

# Surrogacy in India: Ethical and Legal Aspect

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## Abstract

India has emerged as a surrogacy capital and destination for couples from different countries, in the past two decades. Fertility clinics operating across India, offering artificial insemination, IVF and surrogacy services to Indian citizens and foreign couples have increased dramatically. With the boom in surrogacy, there are increased instances of complex legal and ethical issues. Incidents of unethical practices such as exploitation of surrogate mothers, selective breeding, abandoning of children have increased. This paper highlights the various case scenarios in India and the timeline of various regulations brought by the government of India to regulate surrogacy services. Various guidelines and regulation bills across the period have been discussed in simple tables with the up to date surrogacy regulation bill of 2019. Issues not addressed in the recent Indian regulation have also been discussed.

**Keywords:** surrogacy; artificial insemination; IVF; commercial surrogacy; surrogate mothers

## Introduction

### *Background and Significance*

Many countries, around the world, prohibit commercial surrogacy contracts and it's extremely difficult to hire a surrogate mother. Comparatively, the procedural charges/rates for IVF and surrogacy procedure cost less than one third in India, than globally, and the easy availability of surrogacy services have triggered the global inflow of patients to India. The package for surrogacy, costs from \$10,000 to \$35,000 in India, whereas in United States it's around \$59,000 to \$80,000. The "Reproductive Tourism" industry is estimated to generate more than \$400 million a year from the 3,000 fertility clinics operating across India, offering artificial insemination, IVF and surrogacy services in

2012.<sup>1</sup> The number of medical tourists increased from 150,000 in 2005 to 450,000 in 2008 and the number of births through surrogacy doubled with estimates ranging from 200 to 350 in the same year.<sup>2</sup>

Surrogate services are advertised, rampantly in India, mostly by the agents of the infertility clinic. Surrogates are selected by agents targeting uneducated, poor females. Because of thriving sarcastic terms such as womb for rent, womb outsourcing, baby farms, and baby factory have emerged. There are incidents of unethical practice of exploiting surrogate mothers, abandonment of children, and import of human embryos and gametes on the rise in India. Global criticism and reporting, on commercial surrogacy, through different media, continues to cast a grey shadow. There are increased instances of complex legal and ethical issues arising out of it. This paper will highlight the various regulations brought by the government and the medico-legal issues regarding surrogacy

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## Discussion

### *Life of a surrogate in India*

According to WHO about 186 million women globally, are unable to conceive.<sup>3</sup> Multifactorial medical reasons of biological inability to conceive a child exists

among couples, pushing them to restore to surrogacy services.<sup>4</sup> Certain unidentified endometrial factor leading to repeated IVF failures also force couples to go for surrogacy.<sup>5</sup> Surrogacy helps in 70% of the infertile couples to become parents.<sup>6</sup>

The report titled “Surrogate Motherhood- Ethical or Commercial” has studied a total of 100 surrogate mothers and 50 commissioning parents with their families from Delhi and Mumbai.[2] Most of them are uneducated, and their understanding of the clauses and information while signing the contract is disputed. The role of the government authorities while the agreement is framed and signed is nil, and the records of the signed agreement are also kept dark.

The surrogate mother receives of 3 - 4 lakh, from the contract and gets around Rs 25,000 to Rs 40,000 extra if she delivers a twin baby or undergoes caesarean section. However, the amount received in the event of termination of pregnancy, complications during or continuation of it after gestation is unclear. According to Dar et al., Duffy et al., and Parkinson’s et al., 3.2 % and 10% of surrogate mothers had hypertensive disorders in pregnancy and 1.1 % and 7.9% of surrogate mothers had placenta praevia/placental abruption.<sup>7,8,9</sup>

Mrs Premila Vaghela, a 30-year-old surrogate, died during her 8<sup>th</sup> month of gestation due to a seizure attack in the hospital. Following a seizure attack, she was shifted for an emergency caesarean section and the 8-month fetus was delivered and monitored in the neonatal intensive care unit. The surrogate mother died, and no complaints were filed because her family got the amount, from the commissioned American family.<sup>10</sup>

### ***Cross-border surrogacy***

Surrogacy is not officially permitted in Austria, Bulgaria, Denmark, Finland, France, Germany, Italy, Spain and Sweden. Altruistic surrogacy is allowed in Belgium, Greece, Netherlands, Australia, Canada, New Zealand and the UK.<sup>11,12</sup> Commercial surrogacy is legal in Georgia, Israel, Ukraine, Russia, India and California, USA, while in many states of the USA only altruistic surrogacy is allowed.

The Foreign nationals, seeking surrogacy services, bring about many legal and ethical challenges regarding

the status of the parent and child, immigration and citizenship.<sup>13,14</sup> By regularizing surrogacy, legal and immigration troubles in cross-border surrogacy arrangements can be avoided.<sup>15</sup> Since India became the desired destination for surrogacy with no clarity and anticipations of legal issues. The surrogacy clinics, government officials, the intending overseas couples and children born out of surrogacy had to face lots of problems regarding citizenship and immigration.<sup>16</sup> At this point two important cases which involved cross border surrogacy are too be discussed:

### **Baby Manji Yamada case<sup>17</sup>**

A Japanese couple Dr Yuki Yamada and Dr Ikufumi Yamada visited India in 2007 for availing surrogacy services. After visiting a surrogacy clinic and choosing a surrogate mother in Anand, District of Gujarat a surrogacy agreement was made between the biological parents/intending couples and the surrogate mother. However, the couple got divorced and the biological father Dr Ifukumi Yamada left to Japan due to expiry of his visa. The child was born on 25<sup>th</sup> July 2008 and was nursed and cared in the clinic. The Municipality at Anand issued a birth certificate indicating the name of the genetic father. The grandmother of the baby, Ms Emiko Yamada filed a Certificate of Identification from the Regional Passport Authority to take back Baby to Japan. However; her petition was rejected because in India child to be legally adopted before leaving the country, but bars single men from adopting. Manji’s father was denied travel documents for the baby and subsequently, a petition was filed in the Supreme Court. After that India issued a Certificate of Identification instead of a passport by the Regional Passport Authority, Rajasthan following Supreme Court directions just to facilitate transit out of the Indian Territory.

### **Jan Balaz case<sup>17</sup>**

Mr Jan Balaz and his wife Mrs Susanne Anna Lohle, German nationals, had a twin babies ‘Balaz Nikolas’ and ‘Balaz Leonard’ by fertilizing a donated ova by the sperm of Jan Balaz through a surrogate mother M/s. Marthaben Immanuel Khristi - a citizen of India. However the birth certificate was issued for the twin babies with the name of Jan Balaz mentioned as the father and the mother’s name was mentioned as Marthaben Immanuel Khristi, the name of a surrogate mother, instead of the Susanne

Anna Lohle wife of Jan Balaz. The couples applied for a passport for taking back the twin babies and passport was issued in the name of above-mentioned babies. However, the passports were asked to be surrendered through a notice served to Mr Jan Balaz. Following which, a case was filled in the High Court of Gujarat which involved the question of the nationality of twins born to an Indian surrogate mother. After exhaustive analysis and precedence with the Baby Manji case, the court directed passport Authorities to issue a certificate of identity.

These two cases highlighted the need for regulation and oversight of surrogacy; which was widely covered in Indian and global media about legal and diplomatic crisis paving way to various legislations that came into effect.

#### ***Various legislations passed in India in context to Surrogacy***

##### **ICMR guidelines, 2006**<sup>17</sup>

The Indian Council of Medical Research (ICMR) published guidelines for accreditation, supervision and regulation of ART clinics in India. The guideline has rolled out points to uphold the rights of a surrogate mother. However, did not restrict commercial surrogacy and Foreign Nationals availing these services. Penalties and offences also not mentioned

##### **The Assisted Reproductive Technology (Regulation) Bill, 2008**<sup>17</sup>

Elaborates the physical infrastructure and manpower requirement for an infertility clinic ART procedures in patient selection, surrogate mother and donor. *The confidentiality* of records should be maintained. Rights and duties of donors, surrogate mother and child were outlined.

##### **Draft Assisted Reproductive Technology (Regulation) Bill, 2014**<sup>18</sup>

Expatriated about the setting of national and state boards to regulate and monitor the ART clinic; along with banning foreign nationals from obtaining surrogacy services. Highlighting the issues related to complications, disabilities, and death of the surrogate and abandoning of children.

##### **The Surrogacy (Regulation) Bill, 2016**<sup>19</sup>

###### Status of the bill

- Introduced in Lok Sabha: Nov 21, 2016
- Referred to Standing Committee: Jan 12, 2017
- Report of the standing committee: Aug 10, 2017
- The Union Cabinet approval for moving official amendments in the “Surrogacy (Regulation) Bill, 2016”.
- Bill lapsed

###### Key Points

- To allow ethical altruistic surrogacy to the intending infertile Indian married couple of 23-50 years and 26-55 years for female and male respectively;
- The intending couples should be legally married for at least five years and should be Indian citizens.
- The intending couples shall not abandon the child, and the child born out of surrogacy procedure shall have the same rights and privileges as of the biological child;
- A surrogate mother should be a close relative of the intending couple and an married woman having a child of her own and age of 25-35 years.
- The surrogate mother shall be allowed to act as a surrogate mother only once.
- To constitute the Surrogacy Board at the National and state level to perform functions conferred on it under the Act.
- That no person or organization of any kind shall undertake commercial surrogacy or issue advertisements, abandon the child born through surrogacy, exploit the surrogate mother, sell human embryo or import human embryo and contravention of the said provisions shall be an offence punishable with imprisonment for a term which shall not be less than ten years and with fine, which may extend to ten lakh rupees.

The comparison between the various guidelines and bills concerning the surrogate mother, intending couple are highlighted [Tables 1 and 3]

**TABLE 1: CRITERIA AND RIGHTS OF A SURROGATE MOTHER**

<b>SURROGATE MOTHER</b>	<b>THE ASSISTED REPRODUCTIVE TECHNOLOGY (REGULATION) BILL, 2008</b>	<b>DRAFT ASSISTED REPRODUCTIVE TECHNOLOGY (REGULATION) BILL, 2014</b>	<b>THE SURROGACY (REGULATION) BILL, 2016</b>
Age	21- 45 years	25-35 years	25-35 years
Marital Status	Not specified	Should be married	Should be married and a close relative
Times to be a Surrogate	Not more than 3 successful live births	Only once	Only once
Number of times to transfer the embryo	3	3	2
Mandatory testing for Sexually transmitted diseases and blood transfusion	Yes	Yes	Yes
Certificate of medical and psychological fitness	Not specified	Not specified	Yes
<b>Right to abort</b>	<b>Not specified</b>	<b>Yes, as per MTP Act</b>	<b>Yes, as per MTP Act</b>
Monetary benefits by the intending couples	Yes	Yes	No, except for treatment
Insurance	Yes ( Not specified)	Yes ( Not specified)	Yes, (for 16 months) including long term complications and disability
In the event of death	Not specified	Not specified	If due to pregnancy, amount to be given

**TABLE 2: CRITERIA AND RIGHTS OF INTENDING COUPLE**

<b>INTENDING COUPLES</b>	<b>THE ASSISTED REPRODUCTIVE TECHNOLOGY (REGULATION) BILL, 2008</b>	<b>Draft Assisted Reproductive Technology (Regulation) Bill, 2014</b>	<b>THE SURROGACY (REGULATION) BILL, 2016</b>
Age	21 years	Not specified	Male: 23- 50 years Female: 26-55 years
Marital Status	Married, Unmarried couples, single women	Married couples	Married couples for five years
Nationality i. Overseas Citizen of India (OCIs), People of Indian Origin (PIOs), Non Resident Indians (NRIs) and foreigner married to an Indian citizen ii. Foreign National	Permitted  Permitted	Permitted  Not allowed	Permitted  Not allowed
Infertility registration certificate	Not specified	Not specified	Yes, from Medical board
Right to choose the surrogate	Yes	Yes	No
Right to decide on termination of pregnancy	No	No	No
Penalty in the event of abandoning the child	Not specified	Not specified	Yes

**The Surrogacy (Regulation) Bill, 2019<sup>20</sup>***Status of the bill*

- Passed in Lok Sabha: Aug 05, 2019
- Referred to Select Committee: Nov 21, 2019
- Report of Select Committee: Feb 05, 2020
- Cabinet approval of the bill: Feb 26, 2020

The changes between the surrogacy regulation bill between 2016 and 2019 are highlighted in [Table 3].

**TABLE 3: DIFFERENCE BETWEEN SURROGACY REGULATION BILLS 2016 AND 2019**

S. No	KEY AREAS	SURROGACY REGULATION BILL 2016	SURROGACY REGULATION BILL 2019 [THE SELECT COMMITTEE RECOMMENDATION ON THE SURROGACY (REGULATION) BILL, 2019]
1.	Type of surrogacy	Allows altruistic surrogacy and commercial surrogacy banned.	Rather than complete ban on commercial surrogacy consideration given to economic and health aspect of a surrogate mother intention which could be due to: (i) render a paid service and make money( <b>or</b> ) (ii) Do it for altruistic reasons.
2.	Surrogate mother	Close relative	Any willing woman
3.	Infertility certificate	Five year waiting period	Couple with known/diagnosed infertility can opt immediately
4.	Insurance coverage for surrogate mother	16 months	Extending to 36 months
5.	Time frame to obtain certificates of eligibility and essentiality	No specified time frame	The intending couple or the surrogate mother can file an appeal with the state government within 30 days from the rejection of the surrogacy application.
6.	Persons who can avail surrogacy services	Legally married Indian couple	Include women who are widows, divorcees or intending couples of Indian origin, between the ages of 35-45 years.

**Conclusion**

The conception, that India’s surrogacy clinics are practicing unethical methods to attract people to yield much profit is growing among people. The Government has tried to regulate the surrogacy clinics through various regulations and act. But still, many steps have to be done by the Government to strictly enforce the rules. Commercial Surrogacy, must be fully abolished in India, surrogacy clinics must be strictly monitored and duly penalized if they found guilty. A regulated and ethical means of surrogacy in the best of the patient and community interest is the need of the hour.

**Recommendations**

1. The proper time frame for the intending couple

to get an infertility and eligibility certificate from the medical board and order on parentage with custody of the child needs to be well defined.

2. Since India has decriminalized consensual homosexuality their right to obtain surrogacy services to beget a child must be addressed.

3. Ought to address the emerging issues like children born out of ART techniques with their dead parent’s gametes/cells.

4. Passing the long-pending Assisted Reproductive Technology (ART) Bill will make the surrogacy act more powerful.

**Ethical Clearance-** Not Applicable

**Source of Funding-** Self

**Conflict of Interest-** Nil

### References

- Bhalla N, Thapliyal M. Foreigners are flocking to India to rent womb and grow surrogate babies 2013. Business Insider. [Cited 2020 Mar 20]. Available from: [www.businessinsider.com/india-surrogate-mother-industry-2013-9](http://www.businessinsider.com/india-surrogate-mother-industry-2013-9)
- Kumari R. Final report: Surrogate motherhood-ethical or commercial. Centre for Social Research. Pg.33-34 [Internet]. [Cited 2020 Mar 28]. Available from: <https://core.ac.uk/reader/43024216>
- World Health Organization. 2015. Global prevalence of infertility, infecundity and childlessness. [Internet]. [Cited 2020 April 11]. Available from: [www.who.int/reproductivehealth/topics/infertility/burden/en/](http://www.who.int/reproductivehealth/topics/infertility/burden/en/)
- Dempsey D. Surrogacy, gay male couples and the significance of biogenetic paternity. *New Genet Soc* 2013; 32:37–53
- Practice Committee of the American society for Reproductive Medicine and Practice Committee of the Society for Assisted Reproductive technology. Recommendations for practices utilizing gestational carriers: a committee opinion. *Fertil Steril* 2015; 103:1-8.
- Meniru GI, Craft IL. Experience with gestational surrogacy as a treatment for sterility resulting from hysterectomy. *Hum Reprod* 1997;12:51–54.
- Dar S, Lazer T, Swanson S, Silverman J, Wasser C, Moskovtsev SI, et al. Assisted reproduction involving gestational surrogacy: an analysis of the medical, psychosocial and legal issues: experience from a large surrogacy program. *Hum Reprod* 2015; 30:345–52.
- Duffy DA, Nulsen JC, Maier DB, Engmann L, Schmidt D, Benadiva CA. Obstetrical complications in gestational carrier pregnancies. *Fertil Steril* 2005; 83:749–54.
- Parkinson J, Tran C, Tan T, Nelson J, Batzofin J, Serafini P. Perinatal outcome after in-vitro fertilization-surrogacy. *Hum Reprod* 1998; 14:671–76.
- Desai, K. (2012). India's surrogate mothers are risking their lives. They urgently need protection. *The Guardian*, June 5, US Edition. [Internet]. [Cited 2020 Mar 18]. Available from: [www.theguardian.com/commentisfree/2012/jun/05/india-surrogatesimpoverished-die](http://www.theguardian.com/commentisfree/2012/jun/05/india-surrogatesimpoverished-die)
- Brunet L, Carruthers J, Davaki K, King D, Marzo C, Mccandless JA. A Comparative Study on the Regime of Surrogacy in EU Member States. 2013. [Internet]. [Cited 2020 May 08]. Available from: <http://www.europarl.europa.eu/studies>
- Deomampo D. Defining parents, making citizens: nationality and citizenship in transnational surrogacy. *Med Anthropol* 2015; 34:210–225.
- Schover LR. Cross-border surrogacy: the case of baby gammy highlights the need for global agreement on protections for all parties. *Fertil Steril* 2014; 102:1258–59.
- Crockin SL. Growing families in a shrinking world: legal and ethical challenges in cross-border surrogacy. *Reprod Biomed Online* 2013; 27:733–41.
- Eckberg ME. Ethical, legal and social issues to consider when designing a surrogacy law. *J Law Med* 2014; 21:728–38.
- Jaiswal, S. (2012). Commercial surrogacy in India: An ethical assessment of existing legal scenario from the perspective of women's autonomy and reproductive rights. *Gender, Technology and Development*, 16(1), 1-28 [Internet].
- Surrogacy in India- Wikipedia, the free encyclopedia [Internet]. [cited 2020 Feb 25]. Available from: [https://en.wikipedia.org/wiki/Surrogacy\\_in\\_India](https://en.wikipedia.org/wiki/Surrogacy_in_India)
- The Assisted Reproductive Technology (Regulation) Bill, 2014. Government of India, Ministry of Health and Family Welfare. Press Information Bureau. [Internet]. [Cited 2020 May 08]. Available from: [https://www.prsindia.org/uploads/media/draft/Draft%20Assisted%20Reproductive%20Technology%20\(Regulation\)%20Bill,%202014.pdf](https://www.prsindia.org/uploads/media/draft/Draft%20Assisted%20Reproductive%20Technology%20(Regulation)%20Bill,%202014.pdf)
- The Surrogacy (Regulation) Bill, 2016. Government of India, Ministry of Health and Family Welfare. Press Information Bureau. [Internet]. [Cited 2020 May 08]. Available from: <https://www.prsindia.org/billtrack/surrogacy-regulation-bill-2016>
- The Surrogacy (Regulation) Bill, 2019. Government of India, Ministry of Health and Family Welfare. Press Information Bureau [Internet]. [Cited 2020 May 09]. Available from: <https://www.prsindia.org/billtrack/surrogacy-regulation-bill-2019>