

## **To Surrogate or Not to Surrogate?**

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### **Abstract**

Over the years, reproduction field has been revolutionized with the advent of surrogacy. Surrogacy is a process of assisted reproduction where the intended parents assign the gestation and birth to another woman, also called as the surrogate mother. Generally, the reason couples choose surrogacy is due to medical conditions, infertility and cases of diversity in sexual orientation and identity. There could be variety of reasons for opting surrogacy, be it either social reasons or medical. The woman who gives birth is generally recognised as the mother by law, however, under surrogacy, the commissioning couple are recognized as the parents of a child born to a surrogate. Although, there are some risks associated with surrogacy which could be during the pre-implantation, prenatal, and neonatal period, and some legal problems, yet the couples consider it as one of the best ways to have a biological child of their own<sup>2</sup>. The present paper recognizes the advantages and disadvantages that comes with the process of surrogacy, so that one can choose if surrogacy is the right option for them. It also explains how surrogacy impacts the surrogate and her family, the commissioning parents and the society around them. This paper further, mentions the laws that surround surrogacy in India and around the world and how these laws effects surrogacy and how it can be improved.

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<sup>2</sup>M. Simopoulou, K. Sfakianoudis, P. Tsioulou, et al., "Risks in Surrogacy Considering the Embryo: From the Preimplantation to the Gestational and Neonatal Period," *BioMed Research International*, vol. 2018, Article ID 6287507, 9 pages, 2018, available at- <https://doi.org/10.1155/2018/6287507>., last accessed on 29<sup>th</sup> June'19

## Introduction

Since the 90s, several couples, gay and straight, single people etc., anyone in need of a surrogate have been coming to India to hire surrogates to have their babies. Generally, two types of surrogacy are recognized i.e. traditional and gestational. Under traditional surrogacy, the surrogate mother is artificially inseminated by the intended father or an anonymous donor, and then she carries the baby to term. The child thus born is genetically related to the surrogate mother, who provides the egg and the intended father or anonymous donor. However, in gestational surrogacy, the egg and the sperm both are either from the intended mother and father or anonymous donors. The donated egg and sperm are then artificially fertilized and transferred to surrogate who carries the baby to term. The child born through this surrogacy is genetically related to the donors but not the surrogate.

Traditional surrogacy is more complicated when compared to gestational surrogacy, as there is a biological relationship between the surrogate mother and the child and it often complicates the matters regarding parental rights or validity of surrogacy agreement. Therefore, in several states traditional surrogacy agreements are prohibited.

People resort to surrogacy when pregnancy by natural means is not possible. Surrogacy helps the women who do not have a uterus or a non-functioning uterus. Women lose their uterus sometimes due to complications in childbirth or a ruptured uterus or diseases like cervical cancer that may lead to surgical removal of the uterus. Structural abnormalities, a scarred uterus, having multiple miscarriages, or having severe heart or renal conditions can make pregnancy harmful, and in such cases surrogacy is considered. The biological impossibility of single men or women and same-sex couples having a baby may also necessitate surrogacy<sup>3</sup>.

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<sup>3</sup> Overview of Surrogacy Process, Human Rights Campaign, available at- <https://www.hrc.org/resources/overview-of-the-surrogacy-process>, last accessed on 29<sup>th</sup> June'19

Commercial surrogacy where money is being paid to the surrogate as compensation beyond reimbursement of reasonable expenses is prohibited in some countries. The cost and legality of surrogacy differs from state to state which sometimes creates problems in interstate or international surrogacy. There's still some controversy about using a surrogate mother to have a baby. The legal process is also tricky because it differs from state to state. Some countries have laws that regulate or restrict surrogacy. Thus, many couples seeking surrogacy travel to a jurisdiction which permits surrogacy<sup>4</sup>.

## Hypothesis

In consistent with the research paper, following hypotheses were formed-

1. Surrogacy has its own advantages and disadvantages. The couple that choose surrogacy should be aware of it and choose the surrogate only after proper consideration.
2. Surrogacy can be complicated at times as the laws that govern the surrogacy are different in all the states.

## Research Methodology

The nature of this research paper is mainly doctrinal. It utilizes majorly secondary data. It includes the already available information, unpublished and published. The material has been used to make a comprehensive study on surrogacy and its regulation through law enforcement. The secondary data is used to study the advantages and disadvantages of surrogacy and how to understand the situation of the surrogate mother and the circumstances she has to deal with, with the help of earlier research studies made by others. It is further utilised to find the current situation of surrogacy laws in India and other countries. It is helpful to study the objectives and hypotheses framed for the present paper.

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<sup>4</sup>Surrogacy, Wikipedia, available at <https://en.wikipedia.org/wiki/Surrogacy>

## Main Heading

In a surrogacy arrangement a woman agrees to bear a child for another woman or couple and surrender it at birth. Whilst some people come to terms with their childlessness or find adoption or fostering acceptable alternatives, others see surrogacy as a solution. It provides an opportunity for couples to have a child with some genetic contribution from them where the woman or man is infertile<sup>5</sup>.

However, finding a surrogate could be a difficult task as, not every woman volunteers to be a surrogate and then there are several screening process to go through to be a surrogate. Therefore, many agencies are present in the market that brings together the eligible surrogates to intended parents. One can always search for a surrogate on their own or can choose a friend or family member to be a surrogate if they volunteer. However, in cases as these, it is important to take legal advice before making any agreements or signing any contracts so as it avoid any potential conflict<sup>6</sup>.

## Qualifications for a Surrogate

A couple places their hopes on the surrogate of becoming biological parents. They invest their money, time and emotions into this surrogacy process that is why it is important that the process is safe and secure so that the couple is given the best chance to have a biological child. Therefore, a screening is performed before a surrogate is selected for any couple, this screening may include-

1. Initial application: It includes basic information about the surrogate, their reason for becoming a surrogate and their history with pregnancies and surrogacy. It is

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<sup>5</sup>Kalsang Bhatia, Elizabeth A Martindale, OybekRustamov, Anthony M Nysenbaum, Review Surrogate pregnancy: an essential guide for clinicians, available at- <https://obgyn.onlinelibrary.wiley.com/doi/pdf/10.1576/toag.11.1.49.27468>, last accessed on 29<sup>th</sup> June'19

<sup>6</sup> Overview of Surrogacy Process, Human Rights Campaign, available at- <https://www.hrc.org/resources/overview-of-the-surrogacy-process>, last accessed on 29<sup>th</sup> June'19

necessary to make sure that the surrogate is choosing to become a surrogate for the right reasons.

2. Background screening: A background check is conducted for criminal history and financial status to make sure that they can survive without being only dependent on the compensation paid to them for being a surrogate.
3. Psycho-social screening: The surrogate and their partner are also interviewed to check the mental state of the surrogate and to check if they're emotionally ready to become a surrogate. It important to make sure that the surrogate is prepared for the roller coaster of emotions that they might go through while carrying the baby or while giving up the baby.
4. Health screening: A fertility specialist is called to make sure that the surrogate is physically fit to be pregnant. It may include personal and sexual history, blood and urine test and an overall examination to ensure that the surrogate is physically ready for fertility treatments and pregnancy<sup>7</sup>.

There could be other qualifications to be a surrogate but that varies from agency to agency, for example- mostly agencies have the requirement that the surrogate should have a child of her own, and the support of her partner and her family.

## Problems in Surrogacy

Being a surrogate can be a daunting experience for the surrogate mothers due to any potential adverse effects. Relinquishing a child that the surrogate mothers carry in their womb for nine months may result in depression and other psychological issues, as mothers may form a bond with the baby prenatally which may make it difficult for the surrogate to

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<sup>7</sup> Surrogates, Surrogate.com, available at- <https://surrogate.com/surrogates/pregnancy-and-health/surrogate-health-requirements/>, last accessed on 29<sup>th</sup> June'19

give up the child to the commissioning parents. Further, it is also assumed that surrogate mothers may try to distance themselves from the baby as they will have to relinquish it later on, but such detachment again may cause health risk to the surrogate and the baby. Furthermore, women from a poor economical background may be pressured to enter into surrogacy agreement against their will only because of financial gains, without being fully aware of risks that may come with surrogacy.

There are several other issues that may come up during surrogacy, including the effect on surrogate's partner, parents and any existing children of her own. It is important that the surrogate's partner gives their full support during the surrogacy and any emotional support after the relinquishment of the baby. Also, if the surrogate already has kids of her own, it is suggested that the children be explained about the surrogate agreement, so that the disappearance of the baby after birth does not cause them any distress. There can also be societal problems like, disapproving and isolation by neighbours and friends that may affect the psychology of surrogates and their families<sup>8</sup>.

Further, the clinics that carry on the process of surrogacy should be properly regulated and that it should be ensured that the surrogate mothers have given their consent to the process and adequate health care and compensation is provided to them. As any other industry, there is always a chance of exploitation, with women being forced to become a surrogate only for monetary benefits. Moreover, another risk the surrogate may have to deal with is, if the commissioning parents abandon their child due to whichever reason, like if they are born with some physical disability or may be are born a girl, when the commissioning parents wanted a boy. Because of this abandoning of children, the surrogates find themselves facing unexpected maternal responsibility that they intended to give up. It would be morally wrong to dump the maternal responsibility of the abandoned children on the surrogate, since they

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<sup>8</sup>VasantiJadva, Clare Murray, Emma Lycett, Fiona MacCallum, Susan Golombok, Surrogacy: the experiences of surrogate mothers; Human Reproduction, Volume 18, Issue 10, Oct 2003, Pages 2196–2204, available at- <https://doi.org/10.1093/humrep/deg397>, last accessed on 29<sup>th</sup> June'19

are only considered as ‘vessel’ and in no way ‘mothers’. They should not be expected to take responsibility of the children<sup>9</sup>. Due to cases like these, proper surrogacy laws are required to regulate the process and to avoid any disputes and exploitation of surrogates.

## **Laws governing Surrogacy**

Every country has their own surrogacy laws, where some countries allow all forms of surrogacy; some prohibit traditional and commercial surrogacy whereas some countries prohibit any form of surrogacy. Countries like Germany, Spain, Portugal, France etc. forbids all types of surrogacy. Belgium, UK, Denmark and Ireland have banned only commercial surrogacy. However, commercial surrogacy is legal in Russia, Ukraine and some US states. Another option that couples opt of their country prohibits surrogacy is to go to other countries (also known as fertility tourism) but even then, sometimes the laws prohibits such travel too. For example, commercial surrogacy is criminalised in some Australian states whereas other states permit it.

Due to these indifferences in laws for surrogacy, there is no internationally recognised laws to regulate surrogacy, because of which intended parents and children suffer. Sometimes it takes months to bring a surrogate baby to the parent’s country due to different laws and the surrogate parents may not be considered as their legal parents<sup>10</sup>.

Therefore, before a surrogacy process is started, a surrogacy agreement is contracted by an advocate between the surrogate and the intended parents, in case any dispute arises and to decide the fundamental matters relating to surrogacy like deciding the domicile of the surrogate baby. The contract should also describe as to who will get the baby’s custody in case something happens to the intended parents before the birth of the baby. The contract

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<sup>9</sup>Jennifer A Parks, Timothy F Murphy, So not Mothers: Responsibility for Surrogate Orphans, Aug, 2018.

<sup>10</sup>Helier Cheung, BBC News, Surrogate babies: Where can you have them, and is it legal? Aug 2014, available at- <https://www.bbc.com/news/world-28679020>, last accessed on 29<sup>th</sup> June’19

helps in the case of any dispute and it further prevents disputes, as all the details regarding the surrogacy process are explained in this surrogacy agreement. Legal services are required to declare that the intended parents will only be the sole legal parents and the surrogate will not have any parental right or obligation, and such declaration has to come from a court order<sup>11</sup>.

## Surrogacy Laws in India

India has been a popular hub for surrogacy for international commissioning parents but due to recent major legislative reforms that regulated the surrogacy process, changed the situation. In 2015, Indian government passed a notification that forbade the foreign nationals to complete surrogacy. Further, in 2016, Surrogacy (Regulation) Bill, 2016 was introduced and passed in 2018. According to the present laws, only Indian commissioning parents who have been married for at least five years can complete a surrogacy process. Several other prohibitions were made under this Bill, some of the features of this Bill are mentioned below-

1. The Bill made commercial surrogacy illegal
2. It only allowed altruistic surrogacy for infertile Indian couples
3. It requires a doctor's certificate of their infertility
4. It allows women to be a surrogate only once, and only if they are a close relative of the intended parents, are married and have a biological child
5. The Bill bans single parents, homosexuals and live-in couples from surrogacy<sup>12</sup>

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<sup>11</sup>Supra 7

<sup>12</sup>Intended Parents, Surrogate.com, available at-<https://surrogate.com/intended-parents/international-surrogacy/surrogacy-in-india/>, last accessed on 29<sup>th</sup> June'19



The major reason for banning surrogacy for international intended parents is because in a country like India, there is very less protection available to the surrogates and the intended parents. Earlier when surrogacy was booming industry in India, due to no laws governing surrogacy, unethical and unsafe practices developed. Surrogate mothers were exploited and were subjected to poor living conditions and unethical treatment. Surrogacy agencies in India forced women to become surrogates to keep up with the demand from foreign intended parents, where, after giving birth to the babies, they were left with no assistance. Further, these surrogates were given only a part of expenses that the intended parents paid as compensation and the rest were kept by the surrogacy agency. Surrogates were mainly exploited in commercial surrogacy as, in only in commercial surrogacy, compensation and expenses were paid by the intended parents. The lack of education and poverty pushed them to become surrogates again for monetary gains, which deteriorated their health conditions, physical and psychological<sup>13</sup>.

Due to these conditions, the government tried to make surrogacy safer for everyone involved. However, the current Surrogacy (Regulation) Bill, 2016 only made the process more problematic or impossible, rather than safer. The Bill aimed to bring strict laws for surrogacy in India as to avoid any exploitation but ended up restraining chances of parenthood for many. Moreover, the Bill asks the intended parents to prove the condition of 'infertility' to be eligible to commission a surrogacy, but it does not include all the cases where a couple may not be able to bear a child including multiple miscarriages, weak uterus, hypertension etc. And when altruistic surrogacy is not allowed for couples with these conditions, the Bill is

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<sup>13</sup>TarishiVerma, March 2017, What are the surrogacy laws in India: Here is everything you need to know; available at- <https://indianexpress.com/article/research/karan-johar-surrogate-children-yash-roohi-what-are-the-surrogacy-in-laws-in-india-here-is-everything-you-need-to-know-4555077/>, last accessed on 29<sup>th</sup> June'19

taking away their only chance to have a biological child of their own<sup>14</sup>. Therefore, it is suggested by many surrogacy professionals that surrogacy should be chosen as a method to build a family only when the laws and regulations support and protect the one's involved in the process.

## Conclusion

Surrogacy is believed to be one of the best and safest approaches that provide significant and promising results to the intending parents. There exist different challenges while providing health care for a surrogate woman, all the health care providers like general practitioners, obstetricians, paediatricians and midwives should be aware of the surrogacy related laws so as to avoid any conflict with the existing law of that State. Although the main responsibility of all these health care providers is to take care of the surrogate mothers, they also have a duty to protect the unborn baby. Caution needs to be taken by all those involved in the surrogacy process to make the surrogate pregnancies successful and less risky<sup>15</sup>.

The parliamentary Bill is a good bill to prevent exploitation of surrogates but it is not modern enough. The definition of infertility should be properly explained and the cases of medical conditions, diversities that reside with sexual orientation should be recognised and included in the Bill. Further, same sex couples and single people should also be allowed to have a child through surrogacy. It is evident that surrogacy in India is really complicated and restrictive, thus, a couple choosing surrogacy should be aware of all these laws and should opt for surrogacy only after being sure that they are eligible to use a surrogate. There is a need for better and liberal laws for surrogacy so that the surrogates and the people involved in surrogacy are protected as well as all the couples unable to have a biological child through

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<sup>14</sup>Neetu Chandra, Dec 2018, Surrogacy law may limit chances of parenthood for many couples; available at -<https://www.livemint.com/Politics/LNv4btZv8L53qiD6x1WqiJ/Surrogacylaw-may-limit-chances-of-parenthood-f8or-many-coupl.html>, last accessed on 29<sup>th</sup> June'19

<sup>15</sup>Supra 6

natural means can get an opportunity to become a biological parent, irrespective of the couple's sexual orientation, status and nationality.