



## Surrogacy: The concept of renting a womb

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### Abstract

Surrogacy is a new thing in India. It has come from western countries. It is a system where womb of a lady is hired under a contract whose name is generally not brought into the public domain. This system also opens door for those who are unmarried and wanted a child. India is regarded as hub of surrogacy. Infertility is a great problem of modern technocratic society. Thus the demand for surrogacy gets its high priority in India. We understand that infertility is not about being unable to conceive it is also the trauma individual or the couple passes through. The cheaper availability of surrogates in India is attracting a lot of couples from all over the world who are unable to have children. The legal environment had been favorable with surrogacy having been made legal in 2002, by the guidelines laid out by the Indian Council of Medical Research (ICMR). In fact in 2008, the Supreme Court while ruling a case of surrogacy had made commercial surrogacy permissible. In 2016, the Surrogacy (Regulation) Bill, 2016, introduced by Union Health Minister J P Nadda which has still not taken the form of an Act. So we need an effective legal force to regulate this developed technique in absence of which there is chance to abuse the interest of surrogates.

**Keywords:** surrogacy, Indian Council of Medical Research

### Introduction

After passing so many times of my life with kids, I can't deny the feelings of happiness: It's absolutely fine choice to never become a parent, but there is absolutely *no* chance that your life will be worthwhile, or that you will learn as many significant truths about existence, as you would if you had kids. I feel very lucky when my mother says that I am precious to her than anyone else, when my father fulfils all my wants instead his own basic needs. So definitely they do so because they love their children so much. They used to say there are certain truths about life that you literally cannot know until you've become a parent. The list of those truths could go on forever, but the core truth behind all of it is about what human life is about, how we relate to each other, how to care for each other, and the tiny moments that, in the end, are what we do all this other shit to support.

Surrogacy is a concept which helps the person who is unable to have their children because of some cause but wants to become parents. It is an agreement whereby a woman agrees to carry a child in her womb for another person or persons, who will become the newborn child's parent(s) after birth. Watching a new life come to exist and seeing your child discover everything for the first time literally every moment of being a parent, if you're thoughtful and observant, is a mind-blowing opportunity to learn the most basic things about what it means to be human. This system has also open a door for those who are unmarried and wanted a baby.

### Historical Background

The history of surrogacy can be traced by following:

- **Biblical Times:** The first case of surrogacy can be found in "The Book of Genesis" in the story of Sarah and Abraham. Sarah and Abraham were married but were not

able to conceive a child of her own, so Sarah asked her servant Hagar to be the mother of Abraham's child. This is a case of traditional surrogacy, where the surrogate mother uses her own egg in the child she's carrying for intended parents.

- **1884:** The first successful artificial insemination of a woman was completed, although in an ethically questionable way. This paved the way for future artificial inseminations used in the surrogacy process.
- **1978:** The first ethically completed IVF embryo transfer was successful. On July 25, 1978, Louise Joy Brown was the first test-tube (aka IVF) baby born. While this was not a surrogate motherhood arrangement, this historic event paved the way towards gestational surrogacy in the future.
- **1980:** The first compensated surrogacy agreement was arranged between a traditional surrogate and the intended parents. Elizabeth Kane (a pseudonym) received \$10,000 to carry a baby for intended parents. Although she had already completed her family and placed a child for adoption, Kane was not prepared for the emotions of surrogacy and the challenges she faced after giving birth to the baby. She eventually regretted her choice to become a surrogate and wrote about her experiences in a book called Birth Mother.
- **1982:** the first baby from an egg donation was born. The combination of these two innovative technologies resulted in the birth of gestational surrogacy, which was first performed in 1985. A menopausal woman at Monas University in Melbourne, Australia became the first mother to give birth to a baby using donated eggs.
- **1985:** the first gestational surrogate pregnancy took place, a historical moment in field of surrogacy. The surrogate carried the biological child of a woman who had a

hysterectomy, but had retained her ovaries <sup>[1]</sup>.

- **1986: Baby M Case** William Stern and Mary Beth Whitehead entered into a surrogacy contract stating that Stern's wife, Elizabeth, was not able to conceive and that they wanted a child, and Mrs. Whitehead was willing to provide that child as mother with Mr. Stern as father. Through artificial insemination using Mr. Stern's sperm, Mrs. Whitehead would become pregnant. Mrs. Whitehead would deliver the born child to the Sterns and terminate her maternal rights so that Mrs. Stern could thereafter adopt the child. Mrs. Whitehead's husband, Richard, was also a party to the contract; Mrs. Stern was not. Mr. Whitehead promised to do all acts necessary to rebut the presumption of paternity. Mrs. Whitehead gave birth to Melissa Stern as a traditional surrogate mother. Upon the birth of her child, Whitehead decided to keep the baby, which followed a two year legal battle with Melissa's biological father, Bill Stern, and intended mother, Mrs. Stern, over custody, which finally ended in the Sterns getting custody.
- **1988:** As a surrogate mother Patty Nowakowski gave birth to boy/girl twins. Upon their birth, the intended parents said Patty that they want only a girl, so they left their new born son with her in the hospital. Patty, who had entered into surrogate motherhood with no intention of ever having another child herself, was suddenly left with the prospect of raising an unexpected child. Patty and her husband decided to seek custody of the twin daughter also. After a custody battle, they kept both children.
- **1999:** Surrogacy took another step forward which leads to the development of the Special Program of Assisted Reproduction (SPAR). This program allows an HIV-positive man to become the biological father of his children without transmitting the disease <sup>[2]</sup>.

### Meaning of surrogacy

According to Dictionary Meaning, Surrogacy means the process of giving birth as a surrogate mother or of arranging such a birth.

According to Black's Law Dictionary, the word 'surrogate' has its origin in the Latin word 'surrogatus', meaning a substitution or replacement, i.e., a person appointed to act in the place of another. The term 'surrogate mother' or 'surrogate' is usually applied to the woman who carries and delivers a child on behalf of another couple. It is considered as a 'blessing' and 'miracle of science' <sup>[3]</sup>.

According to Merriam-Webster Dictionary defines surrogacy as "the practice by which a woman (called a surrogate mother) becomes pregnant and gives birth to a baby in order to give it to someone who cannot have children." Surrogacy is also known as womb for rent <sup>[4]</sup>.

Surrogate mother is a woman who bears a child for another couple, and give chance to intended parents to become parents.

### Types of Surrogacy

There are two primary types of surrogacy:

- Traditional Surrogacy and
- Gestational Surrogacy.

1. **Traditional Surrogacy:** In which the surrogate either undergoes artificial insemination or IVF with sperm from the male or from a sperm donor. The surrogate mother herself provides the eggs and is therefore genetically related to the child. This form of surrogacy is the older method and because of the genetic link between the surrogate and the baby, there is some downside risk to this form of surrogacy. The surrogate mother carries the baby, delivers that baby and then gives that baby to the parents to raise. The traditional surrogate mother is the baby's biological mother because it's her egg that was fertilized by the intended father's sperm <sup>[5]</sup>.
2. **Gestational Surrogacy:** In which the surrogate mother carries a pregnancy and delivers a child who is created from the egg of female intended parents and the sperm of the male intended parents and /or donor egg and /or donor sperm and/or donated embryos in any combination. The key to this type of surrogacy is that the gestational surrogate is not genetically related to the child and acts only as a gestational carrier for the pregnancy. The gestational surrogate mother is the baby's birth mother only <sup>[6]</sup>.

The main difference between gestational and traditional surrogacy is that in traditional surrogacy, the surrogate mother's eggs are used, making her the biological mother of the child she carries; in gestational surrogacy, the surrogate mother has no biological connection to the baby.

### Surrogacy laws in India

From past many years, Surrogacy was been used in India in the form of assisted reproduction method and also India is regarded as hub for surrogacy, but it did not had any effective legal battle. It was in the year 2008 after baby Manji's case that the Supreme Court of India declared commercial surrogacy legal in India.

Despite of the fact that surrogacy is a ray of hope for childless couples, there are a number of legal factors, which need to be brought into consideration like paperwork and assisted reproduction guidelines.

### Baby Manji Yamaha v. Union of India <sup>[7]</sup>

In 2007, a Japanese couple Dr. Yuki Yamada and Dr. Ikufumi Yamada comes India in search of a surrogate mother and found their way in Akanksha Infertility Clinic, Anand, Gujarat. They entered into a surrogacy agreement with the surrogate mother. The baby was born on 25<sup>th</sup> July, 2008. Due to some legal matters, the baby was brought to a hospital in Jaipur in August 2008. Because of marital discord, the couple refused taking-up the responsibility of the child. Though the father was ready to take the baby along but the Indian law does not permit single men who are foreign nationals to adopt children from India. Along with this, Indian law does not allow the father to get the custody of the baby immediately after birth. While there was a clause regarding the same in their agreement but it missed the eyes of both the parties. Later, the child's 70-yr-old grandmother came to take the baby that was not handed over to her because of legal issues. After a legal battle of a few months, finally in November 2008, the grandmother was allowed to take back to baby.

The cost of surrogacy packages in India is around 50 percent less in comparison to the packages available in the western countries. India has been a favourite country for those wanting a surrogate child because of its cheap availability of the service, it enables an overuse of the practice with intended parents arriving from various other countries as well.

In 2002, the Indian Council of Medical Research (ICMR) laid out guidelines for surrogacy, which made the practice legal, but did not give it legislative backing. This led to a booming surrogacy industry which had lax laws and no enforcements. A study conducted in July 2012, backed by the UN, put the surrogacy business at more than \$400 million with more than 3000 fertility clinics all over the country [8].

### **Assisted Reproductive Technologies Bills in the Parliament**

#### **Assisted Reproductive Technologies (Regulation) Bill, 2008**

Taking into consideration the prevalence of surrogacy in India and its challenges as well as controversies, the Government of India formed a committee of experts to prepare draft for the Surrogacy and ART in India. The committee submitted a copy the proposed bill to the Government. The committee tried to cover all the necessary dimensions of surrogacy. This bill was pending with the government and was not presented in the Parliament. Irrespective of no legislation for the regulation of surrogacy, the process is completed in ethical manner, keeping into consideration the guidelines by ICMR.

A draft ART (Assisted Reproductive Technology) Bill was formulated in 2010, but was never passed as a law. The bill lays down further conditions and procedures for surrogacy and states that there are no regulations as to how many times a birth mother may be allowed to reproduce. The bill also allowed single parents, male or female, to have a child through surrogacy. Here, the women had to prove they were not able to conceive and couldn't give birth while the men had no such condition. The bill also prohibited single foreign nationals and homosexual couples to become parents through surrogacy. It defines "couple", as "two persons living together and having a sexual relationship that is legal in India."

The Surrogacy (Regulation) Bill, 2016 was introduced in Lok Sabha in November. The cabinet approved bill, however, has not been passed till now. The first proposition of the bill is to completely put ban on commercial surrogacy. The bill only enabled for altruistic surrogacy, where the surrogate mother is a close relative of the intended parents.

### **Examples of person who become parents through surrogacy**

- Bollywood actor Shah Rukh Khan and his wife Gauri Khan who had opted for surrogacy at the time of their third child. His third child was born with the help of a surrogate mother at the same hospital [9].
- Incidentally, Bollywood actor Tusshar Kapoor also became a single parent through in-vitro fertilization and surrogacy [10].
- Bollywood producer-director Karan Johar became the single parent to twins, a boy and a girl, through surrogacy [11]. The twins, named Yash and Roohi, were born at Masrani hospital.

- In case of both Karan Johar and Tusshar Kapoor, while the sperm came from them, the eggs belonged to a donor [12].

### **Conclusion**

From above mentioned details we may say that mostly surrogacy is successful in India and it is cheap in India also as compared to other countries but we have lack of legal provisions regarding this developed technique which needs to be implements for better regulation of this emergent technique.

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