Surrogacy: The Only Hope for a Few

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ABSTRACT

“Mother love is the fuel that enables a normal human being to do the impossible”

- Marion C. Garetty

A bouncing baby boy or giggling toddler girl can bring love and life to a household. For childless couples hoping to have a family, adoption or surrogacy can be their best options. While the ultimate objective for anyone considering adoption or surrogacy is to bring a child into the family, some parents agree that surrogacy is the better option for them because they feel very strongly about having a child that is genetically [a] part of them. When this is the case, surrogacy is a good choice because, when it's possible, either the mother or father can be genetically linked to the child or, in some cases, both. The process of surrogacy involves one woman carrying the embryo that develops from a father's sperm and either the surrogate's or the biological mother's egg in order to carry and subsequently birth the child for the couple. It is only in the last 20 years that surrogate motherhood has increasingly become an issue of national and international public debate. Factors such as the growth of infertility in modern society, coupled with the declining number of children available for adoption, the development of the surrogacy contract and commercial surrogacy agencies and the introduction of new technologies such as in vitro fertilisation (IVF) which can be combined with surrogate motherhood, have resulted in increasing publicity and public interest in the formation of such agreements between infertile couples. Surrogate mothers are not a new solution to the old problem of not being able to reproduce an offspring. In fact, surrogacy has been a ray of hope for those couples who, for various reasons, could not otherwise dream of having their own child and it also allows you to decide the genetics that are passed along to the child.

Keywords

Surrogacy, Couples, Genetics, Hope

INTRODUCTION

“There is an instinct in a woman to love most her own child – and an instinct to make any child who needs her love – her own”

- Robert Brault

Marriage as an institution is the social order through which a married couple wish to beget a child. Nature has bestowed the beautiful capacity to procreate a life within women. A bouncing baby boy or giggling toddler girl can bring love and life to a household. But for an infertile couple, this desire remains unfulfilled. Some women are unable to carry a child to term due to health problems. Many women have medical issues or genetic conditions which make pregnancy life-threatening, or impossible. Others are unable to become pregnant as a result of infertility. Infertility is the inability to conceive after one year of unprotected intercourse for women under the age of 25, and after six months for a woman over the age of 35. Infertility, however, isn’t a female problem. Men can be infertile in terms of low sperm counts or sterile men.

For childless couples hoping to have a family, adoption or surrogacy can be their best options. Surrogacy and adoption are both rewarding experiences that allow prospective parents to complete their families. Each has its own unique process, benefits and challenges, and it is up to each growing family to consider all of the factors as they decide which path to parenthood is right for them.

There is always a desire to see your own features / habits / little quirks in your child. There is also an almost instinctive need to ‘continue your line’. Because of which

it becomes very difficult for couples to be mentally ready for adoption.4

While the ultimate objective for anyone considering adoption or surrogacy is to bring a child into the family, some parents agree that surrogacy is the better option for them because they feel very strongly about having a child that is genetically [a] part of them. When this is the case, surrogacy is a good choice because, when it's possible, either the mother or father can be genetically linked to the child or, in some cases, both.5

Surrogacy is when another woman carries and gives birth to a baby for the couple who want to have a child. The process of surrogacy involves one woman carrying the embryo that develops from a father's sperm and either the surrogate's or the biological mother's egg in order to carry and subsequently birth the child for the couple. In fact, surrogacy has been a ray of hope for those couples who, for various reasons, could not otherwise dream of having their own child and it also allows you to decide the genetics that are passed along to the child.6

HISTORY

“The Vatican is against surrogate mothers. Good thing they didn't have that rule when Jesus was born.”

- Elayne Boosler

(American Comedian and Activist)

There are no authentic documents survived up to contemporary times. Information is to be collected from chronicles, legends, myths, epics and even the folk songs that have survived from oral transmissions from generation to generation. The concept of surrogate motherhood was well known in the ancient world.7

In our society infertility has historically been seen as a problem which merits treatment. Surrogacy provides some couples with their only hope of raising a child genetically related to at least one of them. Surrogacy describes an arrangement where a woman (the surrogate mother) agrees to become pregnant and bear a child for another person or persons (the commissioning parents) to whom the custody of the child will be transferred directly after birth. Surrogacy is not a new solution to the old problem of not being able to reproduce an offspring.8

In ancient Hindu society there, existed, a practice known as Niyog Pratha, wherein a woman who was childless because her husband was impotent was allowed to conceive through her brother-in-law. Before the advent of modern assisted conception techniques, surrogacy by natural conception was the only means of helping certain barren women to have children.9

The basic concept of surrogacy dates back at least 4000 years to Rachel, wife of Jacob, the father of the twelve tribes of Israel. Unable to bear children, Rachel sent her husband into the tent of her maid, Bilah. It was understood that the child born of that union belonged to Jacob and Rachel. Surrogacy has also been seen around a long time and dates back to biblical times. Some say it all started with Sarah and Abraham. Certain people say it started even before them, and that it is only recorded about Abraham because he was written about in the Bible.10

In many countries, surrogacy has been around since before records. Many cultures have belief systems that abide with the rules of surrogacy and those that do not agree can be thrown out of their families. Numerous religions and civilisations will actually celebrate the surrogate mothers, for their good deeds and service to others. During the 1980's surrogate mothers were used by the gay community to build their families, then, it was frowned upon by society.11

It is only in the last 20 years that surrogate motherhood has increasingly become an issue of national and international public debate. Factors such as the growth of

4 “How can/should a couple choose between adoption, surrogacy, and in-vitro fertilization ("test-tube baby")?”
   last seen on 13.09.2016

5 Ibid 1.

6 “A woman has every right to hire out her womb”
   last seen on 13.09.2016 last seen on 13.09.2016.

7 “SURROGATE MOTHERHOOD: HISTORY AND CONCEPT”
   http://shodhganga.inflibnet.ac.in/bitstream/10603/57389/8/chapter%202.pdf
   last seen on 13.09.2016.

8 Anita Stuhmcke, “For Love or Money: The Legal Regulation of Surrogate Motherhood” Surrogate Motherhood: Law and Legislation (1995).

9 Pratibha Ganesh Chavan, “Psychological and Legal Aspects of Surrogate Motherhood” AIR 2008 Jour 103.

10 Grayee P. Storey, “Ethical Problems Surrounding Surrogate Motherhood” Available at: http://www.yale.edu/ynhti/curriculum/units
   (visited on June 5, 2010).

11 Ashley Kate, “History of Surrogate Motherhood” Available at: http://www.ezinearticles.com (visited on July 17, 2010).
infertility in modern society, coupled with the declining number of children available for adoption, the development of the surrogacy contract and commercial surrogacy agencies and the introduction of new technologies such as in vitro fertilisation (IVF) which can be combined with surrogate motherhood, have resulted in increasing publicity and public interest in the formation of such agreements between infertile couples. In the 1930s, U.S., pharmaceutical companies Schering-Kahlbaum and Parke-Davis started the mass production of estrogen. For the first time in 1944, Harvard Medical School Professor John Rock fertilized the human ovum outside the uterus. In 1953, the first cryopreservation of sperm was performed successfully. A commercial sperm bank was first opened in New York in 1971, which turned this into a highly profitable business throughout the world. Louise Brown, the first test-tube baby and product of the IVF procedure, was born in England in 1978. In 1980, Noel Keane, a lawyer from Michigan prepared the first surrogacy contract. The first successful gestational surrogate pregnancy in a woman was carried out in 1985. In 1986, surrogate and biological mother, Mary Beth Whitehead of the United States, refused to give custody of the child (Baby M) to the couple against the surrogacy agreement. However, the courts of New Jersey awarded custody of the child to the biological father and not the surrogate mother. Similarly, in 1990, the surrogate mother Anna Johnson in California refused to yield custody of the baby to the intended parents. The court upheld the parental rights of the couple. This verdict legally defined the true mother as the woman who intends to create and raise a child. A convention was held in Chile in 1994 by Latin American fertility specialists to discuss assisted reproduction and its ethical and legal status. So, the concept of surrogacy is not new and has existed in the world since ages.

SURROGACY – DEFINITION AND Types

Surrogacy is when another woman carries and gives birth to a baby for the couple who want to have a child. A surrogacy arrangement or surrogacy agreement is the carrying of a pregnancy for intended parents. The process of surrogacy involves one woman carrying the embryo that develops from a father’s sperm and either the surrogate’s or the biological mother’s egg in order to carry and subsequently birth the child for the couple. Surrogacy arrangement is usually sought by intended parents when pregnancy is either medically impossible or it is considered very risky for the mother's health. These agreements may or may not include monetary compensation. The arrangement is termed commercial surrogacy when the surrogate is given compensation higher than the medical reimbursement and other reasonable expenses; otherwise, it is referred to as altruistic or non-commercial surrogacy. There are four types of surrogacy — Traditional or Straight Surrogacy, Gestational or Host Surrogacy, Commercial Surrogacy and Altruistic or Non-Commercial Surrogacy.

Traditional Surrogacy is the simplest and least expensive form of surrogacy and is also known as artificial insemination. In Traditional Surrogacy, a surrogate mother is artificially inseminated, either by the anonymous donors or intended father’s sperm, using an insemination kit at home or clinic and carries the baby to term. The child is thereby genetically related to both the surrogate mother, who provides the egg and the intended father/anonymous donor, who provides the sperm. Sperm from the male partner of the 'commissioning couple' may be used, or alternatively, sperm from a sperm donor can be used. Donor sperm will, for example, be used if the 'commissioning couple' are both females and/or where the child is commissioned by a single woman. Thus it can, however, be harder emotionally for both the surrogate and the intended parents.

Gestational Surrogacy is when IVF is used, either with the eggs of the intended mother, or with donor eggs. The surrogate mother therefore does not use her own eggs, and is genetically unrelated to the baby. It is physically more complicated and considerably more expensive than straight surrogacy, (although many IPs can have some costs covered by the NHS) and always takes place in a fertility clinic. In Gestational Surrogacy, an egg is removed from the intended mother or an anonymous donor and fertilized with the sperm of the intended father or anonymous donor. The fertilized egg, or embryo, is then transferred to a surrogate who carries the baby to term. The child is thereby genetically related to the woman.

12 Ibid 8.
18 “Surrogacy in India: Legality”, Deepmala Mishra, IJSRM volume 3 issue 3 March 2015 [www.ijsrm.in], pages 2258-2262
19 Ibid 14.
who donated the egg and the intended father or sperm donor, but not the surrogate. Some lesbian couples find gestational surrogacy attractive because it permits one woman to contribute her egg and the other to carry the child.\textsuperscript{20}

Third is a kind of Commercial Surrogacy. It’s a form of surrogacy in which a gestational carrier is paid to carry a child to maturity in her womb and is usually resorted to by higher income infertile couples who can afford the cost involved or people who save or borrow in order to complete their dream of being parents. This procedure is legal in several countries including India. Commercial surrogacy is also known as wombs for rent, outsourced pregnancies or baby farms. And the fourth is Altruistic surrogacy where the surrogate receives no financial reward for her pregnancy or the relinquishment of the child (although usually all expenses related to the pregnancy and birth are paid by the intended parents such as medical expenses, maternity clothing, accommodation, diet and other related expenses).\textsuperscript{21}

Traditional Surrogacy is more controversial than Gestational Surrogacy because the biological relationship between the surrogate and the child often complicates the facts of the case if parental rights or the validity of the surrogacy agreement are challenged. As a result, most Countries prohibit traditional surrogacy agreements. Additionally, many Countries that permit surrogacy agreements prohibit compensation beyond the payment of medical and legal expenses incurred as a result of the surrogacy agreement.\textsuperscript{22}

SURROGACY – PROS AND CONS

As it said that a child completes a family; however, some couples don’t have the ability to conceive a child of their own. Even with the aid of medications and even after several visits to fertility specialists, nothing happens. It just can’t be done.

In the past, the only alternative couples have if they want to have a child is to adopt. These days, there are a few options. One of which is – surrogacy. The desire for motherhood leads couples to search for an alternate option and surrogacy itself presents a viable solution for it. While surrogacy may appear like the perfect solution, it also has pros and cons.\textsuperscript{23}

- **Pros of Surrogacy** –

  - It allows couples to have biological relative. This allows the couple to have one of their bloodlines to naturally continue unlike in the case of adoption.
  - It is cheaper. Undergoing fertility treatments for a long period of time can get expensive. Not to mention, success is not guaranteed. Whereas with surrogacy, a couple only needs to pay the surrogate a mother for successfully carrying a pregnancy to terms.
  - It has 1:4 success rates. Not many fertility treatments can claim the same level of success so far.
  - It can create positive lifelong connection. Surrogacy offers families the chance to build beneficial lifelong connections.

- **Cons of Surrogacy** –
  - It gives surrogates some rights to the child. This means that a surrogate mother is allowed to claim parenthood rights over the baby and is not forced to follow her contracted arrangement with the couple who hired her help.
  - It puts a child’s health at risk if the surrogate mother doesn’t follow health instructions. It is possible though that a surrogate may drink heavily or sneak in a cigarette every now and then. Even when candidates for surrogate pregnancy are extensively screened, there is no guarantee that health instructions will be followed.

Surrogacy offers hope for childless couples to have their own biological child. So, despite its cons (which happens only rarely), it proves to be a good route for many couples who are ready for parenthood.

SURROGACY IN INDIA – LEGAL ISSUES

Not all countries encourage surrogacy. Ethical and legal implications have been a deterrent for its worldwide acceptance. In France, Germany, Sweden and Spain, the people have voted against surrogacy. In France, commercial surrogacy is banned; and in 1991 its highest court announced that “the human body is not lent out, is not rented out, and is not sold.” In the United Kingdom, South Africa and Argentina, where surrogacy is allowed, surrogacy requests are decided by independent surrogacy committees. In the United States, rules and regulations on surrogacy differ among states. California has legalized commercial surrogacy, while it is illegal in some states and in some others, regulations are introduced.\textsuperscript{24}

\textsuperscript{20} Ibid 15.
\textsuperscript{21} Ibid 18.
\textsuperscript{22} Ibid 15.
\textsuperscript{24} Ibid 13.
In such a scenario, couples in these countries where legalities involved in commercial surrogacy are complicated, would rather opt for other countries where the legal procedure in this issue is much simpler. Since many nations do not recognize surrogacy agreements, India has become a popular destination of fertility tourism. Infertile couples from all over the world travel to India where commercial surrogacy is legal. This arrangement may seem to be beneficial for all concerned parties; however, certain important issues have to be addressed through carefully framed laws in order to protect the rights of the surrogate mother and the intended parents. An added attraction is the low cost of the whole procedure in India which is much less compared to other countries. Commercial surrogacy was made legal in India with the landmark Supreme Court judgment and later, the Indian Council of Medical Research Guidelines 2005 which prescribed conduct and use of ART procedures or treatment by fertility clinics. The ART Bill legalized commercial surrogacy by prescribing monetary compensation to the surrogate mother by the intending couple. Law Commission Report No. 228 (2009) recommends legalization of altruistic or non-commercial surrogacy arrangements in India in order to protect the surrogate mother from exploitation.

Under these scenarios, with the aim of putting an end to the exploitation of poor women who agree to become surrogate mothers for money, the Union Cabinet recently cleared the Surrogacy (Regulation) Bill, 2016. It allows ethical surrogacy to the married infertile couples and banning commercial surrogacy in India. The surrogacy bill aims to prohibit potential exploitation of surrogate mothers and children born through surrogacy.

When India legalized commercial surrogacy in 2002, it slowly gave rise to a booming industry of foreign surrogacy requirements and fertility tourism, such so much that the demand of banning the commercial surrogacy was raised. The question of foreign surrogacy became especially relevant after the case of Baby Manji Yamada on 29 September, 2008. In 2007, a certain Dr. Patel working at the Akanksha Infertility Clinic arranged for Japanese couple Ikufumi and Yuki Yamada to have a surrogate baby by Pritiben Mehta. Pritiben was impregnated using a mix of Yamada’s sperm and an anonymous Indian woman’s egg. However, in the months to come, Yamada and his wife filed for divorce. None of the Indian laws covered whose child the baby (Manji) was:

the woman who donated the egg, Pritiben, or Yuki Yamada. Furthermore, there was even a petition filed later in court that Dr. Patel was running a child trafficking racket by abusing the lack of surrogacy laws, and gaining easy money by enabling surrogacy. Although the case was resolved and Baby Manji was given to her grandmother Emiko, this, as well as the booming surrogacy industry, the easy abandonment of children, and the exploitation of women who were forced to become surrogates many times in order to sustain their family; led to the necessity of this bill.

Important Features of the Bill:

1. According to the Bill, only Indian couples, who have been married for at least 5 years can opt for surrogacy, provided at least one of them have been proven to have fertility-related issues.
2. Only close relatives, not necessarily related by blood, will be able to offer altruistic surrogacy to the eligible couples.
3. The new Bill has put a complete ban on commercial surrogacy.
4. It also bans unmarried people, live-in couples and homosexuals from opting for altruistic surrogacy. Now, foreigners, even Overseas Indians, cannot commission surrogacy.
5. A woman can become a surrogate mother only for altruistic purpose and under no circumstances she will be paid for it, although payment can be made towards medical expenses.
6. Surrogacy regulation board will be set-up at both Central and State-level.
7. The law will be applicable to the whole of India, except for the state of Jammu and Kashmir.
8. All Assisted Reproductive Technology (ART) clinics will need to be registered.
9. Surrogacy clinics will be allowed to charge for the services rendered in the course of surrogacy, but the surrogate mother cannot be paid.
10. Commercial surrogacy, abandoning the surrogate child, exploitation of surrogate mother, selling/import of human embryo have all been

27 Baby Manji Yamada vs. Union of India and Another (2008) 13 SCC 518
categorised as violations that are punishable by a jail term of at least 10 years and a fine of up to Rs 10 lakh.

11. Under the new bill, the clinics will have to maintain records of surrogacy for 25 years.

12. The surrogate child will have the same rights of as that of a biological child.

Although the bill was made and passed with the intention of preventing this exploitation, some of the clauses had both the medical community and the general public outraged. However, sometimes we are quick to criticize policies without understanding the true extent of the situation. The bill is extremely necessary in certain places in India; for example, Gujarat, where ‘baby farms’ exist, i.e. underprivileged women are rounded up in scores and given out as surrogates to potential parents.  

**SURROGACY – A RAY OF HOPE**

Starting a new family is the most precious moment in a person’s life. While some become parents through natural means without any kind of complications, some take years to have a baby of their own. There are still a few, who are forever incapable of having a baby naturally. This is where surrogacy comes to their rescue, which is often the last resort. Genetically having a child that you’ve wanted would be a lot better than having one that isn’t. Just because someone else is having the child for you doesn’t mean it won’t be loved as much, it will be loved even more because it’s giving a woman a child that she couldn’t have by herself. It isn’t about the money, it’s about giving the gift of love to a person who can’t do that on their own.

If one can’t conceive, surrogacy creates a chance for her and her partner to parent a child who is at least partially genetically, their. This genetic link may be through her partner’s sperm or an embryo which was created from her egg and her partner’s sperm.  

And more, for gay male couples, surrogacy offers a route to parenthood.

Surrogacy is legal in India and the industry is estimated to be as big as Rs 9 billion, and growing at 20 per cent every year. But, like everything else that lends hope, surrogacy - where woman is hired to bear a child that is genetically not her own -- has become a lucrative business that has more fly-by-night players than legitimate professionals. But sadly, the evolution of surrogacy has ended due to the introduction of the surrogacy bill in India. The government recently decided to ban Indian women from being surrogate mothers to foreigners to stop ‘commercial surrogacy.’ It is really disappointing that such action taken by the government on surrogacy in India. The government of India should have amended the surrogacy laws and regulations to ensure proper care of Indian surrogate mothers during surrogacy treatment. Instead, they have banned surrogacy in India in the garb of morality and righteousness. It clearly seems that the government is washing off their hands from taking actions for surrogate safety. The surrogate bill may seem to be beneficial for the surrogate mothers but what about the couples who could have a baby only through surrogacy? Will the couples with failed IVFs be able to make to become parents? Moreover, how many people have relatives who are willing to become surrogate mothers for them?

It is really evident how the government ignored the condition of infertile couples today and how surrogacy has helped millions of couples to become parents. Thus surrogacy bill is pointless and needs an urgent change. Surrogacy has delivered millions of chances to single parents, same-sex couples and married couples with fertility issues to make their parenthood dream a reality, since decades. Through surrogacy, couples are able to have a child who has their genetic links. It is very fortunate that assisted reproductive technology is bringing up such a wonderful alternative for infertile couples.

**CONCLUSION**

“Biology is the least of what makes someone a mother”

- Oprah Winfrey

Surrogacy is a highly controversial form of infertility treatment, with views varying widely between faiths, personal beliefs and national legislation. There is also a range of far more personal surrogacy issues to consider, such as whether the parents will bond with the child in the

30 **Ibid** 28.
34 **Ibid** 14.
35 **Ibid** 20.
36 **Ibid** 20.
same way and whether the child should be told about his or her origins.37

The surrogacy process also allows one or both intended parents to be the genetic parents of their child. This makes surrogacy a popular choice for prospective parents who feel strongly about maintaining a genetic link to their children. Having a biological connection to the child also simplifies the legal process and gives intended parents more control over the surrogacy process. Though surrogacy requires a lot of time, money and patience to succeed, whether it's carried out privately or through an agency, but it can bring happiness to all concerned if the medical, legal, financial and emotional aspects are properly considered.38

Where the concept of surrogacy underlines the various aspects that are dealt with the whole society at large but this original work is an attempt to look into the issues with special reference to the population to which it is a HOPE. Thus, surrogacy is like a boon and a ray of hope for those childless couples or single parents who wish to fulfill their dream of having a complete family with their own child and it also allows them to decide the genetics that are passed along to the child.

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38 Ibid 21.