

## REVIEW ARTICLE

### SURROGACY POLICY IN INDIA AND NEED OF ACTS TO REGULATE COMMERCIAL SURROGACY

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**ABSTRACT:** Surrogacy is an arrangement by which a woman, called as surrogate, carries and delivers the offspring of the commissioning parents and it has been recognized in India under the ART treatment. For commercial surrogacy, there is no any uniform law in India or there is no law that binds or regulates this industry. In this paper, we have focused our attention on the present existing laws or guidelines regulating surrogacy with emphasis on need for stringent laws to regulate commercial surrogacy.

**KEYWORDS:** Surrogacy, Artificial Reproductive Technologies (ART), Indian Council of Medical Research (ICMR).

**INTRODUCTION:** Surrogacy is an arrangement by which a woman, called as surrogate, carries and delivers the offspring of the commissioning parents and it has been recognized in India under the ART treatment<sup>1</sup>. The surrogate could be the child's genetic mother (Traditional Surrogacy) or a woman unrelated to the child, in which case it is called 'gestational surrogacy'.<sup>2</sup>

In India, surrogacy industry is not a reformed business and largely unmapped but in 2008, the ICMR had estimated it as a 6 billion dollar industry. Indian surrogates have been increasingly popular with foreign couples of the industrialized nations because of the relatively low cost and easy availability of surrogate mother. ART clinics are at the same time becoming more competitive, not just in the pricing, but in the hiring and retention of Indian females as surrogates. Clinics charge patients between ₹100, 000 and ₹400, 000 for the complete package, including fertilization, the surrogate's fee, and delivery of the baby at the hospital. Thus, in comparison to others European countries, including the costs of flight tickets, medical procedures and hotels, it comes to roughly a third of the price for going through the same procedures in India; so India is rapidly growing as a main destination for surrogacy.<sup>3</sup>

Commercial surrogacy has been in practice in India since 2002. Recently there has been a sharp increase in the frequency of commercial surrogacy arrangement in India. People from western countries are coming to India to get a baby of their own genes. Owing to the controversies that has aroused skepticism for commercial surrogacy in the recent past; some loopholes in the laws have come to light. First time, the case of Manji (Japanese baby) in India in June 2008 illustrated the complexity and challenges related with surrogacy.<sup>4</sup>

The biggest irony in this story is that the couple has parted away and biological father who wishes to take custody of female surrogate child is unable to do so since Indian law (Guardianship & wards Act -1980) does not permit a single male to adopt a girl child. We in India do not have any solid legislation to solve such complicated issues.<sup>5</sup>

For commercial surrogacy, there is no any uniform law in India or there is no law that binds or regulates this industry except for a set of guidelines for Accreditation, Supervision and Regulation

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of ART clinics formulated by the Indian Council of Medical Research and National Academy of Medical Sciences, which gives a basic platform and the code for conducting surrogacy in India. In this paper, we have focused our attention on the present existing laws or guidelines regulating surrogacy with emphasis on need for stringent laws to regulate commercial surrogacy.

**Present Legal Scenario in India:** The Government of India has decided to come out with a law to regulate the business of IVF and Surrogacy in the country. The proposed legislation was drafted by a team of experts from the field of medicine and law but has not been finalized and implemented till now. At present, ICMR guidelines, ART bill and home ministry's order are regulating surrogacy policy in India.

**ICMR Guidelines on Ethical and Legal Aspects of ART & Surrogacy (2007)**<sup>6,7</sup>: The Indian Council of Medical Research in collaboration with National Academy of Medical Sciences had constituted a Committee of Experts from different disciplines like gynecologists, biologists, representatives from legal, social or professional bodies to formulate the "National Guidelines for accreditation, supervision and regulation of ART clinics in India.

The Code of Practice described in the draft guidelines deals with all the activities which cover the doctors, scientists and patients. Salient features of the draft are as follows:

- Surrogacy arrangement will continue to be governed by a contract amongst parties, which will contain all the terms requiring consent of the surrogate mother to bear the child, agreement of her husband and other family members for the same, medical procedures of artificial insemination, reimbursement of all reasonable expenses for carrying child to full term, willingness to hand over the child born to the commissioning parent(s) etc.
- A surrogacy arrangement should provide for financial support for the surrogate child in the event of death of the commissioning couple or individual before delivery of the child, or divorce between the intended parents and subsequent willingness of none to take delivery of the child.
- A surrogacy contract should necessarily take care of life insurance cover for surrogate mother.
- One of the intended parents should be a donor as well, because the bond of love and affection with the child primarily emanates from biological relationship. Also, the chances of various kinds of child-abuse, which have been noticed in cases of adoptions, will be reduced.
- In case the intended parent is single, he or she should be a donor to be able to have a surrogate child. Otherwise, adoption is the way to have a child, which is resorted to if biological (natural) parents and adoptive parents are different.
- Legislation itself should recognize a surrogate child to be the legitimate child of the commissioning parent(s) without any need for adoption or even declaration of guardianship.
- The birth certificate of the surrogate child should contain the name(s) of the commissioning parent(s) only.
- Right to privacy of donor as well as surrogate mother should be protected.
- Sex-selective surrogacy should be prohibited.
- Cases of abortions should be governed by the Medical Termination of Pregnancy Act 1971 only.

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**Assisted Reproductive Technologies (Regulation) Bill, 2010<sup>8</sup>:** Considering the growing number of Surrogacy cases in India and the challenges that the Surrogacy would face in the future, the Government of India has decided to come up with a law which would govern the surrogacy and ART in India in future. A committee of experts has been set up and the said committee has now submitted a draft of the proposed bill to the Government of India. The said bill is still pending with the government and has not yet been presented in the Parliament. The proposed draft has taken into consideration the various aspects of surrogacy and has built in safe guards for both commissioning parents and to the surrogate mother.

Some of the features of this proposed bill are as under:

- Constitution of an authority at National as well as State level to register and regulate the IVF clinics and ART centers.
- Creation of a forum to file complaints for grievances against clinics and ART centers.
- Imposing duties and responsibilities on the clinics and ART centers.
- Regulations for sourcing, storage, handling, record keeping of Gametes, Embryos and other human reproductive materials.
- Placing rights and duties on Surrogate and commissioning parents.
- Imposing stringent penalties for breach of the duties and regulations under this Act.
- The above features are still dynamic in nature, but will take a long way in making the entire surrogacy procedure transparent and fair. The chances of any exploitation of the Intended Parents and Surrogate cannot be eliminated with mere introduction of the proposed bill; better implementation across the country must be needed.

**Union Home Ministry Guidelines for Regulating the Practice of Commercial Surrogacy (2012)<sup>9</sup>:**

Now, foreign nationals intending to visit India for commissioning surrogacy will not be allowed to come on a tourist visa with the Home Ministry ordering strict adherence of surrogacy laws. First time, for the practice of surrogacy in India, the Union home ministry of India has issued stringent guidelines for visas being issued to foreigners seeking child or children from surrogacy procedure in India. These guidelines for foreigners planning surrogacy in India came up in July 2012 following allegations that commissioning parents from abroad were cheating the surrogate mothers. There are also few reported cases that the children were ill-treated in foreign land and that they are not treated as citizens there.

The Union ministry of home affairs had noticed that some foreign nationals visited India for surrogacy on tourist visas, which was not appropriate, so the ministry had decided and sent a circular to foreign embassies in July 2012, that such foreigners would be eligible to enter the India only on "medical" visas, if they fulfilled certain criteria formulated by home ministry. The circular was notified by the Foreign Regional Registration Office in Mumbai on December 17, 2012 and was subsequently sent to fertility clinics in India.

Under this order, a letter from the embassy of the foreign country in India or the Foreign Ministry of the country should be enclosed along with the visa application stating clearly that the country recognizes surrogacy and the child or children to be born to the commissioning couple through the Indian surrogate mother will be permitted entry into their country as a biological child or children of the couple commissioning surrogacy. This is particularly significant, as many babies born out of cross-border surrogacy in recent years have been trapped in legal tangles between the home

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country and India. A Norwegian woman, who had twins by an Indian surrogate in 2009, was stranded for over two years as Norway refused to accept her as the biological mother of her children. Many countries, like France, Germany, Italy and Norway do not recognize commercial surrogacy.

The couple will have to furnish an undertaking that they would take care of the child or children born through surrogacy, the treatment should be done only at one of the registered Assisted Reproductive Treatment (ART) clinics recognized by Indian Council of Medical Research. Besides, the couple should produce a duly notarized agreement between the applicant couple and the prospective Indian surrogate mother. "If any of the above conditions are not fulfilled, the visa application shall be rejected," the Home Ministry said.

The Ministry also told Indian missions abroad that before the grant of visa, the foreign couple needs to be told that before leaving India for their return journey, "exit" permission from the Foreigner Regional Registration Offices or Foreigner Registration Offices (FRRO /FRO) would be required. Before granting "exit", the FRRO/FRO will see whether the foreign couple is carrying a certificate from the ART clinic concerned regarding the fact that the child or children have been duly taken custody of by the foreigner and that the liabilities towards the Indian surrogate mother have been fully discharged as per the agreement and guidelines.

A copy of the birth certificate(s) of the surrogate child or children will be retained by the FRRO or FRO along with photocopies of the passport and visa of the foreign parents. It may be noted that for drawing up and executing the agreement, the foreign couple can be permitted to visit India on a reconnaissance trip on tourist visa, but no samples may be given to any clinic during such preliminary visit," the order said.

According to this new rule, gay couples and single parents living abroad will not be given an Indian medical visa if they are visiting to commission a surrogacy. Also, commissioning parents have to be heterosexual couples married for at least two years before commissioning a surrogacy, and will have to apply for a medical visa only. Apart from this, commissioning parents will now have to get documents from clinics certifying that they are heterosexual couples who cannot have children under normal conditions and need medical treatment.

**Need of Acts to Regulate Commercial Surrogacy:** In its response to the Drafted Bill, SAMA Resource Group for Women and Health, Delhi has welcomed the initiative of the Union Ministry of Health and Family Welfare for making efforts to regulate the commercial surrogacy industry in the country and has found that it is inadequate in protecting and safeguarding the rights and health of women going for IVF techniques.<sup>10</sup>

The proposed bill has not defined the standard protocol for medical practice in respect to surrogacy and completely ignores the regulation of the third party agents like surrogacy agents, tourism operators and surrogacy home operators, who play pivotal role in arranging surrogates. Thus, the Drafted Bill should make clear guidelines for them to regulate and monitor consultancies, surrogacy agents, surrogacy home operators, private agencies and tourism firms involved in offering and promoting ART and surrogacy services in India.

The Bill should permit genetic surrogacy; a simpler and less invasive form of surrogacy and not restrict to the more complicated, expensive and invasive gestational surrogacy. The upper age limit for undergoing assisted reproductive technology procedure should be clearly defined under the Bill.

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The Bill should define the number of cycles a woman can undergo as a surrogate as the number of live births is not equivalent to the number of ART cycles and given the low success rates of ARTs, it often implies multiple cycles for successful outcomes, thus posing serious risks to the surrogate's health. The Drafted Bill should clearly list the various health risks and adverse consequences of these technologies to surrogate mother and child, so there is no listing of the risks and adverse outcomes of these technologies for the child and the mother.

This draft has not mentioned about consent(s) to be given before abortion, if abortion to be demanded by surrogate mother or intended parents. Moreover, the intended parents may demand or force her to follow a particular diet, religious rituals or lifestyle changes during pregnancy and keeping her under extreme medical observation till delivery and also keeping her away from her family and previous kids, these issues are violation of right and responsibilities of her to family members and have not been defined under this bill.

Further, in light of the Artificial Reproductive Technology (ART) practiced today, it reflects that there is no standardization of the drugs used, no proper documentation of the procedure, insufficient information for patients about the side-effects of the drugs used, and no limit to the number of times a woman will go to these procedures. They do not disclose the fact that a successful cycle need not lead to a baby being born. Further, ART clinic gives ambiguous and incomplete information on the procedures and their possible side-effects to surrogate mother and her family.

The pattern of payment to surrogates must be clearly stated in the Bill and should be in the best interests of the surrogate. The present Draft rules on payment are exceedingly imbalanced and unfavorable towards the surrogate and also, have not mentioned about mode of payment to her but will provide a rich business to corporate hospitals and ART clinics.

While some of the definitions have been added in the present draft, changes have been made in definition related to eligibility of accessing ARTs. The present draft defines "Couple" as a relationship between a male person and female person who live together in a shared household through a relationship in the nature of marriage. Therefore, the Bill has confined itself to provision of ARTs within a hetero-normative framework. It is also clear that gay couple(s) cannot access ARTs in India, once the Bill is implemented. Some association said that current clause in the Draft Bill is discriminatory, baseless, and a violation of rights to equality, freedom, and reproduction right to gay couple or single parent.

The status of the child in case of death of the individual or couple commissioning surrogacy needs to be elaborated under the proposed Bill and foreign country to which commissioning parent belongs, must make legal party to take responsibility of a born child. All these conditions should be applicable not only in cases of trans-national surrogacy but also in cases of surrogacy for Indian individual or couple.

**Conclusive Remarks:** In India, for commercial surrogacy business there is still no regulating system to enforce the law until there is a legal dispute. Additionally, the range of guidelines formulated by the government agencies have complicated commercial surrogacy arrangements, and as a result there are frequent custody battle between the surrogate and the intended parent(s), causing heart break for both parties as well as the child. Commercial surrogacy should be heavily regulated in order to protect the rights of the commissioning parent(s), the surrogate and the child born. There must be different law which should govern international surrogacy arrangement because new problems may

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arise related to citizenship and race of child and commercial surrogacy in India should be permitted in the benefit of the society at global level but only in consultation with the medical and medicolegal experts, religious teachers and the legal experts of different countries.

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