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## SURROGACY MILIEU IN INDIA: A LEGISLATIVE VACUUM

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*Surrogacy gives hope to couples who are unable to carry child on their own. Single men, women and same-sex couples can also opt surrogacy to have their own genetic child. Surrogacy has adjourned the practice of adoption by childless couples who can bear the cost of surrogacy. Recent past has witnessed the blooming of surrogacy clinics all over the world. Eligibility of surrogates, process, legality and expenses, involved in surrogacy, differ from country to country. Most of the countries do not have surrogacy regulating legislation in force. Few countries prohibit surrogacy, while some ban commercial surrogacy and permits altruistic one. Even international surrogacy is not allowed in some jurisdictions. Easy availability and low costs of surrogacy procedures in developing countries have made surrogacy a lucrative business. India developed into a hub of commercial surrogacy with no harsh laws, regulating surrogacy clinics. Even though commercial surrogacy has been banned, still lack stringent laws, governing surrogacy clinics in the country, creating a legislative vacuum. Legal and ethical issues surrounding the surrogacy are also complex, thereby making it difficult to differentiate whether surrogacy is a boon or bane. The need of the hour is to legalize altruistic surrogacy and prohibit commercial one. Till laws being enacted and appropriate monitoring authorities are instituted, one has to assess with his/her conscience what is right and where wrong begins*

**Keywords:** surrogacy, gestational surrogacy, altruistic, commercial surrogacy, Surrogacy bill, surrogate mother, intending couple, legal and ethical issues, international surrogacy, surrogacy regulation

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### 1. Introduction

The word “surrogate” is originated from Latin “Subrogare”, which means “appointed to act in the place of.” It implies a substitute, so the surrogate mother means a woman who gets pregnant and brings the birth to a child to give away this child to another person or couple, generally alluded to as the “intended” or “commissioning” parents. [1] As per the Black's Law Dictionary surrogacy means the practice of carrying and delivering a child for another person [2]. The Encyclopedia Britannica defines surrogacy as a process, in which a woman endures a child for a couple who is incapable of procreating customarily [3]. Likewise, for childless couples, this sort of arrangement gives a ray of hope to gay couples and single men to accomplish fatherhood by using their sperms for creating embryos from donor oocytes.

Surrogacy is of two types – traditional and gestational. Traditional surrogacy, also known as genetic/partial/straight surrogacy, is the outcome of artificial insemination of the surrogate mother with the intended father's sperm, which makes her a genetic parent alongside the intended father. While in gestational surrogacy, also termed as host/full surrogacy, an embryo from the intended parents or a donated oocyte or sperm is transferred to the surrogate uterus. The surrogate has no genetic ties to the child [4].

Dependent upon whether the surrogate receives financial remuneration for her pregnancy, surrogacy can be commercial or altruistic. If surrogate receives money for the surrogacy arrangement, it is deemed as commercial. If she gets no reparation beyond the settlement of her medical and other pregnancy-related expenses along with the insurance coverage for her, it is signified to as altruistic one [5].

### 2. The aim and objectives of the study

The objective of this study was to analyze the current scenario of Surrogacy in India and the related laws in other countries.

To accomplish the aim, the following tasks were set:

1. To know the status of surrogacy in India.
2. To know the laws and statute relevant to surrogacy in India.
3. To know the prevalent surrogacy laws in other countries.

### 3. Materials and Methods

The purpose of this study was to explore and discuss the existing laws, pertaining to Surrogacy in India and other countries. The laws are different in different countries and even vary among different states, which keep changing from time to time. Despite the regulatory laws, there are still many lacunas, which need to be addressed. Two authors had independently searched and reviewed the following sources and databases: PUBMED, Google Scholar, SCOPUS, Google search engine. The following combinations of key search terms/ words were used: surrogacy, India, current scenario, laws in other countries, surrogacy bill, regulation.

### 4. Result

#### 4.1. Surrogacy in India

Surrogacy has been deep-rooted in Indian custom since primal times where a childless king or even an ordinary would have sex with other women to procreate an offspring. India had unfolded as a leader in international surrogacy and a destination in surrogacy-related fertility tourism. Because of relatively low costs of surrogacy arrangements and easy access, offered by Indian surrogacy agencies, Indian surrogates turn out to be progressively popular amongst intended parents in industrialized nations [6]. India had developed into a hub of commercial surrogacy with no harsh laws, regulating surrogacy clinics.

A bill for legalizing commercial surrogacy in India was prepared in 2002, which was drafted by a fifteen-member team of experts, headed by Baidyanath Chakraborty in collaboration with the Indian Council of Medical Research (ICMR) and National Academy of Medical Sciences (NAMS). It was then presented to union health and law ministries. In 2005, ICMR drafted the national guidelines for accreditation, supervision and regulation of ART (Assisted Reproductive Technology) Clinics in India are thus deliberating the initial attempt to regulate the surrogacy in India [7]. This led to the drafting of the ART Bill in the year 2008, 2010 and 2014 but was never approved by the Parliament [8–10]. The ICMR issued guidelines to regulate the surrogacy arrangements. As per the guidelines, the surrogate mother would be allowed for monetary compensation, the worth of which would be determined by the couple and the surrogate mother. The guidelines also stated that the surrogacy would be gestational one, means the surrogate mother cannot donate her egg for the surrogacy and that she has to renounce all parental rights, related to the surrogate child [7–10].

The Supreme Court of India, the highest judicial tribunal in the country, in the historical judgment of Baby Manji Yamada vs. Union of India case in the year 2008, where baby Manji was born through a surrogate mother in India to Japanese biological parents, also emphasized the want of regulation for surrogacy in India. In that specific case, the intended couple separated before the birth of the baby due to marital dispute and the baby's custody was handed over to her grandmother [11]. Subsequently, on August 5, 2009, the Law Commission of India tendered the 228th Law Commission Report titled "Need for Legislation to regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of parties to a Surrogacy" to the Ministry of Law and Justice, Government of India. Their report expressed the view of the Law Commission on the ICMR Guidelines 2005 on Surrogacy; the draft Assisted Reproductive Technology (Regulation) Bill and Rules 2008 and the Seminar on "Surrogacy – Bane or Boon". The Law Commission perceived that foreign nationals were using the surrogacy arrangements in India, and the nonexistence of a comprehensive legal framework, addressing surrogacy, could lead to exploitation of poor women, acting as surrogate mothers. Further, they recommended barring of commercial surrogacy, permitting altruistic surrogacy and legislating law to control the matters, pertaining to surrogacy [12].

In 2013, surrogacy by homosexual couples of foreign nationals and single parents were disallowed in India [13]. Later on, commercial surrogacy was banished in India in 2016. Before this, India was a popular destination for surrogacy. As per the study, backed by the United Nations in July 2012, there were over 3,000 fertility clinics across India with an assessed turnover of more than \$ 400 million a year [14].

Shortly after that in 2016, a Surrogacy (Regulation) Bill was introduced and passed by Lok Sabha, the lower house of the Indian parliament. The bill advocated the permission to only heterosexual Indian couples, married for at least five years with infertility problems, to approach altruistic surrogacy and thereby further to bar commercial surrogacy [15]. The 2016 bill lapsed due to the adjournment of the parliament session. The law was reestablished and approved by the Lok Sabha in 2019 [16].

#### ***The Surrogacy (Regulation) Bill, 2019***

The bill was introduced by the Minister of Health and Family Welfare, in Lok Sabha on July 15, 2019. It defines surrogacy as “a practice where a woman gives birth to a child for an intending couple to hand over the child after the birth to the intending couple”.

The Bill utterly interdicts commercial surrogacy and authorizes altruistic surrogacy where no financial compensation to the surrogate mother other than the medical expenses and insurance coverage during the pregnancy will be furnished. It also prohibits surrogacy for producing children for sale, prostitution or other forms of exploitation.

The Bill elucidates that flourishing commercialization, unethical practices, exploitation of surrogate mothers, abandonment of children, born out of surrogacy, and import of human embryos and gametes transpired due to lack of statute on surrogacy. Following the recommendations of the Law Commission of India, it intends to address these issues and protect the rights of surrogate mother and child. Surrogacy is made permissible for intending couples with proven infertility and for any condition or disease, specified through regulations.

Intending couple: The intending couple should be an Indian citizen and married for at least five years. The age of wife has to be between 23 to 50 years and that of husband, 26 to 55 years. They should not have any surviving child biological, adopted or surrogate. However, it excludes a child who is mentally or physically challenged or suffers from life-threatening disorder or fatal illness.

Essentiality certificate: A certificate of essentiality will be furnished on fulfilment of the following:

(i) a certificate of proven infertility of one or both partners of the intending couple from a District Medical Board;

(ii) an order of parentage and custody of the surrogate child, passed by a Magistrate's court; and

(iii) insurance coverage for 16 months, covering postpartum delivery complications for the surrogate.

Surrogate mother: The surrogate mother has to be a married woman of age group 25–35 years, having a child of her own and should be a close relative of the intending couple. She can be a surrogate only once in her lifetime. Before opting to be a surrogate, a certificate of medical and psychological fitness for surrogacy has to be attained from the appropriate authority. Further, the surrogate mother cannot furnish her gametes for surrogacy.

Parentage and abortion of surrogate child: A child, born out of a surrogacy agreement, will be adjudged to be the biological child of the intending couple. The written consent of the surrogate mother is essential for the abortion of the surrogate child. Abortion can be done only with the authorization of the appropriate authority and in compliance with the Medical Termination of Pregnancy Act, 1971.

Appropriate authority: The National Surrogacy Board (NSB) and the State Surrogacy Boards (SSB) will be established by the central and the state governments, respectively. Surrogacy clinics cannot commence surrogacy related procedures unless the appropriate authority authorizes them.

Penalty: Imprisonment for not less than ten years with a fine of up to Rs 10 lakh will be imposed upon contraventions of Bill's provisions.

The Bill vetoes the storage of embryos and gametes (unfertilized egg and sperm) for surrogacy. It was differing from the ICMR guidelines of the year 2005, which allow the storage of embryos for five years [7].

The bill is yet to be approved by the Rajya Sabha, the upper house of the bicameral Parliament of India. After approval from Rajya Sabha and on being subsequently assented by the President, it will become the legislation.

Lacunae of the proposed bill:

The present Bill does not state who will be a 'close relative'. Some other laws and regulations in the country define terms, such as 'relative' or 'near relative'. The Transplantation of Human Organs and Tissues Act, 1994 specifies that a living donor has to be a 'near relative'. A 'near relative' to be related genetically, namely, grandmother, grandfather, mother, father, brother, sister, son, daughter, grandson and granddaughter [17]. The Companies Act, 2013 describes a 'relative' as a member of a Hindu Undivided Family, husband and wife; or other relations, prescribed under the Act [18].

The intending couple has no voice in the accord to abort a surrogate child. An abortion of the surrogate child requires the written permission of the surrogate mother and authorization by the appropriate authority. No person can influence the surrogate mother to abort the foetus. However, after birth, the child will be the biological child of the intending couple, and they are accountable for the rearing of the child.

The repudiation on storage of egg or sperm as per the latest bill may have adverse health implications for the intending mother. In surrogacy, the eggs are extracted from the intending mother and are implanted in the surrogate mother's uterus. The success rate of one implantation is below 30 %; therefore, several implantation attempts may be required. To ensure availability of the eggs for the numerous trials, extra eggs are extracted and stored in routine IVF procedures. Note that the intending mother needs to undergo extensive hormonal treatment for this extraction of eggs. In case of a failed IVF attempt, repeated stimulation of the intended mother for retrieval of her eggs is associated with risks, related to multiple hormonal injections and complications of the procedure itself.

A surrogacy arrangement should provide financial backing for a surrogate child in the event of the death of the intending couple or divorce between the intended parents.

Although the commercial surrogacy practice leads to the exploitation of poor women, on the other hand, it is also contended that surrogacy has to be a women's choice solely. Women should have right over their body and not binding by law. In a country like India, where surrogacy practices are rampant without any legislation until now, voices were raised against the bill presented, as it explicitly prohibits commercial surrogacy. Contrary to that, the medical fraternity in India interprets the Bill as an excellent move to end commercial surrogacy. The move to allow surrogacy only for Indian married couples and prohibiting for single parents was also applauded, as 90 % of those, coming in the past from overseas for

commercial surrogacy in India, were from the gay community. However, medical fraternity deliberate that the ART Bill should have come first, and that clarity should be there on the term close relative [19].

The Surrogacy (Regulation) Bill, 2019 passed by the Lok Sabha, was referred to the Select Committee, comprising of 23 Members of Rajya Sabha for examination of the Bill and report thereon. The panel had suggested several noteworthy changes to be made in the Surrogacy (Regulation) Bill, 2019 and submitted its report on February 5, 2020 [20]. Instead of being an altruistic one, the surrogacy model should be based on compensation, which must take care of the damages, suffered by the surrogate mother, in terms of health and wages. The panel opposed to restrict surrogate to a 'close relative', letting any keen woman to act as a surrogate mother, as a 'close relative' potentially confines the availability of surrogate mothers. The eligibility for surrogacy in the definition of 'infertility' to those unable to conceive for 'five years' was also questioned by the panel. The committee objected with the hypothesis that such restraints would only weaken the prospect of parenthood to many, because people get married late these days with their biological clock ticking, and it also breaches their reproductive rights. It endorsed that either or both members of the couple, suffering from a medical condition, which compels gestational surrogacy (absent uterus, removal of uterus due to cancer, fibroids, and medical conditions where normal pregnancy is ruled out), should be permitted to undertake surrogacy. The panel also opposed to curbing surrogacy to only legally married couples and requiring them to be certified as infertile. Confining it to only legally married couple foists prohibition on widows, divorced women, live-in partners, which is unjust. The committee also recommended extending the insurance coverage to a surrogate mother from 16 months to 36 months. The proposal to file an appeal by the intending couples with the state government within 30 days in case of the rejection of the surrogacy application from the relevant appropriate authorities was also suggested by the committee. The committee endorsed that the Assisted Reproductive Technology (ART) Bill should be introduced before the Surrogacy (Regulation) Bill, 2019, which will permit addressing all the highly technical and medical aspects in the Surrogacy (Regulation) Bill, 2019 [20].

The Union cabinet approved recommendations by the Select Committee of the Rajya Sabha on February 26, 2020. Now, time will tell, when this long-pending law to be enacted will see the light of the day.

#### **Legal and Ethical Issues related to Surrogacy**

The legal and ethical issues, allied to surrogacy, are very multifaceted and mostly disconcerted. The discussion on its legalities and ethical principles is never-ending. There is a default legal assumption in most of the countries that the women, giving birth to a child, are the child's legal mother. Is it iniquitous if the surrogate decides to maintain her privacy? The surrogate has to sustain the abstinence with her partner, and it should not be infringed.

At a later stage, when the child, born out of surrogacy, comes to know about the reality, he or she may wish to meet the birth mother. In case, during the period when the agreement between a surrogate and intending parents is in force, if any mishap occurs with intending parents, who will take the custody of the child? The custodial issue of the child may also surface if intending parents undergo matrimonial discord during the surrogacy contract.

The surrogate can abort the child in compliance with Medical Termination of Pregnancy Act 1971. If at any stage she is not willing to continue the pregnancy to full term and she wishes to revoke the surrogacy contract, then will she be allowed for the same?

#### **4.2. Surrogacy in other countries**

All around the world, the laws and legality of surrogacy differ. Many countries do not have any regulations, which explicitly deal with surrogacy. Some countries prohibit surrogacy absolutely, while others restrict commercial surrogacy and permit altruistic surrogacy. In contrary, few nations allow commercial surrogacy, with some restrictions. International surrogacy is prohibited in certain jurisdictions.

**United Kingdom:** Surrogacy is lawful in the United Kingdom. The surrogate will be the child's legitimate parent at birth and if the surrogate is married or in a relationship, their spouse or partner will be the child's second parent at birth. After the birth of the child, legal parenthood can be transferred by parental order or adoption. In case of a dispute regarding who will be the child's legal parents, the courts will pronounce judgment, keeping in view the paramount interests of the child. Even though intended parents and surrogate have signed a document and all the expenses are paid to the surrogate, surrogacy agreements are not reinforced by UK law. Only reasonable costs can be paid to the surrogate [21].

**South Africa:** The Children's Act of 2005 governs the surrogacy law in South Africa. The surrogate can only be paid for expenses, directly related to the surrogacy, including medical costs and loss of income during the pregnancy and birthing period. Commercial surrogacy is prohibited in South Africa. The commissioning parents are the lawful parents upon the birth of the child, and the surrogate mother cannot legally terminate the pregnancy for reasons other than medical. In case, the surrogate wishes to abort apart from the medical reasons, in that case, the court will decide after a dialogue with the intended parents. One or both commissioning parents and the surrogate should be the resident of the country at the time of signing the agreement. The gametes of at least one of the commissioning parents have to be used, for providing the biological link, required for claiming natural relation to the child [22].

**Australia:** Presently under Australian law, altruistic surrogacy is allowed, but commercial surrogacy is banned in New South Wales, Queensland, Tasmania and the Australian Capital Territory [23].

**France:** It is presumed, that the French people who opt for surrogacy out of the country act deliberately against French law. If a child is born through surrogacy on foreign soil, the birth is not included in the French birth register. The child will have a foreign birth certificate and the nationality of their country of delivery [24].

**Germany:** In Germany, surrogacy is prohibited by the law. Anyone who performs artificial insemination or transfers a human embryo to a woman, having an intention to give her child permanently to a third party after birth, can be sentenced with up to three years imprisonment, or a fine is imposed. In such cases, it is the physician who is punished and not the intended parents or the surrogate [25].

**Russia:** Following the provisions of the Federal law, surrogacy is legalized in Russia. Although the surrogacy is permitted for foreign nationals and unmarried couples, the surrogacy is only allowed to heterosexual couples and single females. Only gestational surrogacy arrangements are permissible. Single women must use their egg cells for the creation of the embryo that will be placed into the gestational surrogate's womb. The names of intended parents are entered on the birth certificate, and they are the child's legal parents [26].

**Belgium:** Altruistic surrogacy is permitted in Belgium, but the law prohibits commercial surrogacy [27].

## 5. Conclusion

Surrogacy has adjourned the practice of adoption by childless couples who can bear the cost of surrogacy. It can also be a blessing in some situations, e.g. same-sex marriages, single women, single men, although it is not legalized in India. Surrogacy arrangement will continue to be regulated by an agreement amongst parties, involving the consent of the surrogate mother, the treaty of her husband and other family members for the same, compensation of all generous expenses for carrying a child to full term along with the willingness to hand over the child born to the intending parents. The need of the hour is to legalize altruistic surrogacy and prohibiting commercial one. Till laws being enacted and appropriate monitoring authorities are instituted, one has to assess with his/her conscience what is right and where wrong begins.

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