

Surrogacy: Current Scenario in India

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ABSTRACT

Surrogacy is a legal arrangement and a well-known method of artificial reproduction in which an adult female accedes to carry a pregnancy in her womb and is obliged to give the parenting rights to a third party as per agreement. It is a blessing for seeking parents who for various medical reasons are unable to bear an offspring and seemingly beneficial for a substitute mother who may get a financial reward in return. Ever since it came into being this practice has been critically analyzed by social, medical, ethical and legal groups. World over the practice is legalized in only some countries and the citizens of existing others seek such treatment by reproductive tourism. This practice adds fuel to the fire to the controversy of whether it is an ethical practice or simply a means of rich foreign nationals exploiting the desperation of poor and needy women. This article deals explores the finer details and intricacies of surrogacy.

Keywords: Surrogacy, intended parents, surrogacy laws, transnational surrogacy, ethical issues.

INTRODUCTION

The Surrogacy (Regulation) Bill, 2018 has been passed in Lok Sabha which bans any surrogacy arrangement with monetary compensation in India. This is a much desired step to stop the growing unregulated surrogacy “market” and “fashion surrogacy” in India.¹ Surrogacy may prove to be a boon if judiciously framed laws are implemented to protect rights of child born through surrogacy, surrogate mother and intended parents. The essence of a living organism is to be able to have its progeny and parenting is an intrinsic desire deeply rooted in humankind.² Surrogacy is a popular artificial reproductive technique (ART) where a woman carries a pregnancy in her uterus and is involved only in the reproductive process. The commissioning parents are intended to raise the child born from such an agreement. In ‘traditional surrogacy’, the surrogate contributes with her own egg where as in ‘gestational surrogacy’, a fertilized egg is implanted in the surrogate. Surrogacy may be altruistic or commercial depending on monetary incentive to the substitute mother. In altruistic surrogacy no financial gain of any kind is given to surrogate mother or her dependents except payment of her medical bills and insurance coverage for the surrogate mother. Mostly here the surrogate is

a close relative of the intending parents. In commercial surrogacy results in a financial gain in cash or kind to the surrogate mother or her dependents other than just payment towards the medical expenses incurred on her.

Surrogacy has remained in controversy time and again. Biggest concerns have been related to commodification of women and baby. In spite of being a great advancement in the field of ART, many concerns surround it relating to ethics and legality. These concerns are valid as a poor surrogate who agrees to rent her womb to the rich intended parents is vulnerable to being exploited.³ The legal arrangement between surrogate mother and intending parent is perceived as unethical by some groups being against moral principles and human rights; akin to selling a part of body or baby.⁴

If the case is not selected judiciously, surrogacy may not give positive results. The society may then repudiate this method of reproduction. The exploitation

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of surrogates in emerging commercial arrangements is flourishing.⁵ Recently, a 42 years old widow referred from a private ART center to AIIMS, Delhi died as a result of complications of pregnancy. She was carrying a 17 weeks twin pregnancy and had concealed her past history of tuberculosis, hydrocephalus and depression to become a surrogate. This incident highlights the existing poor state of affairs related to commercial surrogacy in India. Hence, more stringent but user friendly laws need to be in place to be able to utilize this scientific development.

Historically, surrogacy has been mentioned in *Biblical book of genesis* where the servant Hagar agrees to procreate for the infertile Sarah through her husband Abraham.^{6,7} In Hindu mythology, lord Balram is believed to have been conceived by Devaki but given birth by Rohini.

The first surrogacy contract was made in US in 1980. In 1986, Mary Whitehead, a surrogate who was also a biological mother, refused to give custody of the child born out of agreement to intending parents. Later, in another case in 1990 (Calvert V Johnson case) the court gave landmark judgement suggesting that true mother in such surrogacy arrangements is the one who intends to raise the child. Surrogacy remains a ray of hope for achieving parenthood in women who do not have a uterus by birth or by disease. Amongst others who seek surrogacy are women who have distortion of uterine cavity due to congenital malformations or fibroids, severe medical diseases, repeated implantation failures. Gay couples and single men are amongst an increasing segment of population seeking.

Strict laws were passed in India to ensure careful selection of a surrogate mother in 2014 (Draft regulation bill) defining surrogate's age as 23-35 years. Later, in 2018 surrogacy bill reformulated that a surrogate mother should be a married woman between 25-35 years who has at least one child of her own of minimum 3 years age, with inter-pregnancy interval of 2 years. Husband of surrogate must consent for the agreement. Elaborate psychological and medical test and verification of financial and criminal back grounds is mandatory. Apart from routine blood test, screening for HIV, HBsAg, anti-HCV, ECG, Pap smear, ultrasound of abdomen and pelvis along with mammography are done. For any agreement to be fruitful both parties must be completely informed of their expectations from each-other and have mutual trust. The genetic couple

must be offered alternative treatment options including adoption or childless life. They should be counselled about the possible difficulties and complications to the baby, psychological risk to child, estimated cost of treatment, chances of multiple pregnancy and need for legal advice. The surrogate mother and her husband must completely understand the process of surrogacy and its implications. She should be extensively counselled of the medical risk of pregnancy along with risk of multiple pregnancy, social and psychological aspects related to becoming a surrogate. Both surrogate and intended parents sign a legal contract and are represented by separate attorneys to safeguard interest of their clients. Documents mandatory to be provided are aadhar card, Voter identification card, school leaving and birth certificate. Husband of surrogate must be willing for the agreement. Couple/single parent must provide the proof of address and identity of both couples and marriage registration.

With improvement in the ART techniques and use of freezing facility, synchronization of cycle in surrogacy is becoming less challenging. The eggs are retrieved from the intended mother or egg donor who receives medication to induce ovulation. The eggs are then fertilized by intended father's sperm or donor sperm in an invitro fertilization (IVF) laboratory to develop embryo which is transferred in surrogate's uterus. The surrogate is put on hormonal medications for increasing the success of embryo transfer. After confirmation of cardiac activity in the growing fetus, the surrogate starts getting her compensations in instalments. The surrogate is often supervised by a round the clock nursing staff, dietician, physiotherapist, counsellor and gynaecologist at a surrogate house. She often visits her own home for few weeks to avoid stress of staying away from her own children. At these surrogate houses their medical and personal requirements are fulfilled once their pregnancy is confirmed. Antenatal care is done every 3 weeks, and frequent ultrasounds to exclude anomalies and check growth and fetal well-being are done. The intended parents are appraised about the growing foetus frequently. Postpartum surrogate is discharged after 2 weeks postpartum care and observation.

Multiple pregnancy and its related complications are the commonest risks apart from the obstetrical complications. American Society for reproductive medicine (ASRM) and European Society of Human

Reproduction and Embryology (ESHRE) committees recommends only a single embryo transfer though very few centers are following it. All complications related to pregnancy and labor may be seen. Often, most of these pregnancies are terminated by cesarean section posing the surrogate at a higher risk during child birth. Rarely, postpartum hemorrhage and amniotic fluid embolism may be seen. Feeling of emotional hurt related to bereavement of child after birth are natural but decreases over time.

Ethical concerns involve the fact that a human baby cannot be produced and sold in exchange of monetary benefit. There have been concerns about women being exploited by their families to being coerced to become surrogates. The surrogacy industry in India was estimated by a United Nations study conducted in 2012 to be as huge as 400 million dollars a year. 'Anand', a village in Gujrat had been given the status of 'the cradle of the world' due to the booming surrogacy practices in the area.⁸

At the same time risking surrogacy to only altruistic with only 25-35 years age will make it rare for intending parents to find a surrogate to undergo the process without monetary gains. Identity disclosure of all involved in process to be impressed.

Jews accept full gestational surrogacy and use of IVF for fertilization. Some religious beliefs like by Catholic Church mentions any act that involves another person between husband and wife are immoral. Islam has similar beliefs on chastity.

Religious beliefs become society norms in various areas of the world, which in turn become laws. Here, arises the need for couples seeking surrogacy to explore foreign land for the desire to become parents. Which in turn opens the Pandora box of low income country women being commodified by the affluent developed countries. 40% of American women who desire IVF with egg donation make use of reproductive tourism. India has emerged as a leading surrogacy center with good medical facilities, low cost and availability of surrogates ever since it allowed commercial surrogacy in 2002.

It is economically lucrative for a needy woman to offer herself to be a substitute mother as it fetches her money that she would earn in 10 years. This seems to be a relationship which offers mutual benefit if done with careful selection of case and willingly. But in most surrogacy contracts, the woman is deprived of any payment if she miscarries before a certain point. It is a

well-known fact that success of live birth even after 3 IVF cycles is limited to 45%. So despite significant mental and physical efforts, 55% of times surrogate will not be paid complete amount around when she is not able to deliver a take home baby.⁹

INDIAN SCENARIO OF SURROGACY

Indian Council of Medical Research Guidelines (ICMR), 2005

These guidelines opened the doors to legalizing surrogacy in India. They allowed monetary compensation by mutual agreement between surrogate and commissioning parents. It also emphasised need of a life insurance cover of surrogate and ensured privacy to both parties. It prohibited sex selection as well as egg donation by surrogate for embryo.¹⁰

Law Commission of India: 228th Report August 2009

It condemned commercial surrogacy and expressed the need to frame a law to prevent uneducated and poor surrogate mothers from being exploited physically, psychologically and financially.

In the case of *Balaz v. Union of India*, the Honourable Supreme Court of India has given the verdict that it is the citizenship of surrogate mother which will determine the citizenship of the child born through this process.

Draft Assisted Reproductive Technology Bill, 2010

This bill which never became a law mentioned that surrogacy should be available to all single persons, married couples and unmarried couples.

The Surrogacy (Regulation) Bill, 2019

This bill was passed in Lok Sabha on 5th August 2019 to ban commercial surrogacy and protect the interest of surrogate mother.¹¹ It lays down criteria to be eligible as a surrogate. The surrogate should be a woman between 25 to 35 years, a close relative of the commissioning parents who is married with at least one child born. She should prove to be a mentally and physically healthy and should never have been a surrogate earlier. The surrogate cannot provide her own eggs for the process. This bill allows surrogacy only in

Indian couples married for at least 5 years with proven infertility, with wife's age 23-50 years and husband's age 26-55 years old. The intending couple should not have any surviving child (biological, adopted or surrogate) and must obtain a certificate of 'essentiality' and a certificate of 'eligibility' from appropriate authority appointed by state or central government. The practice of surrogacy had become fashionable with many celebrities opting for it. No procedure related to surrogacy would be allowed in any clinic not registered with state or national surrogacy boards. These boards would lay down code of conduct of surrogacy clinics and supervise their functioning. The surrogate mother is allowed to refuse the agreement before embryo transfer. She is allowed abortion on her written consent as per medical termination of pregnancy act, 1971 pending authorization by appropriate authority. A fine of up to 10 lakh rupee and imprisonment upto 10 years is the penalty for violators who are involved in commercial surrogacy, exploit the surrogate, abandon or exploit the surrogate child or misuse gametes/embryo for surrogacy. It identifies biological parents of surrogate child as true parents of child born through surrogacy.

There are many concerns raised by restricting to altruistic surrogacy alone. Finding an appropriate surrogate in the defined age limit may be very difficult without giving any incentives to surrogate. As mostly the conditions requiring surrogacy are related to female infertility she may be forced to divorce for being unable to conceive or stigmatized further leading to unhappy marriage. This also makes intending parents vulnerable to the hostile environment of society towards infertile couple as they will now need to share their intimate details with close relatives. This may be considered as an infringement into their right to privacy. Adoption may be the only option for most couples who are unable to find a consenting close relative to be a surrogate or travelling to other countries for reproductive tourism where commercial surrogacy is legal. The bill also doesn't have provision for single parents, same sex parents, non-resident Indians and overseas Indians.

Rajya Sabha Select Committee's Key Recommendations^{12,13}

The Surrogacy (Regulation) Bill was referred to Rajya Sabha select committee who reviewed the proposed legislation and made the following key

recommendations on 5th February 2020 – Any willing woman should be allowed to act as a surrogate mother, not only 'close relatives', however reinforced only altruistic surrogacy to be permitted.¹⁴

Surrogacy should be allowed to single woman, such as a widow, a divorcee, or a person of Indian origin (PIO). 5 years waiting period before seeking surrogacy should be omitted in proven medical conditions such as absence of uterus by birth, non-functional uterus, removal of uterus because of cancer, fibroids, or patients with chronic medical condition where normal pregnancy is ruled out and it is medically proven beyond any doubt that surrogacy is the only option. There is also no requirement of obtaining certificate of proven infertility in these cases.

It asserted that Assisted Reproductive Technologies (Regulation) Bill may be passed before the Surrogacy (Regulation) Bill in the cabinet as it deals with technical, scientific and medical aspects which apply to storage of embryo, gamete, and oocyte.

The insurance cover for the surrogate mother should be raised from the 16 to 36 months as proposed in the previous Bill.

The appropriate authorities of the central and state governments would be required to submit data on number of surrogacy procedures, surrogacy clinics and all related aspects to the National Board on Surrogacy.

The term of experts on the surrogacy boards should be 3 years instead of 1 year and the Chairman and Vice Chairman of appropriate authorities should be officials of sufficiently higher rank.

CONCLUSION

Considering all the pros and cons surrogacy brings a ray of light into the life of individual and couples who are seeking their biological child or do not intend to go for adoption. Framing of appropriate and fair laws which are implemented world over and having consensus statement of international societies on this vital issue are need of the hour. If judiciously used with correct intent this technique can surely prove to be a rewarding experience for all.

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