

# The Surrogacy-Some Social, Moral and Legal Issues

## Abstract

One of main objectives of marriage is to procreation of children. If one is incapable of procreating children or infertile, one can take help of other methods of procreation including surrogacy. With the advancement of science and technology, surrogacy is very popular as IVF technology and is in vogue in many countries. Persons rent a womb for this purpose by paying handsome amount.

This 'rent a womb' has raised many moral, social, ethical and legal questions which must be addressed immediately. Looking to the intricacies of surrogacy the main question arises whether taking a womb or giving a womb on rent is ethical or morally right as social norms of most of the countries do not permit it. Since it has become wide rampant in poor countries and it has assumed a form of big business, it *sine qua non* to regulate it through legislation. Such social legislation requires thorough study and to take all necessary precautions before we embark upon it. This paper has an attempt to discuss all the aspects of this issue and come out with practical suggestions.

**Keywords:** Surrogacy, IVF, Infertility, Rent-a-Womb, Medical Tourism.

## Introduction

The rapid advancements of science and technology have brought radical and revolutionary changes in the life of common man. Latest, in the series of such revolutionis in the field of medicine and genetic science. This includes genetic/gene pool, growth of skin and organs of body and genome. Surrogacy or Clinically called "Assisted Reproductive Technology" (ART) has become very popular now-a-days as it has proved boon to the childless/infertile couples or who do not want to bear child or to couples that are suffering from fertility issues. Moreover, it has developed like a giant industry as rightly observed 'commercial surrogacy alone is valued at an estimated \$450 million' in India where this technique is cheap<sup>1</sup>. Surrogacy in India is rapidly growing by leaps and bounds, particularly among non-resident Indians and foreign clients. One of the main reasons for the same is the poverty amongst the masses. Rather it has a character of medical tourism in India. In this activity all-clinics and agencies, doctors and lawyers, bookended by vulnerable populations — stand to make a lot of money and have a free play in the absence of proper and adequate legislation on this subject.

Birth of a child is always beginning of hopes, dreams, joy and happiness. It is very difficult to express the feeling, in words, of joy and happiness of a parents and his/her family at such a moment. But think of person who cannot procreate because of infertility or for any other reason. Sometimes it is said that home is not home without any children. They bring joy, happiness and bundle of hope with their arrival. Because of infertility, persons adopt various methods to fill the vacuum- like adoption or surrogacy. Adoption is a popular method, whereas surrogacy has been in vogue for last two decades or more only. Therefor,

e time is ripe when society must think about the advantages and deficiencies of surrogacy as it is becoming a grey market and persons have made it a business. Thus it raised legal, moral and ethical issues attached to it.

The act of hope has been revered since ancient time. History crammed with instances of surrogacy in many religions and civilizations up holding surrogate mothers with adulation for their noble services to mankind.<sup>2</sup>

## Aim of the Study

As it has been declared that surrogacy has become a very thriving business in some countries and it is flourishing very rapidly in the developing countries. Persons from the affluent society or developed Countries come to developing and countries third World to fulfill

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their Wish to have children without bearing the load of it or their inability to bear the Child. They simply rent-a-womb of an indignant or needy person to fulfill their desire with the help of advancement in the science and 'assisted reproductive technology' (ART). But ART has raised many moral, social, legal questions before the society as it involves a female who is not in any way connected to the parents of the children. In most cases citizens from two countries are involved which also create a problem as to law of which country must be made applicable? Another significant question is- what should be the measure of compensation/payment to the child bearer or for womb rent, or for any complication arising from the child in the womb. Similarly most of the countries either do not have any law on it or have deficient/inefficient law. These questions necessitate discussing the subject and coming out with practical and useful suggestions.

#### **Surogatus**

It is a Latin term, which means a substitute (a person appointed to act in place of another). Surrogacy is a method of reproduction where by a woman (named as a surrogate) agrees (she under goes a contract) to carry pregnancy and give birth to a child as a substitute for the contracted party.

#### **Kinds of Surrogacy**

1. Natural- it is also known Traditional or Straight
2. Gestational
3. Commercial surrogacy
4. Altruistic surrogacy.

The Parents construct the Child biologically, while the Child constructs the Parents socially.

The roots of surrogacy can be traced long back in Indian history. The world's second and India's first IVF (In Vitro Fertilization) baby *Kanupriya alias Durgawa* was born in Kolkata on Oct. 3, 1978. Since then the field of assisted reproductive technology (ART) has developed rapidly. But legally the laws related to surrogacy are still in the nascent stage. At present, the agreement between the parties based on the ART Guidelines are the guiding force. The codified law is yet to be adopted and implemented. With the recent growth in the Intended parents opting for surrogacy, India has become the much sought after surrogacy destination. With the acceptance of same sex marriages/union and the recognition of the basic human right to have family and children has given rise to surrogacy manifold. However, at the same time, nations all across the globe are condemning commercial surrogacy as it results in commercialization of human reproductive system and commodification of children. For its various socio-ethical reasons, surrogacy has become a topic of deep interest amongst the *governments of different nations, medico-legal luminaries as well as public at large.*

#### **Natural (Traditional/Straight) Surrogacy**

In traditional surrogacy, the surrogate is pregnant with her own biological child, but this child was conceived with the intention of relinquishing the child to be raised by others such as the biological father and possibly his spouse or partner and thus the child that results is genetically related to the Surrogate

mother. The child may be conceived via sexual intercourse, home artificial insemination using fresh or frozen sperm or impregnated via IUI (intra-uterine insemination), or ICI (Intracervical insemination), which is performed at a fertility clinic. Sperm from the male partner of the 'commissioning couple' are injected into female and the child is commissioned by a single woman.

#### **Gestational Surrogacy**

In gestational surrogacy, a surrogate is only a carrier/female host and is not genetically or biologically related to the child. The Surrogate is implanted with an embryo that is not her own, and becomes pregnant with a child to which she is not the biological mother. After birth, the surrogate relinquishes the child to the biological mother and/or father to raise, or to the adoptive parent (in which case, the embryo would be a donated embryo). The surrogate mother may be called a gestational carrier.

#### **Commercial Surrogacy**

Commercial Surrogacy is a form of surrogacy in which a gestational carrier is paid to carry a child to maturity in her womb and is usually resorted to by higher income infertile couples who can afford the cost involved or people who save or borrow in order to complete their dream of being parents. This procedure is legal in several countries including India. Commercial surrogacy is also known as 'wombs for rent', outsourced pregnancies' or 'baby farms'.

#### **Altruistic Surrogacy**

Altruistic surrogacy is a situation where the surrogate receives no financial reward for her pregnancy or the relinquishment of the child (although usually all expenses related to the pregnancy and birth are paid by the intended parents such as medical expenses, maternity clothing, accommodation, diet and other related expenses).

#### **Causes of Surrogacy**

The intended parents/Commissioning couple may enter into a surrogacy arrangement because of:

#### **Infertility**

Female infertility, or other medical issues, which may make the pregnancy or delivery risky.

#### **Risky Pregnancy**

The intended mother could also be fertile and healthy, and prefer the convenience of someone else undergoing pregnancy and labor for her.

#### **Same Sex Couple**

Surrogacy can help the same sex couples to realize their dream of having their own child which is otherwise not possible for them to have a child of their own by natural way.

#### **Single Parent**

For those who want to fulfill their desire of having a child sans a partner, surrogacy is a ray of hope.

The parents construct the child biologically, while the child constructs the parents socially.

#### **History of Surrogacy**

Surrogacy is not a modern concept this concept was also rooted in history. In the biblical time a story was there in the Chapter of 16 in the Book of Genesis.

Story is related to the wife of Abraham Sarah who could not bear the child for Abraham thus she

gave him her servant Hagar so that she could begethis children!

This story is primitive version of traditional surrogacy, a concept where artificial insemination is used to impregnant a woman. In prehistoric time,in many countries surrogacy had been a prevalent practice. Many culture had the concept of surrogacy integrated into their belief systems to such onextent that those who refused to abide by it were actually thrown out of their families.

### **The American Indians<sup>3</sup>**

There are instances of many religions and civilizations praising surrogate mothers as father's good deeds and service to others.

Surrogacy was favored big time by the American Indian society as a way to carry their family name and bloodline.If wife to barren than the husband would take another woman and impregnant her. The child born out of such relationship would continue to live with his biological mother.

### **In India**

Surrogacy was known and practiced from ancient India. As per Mahabharata, Gandhari, wife of king Dhritarashtra conceived but after two years, she delivered the mass (male). Lord Vyas found there were 101 cells they were normal in the mass. These cells were but in a nutrient medium and were grown in Vitro till full term from them 100 developed in male children ( Karata) one as female child named as Duhsala.

The Hindu mythology provides many examples like that sage Bharatdawajproduced *Droha*. The story relating to the birth of Dhristadyumanand Draupadi is very interesting and also reflects the super natural powers of the great rishi. Rishi gave medicine to king Draupadi and after collecting his semen, processed it and suggested that AIH should be done for his wife, who then put the semen in a Yojanakendra from which Drishatadyumnaand Draupadi were born.Above examples are called as IVF and parthenogenesis under Hindu belief.

There is one more story which is related to embryo transferred. This story is regarding the seventh pregnancy of Devakiwife of Vasudeva, by the will of the Lord, the embryo was transferred to the womb of Rohine the first wife of Vasudeva.<sup>4</sup> There are many instance in Indian history. Islam considers surrogacy immoral to introduce into a woman the sperms of any man except her husband's. It will be Haram (forbidden) to form the embryo by the fusion of woman's haram with sperms of a man other than her husband .Legal aspect of surrogacy is very complicated, complex, diverse and mostly Unsettled in most of the countries in the world over. The woman giving birth to a child is considered as the legal mother. However, in very few countries, the intended parents are be recognized as legal parents from birth by the virtue of the fact that the surrogate has contracted to give birth of the child for the commissioned parents.<sup>5</sup>

India is one country amongst the few which recognized the intended/ commissioning parents as the legal parents. In 2013, opting for surrogacy was declared legal for single parents, unmarried and

couple. Many state now issue pre-birth orders through the courts placing the name(s) of the intended parents on the birth certificate from the start. In others, the possibility of surrogacy is either not recognized (all contracts specifying different legal parents are void) or is prohibited.

### **Australia**

A couple who makes surrogacy must adopt the child rather than being recognized as birth parents, particularly surrogate mother is married. After the announcement of victoriathey changed their legislation. Since 2010 under *the Reproductive Treatment Act, 2008* to make altruistic surrogacy with in the state legal. However commercial surrogacy is still illegal and it is a criminal offence. It recognizesonly altruistic surrogacy through close relatives and friends.

### **Canada**

Commercial surrogacy is prohibited under *the Assisted Human Reproduction Act, 2004*, altruistic surrogacy is legal.

### **France**

After 1994, any surrogacy arrangement is illegal and unlawful.

### **Hungry**

Commercial surrogacy is unlawful.

### **Israel**

The first country in the world to implement a form of state controlled surrogacy in which each and every contract must be approved directly by the state. In March 1996, the Israeli government legalized. gestational surrogacy under the "embryo caring agreement law" surrogacy arrangements permitted only two Israel citizens who shares the same religion. surrogates must be single, widowed or divorced and only infertile hetro sexual couples are allowed to heirs surrogates. Due to the humorous restriction on surrogacy under Israeli law, the Israeli intended parents have turned to international surrogacyIndia is a preferred destination of its low coasts.Intended parents also turn to US surrogateswhere an added bonus is an automatic US Citizenship for the new born.

### **Japan<sup>6</sup>**

India is the preferred destination because of its. In 2008, the Science council Japan proposed a ban on surrogacy.

### **USA<sup>7</sup>**

Some of the States allow commercial surrogacy. Some states do not recognize any form of surrogacy. Many States have their own surrogacy law like Florida, California; Delaware, Pennsylvania have well defined surrogacy law. It is illegal to hire a surrogate in New York and even embryonic transfers may not be done in New York.

### **U.K.**

Surrogacy arrangement is legal in the UnitedsKingdom since 2009. It is illegal to pay more than expenses for a surrogacy. The relationship can be recognized under sec. 30 of *the Human Fertilization and embryology Act, 1990*. Under which a court may make parental orders similar to adoption orders.<sup>8</sup>It recognizes only Altruistic Surrogacy through blood relatives.

**Netherland and Belgium**

Commercial surrogacy is illegal.

**China<sup>9</sup>**

Any form of surrogacy is banned

**New Zealand<sup>10</sup>**

Commercial surrogacy is illegal.

All kind of surrogacy is banned or not recognized in 12 countries. Commercial surrogacy allowed in 20 countries only. Altruistic surrogacy/ commercial surrogacy is legal in less than 5 countries.<sup>11</sup>

**Indian Scenerio**

Development in the field of science and technology is boon as well as bane also. It is a matter of the debate. It is two sides of a coin. Surrogacy is also scientific boon for the childless couple; this scientific progress is measure but it is humiliating to use it as commercially. Women are compelled under various economic circumstances/problems to become a surrogate mother. Intended couple wants to get rid of the stigma that is attached for not having genetic offspring.

It is two faced coin. Some say that it is an opportunity to the infertile couples to have genetic child and on the other side it possess many social, ethical moral and legal issues. Genetic child is a very important in Indian society. The roots of surrogacy is traced in India in 1978 when world's second and India's first I V F (in vitro fertilization) baby *Kanupriya alias Durga* was born now in KolKatta on 30 Oct, 1978. After that Assisted reproductivetechnology [ART] has developed in India rapidly. But till today India has no surrogacy law covering all the aspects. Commercial surrogacy is legal in India since 2002. Under the National Guide lines for Accreditation, Supervision and Regulation of ART clinics in India, were issued by the Indian Council for Medical Research (ICMR) in 2000. There is no bar to use Artificial Reproductive Technology [ART] by a single or an unmarried one and the child born would have legal rights with the man and woman concerned,

In India, surrogacy boomed in January 2004 when a grandmother delivered her daughter's twins. India is emerging as hub in the world as a surrogacy industry. India is very popular amongst the intended couples because of relatively low expenses, very competitive medical assistance and easily available surrogates. Renting wombs in India are very cheap and easily available, low cost of medical services. This practices are attracting foreigners and non-resident Indians for surrogacy. Now India is well known tourism center for this purpose. In 2005, Indian council of medical research (ICMR) prepared guidelines and after the Baby Manji's case assisted reproductive technology regulation bill was prepared by the Health Ministry and concluded that commercial surrogacy is not illegal in India.

Very important decision has been pronounced by Supreme Court of India in the year 2008. In a very famous case-*Baby Manji Yamadas v. Union of India*<sup>12</sup>, it was observed by the hon'ble court that "commercial surrogacy" reaching "industry proportions is sometimes referred to by the emotionally charged and potentially offensive terms- wombs for rent, outsourced pregnancies or baby

farms". It is presumably considered legitimate because no Indian law prohibits surrogacy.

**Indian Scenerio after Manji's Case****Assisted Reproductive Technology (Regulation) Bill, 2008**

The legal issues related with surrogacy are very complicated and need to be addressed by comprehensive legislation. The bill acknowledges surrogacy agreements and their legal enforceability. The bill also ensures that surrogacy agreements are treated at par with other contracts.

The principles of the Indian contract Act 1872 and other laws will be applicable to these kinds of agreements. The Bill provides that a foreigner or foreign couple, not resident in India or non- resident Indian individual or couple, seeking surrogacy in India, shall appoint a local guardian who will be legally responsible for taking care of surrogatemother during and after pregnancy till the child is delivered to the foreigner or foreign couple or the local guardian. It is further provided that the commissioning parents or parent shall be legally bound to accept the custody of the child irrespective of any abnormality that the child may have, and the refusal to do so shall constitute an offence. A surrogate mother shall relinquish all parental rights over the child. The birth certificate in respect of a baby born through surrogacy shall bear the name(s) of genetic parents of the baby.

The bill also provides that a child born to a married couple or a single person through the use of ART shall be presumed the legitimate child of the couple or the single person, as the case may be. If the commissioning couple separates or gate divorced after going for surrogacy but before the child is born, then also the child shall be considered to be the legitimate child of the couple.

The bill further provides that a couple or and an individual shall not have the service of more than one surrogate at any given time. A couple shall also not have simultaneous transfer of embryos in the women or surrogates.

The Bill also provides for constitution of national and states boards for ART for laying down policies, regulations and guidelines and register, Authorities for registering ART clinics. It also prescribes duties of ART clinics; one of the duties is making of the couples or individuals, as the case may be, aware of the rights of a child born through the use of ART. The duty also includes not to provide couples with a child of pre-determined sex. It also narrates rights and duties of patients, donors surrogates. This legislation is intended to be in addition to, and not in derogation of other relevant laws in force.

With no legislation in India, commercial surrogacy has become a big industry. The draft Assisted Reproductive Technology (Regulation) Bills of 2008, 2010, and 2013 proposed that ART in India would be available to all persons including single parents and foreign couples. The 2010 draft Bill states that any NRI or Foreigner, coming to India for surrogacy arrangement, shall have to submit a legal document confirming that their country of residence recognizes surrogacy as legal and that it will give citizenship to the child born through the surrogacy agreement from a Indian surrogate mother. Till 2013,

single parents could have also had children using a surrogate mother. It also proposes to legalize commercial surrogacy for single persons, married or unmarried couples stating that the surrogate mother shall enter into a legally enforceable surrogacy agreement. Foreigners can seek surrogate arrangements after the registration given by their Embassy. Meanwhile, in 2012 the Ministry of Home Affairs issued guidelines of 2012 and restricted surrogacy to foreign nationals under the new MEDICAL Visa Regulations 2012. So, now, foreign signal parents, gay couples and unmarried partners cannot come to India for surrogacy. It is now barred for them. It has been decided that till the enactment of a law on the ART Regulation Bill, 2014, the guidelines already issued by the Ministry of Home Affairs will prevail. 'The ART Bill, 2014 contemplates that surrogacy will be available to all married infertile couples thereby, debarring single persons from surrogacy. It proposes to disallow surrogacy for foreigner but make it permissible for overseas citizen of India or people of Indian Origin, Non-resident Indian and foreigner married to Indian Citizens with to years of marriage and they will be required to obtain a Medical Visa for surrogacy in INDIA<sup>13</sup>.

The law remains silent on issues of parentage, citizenship, nationality and rights on parties on surrogacy arrangements. Other issues like the jurisdiction of writ courts to be invoked for solution for foreigners so that new born surrogate babies are not rendered stateless, and upon doing so, exit permits summary adoption procedures and birth certificates being issued summarily,\*

It is necessary to mention that the Law Commission of India also submitted the 228th report on Assisted Reproductive Technology procedures discussing the importance and need for surrogacy, and also the steps taken to control surrogacy arrangements. The following observations had been made by the Law Commission:

1. 'Surrogacy arrangement will continue to be governed by contract amongst parties, which will contain all the terms requiring consent of surrogate mother to bear 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. But such an arrangement should not be for commercial purposes.
2. A surrogacy arrangement should provide for financial support for 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.
3. A surrogacy contract should necessarily take care of life insurance cover for surrogate mother.
4. One of the intended parents should be a donor as well, because the bond of love and affection with a 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.

5. Legislation itself should recognize a surrogate child to be the legitimate child of the commissioning parent (s) without there being any need for adoption or even declaration of guardian.
6. The birth certificate of the surrogate child should contain the name(s) of the commissioning parent(s) only.
7. Right to privacy of donor as well as surrogate mother should be protected.
8. Sex-selective surrogacy should be prohibited.
9. Cases of abortions should be governed by the *Medical Termination of Pregnancy Act 1971* only.'

#### **The Journey of Surrogacy Bill is not Complete without the Bill of Surrogacy (Regulation) Bill, 2016**

The surrogacy debate started in India after the case of baby Manji Yamada, therefore, the 228 Report of the Law Commission of India recommended prohibiting commercial surrogacy and allowing ethical altruistic surrogacy to the needy Indian citizens only. Now the time is ripe to push the matter through proper legislation. The Bill of Surrogacy (Regulation) 2016 has been approved by the Union cabinet recently.

#### **Some of the suggestions are as follows to improve the dismal situation**

1. The Bill completely prohibited foreigners, even overseas Indian from commissioning surrogacy. As far as the legality of the concept of surrogacy is concerned it would be worthwhile to mention that Article 16.1 of the *Universal Declaration of Human Rights 1948* says, *inter alia*, "that men and women of full age without any limitation due to race, nationality, or religion have the right to marry and found the family". Therefore, this provision is the violation of human rights.
2. Commercial surrogacy is bad, although it is true that poor and illiterate Indian women are exploited but it is also very true that poverty is main cause of to involve in this. ROTI, KAPDA AND MAKAN is basic need of every human being. Surrogacy is better option for them. Due to poverty sometimes they kill or sale out their children. After the earning money from surrogacy they can live comfortably, and educate their children. Many women agree to become a surrogate mother to support their families financially. Given a choice, so they could lead a decent livelihood.
3. The Bill takes away the 'rights to choices of women'. It should be up to women to decide if they want to be a surrogate.
4. A thousand of couples come to the country in the ray of the hope of having parenthood by small amount in comparison to the joy they get.
5. Abundant money is paid for the medical insurance of surrogate mother and also for the maintenance by the legal parents.

