

The Concept of Surrogacy: An Analysis

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ABSTRACT

Procreation is essential for the survival of all forms of life including man because no living being is immortal. Like animals, human beings also require the cooperation of two individuals with different sex structures for protection. Urge in living beings in this regard is called sexual urge. Nature has bestowed the beautiful capacity to procreate a life within women and every woman cherishes the experience of motherhood. Unfortunately, some women due to certain physiological conditions cannot give birth to their offspring. The desire for motherhood leads them to search for alternative solutions, and surrogacy presents itself as the most viable alternative. Advances in assisted reproductive techniques such as donor insemination and, embryo transfer methods, have revolutionized the reproductive environment, resulting in surrogacy as the most desirable option. To channel this the concept of marriage developed in the society of human beings.¹ Procreation is a biological process by which a woman gives birth to a child. Women are raised to see themselves as child bearers and men to see themselves as generations of procreation. Biological parents raise a child to achieve the success and identity that comes from genetic heritage.² Thus reproduction transcends the boundaries of individual lives to signal the survival and continuation of the family and the species.

History of Surrogacy

Surrogacy is an ancient practice, dating back to biblical times. The first known surrogate mother is believed to have lived near the city of Hebron in the land of Canaan around 2000 BCE. Sarah, the infertile wife of Abraham, persuaded him to sleep with her maid, Hagar, who then bore Abraham a son named Ishmael in 1910 BCE. This event marks the earliest recorded instance of traditional surrogacy. Another early instance of surrogacy occurred in Sumer, Mesopotamia, in the mid-18th century BCE. Rachel, the wife of Jacob, convinced him to sleep with her maid, Bilhah, to bear children. Surrogacy was also common in ancient Egypt, where many Pharaohs relied on their concubines to produce offspring, as they were believed to be direct descendants of the Sun God Ra. Artificial insemination, a related concept, has been studied for centuries. In 1677, Dutch scholar Antonie van Leeuwenhoek, the inventor of the microscope, was the first to observe spermatozoa in human semen. He suggested that a spermatozoon was akin to a seed, and a woman's uterus provided a favorable environment for its development. In 1790, Scottish surgeon and venereologist John Hunter performed the first artificial insemination by artificially inseminating a woman. In 1880, the first documented attempt at in vitro fertilization (IVF) was conducted on guinea pigs. In 1891, French scientist Walter Heape successfully carried out IVF by transferring an embryo from one guinea pig to

¹ P.C. Pant, Law of Marriage, Divorce and other Matrimonial Disputes, Orient Publishing company, New Delhi, 2003, P.3

² Mindy Schulman Roman, Rethinking Revocation adoption from a new perspective, 23 Hofstra Law of Review, 733, 1995.

another, demonstrating that the spermatozoon, akin to a seed, could unite with an egg in a fertile environment, leading to the development of a fetus.⁷

Concept of Surrogacy

Surrogacy is yet another alternative for those who cannot procreate traditionally. Surrogacy, one of the most dramatic of the new reproductive technologies, is an arrangement by which a woman agrees to be impregnated by assisted conception, carries the resulting fetus, and relinquishes all parental rights to the child at birth. Fertility is revered in almost all cultures and the ability to reproduce is perceived as a milestone in adult development. A surrogacy arrangement or surrogacy agreement is the carrying of a pregnancy for the intended parents. The word 'surrogate' has its origin in Latin '*surrogates*', the past participle of '*surrogate*', meaning a substitute³ that is, a person appointed to act in the place of another. A surrogate mother is a woman who bears a child on behalf of another woman, either using her egg or by having a fertilized egg from another woman implanted in her womb. According to American Law Reports, surrogacy is defined as a contractual arrangement in which the surrogate mother agrees, for a fee, to conceive a child through artificial insemination using the sperm of the intended father, to carry and deliver the child, and to relinquish all parental rights following the child's birth.⁴ The Report of the Committee of Inquiry into Human Fertilization and Embryology or the Warnock Report (1984)⁵ defines surrogacy as the practice whereby one woman carries a child for another with the intention that the child should be handed over after birth.

Types of Surrogacy

There are two types of surrogacy, Gestational surrogacy and Traditional surrogacy. Gestational surrogacy is known as host or full surrogacy and traditional surrogacy is known as partial, genetic, or straight surrogacy. The Black's Law Dictionary categorizes surrogacy into two classes: **Gestational surrogacy** and **Traditional surrogacy** and describes it as follows: **Gestational surrogacy** - A pregnancy in which one woman (the genetic mother) provides the egg, which is fertilized, and another woman (the surrogate mother) carries the fetus and gives birth to the child. **Traditional surrogacy**- A pregnancy in which a woman provides her egg, which is fertilized by artificial insemination, and carries the fetus and gives birth to a child for another person. Gestational surrogacy can be considered complete in the sense that an embryo created through IVF is implanted into the surrogate mother, who has no genetic connection to the child. In contrast, traditional surrogacy may be called partial or genetically contracted motherhood because the surrogate mother is impregnated with the sperm of the intended father, making her both the genetic and gestational mother. In this case, the child shares genetic material with both the surrogate mother and the intended father.⁶ Surrogacy involves women acting as a surrogate or as an incubator for bearing a child for another person or couple. A surrogate woman conceives by using an egg from another woman or by using her own donated egg and sperm from the donor.⁷ The concept of surrogate motherhood is not new and has been practiced since ancient times. Surrogacy in its modern avatar has its roots originating from ancient Egypt, where infertile women were allowed to undertake the practice of allowing another woman to bear the biological child of her husband to avoid divorce. It was a practice though not held commonplace but was still considered an act and not a criminal offence. The practice of surrogacy has developed with time and in the present scenario it has become the most popular and controversial form of ART both at national as well as international level.

³ Available at <http://www.webmd.com/infertility-and-reproduction/guide/using-surrogate-mother> (Visited on July 21, 2015)

⁴ American law Reports, Validity and Construction of Surrogate Parenting Agreement, 77A.L.R. 470 (1989)

⁵ The Assisted Reproductive Technologies (Regulation) Bill-2010, Indian Council of Medical Research (ICMR), Ministry of Health & Family Welfare, Govt. of India, p. 4

⁶ Merino, Faith, Adoption and Surrogate Pregnancy. New York: InfoBase Publishing, 2010.

⁷ Ved Kumar, Fertility Revolution and changing concept of Family and Identity, Delhi Law review, 103, 2003, p.109.

In modern times, it was in the year 1978 that in the United Kingdom, the first successful IVF procedure was carried out and resulted in the birth of baby Mary Louise. This heralded a newfound hope for childless couples as well as ushering in a new branch of science. This did however also raise a multitude of questions in morality, law, and ethics about the field of assisted reproductive techniques. There is an amalgamated pool of ethical and legal issues that are hovering around the practice of assisted reproductive techniques and none are more important than in the case of surrogacy. The main concern with surrogacy, whether gestational or traditional, is the lack of a specific, outlined plan to protect the surrogate mother and the child if the intended parents do not honor the contract. Most insurance companies do not have plans to cover surrogate mothers specifically and even in places where schemes are available, the premiums are very high and the knowledge is not distributed among the surrogate mothers.⁸

Technology of Surrogacy

Surrogacy became possible with the advent of two distinctly different reproductive technologies: artificial insemination and in vitro fertilization. Artificial insemination (AI) was the first method of non-coital conception (that is, conception without sexual intercourse) to be developed.⁹ Surrogacy is an arrangement between a woman and a couple or individual to carry and deliver the baby therefore surrogate mother is known as the 'gestational carrier'.¹⁰ It is a simple procedure in which sperm is injected into a woman's vagina, allowing her to carry the resulting child until birth. Donated semen has mainly been used to impregnate the fertile wife of an infertile husband¹¹ In this way, the couple can raise a child who is genetically related to one of the partners. In vitro fertilization (IVF), known as the test-tube baby method¹², involves removing the eggs from a woman's ovaries through a surgical procedure known as a laparoscopy. The eggs are then placed in a laboratory dish together with a man's sperm. If all goes well, one of the sperm will fertilize an egg and the resulting embryo will be inserted into the woman's womb through her vagina. In vitro fertilization is primarily used by childless couples who, for some reason, are unable to conceive conventionally. Surrogacy emerged in conjunction with these two methods of reproduction. In some surrogacy arrangements, the surrogate is inseminated with sperm from the husband of the infertile couple. The resulting child is genetically related to both the surrogate mother and the husband. Another type of surrogacy arrangement involves retrieving the infertile wife's egg through laparoscopy, fertilizing it with her husband's sperm in a laboratory dish, and then implanting the resulting embryo into the surrogate's womb. The surrogate carries the child, who is genetically related to both the infertile wife and her husband, until birth. Thus, depending on the infertility problem involved, either AI or IVF may be used in a surrogacy situation.¹³

A surrogacy arrangement, or surrogacy agreement, involves carrying a pregnancy for the intended parents. There are two main types of surrogacy: gestational and traditional. In gestational surrogacy, the pregnancy results from the transfer of an embryo created via in vitro fertilization (IVF), so the resulting child is genetically unrelated to the surrogate, who is referred to as a gestational carrier. In traditional surrogacy, the surrogate is impregnated naturally or artificially, and the resulting child is genetically related to the surrogate.

Surrogacy remains somewhat controversial, but it provides an additional option for people seeking to have a baby through new reproductive technologies. Historically, surrogacy arrangements were typically confined to close relatives, family, or friends, often as an altruistic act. However, with the introduction of financial arrangements, surrogacy has expanded beyond family and community, crossing state and national

⁸ Imrie, Susan, Jadv, Vasanti, The long-term experiences of surrogates: relationships and contact with surrogacy families in genetic and gestational surrogacy arrangements. *Reproductive Biomedicine Online* 29 (4): 424– 435.

⁹ CARML Salve, Bimth POWER: THE CASE FOR SURROGACY 58 (1989).

¹⁰ Available at www.surrogacy.com (Visited on July 22, 2015)

¹¹ David. H. Smith, Wombs for Rent, Selves for Sale?, 4 J. P. HETH L & PoL'y 23, 24 (1988).

¹² Jyotsna A. Gupta, Women's Bodies: The Site for the Ongoing Conquest by Reproductive Technology 93, 103 (1991)

¹³ Morgan, Derek, *Surrogacy & the Moral Economy*, 1990. Gower.

borders. This shift has turned a natural biological function into a commercial contract, with surrogate services advertised, surrogates recruited, and agencies profiting significantly.

The commercialization of surrogacy has raised concerns about the potential for a black market, baby selling, and breeding farms, exploiting impoverished women as baby producers and possibly leading to selective breeding for a price. Surrogacy reduces pregnancy to a service and a baby to a product, with customers often dictating conditions before "purchasing" the child.

India has emerged as a popular destination for surrogacy arrangements among wealthy foreigners due to cheap medical facilities, advanced reproductive technology, poor socio-economic conditions, and a lack of regulatory laws. Women from lower socio-economic backgrounds in India often agree to become surrogates in return for payment, as hiring a surrogate in Western countries is difficult and costly, and surrogacy is legally prohibited in some countries. These women, usually from lower-class to lower-middle-class backgrounds, married, and in need of money, accept the assignments. The money paid to surrogate mothers in India, although seemingly small, can be crucial for their families, often used for essential needs like housing, children's education, and medical treatment.

Surrogate mothers in India often insist on anonymity due to social stigma, and their husbands may initially support but later oppose the arrangement. As more childless couples from overseas seek surrogates in India, legal experts caution about potential post-birth complications due to the lack of clear laws. Foreigners face challenges in obtaining legal assistance for taking their children back to their home countries. The financial aspects of surrogacy raise ethical, philosophical, and social questions, complicating the rights of the surrogate mother, the child, and the commissioning parents.

Legislative Regulation of Surrogacy in India

The Surrogacy (Regulation) Act 2021

Eligibility criteria for surrogate:

- i. Only ever-married women who have their child and are aged between 25 to 35 years on the day of implantation may participate as surrogate mothers or contribute through egg or oocyte donation. Women meeting the eligibility criteria and willing to act as surrogate mothers may undergo surrogacy procedures by this Act:
- ii. The intending couple or intending woman must approach the appropriate authority together with a willing woman who consents to serve as a surrogate mother.
- iii. No woman may act as a surrogate mother by providing her gametes.
- iv. A woman may not serve as a surrogate mother more than once in her lifetime, with the number of permitted attempts for surrogacy procedures specified as prescribed.
- v. A registered medical practitioner must provide a certificate of medical and psychological fitness for both surrogacy and the related procedures.
- vi. These provisions aim to regulate and ensure the proper conduct of surrogacy arrangements, emphasizing consent, medical suitability, and procedural limits.

Eligibility criteria for intending couple:

An eligibility certificate for intending couples is issued by the appropriate authority upon fulfillment of the following conditions: (I) The intending couple must be married, with the female between the ages of 23 to 50 years and the male between 26 to 55 years on the day of certification. (II) The intending couple must not have any surviving child, whether biologically, through adoption, or via surrogacy, before certification. These criteria establish the eligibility requirements for couples seeking to undergo surrogacy, ensuring that they meet specified age limits and have not previously had children through various means. "However, this provision does not apply to intending couples who already have a child who is mentally or physically challenged, or suffers from a life-threatening disorder or fatal illness with no permanent cure, as approved by the appropriate authority and confirmed by a medical certificate from a District Medical Board. (III) Additionally, any other conditions specified by regulations shall also apply." This rephrasing clarifies that the exception applies to couples with children meeting specific health criteria, while also acknowledging the possibility of additional conditions outlined in regulations.

Surrogacy procedures must not be sought or conducted without first explaining all known side effects and aftereffects to the surrogate mother. Written informed consent, in the prescribed form and in a language she understands, must be obtained from the surrogate mother before proceeding. Notwithstanding anything contained in sub-section:

- (1) The surrogate mother shall have the option to withdraw her consent for surrogacy before the implantation of the human embryo in her womb.
- (2) Prohibition on Abandoning a Child Born Through Surrogacy: The intending couple or woman must not abandon a child born through a surrogacy procedure, whether within India or outside, for any reason. This includes, but is not limited to, genetic defects, birth defects, other medical conditions, defects developing later, the sex of the child, or the conception of multiple babies.
- (3) Rights of Surrogate Child: A child born through a surrogacy procedure shall be considered the biological child of the intending couple or intending woman. This child shall have all the rights and privileges granted to a natural child under any current law.
- (4) Number of Oocytes or Human Embryos to be Implanted: The number of oocytes or human embryos to be implanted in the uterus of the surrogate mother for surrogacy shall be determined as prescribed.
- (5) Prohibition of Abortion: No person, organization, surrogacy clinic, laboratory, or clinical establishment of any kind shall force the surrogate mother to undergo an abortion at any stage of the surrogacy process, except under conditions as prescribed. Prohibition of Commercial Surrogacy, Exploitation of Surrogate Mothers, and Children Born Through Surrogacy: Commercial surrogacy, as well as the exploitation of surrogate mothers and children born through surrogacy, is strictly prohibited.

(1) No person, organization, surrogacy clinic, laboratory, or clinical establishment of any kind shall:

- (a) Undertake commercial surrogacy, provide commercial surrogacy or its related component procedures or services in any form, or run a racket or an organized group to empanel or select surrogate mothers. Use individual brokers or intermediaries to arrange for surrogate mothers and surrogacy procedures, at clinics, laboratories, or any other place.
- (b) Issue, publish, distribute, communicate, or cause to be issued, published, distributed, or communicated any advertisement regarding commercial surrogacy by any means whatsoever, scientific or otherwise.
- (c) Abandon, disown, exploit, or cause to be abandoned, disowned, or exploited in any form, the child or children born through surrogacy.
- (d) Exploit or cause to be exploited the surrogate mother or the child born through surrogacy in any manner whatsoever.
- (e) Sell human embryos or gametes for surrogacy or run an agency, racket, or organization for selling, purchasing, or trading in human embryos or gametes for surrogacy.
- (f) Import or help in the importation of human embryos or human gametes for surrogacy or surrogacy procedures.
- (g) Conduct sex selection in any form for surrogacy.

(2) Notwithstanding anything contained in the Indian Penal Code (45 of 1860), contraventions of the provisions of clauses (a) to (g) of sub-section (1) by any person shall be an offence punishable with imprisonment for a term which may extend to ten years and with a fine which may extend to ten lakh rupees.

(3) For this section, the expression "advertisement" includes any notice, circular, label, wrapper, or any other document, including advertisements through the internet or any other media, in electronic or print form. It also includes any visible representation made through hoarding, wall painting, signal light, sound, smoke, or gas.

Judicial Response to Surrogacy in India

India currently lacks a comprehensive legal framework addressing the complex issue of surrogate motherhood, despite its status as a prominent destination for surrogacy. This gap in legislation has created significant challenges and uncertainties, as highlighted by cases such as *Baby Manji Yamada vs. Union of India*. In this landmark case, a Japanese couple entered into a surrogacy agreement with an Indian woman in Anand, Gujarat, a city known for pioneering surrogacy practices. However, disputes arose between the

couple, leading to the surrogate mother abandoning the child and leaving its custody in limbo due to the absence of clear surrogacy laws.

The Supreme Court's recognition of surrogacy as an industry has reignited debates on its commercialization in India. The court's acknowledgment of factors such as India's advanced medical infrastructure, high international demand, and the availability of economically disadvantaged surrogate mothers has raised concerns about the exploitation of women and the commodification of pregnancy. Terms like 'wombs for rent', 'outsourced pregnancies', and 'baby farms' have been used to describe the phenomenon, underscoring ethical and moral dilemmas.

Despite surrogacy being practiced on a large scale in India, there is neither a prohibition nor a regulatory framework governing its commercial aspects. This legal vacuum has prompted discussions on the need for a structured law to oversee and regulate surrogacy practices in the country. India's forthcoming legislation aimed at legalizing commercial surrogacy reflects evolving legal perspectives and societal concerns, positioning the country uniquely on the global stage in addressing the complexities of surrogate motherhood. In *Jan Balaz vs. Union of India*, the Gujarat High Court made a significant decision by granting Indian citizenship to twin babies born through compensated surrogacy by a German national in Anand district. The court emphasized the paramount importance of protecting the rights of new-born babies above all else, including the rights of biological parents, surrogate mothers, or egg donors. The emotional and legal relationships between the babies and the surrogate mother and egg donor were also deemed crucial in their decision-making process.

In the recent case of *H Siddaraju & anr. v. Union of India & others*, the Karnataka High Court developed a "triple test" framework to determine the eligibility of couples seeking to undergo surrogacy under the Surrogacy (Regulation) Act, 2021. This framework addresses specific criteria that must be met:

1. **Genetic Test:** The husband must undergo a genetic test to ensure the health of his sperm, thereby reducing the risk of the child being born with deformities or disorders.
2. **Physical Test:** The couple must demonstrate physical capability to care for the child, ensuring they are fit to undertake the responsibilities of parenting.
3. **Economic Test:** The intending couple must prove they are financially stable and capable of providing for the child's needs without leading them into poverty upon birth.

These legal developments illustrate efforts to establish a structured regulatory framework for surrogacy in India, aiming to balance the interests of all parties involved while safeguarding the welfare and rights of children born through surrogacy.

Judicial Response to Adoption of Surrogacy by Lgbtq+

Surrogacy in India has also been embraced by gay couples. In the case of *Devika Biswas vs Union of India*, the Supreme Court affirmed reproductive rights as an integral aspect of Article 21's 'right to life'. These rights encompass a woman's ability to carry a fetus to term, give birth, and raise children, alongside privacy, dignity, and bodily integrity. The court found restrictions limiting surrogacy to married couples or widowed/divorced individuals of a certain age to be discriminatory against LGBT individuals and elderly couples, thus violating Article 21. This legal stance contrasts with the experience of Greg and Rob, a gay married couple from Washington, who faced no hurdles in taking their daughter back to the US, where state laws recognize commercial surrogacy. Meanwhile, Australia is contemplating banning commercial surrogacy arrangements with India, reflecting global debates and shifts in moral perspectives on the gestation of future generations. In *K.S. Puttaswamy vs Union of India*, the Supreme Court emphasized that state interference in procreation constitutes a direct infringement on one's right to procreate and privacy, both recognized as components of the right to life under Article 21 of the Indian Constitution. Despite the lack of specific legislation on surrogacy in India, except for a pending 2019 bill in the legislature due to legal issues, the judiciary has sanctioned surrogacy in various cases. These developments highlight the evolving legal landscape and societal debates surrounding surrogacy in India, particularly concerning reproductive rights, privacy, and equality for LGBT individuals and other prospective parents.

CONCLUSION

The concept of surrogacy presents a complex interplay of biological, ethical, legal, and societal dimensions. It emerges as a viable alternative for individuals facing challenges in traditional conception methods due to various physiological reasons. Surrogacy, rooted in historical practices dating back to ancient times, has evolved significantly with advancements in assisted reproductive technologies like artificial insemination and in vitro fertilization. Legally, the landscape of surrogacy in India has been characterized by a lack of comprehensive regulation until the recent enactment of the Surrogacy (Regulation) Act, 2021. This legislation seeks to govern surrogacy arrangements, defining eligibility criteria for both surrogate mothers and intending couples, emphasizing medical and psychological fitness, and prohibiting commercial surrogacy to prevent exploitation. In conclusion, while surrogacy offers hope and fulfillment to many aspiring parents, its practice demands careful regulation to safeguard against exploitation and ensure the well-being of all stakeholders. As global perspectives and legal frameworks evolve, the future of surrogacy will likely continue to be shaped by ongoing debates, advancements in technology, and changing societal norms.