is where the doctors and the Intended Parents take advantage of the situation and puts her life in risk. Below given are some of the remedies where how a surrogate mother should be safe from not being violated: -

1. There should be a law where only **educated, sensible woman** is allowed to be a surrogate mother and if an illiterate woman wants to be a surrogate mother then she has to compulsorily undergo a surrogacy session where she will be educated about what surrogacy is, procedure, treatment, risks etc. This should be given the first preference so that she should not fall in the wrong hands of the people.
2. Secondly, if a surrogate mother’s **right is infringed** then she should be allowed to not surrender the baby to the Intended parents after the delivery of the baby.
3. Surrogacy is taken up by a woman who knows the couple and voluntarily agrees to help the couple have a family of their own, so much more **stringent laws to protect her privacy** are suggested to be formulated so that the surrogate’s life after the delivery of the child is not disturbed.
4. **Awareness programs** related to surrogacy should be conducted so that the mass public is very well aware of such method of conceiving and choose wisely when it comes to decision making.

¹⁴ Frederik Joelving, “Surrogate Mothers in India unaware of risks”, Health News, (March 2nd, 2015, 7:55PM), <https://www.reuters.com/article/us-surrogate-mothers-india/surrogate-mothers-in-india-unaware-of-risks-idUSKBN0LY1J720150302>

VII. CONCLUSION

Through this paper it can be seen that surrogacy in India is found to be voluntary and something which is done by a woman out of her own will as commercial surrogacy is not allowed in India, therefore it is very essential that such a noble deed done by the woman is well appreciated by allowing her with the basics human rights that she is entitled to. The surrogate's life for the duration of the pregnancy is very crucial and of a very delicate and sensitive nature and therefore taking proper care and ensuring safety of the woman is very much necessary. The various legal rights guaranteed by the law to such surrogate mothers along with the duties of the intended parents is researched upon in this paper and made a link of it to the human rights aspect. Surrogacy is a very modern and upcoming method of having a child and therefore every person should be aware of the intricacies involved in it along with the legal obligations to be fulfilled.
