

**“Surrogacy - Being a Surrogate Mother”**

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**GOD’S WAY OF SAYING THE WORLD SHOULD GO ON****INTRODUCTION**

An Indian proverb states “One’s mother and motherland are greater than even heaven.”

A Jewish proverb states “God could not be everywhere and therefore he made mothers.”

Motherhood is lucky and a gift that it would give a pious expression of a mother to a female-only if she is able to give birth to a child and motherhood marks a new chapter in every woman’s story which gives a new purpose and meaning in life. But due to socio-environmental and urbanized conditions where there had been several changes in the lifestyle of the people in their food habits, sleeping patterns, working conditions, frequent travels and environmental reasons such as climatic changes, global warming many of the married couple or the intending parents who wish to have a child are unable to procreate as these conditions have a huge toll on the human body. Nowadays, as women are also becoming ambitious to be independent both socially, financially undergo a lot of pressure both physically and mentally both in their personal and professional life are facing gynecological conditions such as primary ovarian insufficiency(POI) or polycystic ovary syndrome(PCOS) and several other medical problems which are the reasons for infertility. Since time immemorial, if a couple couldn’t beget a child, they either follow the tradition of Niyoga according to Hindu religion or adoption or in other religions, they would go for adoptions according to their respective faiths and fertility attitudes towards reproductive practices according to their religions from ancient to modern times but with the evolution of science and technology the modern scientific developments have provided opportunities or options to overcome adoption through the option of surrogacy which has resulted as a boon for those childless couples who desire to have their own child.

Surrogacy is a medical procedure or practice whereby a woman who becomes pregnant by implanted embryo or medically inseminated sperm created by In vitro fertilization for the purpose to bear a child for another person or persons, to whom she intends to deliver the child shortly soon after the birth of such a child and in return receives the compensation for carrying and delivering the child.

## **HISTORY**

While the practice of surrogacy seems relatively a new concept in reality, the first mention of surrogacy was made in Bible where Abraham and his wife Sarah were unable to bear the child so the couple took the help of their servant in begetting the child for themselves as mentioned in Genesis chapter 16. However, only in mid-1970's surrogacy became feasible and more recognized option as a modern method for childbearing with the first official surrogacy agreement which has been enacted in mid-1970's with the child born out of surrogacy being to be referred as baby M. The very concept of surrogacy has come into limelight making national and international news worldwide with the first test- tube baby Louise Joy Brown. Though in technicality Louise Joy Brown is a test tube baby and not born to a surrogate mother but with this advancement in technology it paved its way forward known as Gestational surrogacy which overtook the traditional surrogacy which had its prevalence till during the recent times.

## **METHODS**

Surrogacy may be either traditional or gestational which is differentiated by the genetic origin of the egg. However, gestational surrogacy is believed to be more common and less legally complex practice compared to that of a traditional surrogacy.

## **TRADITIONAL SURROGACY**

Traditional surrogacy is a straight natural or a partial surrogacy where the father's sperm is artificially inserted into the surrogate mother via IUI or IVF or Home Insemination where the surrogate's egg is fertilized in vivo. Hence, the child is genetically related to its father and the surrogate mother making the surrogate the biological mother of the child.

## **GESTATIONAL SURROGACY**

The process is through in vitro fertilization where the egg from the intended mother is fertilized with the sperm of the intended father and thereby the fertilized egg is transferred into the uterus of the surrogate. In gestational surrogacy, the surrogate mother would have no genetic ties with the child. The gestational surrogacy is also known as host or full surrogacy and gestational surrogacy has several forms wherein the embryo is created using combinations such as

1. The intended father's sperm and the intended mother's egg.
2. The intended father's sperm and a surrogate's egg.
3. The intended mother's egg and a donor's sperm.
4. A donor's embryo is transferred to a surrogate.

Having different types of surrogacies seems to be little complex as there are always changes within the legal and medical arenas of gestational surrogacy and traditional which is being followed since ages. Nevertheless, the practice which has developed from a documented occurrence thousands of years ago has rapidly grown as an only viable option for intending parents who desire to have their own children. Hence with the innovative technologies' surrogacy both in traditional and gestational methods had assisted and aided many families across the world for centuries to beget a child for themselves.

## **TYPES OF SURROGACY**

There is a range of procedures available to assist couples in conceiving a child with the methods of gestational and traditional surrogacy with the arrangements made either independently or either through an agency by arranging a surrogate to beget a child.

1. **Gestational surrogacy:** This is the most preferable method of surrogacy adopted by the intending parents who want to beget a child generally because they have the liberty to choose the genetics of their baby. Thanks to gestational surrogacy as it offers those couples who are unable to have a baby the ability to have their own child biologically involved throughout the entire process of selecting or choosing a surrogate till the baby is delivered.
2. **Using an egg donor:** As a part of assisted reproduction treatment or for biomedical research egg donation is the process where a woman donates egg to enable another woman to conceive and typically involves in vitro fertilization technology where the eggs are fertilized in the laboratory. As part of the assisted reproductive technology, the egg donation is a third-party reproduction. In the process, a screened egg donor undergoes hormone therapy usually through injections over the course of many weeks which causes her ovaries to release more than one egg. During a surgical procedure, one to fifteen eggs are usually harvested and inspected for quality and the unfertilized eggs may be frozen and stored for later use or immediately mixed with the sperm from the intended father or a sperm donor.
3. **Altruistic surrogacy:** Altruistic surrogacy is a contract made between the intending parents and their close relative as a surrogate to deliver a baby. In this method of surrogacy, the surrogate receives no financial aid for the pregnancy or giving up the child though all the expenses related to the pregnancy and birth are paid by the intended parents such as medical expenses, maternity clothing and other related aspects. However, it includes insurance coverage for the surrogate mother and protects the ethics of society.

4. Commercial surrogacy: This procedure is legal in several countries including India were because of excellent medical facilities, medical infrastructure and high rates of infertility cases and ready availability of poor surrogates. Commercial surrogacy is offensively also referred to as “rent a womb” which was legalized in 2002 and promoted medical tourism. This type of surrogacy has gained popularity in India as India became a surrogacy hub driven by factors like low cost and absence of strict legislation which made it a booming business in the country.

## **SURROGACY IN DIFFERENT COUNTRIES**

Across the globe, the surrogacy laws would widely differ from one jurisdiction to another. In any country which allows surrogacy should have residency or citizenship requirements for any of them either the intended parents or the surrogate. The countries without such requirements are being destinations for fertility tourism. In countries like the United States, Canada and Australia law varies by state/territory.

The legal aspects of surrogacy in different countries hinge on to the laws belonging to those respective countries.

### **United States:**

Surrogacy and the legal issues arising falls under the state jurisdiction and legal situation for surrogacy from state to state. States generally which are surrogacy friendly include California, New Hampshire, New Jersey and other states where commercial surrogacy has come into effect. For legal purposes factors like the residence of the surrogate mother, information regarding parties in the contract and the birthplace are known. Therefore, the policies of surrogacy friendly states of the US regarding surrogacy would benefit even the non friendly states by contracting with a surrogate mother who lives and will give birth in a surrogacy friendly state. Most surrogates reside in Florida and California as the laws dealing with surrogacy are most accommodating. However, it is illegal to hire a surrogate in New York.

### **United Kingdom:**

Surrogacy is made legal in the UK since 2009. However, commercial surrogacy isn't legal and such arrangements were prohibited by the Surrogacy Arrangements Act of 1985. The relationship between intending parents and the surrogate mother is recognized under section 30 of the Human fertilization and Embryology Act of 1990. However, regardless of contract or financial consideration for expenses surrogacy arrangements aren't legally enforceable unless a parental order or an adoption order is made the surrogate mother remains the legal mother of the child.

**Japan:**

In March 2008 a ban was proposed on commercial surrogacy arrangements by the Science Council of Japan and it was said that the doctors, agents and their clients who will make a new contract for the commercial surrogacy should be punished under the law.

**Israel:**

The “Embryo carrying agreements law” under gestational surrogacy has been legalized by the government in March 1996. Hence Israel is the first country in the world to implement this form of state-controlled surrogacy in which every contract of surrogacy made must be approved directly by the state.

**Germany:**

According to the German civil courts, the legal mother is always the woman who gives birth to the child. Hence, all surrogacy arrangements both commercial and altruistic are illegal.

**Australia:**

In Australia, altruistic surrogacy is allowed with commercial surrogacy being a criminal offense.

**Netherlands and Belgium:**

Surrogacy is illegal in both Netherlands and Belgium.

**SURROGACY AND ITS EVOLUTION IN INDIA**

Introduction: Commercial surrogacy has been legalized in India in 2008 by the Supreme Court of India by virtue of case, Baby Manji vs Union of India. At instance, India has emerged as a leader in international surrogacy because of cost\*effective and simpler procedures as there was an absence of strict legislation than anywhere else in the world. The surrogacy agreement is the only base that governs the parties to surrogacy since there is no law. Hence, both the intending parents and the surrogate mother should be attentive while signing the agreement as the purpose of the agreement expresses the need for surrogacy, the free will of a surrogate, the details about the surrogate and the terms on which surrogate agrees to gestate the child.

According to 2012, the report by Confederation of Indian Industry has showed that the size of India’s surrogate motherhood industry was about \$2 Billion a year. A study backed by the UN also conducted in 2012 estimated that the economic scale of the Indian surrogacy industry to be \$400 Million a year with more than 3000 fertility clinics across the country.

**ASSISTED REPRODUCTIVE BILL 2010**

Considering the challenges being faced and the lacunae due to the absence of a growing number of surrogacy cases had made the Government of India decide to come up with a law that would govern surrogacy and Assisted Reproductive Technology (ART) in India. A committee of experts was set up and the said committee had submitted a draft to the government of India under the Ministry of Health and Family welfare. However, in 2005 the Indian Council of Medical Research (ICMR) had framed guidelines for Assisted Reproductive technologies clinics. The Indian Council of Medical Research presented the Draft Assisted Reproductive Technologies (Regulation) Bill & Rules for the first time was proposed in 2008, but there is no legal mechanism to enforce or monitor compliance by clinics. However, the proposed draft namely “Assisted Reproductive Technologies” bill 2010 has taken into consideration various aspects of surrogacy and banned commercial surrogacy in India.

The drafted bill has barred the foreign nationals, homosexual couples, and people in living relationships to hire a surrogate mother. The draft bill which has been proposed to allow surrogacy to the overseas citizens of India (OCIs), people of Indian origin, Non-resident Indians and also to the foreigners married to Indian citizens. A foreigner married to an Indian citizen shall produce a medical visa for surrogacy. The bill also proposed to make it mandatory for all couples that they should produce a certificate saying, ‘the woman is unable to conceive her own child.’ And irrespective of any abnormality that the child/children might have the couples commissioning surrogacy should accept the custody of the child/children.

However, the bill made it clear that a child born to a foreigner married to an Indian citizen or through surrogacy in India the child begotten will not be an Indian citizen despite being born in India and will be entitled to overseas citizenship of India under sec 7A under Citizenship Act of 1955.

The Assisted reproductive technology bill of 2020 is the latest in a series of legislations approved by the Union cabinet for the protection and to safeguard the reproductive rights of the women. The bill makes provisions for the safe and ethical practice of assisted reproductive technology services in the country which dealt with key features of creation of the National board to lay down and implement code of conduct for people working at IVF clinics. The bill even proposed stringent punishment to all those practicing sex selection, sale of human embryos or gametes and running agencies for such unlawful practices and so the need of the hour is to regulate the ART services to protect the affected women and children from exploitation. As the social stigma of being childless and lengthy adoption processes had increased the demand for ART in India.

**SURROGACY (REGULATION) BILL, 2016**

As the Indian surrogacy industry has undergone abuse due to any external or internal reasons in the country there was a complete ban of commercial surrogacy with the surrogacy regulation bill of 2016 which was introduced and passed by Lok Sabha proposing to permit only Indian heterosexual couples married for at least 5 years with infertility problems to access altruistic or unpaid surrogacy. This is because 75% of surrogacy procedures in India are involving foreigners. In the surrogacy tourism, the foreigners traveled to India and commissioned poor women as surrogates and the women were delivering the babies and later refused by the intending parents which is what exactly happened in baby Manji's case of Anand, Gujarat whose parents are from Japan and the surrogate's mother is from Gujarat.

Hence, this law was thought to be urgent after recording several such cases and there was no regulation and the complete vacuum regarding surrogacy. Hence, a law mechanism to protect the interest of child born of a surrogacy arrangement and the law was absolutely needed.

**SURROGACY (REGULATION) BILL OF 2019**

The need for the amendments in the surrogacy regulation bill of 2016 was viewed from the other side of the coin as the bill was thought to be a regressive approach in the 21st century as the bill limited its scope in its practicality in terms of who can benefit from surrogacy. However, the surrogacy regulation bill of 2019 was passed in the same lines and terms as in the surrogacy regulation bill 2016 and is passed in Lok Sabha in Aug 2019 but referred further for reassessment to select committee in Nov 2019. The key features of the surrogacy regulation bill of 2019 were only to facilitate altruistic surrogacy only to Indian couples who have been wedded for at least for 5 years and obtain a certificate of essentiality and a certificate of eligibility before going ahead with surrogacy. According to this bill, the intending couples should be between the age group of 23 to 50 years in case of women, 26 to 55 years in case of men. The surrogate mother should be in the age group of 25 to 35 years and must not have been a surrogate earlier. The surrogacy regulation bills of 2016 and 2019 had banned the divorced single, transgender, widowed to opt for surrogacy which is a double-edged by many progressive ideologists of the country.

**CURRENT SCENARIO:****SURROGACY (REGULATION) BILL, 2020**

The union cabinet on 26th Feb 2020 has approved the surrogacy regulation bill, 2020 after the recommendations suggested by the select committee appointed in Nov 2019 for the said purpose.

According to this new bill the single woman, widow, divorcee and persons of Indian origin who were once banned can avail themselves of surrogacy and increase insurance cover for the surrogate mother up to 36 months. The committee also recommended removing the criteria of “close relative” surrogate as it reduces the availability of surrogate mothers and effects the genuine and needy persons. The wait for opting surrogacy or the marriage duration of 5 years of the couple has also been omitted. The choice which was earlier deprived for a willing woman who wants to act as a surrogate can now be a surrogate as per the provisions of the act. The huge step forward is that the surrogate mother will now be compensated beyond the medical expenses and insurance coverage including her nutritional requirements, maternity wear.

In order to regulate the abuse of surrogacy in the country the committee’s recommendation to the authorities of both central and state governments to submit data of the number of surrogacy procedures, surrogacy clinics and all other related aspects would help keep track of surrogacy in the country.

The intending parents always have a choice if they intend to become parents, they can go for adoption. Adoption mostly fails because there is no guarantee that the child will be given to the intending parents, as the mother carrying the child never gives birth to the child with the intention of giving away. There is no legal binding for adoption, another way is to adopt children from adoption centers but a women can accept an unknown family after her marriage but it is very hard for her to accept a child who doesn't share her blood. Hence most of the parents choose surrogacy having a child with completely their own genes or partially which helps the intending parents to continue the next generations. Everything seems hunky Dory but it surely has its own merits and demerits which come along with it so let's have look at it.

**Merits:**

1. It is a blessing for those intending parents who wish to have their own biological child. They can finally see their own blood come to life and finally start a family with the help of surrogacy.
2. With the medical advances in today's world, the intending parents can be assured of getting a health and risk free baby.
3. There is a sense of completeness which a biological child brings to a family which helps the intending parents overcome the mental trauma which they have been facing for years. This gives an inexplicable joy and happiness to many families around the world.
4. Same-sex couples can also start a family and have their own child with surrogacy.
5. Surrogacy provides protection for the surrogate mother with legal contracts which clearly put the responsibilities of both the parties upfront which ensures a healthy pregnancy and provides good compensation for the surrogate mother. The contract also enforces that the surrogate mother doesn't have any rights and responsibilities after the birth so it is a win-win situation for both the parties involved.



**Demerits:**

1. Surrogacy is a very physically demanding and emotionally draining process for a surrogate mother as she has to undergo several medical procedures several times. There are chances that a surrogate mother might become pregnant in the first transfer which could lead to a negative effect on the health. Delivering a child is a time taking process and may involve many ups and downs throughout the journey which needs to be handled carefully.
2. The laws regarding surrogacy are not completely supportive in most of the countries and are quite complex. For example in USA surrogacy is Legal in some states and illegal in some. There are several legal procedures which an intending couple has to undergo and finding a suitable surrogate mother becomes difficult.
3. Surrogacy is not only mentally and physically draining but also financially draining. It is a very costly process as it requires huge amount of money in medical procedures and also in taking the complete care of the surrogate mother.
4. Most people think the practice of surrogacy is still unethical as it is against the nature of becoming a parent which is considered as a sacred act. People tend to believe surrogacy commercializes human life, undermines human dignity, and dehumanizes our society as it is not easy for one and all to understand the whole process of surrogacy.
5. In gestational Surrogacy, there is no control of the intending parents during the whole procedure as there are several health risks related with to the procedure and the intending parents have to wait patiently and can only support financially.

Though there are some considerable challenges the pros of Surrogacy outweigh the cons. Intending parents who really want to experience the gift of parenthood and want to have a family this whole journey completely makes the process worthwhile and rewarding.

**CONCLUSION**

Though the amendments made in the Surrogacy (Regulation) bill,2020 are a welcoming step and are to look way forward by cementing the ban on commercial surrogacy and modifications and amendments made even in altruistic surrogacy, but fails to effectively tackle the larger social, physical, psychological, emotional and economic issues that continue to challenge the welfare and safety of both the surrogate mother and the child as just the removal of commercial aspects in surrogacy does not remove the chances of exploitation.