



# Surrogacy in India: Current Scenario and Ethical Perspective

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## Abstract

Advancement in reproductive technologies has blessed infertile couples with their own babies with the surrogacy. On one hand this is helpful; on other hand this has potential for exploitation of all three; surrogate, surrogate baby and infertile couple. Government of India has taken many initiatives to control this and to regularize the ART clinics. Recently surrogacy regulation bill has been passed from Lok Sabha on 19<sup>th</sup> December 2018 and soon it will become law. This is a major step towards ending commercial surrogacy in India. This step does not seem to end all the issues related to surrogacy and need critical evaluation. Making Commercial surrogacy illegal has the potential to perpetuate illegal practices; making surrogate even more vulnerable. Putting ban over this is not the solution rather commercial surrogacy has to be regulated.

**Keywords:** Surrogacy; Commercial surrogacy; Surrogacy regulation bill; Altruistic

## Introduction

When a couple who are unable to give birth to a child, takes the help of another woman and that woman carries and give birth to a baby of that couple then it is termed as surrogacy. Surrogacy is derived from Latin word Subrogate means to substitute. Surrogacy arrangements are usually sought when pregnancy is either medically impossible or it is considered very risky for health of the mother. Those couple seeking surrogacy are called intended parents and this is not a new concept. It has been used since ancient times like there was a custom known as antiquity in the times of Babylonian civilization. A barren woman allows her husband to reproduce a child with another woman to prevent divorce because of childlessness and that child would be reared by that childless woman. Recent advances in medical science, changes in social customs and legal framework have led to the development of modern commercial surrogacy. With the help of modern science now a day it is possible to develop embryo outside the womb or to inseminate the woman artificially without any need for physical contact between man and woman; so the moral issues are less with ART.

Surrogacy is of two types mainly gestational and traditional. Traditional surrogacy involves insemination of the surrogate naturally or artificially with semen of the male partner of the childless couple and thus resulting child is genetically related to the surrogate mother. This has several ethical, social as well as legal implications. In case of gestational surrogacy, it is with the help of Artificial Reproduction Techniques (ART) and an embryo from the eggs of intended couple is formed in the test tube and transferred to the womb of the surrogate. Thus Resulting child has no genetic similarity to the surrogate mother. Newer advancement in the Artificial Reproductive Techniques (ART) has led to the boom in the field of surrogacy. The first test tube baby was born in England in 1978. Term commercial surrogacy is used when the surrogate is given compensation higher than the medical reimbursement and other reasonable expenses. When surrogate mother helps the couple out of love and compassion and monetary compensation is not more than medical reimbursement then it is called altruistic or non-commercial surrogacy.

## Issues with Surrogacy

There are several ethical, social, psychological and legal issues associated with commercial surrogacy [1]. These issues have worked as deterrent for its worldwide acceptance and for that reason commercial surrogacy is not legal in all the countries. In United States and Argentina, surrogacy requests are decided by independent surrogacy committees. In countries like United Kingdom, Netherlands, Ireland, Denmark, Belgium, South Africa, Australia, Canada and Greece; only altruistic surrogacy is allowed. Commercial surrogacy is legally allowed in countries like

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Russia, Ukraine, and Thailand. While in France, Germany, Spain, Sweden, Italy and Iceland any form of surrogacy is not allowed at all. In India commercial surrogacy is banned but not illegal [2]. Such discrepancies in laws in different nations, legal restrictions in native country and cheaper services abroad result in reproductive tourism. Childless couple of those nations where surrogacy is illegal usually goes to other country where it is legal and take help of surrogate and come back with their own child after adoption. These commissioning parents usually go to developing countries for this purpose as the services are cheaper over there. This give rise to a trend called the baby factories and has a potential for exploitation of surrogate by the middleman for greed of money [3]. Sometimes there is difficulty in handing over the babies as in case of baby Manji [4], as the laws in different countries are different for surrogacy and adoption and they are not at par. There are different laws for legal parentage of such child and also issues with travel documents and citizenship. There is no inter-national convention over these problems. Sometimes these infertile parents abandon the child which is against the right of a child and endanger the child born out of surrogacy. Relinquishment of baby sometimes leads to psychological problem. There is a social stigma attached with infertility and surrogacy.

### **Laws Related to Surrogacy in India**

Commercial surrogacy is legal in India since 2002. First effort to regularize this was done in 2005 when Indian Council for Medical Research (ICMR) gave first guidelines for accreditation, supervision and regulation of ART clinics. In 2008 Supreme Court of India stressed the need of legislation to govern the surrogacy. Then in 2009 Law Commission of India submitted a report on need for legislation to control surrogacy and to solve issues related to this. In 2010 ICMR revised the guidelines and proposed a legal agreement between commissioning parent, prospective surrogate and ART clinic before commencing the process [5]. In 2015 ministry of health and family welfare invited suggestions to revise the draft of ART bill which is still pending [6]. In 2015 Government of India prohibited commercial surrogacy and closed the doors for foreign nationals, NRI and POI. In 2016 union cabinet approved the surrogacy regulation bill [7]. This bill allows only Indian married heterosexual infertile couple to avail surrogacy services. Now this bill has been passed from Lok Sabha and to be discussed in Rajya Sabha and soon will be implemented as law [8].

### **Lacunae of Surrogacy Regulation Bill (2016): Indian Perspective**

As per surrogacy regulation bill 2016 commercial surrogacy is banned in India and only altruistic or non commercial surrogacy is allowed that too by a close relative. Although close relative is not defined here and this is also a shortcoming of bill and it need to be addressed. This bill is framed such that to prevent exploitation of surrogate mother and to safeguard the rights of a surrogate child, so that nobody can force her to carry a pregnancy in the greed for money. But is it the situation in reality. Are these measures are enough to prevent exploitation of female body. Is it really working for infertile couples? The altruistic concept of carrying a baby for someone else is allowed in the bill as long as there was no exchange of money beyond the medical bills. In addition, this altruistic form of surrogacy can only be done with the help of a close relative. As per the bill, this close relative should be married and must have her own child. It sounds good but practically it will be almost impossible for an infertile couple to find such close relative to carry their pregnancy and that too for no

money. In today's scenario, peoples do not have extended families; they usually have nuclear family so finding such close relative who fulfils the criteria for surrogate may be difficult. Now a day's women are carrier oriented and usually they themselves find it difficult to carry pregnancy for them self then how such close can relatives can spare time to help their needy relatives even if they wanted to do so and that too without compensation for their wages loss. How many infertile couples will be able to find appropriate surrogate and can ask for such favor. Even if a close relative is ready to help she may be restrained by her husband or family members from doing so and it may lead to friction within family. Here also there are chances that close relative female could be forced by family members for helping infertile couple against her own wish as infertile couples do not have other option, so they may force her. Is it not the exploitation of that poor lady? She may become surrogate against her wish just to prevent coercion in family. Even if both the parties are ready even then there are few issues with close relatives like secrecy is not maintained in such situation and everyone in relation knows about surrogacy. There could be problems in handling over of resulting child, as child is in continuous contact with her gestational mother and this can complicate their lives later. Gestational mother may find it difficult to detach emotions as she is in continuous contact with the child and that child may know that she is her real mother and may develop affection for her later when he grow up. There could be issues with property within the family. If such infertile couples go for traditional surrogacy with their blood relatives then there are increased chances of baby having genetic disorders as this situation is just like consanguinity as both are close relative. When you make something illegal, people find other ways to do so and surrogacy may take place undercover and you cannot stop them. Such infertile couple may find someone in need of money and they may get their work done. She will become surrogate but will be deprived of insurance and will put her life to danger. So this is clear that a woman can be exploited even in altruistic surrogacy. It would be wise not to ban commercial surrogacy but to make strict laws to regulate it. When this will become a law that a woman cannot become surrogate more than once then this would be injustice not to compensate her daily wages loss and her efforts monetarily. Since she is doing it once, it cannot be called commercial rather it should be called compensated altruistic surrogacy. Another issue is age of the intended parents; this should be 40 years for woman and 45 for father. Presently it is 50 and 55 years respectively. Imagine how old these parents will be when their children will become 20 year old. This long age gap between child and parents is not good for child. They could die when their child born out of surrogacy is very young and he may be emotionally and financially not secured. Old age parenthood is especially dangerous for their child and should be discouraged. Also there are more chances of birth defects in such pregnancies if parents are that old, it will itself complicate the situation.

One important issue which needs to be addressed is the question that whether single parent should be allowed or not. A child needs both mother and father for his complete personality development. By allowing single parent we will diligently deprive child from his basic need since birth. Child is not a toy meant for fulfilling your emotions only. This is a big responsibility since a properly grown child can become a responsible citizen in future. One has no right to bring a new life in this world for their enjoyment without taking care of what is good for that child. It is injustice with the unborn child. Every child has a right of full potential to grow as a person but by allowing single parents to have their own babies through surrogacy, we are depriving

the child for no reason. It may lead to psychological and behavioral problems in child in future. Single parents have other options to satisfy their urge to become parents like adoption if they really want.

Since there are so many criticism and lacunae to this draft bill; there is a strong need to address all the pitfalls before enforcement of law. Government should not take hasty decisions and consider all the future prospects.

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