



## SURROGACY: WOMB FOR RENT

By Sandeep Kumar & Kanika Sarin  
From Army Institute of Law, Mohali

*“Little souls find their way to you, whether they’re from your womb or someone else’s”*

*Sheryl Crow<sup>1</sup>*

A woman has an alluring capacity to procreate a life within her and every woman loves to cherish the experience of motherhood. Unfortunately, though, for some people, the inability to have their own off springs can be extremely heartbreaking and devastating to their future plans. Such people then search for alternative solutions.

### Introduction to Surrogacy

The word surrogate has its origin in Latin ‘surrogatus’ past participle of ‘surrogare’, which means ‘substitute’<sup>1</sup>. So a surrogate mother is the substitute for the genetic biological mother. A surrogate mother is a mother who carries a child for someone else, usually an infertile couple. In other words, a surrogate mother is a person who is hired to bear a child, which she hands over to her employer at birth.<sup>1</sup>

According to Artificial Reproductive Technique (ART) Guidelines, surrogacy is an “arrangement in which a woman agrees to a pregnancy, achieved through assisted reproductive technology, in which neither of the gametes belong to her or her husband, with the intention of carrying it to term and handing over the child to the person or

persons for whom she is acting as surrogate; and a ‘surrogate mother’ is a woman who agrees to have an embryo generated from the sperm of a man who is not her husband, and the oocyte for another woman implanted in her to carry the pregnancy to full term and deliver the child to its biological parent(s).”<sup>1</sup> According to the National Guidelines for Accreditation, Supervision & Regulation of ART Clinics in India “Surrogacy is an arrangement in which a woman agrees to carry a pregnancy that is genetically unrelated to her and her husband, with the intention to carry it to term and hand over the child to the genetic parents for whom she is acting as a surrogate.”<sup>1</sup>

### History of Surrogacy (From Biblical times to Modern day surrogacy)

The pathology “female infertility” gives rise to the idea of surrogacy. The first venture to solve the problem of female infertility was far from the real concept of surrogacy. The first case of surrogacy is written in The Holy Bible. According to the Chapter 16 of the “Book of Genesis” Abraham’s wife Sarai, could not bear him a child. She gave him her Egyptian slave Hagar so that she could build a family through her.<sup>1</sup> This story is somewhat related to ‘traditional surrogacy’.

In ancient times healthy and young slaves were used for carrying heirs and they were the biological mothers for these babies.

On July 25, 1978 the first ‘test-tube baby’ ‘Louise Joy Brown’ was born through the efforts of Dr. Robert G Edwards and Dr. Patrick Steptoe. But this was not a case of surrogacy. The first traditional paid surrogacy arrangement was steered in 1980



where a 37 year old woman acted as a surrogate and was paid \$10000 upon the successful delivery of the baby.<sup>1</sup> After the case of successful traditional surrogacy, pregnancy via egg donation was attempted. In this case a woman was able to give birth via the use of eggs donated by another. This later led to the first successful gestational surrogacy in 1985.

Today, surrogacy has achieved new heights of popularity. In 2005, a 58 year old woman donned the role of a surrogate mother to give birth to her own twin granddaughters.<sup>1</sup>

#### Types of Surrogacy:

1. Traditional Surrogacy
2. Gestational Surrogacy

**Traditional Surrogacy:** In traditional surrogacy, the surrogate is the genetic/biological mother of the resulting child because surrogate's own egg is used. In other words, the surrogate acts as both the egg donor and as the actual surrogate for the embryo. In this process surrogate mother is artificially inseminated with the sperm of the intended father or a sperm donor. In simple words the sperm that is taken from the biological father or sperm donor is transferred into the surrogate's uterus. In traditional surrogacy, fertilization takes place naturally and the process for impregnating a woman by this process is also known as intrauterine insemination or IUI.

**Adoption of Child:** Usually, the intended father's name is put directly on the birth certificate and the intended mother will need to do a step-parent adoption, however,

laws regarding this issue vary from state to state.<sup>1</sup>

**Gestational Surrogacy:** In gestational surrogacy, the surrogate is not the genetic/biological mother of the resulting child because surrogate's eggs are not used at all. The surrogate just carries the embryo through the pregnancy term until its birth. She acts as the carrier of the embryo only. The embryo that the surrogate carries is actually created by using both the biological father's sperm and the biological mother's egg through a process called IVF (In vitro fertilization).

In this process embryo is developed in the laboratory. It can take 3-5 days for the embryo to develop and then it is transferred to the uterus of surrogate. The rate of success will depend upon many factors like the age and health of the biological mother whose egg is being used. In many cases, the rates of pregnancy are actually higher when using eggs that are taken from biological mothers who are otherwise infertile versus when eggs are taken from fertile woman.<sup>1</sup>

**Adoption of child:** In many areas, the intended parents may petition the court during the third trimester of pregnancy to have both of their names placed directly on the birth certificate; however, laws regarding this issue vary from state to state.<sup>1</sup>

#### Surrogacy in Modern India:

The world saw the first successful birth through gestational surrogacy in 1985. On June 23<sup>rd</sup>, 1994, in Chennai, this happened for the first time in India. 3 years later, in



1997, an Indian acted as a gestational carrier, and got paid for it. In 1999, an Indian newspaper carried the story of a villager in Gujarat who served as a surrogate for a German couple.<sup>1</sup> In the past couple of years, the number of births through surrogacy doubled with estimates ranging from 200 up to 350 in 2008.<sup>1</sup>

India is rising as a popular destination for surrogacy arrangements for many foreigners due to some reasons like cheap medical facilities, easy availability of surrogate etc. Foreigners come to India in search of surrogate mothers. Women from lower socio-economic background to lower middle socio-economic backgrounds easily agree to become a surrogate mother in India, in return for money, as compared to western countries as hiring a surrogate is not only difficult, but the treatment is also very costly in western countries.<sup>1</sup> The laws of some countries also lead the foreigners to come to India for surrogacy. For example, a 37 year old Russian came to Bhopal as the expense for surrogacy is prohibitive in her country – between Rs. 1500000 and Rs. 2000000 - as compared to the Rs. 200000 cost in Bhopal.<sup>1</sup>

Dr. Randhir Singh, Director, Bhopal Test Tube Baby Centre, elaborates, “Women source information about the availability of surrogate mothers in Bhopal over the Internet and then contact us. In foreign countries, surrogate mothers are not easy to find. Therefore, the interest in India.”<sup>1</sup>

#### **Laws on Surrogacy in India:**

Presently, there is no law governing surrogacy in India. Eventually the

commercial surrogacy or renting a womb was considered legitimate till the introduction of the new Bill i.e. Surrogacy (Regulation) Bill, 2016. In the absence of any law on surrogacy, the Indian Council of Medical Research (ICMR) working under the auspices of Ministry of Health and Family Welfare, issued national guidelines for accreditation, supervision and regulation of ART (Assisted Reproductive Technology) clinics in India in 2015. Under these guidelines, there were no restrictions for the use of ART by a single or an unmarried woman and the child born would have legal rights on the woman or the man concerned. But there is need for legislation as ICMR guidelines being often violated and reportedly rampant exploitation of surrogate mothers and even cases of extortion also. Therefore the draft ART (Regulation) Bill, 2008, the draft ART (Regulation) Bill, 2010 & the draft ART Bill, 2014 were drafted for legalizing surrogacy in India. The draft ART (Regulation) Bill, 2014, if passed, would establish a National Board for Assisted Reproductive Technology, with a head office to be located in New Delhi, at the Department of Health Research in the Ministry of Health and Family Welfare.<sup>1</sup> In addition, the draft law includes a number of provisions on rights and duties in relation to surrogacy, which include requirements regulating commercial surrogacy. It stipulates that “surrogacy for foreigners in India shall not be allowed but surrogacy shall be permissible to Overseas Citizen [sic] of India (OCIs), People of Indian Origin (PIOs), Non Resident Indians (NRIs) and [a] foreigner married to an Indian citizen.<sup>1</sup> Moreover the surrogate



mother is required to be an “ever married Indian woman with minimum twenty three years of age and maximum thirty five years of age...”<sup>1</sup>.

Recently the scope of bill was narrowed down to surrogacy only and hence the bill now titled is Surrogacy (Regulation) Bill, 2016<sup>1</sup>. This Bill completely bans the commercial surrogacy. Defining commercial surrogacy as “Surrogacy or its related procedures undertaken for a monetary benefit or reward (in cash or kind) exceeding the basic medical expenses and insurance coverage”<sup>1</sup>. The Union Cabinet has given its consent for the introduction of the Bill.

#### **The Surrogacy Bill 2016<sup>1</sup>:**

The Bill addresses the issues and concerns associated with surrogacy only. The Bill is aimed at making parentage of such children “legal and transparent” noting that there may be some cases of exploitation of woman by elements of money.

The Minister of State for Health, Shri Pad Yesso Naik, said in a written reply in Rajya Sabha, “Yes to make issues of parentage of children, born out of surrogacy legal and transparent, provisions have been made in the draft Surrogacy (Regulations) Bill, 2016. In the absence of a statutory mechanism to regulate commissioning of surrogacy in the country at present, there may be some cases of exploitation in the name of commercial surrogacy of women in the vulnerable section of the society by unscrupulous elements for monetary benefit. In order to prevent this, the government has prohibited foreigners from commissioning surrogacy in the country and has drafted a comprehensive

legislation, namely the Surrogacy (Regulation) Bill, 2016 for safeguarding the interest of surrogate mothers and the children born out of surrogacy.”<sup>1</sup>

The Union Cabinet headed by the Prime Minister Shri Narendra Modi has given its consent for introduction of the “Surrogacy (Regulation) Bill, 2016” on August 24, 2016.

#### **Provisions of the Bill:**

The Surrogacy (Regulation) Bill, 2016 will apply to whole India except the State of Jammu & Kashmir

According to the Bill, there will be establishment of National Surrogacy Board at the central level and State Surrogacy Boards and Appropriate Authorities in the States and Union Territories.

- This Bill will ensure the complete prohibition of commercial surrogacy and permission of ethical surrogacy to the needy infertile couples. Altruistic Surrogacy can be offered by close relatives only, not necessarily related by blood.
- Besides protecting the rights of surrogate mothers and the children born out of surrogacy, the Bill will avail benefits to the Indian married infertile couples who want to have children.
- Commercial Surrogacy will be prohibited including the sale and purchase of human embryo and gametes which was recommended by the 228<sup>th</sup> report of the Law Commission of India.<sup>1</sup>
- Only Indian couples, who have been married for at least 5 years can opt for surrogacy, provided at least one of them



have been proven to have fertility related issues.

- Besides banning the commissioning of surrogacy by foreigners and Overseas Indians, It also bans unmarried people, live-in couples and homosexuals from opting for surrogacy.
- All ART (Assisted Reproductive Technology) Clinics will need to be registered and they have to maintain records of surrogacy for 25 years.
- Surrogacy clinics can charge for the services but the surrogate mother cannot be paid except paying towards medical expenses.
- The rights of the surrogate child will be same as of the biological child. Commercial surrogacy, abandoning the surrogate child, exploitation of surrogate mother, selling/import of human embryo have all been categorized as violation that are punishable by jail term of at least 10 years and a fine of up to Rs. 10 lakh.<sup>1</sup>

**Flaws of Surrogacy Bill, 2016:**

1. The choice of finding a womb within the family becomes difficult and limited. For example if a sister is not able to conceive then the daughter in law can be forced to become a surrogate. Thus it creates a social pressure.
2. The right to life enshrines the right to procreation and parenthood. Thus it is for the parent to decide the modes of parenthood and State constitutionally cannot interfere in it.
3. A homosexual or a single parent is deprived of the happiness of parenthood through surrogacy.
4. The Bill leaves several questions unanswered such as ensuring protection of

health of surrogate mother, maternity relief available to her etc.

5. A woman who bears a child for another one is actually performing a service and needs to be compensated for it. If altruistic surrogacy is enforced, the commissioning parents have to find some non-legal means to pay the woman who has spent a year or more of her life trying to ensure the birth of a healthy baby or babies.
6. Further, as per a Supreme Court ruling, live-in relationships are on a par with marriage and children born out of long-standing live-in relationships are legitimate. By limiting the option of surrogacy to legally married couples, the government is countering the acceptability of live-in relationships and setting a wrong precedent.
7. The bill faced backlash from women who are currently involved in commercial surrogacy – these would be women who go from having a stable source of income to nothing at all.<sup>1</sup>

**Suggestions:**

It is often said that in a surrogacy arrangement, “*the barren gets a baby, the broke gets a bonus*”. If we talk about the primitive ambition of surrogacy, then surrogacy seems very beneficial to both the infertile couple and the surrogate mother but using surrogacy for commercial purpose becomes a bane for the society. This is because in order to make more and more money, people make misuse of the surrogacy arrangements. The need to make laws on surrogacy arises, when in 2008, a Japanese couple commissioned a baby in a small town in Gujarat. The surrogate mother gave birth to a baby girl. Till the time the



couple had separated and the baby suffers because she was now parentless and stateless, caught between the legal system of the two countries. The child is now in Japan but cannot obtain citizenship because surrogacy is not legal in Japan. Another case was observed in 2012 when an Australian couple who had twins by surrogacy, rejected one child and took home the other. In the surrogacy arrangement it is the surrogate child who suffers the most.

Banning commercial surrogacy is not the solution to the problem. In order to overcome the flaws of the Surrogacy Bill, 2016, the following suggestions can be implemented:

1. There should be a universal law in all the countries for surrogacy.
2. Interstate surrogacy should be permitted after applying universal law in all the countries.
3. A debate at international level is also needed to discuss the problems and the solutions of surrogacy at the state level and at the international level. The countries should make universal law regarding interstate surrogacy, adoption of the child and citizenship of the surrogate child.
4. The name of the surrogate mother should also be written on the birth certificate of the child so that the surrogate mother could get the identity as the true mother of the surrogate child.
5. There should be provision for the insurance and emergency needs that the surrogate mother may require during pregnancy and after giving birth to the child. In fact health insurance for the surrogate mother and surrogate child should be made compulsory.

6. If the intent of the law is to protect surrogate mothers and children, then it must provide a legal framework that restricts the exploitation of surrogates and their children, and penalise those who do not honour contracts.

7. Surrogacy has prevailed in India since a long time and now the government cannot neglect going into the specifics and just eliminating commercial surrogacy altogether. Instead, the government needs to suitably regulate it thereby streamlining the process and avoid abuse.

#### Conclusion:

*Nature says no; science said yes.*

Detailed study on Surrogacy has led to a beautiful conclusion. India is the land where female deities are enshrined in the temples. It happens only in India that a mother is given regard equal to the God. The exploitation of woman is not only a crime but also a sin in India. While making laws on surrogacy, it should be kept in mind that it won't violate laws or ethics.

The Surrogacy (Regulation) Bill, 2016 introduced by the government is an adorable step. Till now, the laws are imposed on socially and educationally weaker women just for the sake of welfare measure. The educationally weaker women did not know much about surrogacy and she is paid very less for being a surrogate mother. Socially and educationally weaker women are being exploited. Not only, the surrogate mother, but also the surrogate child suffers. When the child is born, he is transferred to the employer (biological parents) even before the breast feeding. It is the child who suffers the most. The bill has already made a



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provision for banning commercial surrogacy but only banning is not the solution. Strict laws should be made for the safeguard of the surrogate mother and the surrogate child. The altruistic or non commercial surrogacy should be legalized only after making strict laws.

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