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**Surrogacy- A need to understand Ethical, Legal & Socio-Economic Issues**

**Ayush Soni**

*“Neither flesh of my flesh, nor bone of my bone, but still, miraculously my own.”*

## **ABSTRACT**

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*The term Surrogacy generally refers to the practice of hiring a fertile woman who agrees to become impregnated, usually through donor insemination, and agrees ahead of time to transfer the child to the infant’s biological father and his wife. Surrogacy has a long history since 1930’s in the U.S., related to the mass production of estrogen. However, the concept of Surrogacy has been a controversial issue in India.*

*Everything has two side i.e., pros and cons. And, so, does Surrogacy, it has a con, that women make contracts about use of their body. On the other hand, the most virtuous pro is that it is boon for childless parents. Surrogacy has more positive aspects than the negative ones.*

*The Indian Judiciary is in favour of the Commercial Surrogacy, (an arrangement in which the surrogate mother is paid a fee for carrying and giving birth to the child, and for subsequently giving up that child and all associated parental rights to the commissioning couple) which is different from Traditional and Gestational Surrogacy, as held in the case of “Baby Manji Yamada v. Union of India and Anr.”.*

*The laws relating to Surrogacy in India are uncertain, immature, untested and unpredictable. However, the Legislature is being asked to consider a Bill titled ‘The Assisted Reproductive Technology (Regulation) Bill, 2010’ which envisages a national framework for the regulation and supervision of Assisted Reproductive Technology (ART).*

*Surrogacy arrangement is made as a result of an agreement between the parties. This agreement is written down and every aspect related to the parties is specifically addressed. The Surrogacy agreements between the intended parents and the surrogate mother are governed entirely by the Indian Contract Act, 1872. The essentials of a contract laid down in Section 10 of the Indian Contract Act, 1872 must be satisfied for an agreement to be enforceable by law.*

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**Key words:** Contracts, India, parents and Surrogacy

## INTRODUCTION:

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Women are bestowed with the most beautiful power of pro-creation and experiencing motherhood. But in some cases, the women are not capable of pro-creation due to some physical problems or medical complications i.e., the history of miscarriage, etc. At this stage Surrogacy comes into force as a viable option that gives hope to such infertile couples. The concept of Surrogacy is becoming very popular these days as the infertile couples are coming forward and accepting this concept whole-heartedly, in order to make a family.

When a woman is not capable of bearing a child, she is called by different names, among which the most common is 'Banjh'. And she faces many psychological problems as well. She might feel guilty, loose self-worth and confidence. The concept of Surrogacy is very useful to such woman as well as to those who really wish to be a mother.

Surrogacy refers to the practice of hiring a fertile woman who agrees to become impregnated, usually through donor insemination, and agrees to transfer the child to the infant's biological father and his wife after birth, according to terms of a contract signed before the woman becomes pregnant.

Initially Surrogacy was confined only between friends, close relatives and family and was done out of altruism. But with the upcoming new concepts and involvement of money, it extended beyond family, close relatives and friends.

Surrogacy is of different types on the basis of genetic Surrogacy and Surrogacy arrangements. On the basis of genetic Surrogacy, there are 3 types of Surrogacy:

- Genetic Surrogacy: This is also known as partial Surrogacy. Here the surrogate mother's egg is fertilized with the commissioning of the male's sperm. The surrogate mother is the biological mother of the child and the intended couple's male is the biological father.
- Total Surrogacy: Here the surrogate mother's egg is fertilized by the sperm of a donor (except the intended couple's male).
- Gestatory Surrogacy: This is also known as Full Surrogacy. Here the intended couple's egg (of the female) and sperm (of the male) are through in vitro fertilization gone into the surrogate mother's womb.

On the basis of the Surrogacy arrangement, it can be classified as of two types:



- **Altruistic Surrogacy:** In this type there is a pre-established relationship between the surrogate mother and the intended couple, i.e., the surrogate mother is either in relation or a friend of the intended couple. The surrogate mother is not paid any money for her 'service' of offering her womb.
- **Commercial Surrogacy:** In this type the surrogate mother is paid some amount for her services of offering the 'womb'. There is no pre-established relationship between the intended parents and the surrogate mother.

It is said that the best feeling in the world is to be a mother and to hear a child call you 'MAA'. But what about those who are not due to any reasons capable of bearing child. Aren't they supposed to experience such happiness? Surrogacy is a way to bring happiness of parenthood to those who are not capable of bearing children.

### **WHY SURROGACY AND NOT ADOPTION?**

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The object of Surrogacy and Adoption is same, that is to provide childless parents with the feeling of Parenthood by completing their family. Although the object is same but there is a difference in the procedure.

In case of Adoption the child is adopted and the child is not genetically linked with the adopting couple. There might at some or the other place be a feeling that the child is not one's own and is an adopted one. Whereas, in case of Surrogacy either the mother or the father (of the intended couple) is linked to the surrogated child and at times both (the intended couple) are linked. Thus, there is a feeling of one's own. There is a genetic bond or biological relationship between the child and the intended parents.

In case of Surrogacy the intended couple has the freedom to choose the surrogate mother. And therefore the intended couple can choose the surrogated mother of clean health history and be assured that the child will not have any health problems out of genetics. But in case of Adoption the adopting parents are not aware of the medical history of the biological parents of the child and there are chances that the child might suffer some medical complications due to genes.

In case of adoption, the couples of same sex cannot adopt. But the case is not the same with Surrogacy, until now.

Moreover, the procedure of adoption is a lengthy one and the couple adopting gets clutched in the formalities of law. But in case of Surrogacy there is no such requirement.

## **PROS AND CONS OF SURROGACY**

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Everything has two sides, i.e., pros and cons, and so does Surrogacy.

There are some cons to the concept such as:

- There are chances that the surrogate mother might not hand over the baby to the intended couple and might refuse to transfer the parental rights.
- It is often seen that the surrogate mother is not aware of the contract that she has entered into and is therefore exploited.
- Surrogacy is often used as a way to earn money (in case of Commercial Surrogacy), in order to support the family financially.
- There are risk regarding the health issues of a Surrogated mother.

Pros of Surrogacy:

- It is a boon for childless parents.
- The child out of Surrogacy has the genes of the intended parents.
- Opting for Surrogacy does not include many legal formalities as Adoption does.
- Surrogacy is considered to be the most successful reproductive treatment than the other methods.
- Surrogacy is also a boon for the couple of same sex, until now.
- The intended couple can choose the Surrogate mother of their choice after checking her background and medical conditions.

## **LEGAL ASPECT OF SURROGACY**

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The Indian Judiciary is seen to be in favor of the Commercial Surrogacy (the surrogate mother here is paid some amount for bearing the child) as decided in the case of Baby Manji Yamuda v. Union of India

On the other hand, the legislature seems to be in favor of the Altruistic Surrogacy and against the Commercial Surrogacy through its Surrogacy Bill,2016. The main features of the Surrogacy Bill,2016 are:

- It bans Commercial Surrogacy and allows Altruistic Surrogacy.
- Surrogacy is permitted only for childless parents and not for those who already have a child.

- Foreigners cannot choose an Indian Surrogate mother.
- It prescribes the age limit of the intended couple who are eligible. Couples above or below that age cannot go for Surrogacy.
- It states that a couple can go for Surrogacy only after five years of marriage and not before that (provided that the couple must satisfy the age limit and must be infertile).

The 228th Report of Law Commission of India on Surrogacy also suggested that the Altruistic Surrogacy should be allowed and there should be a ban on the Commercial Surrogacy. Assisted Reproductive Technologies (Regulation) Bill, 2014 was also in favor of the Altruistic Surrogacy and against Commercial Surrogacy.

The Surrogacy contracts are governed by the Indian Contract Act, 1872. The essentials of a contract laid down in Section 10 of the Indian Contract Act, 1872 must be satisfied for an Surrogacy agreement to be enforceable by law.

## **ETHICAL AND SOCIAL ASPECTS OF SURROGACY IN INDIA**

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Some social and ethical issues arise in Surrogacy, which can be enlisted as follows:

- It is seen that often society regards Surrogacy as the 'selling of the baby' and therefore against the religion and morals.
- What if the surrogate mother refuses to handover the baby to the intended couple and does not transfer her parental rights?
- What if the surrogate asks to maintain relations with the child after giving birth?
- It is possible that the society might not accept the surrogated child.
- At times the family (except the intended father and mother) does not accept the surrogated child.
- In some cases, the surrogate mother is uneducated and is therefore exploited. As she is unaware of the terms and conditions of the contract that she is entering into.
- The health of the Surrogated mother is ignored.

The above social issues can be rectified by establishing rules and regulations. But just due to these issues (that can be rectified) Surrogacy should not be left unaccepted.

Our morals and ethics always teach us to help others. Then why is the process of Surrogacy regarded to be immoral? One must look at the other side of Surrogacy to see that it is a moral act, as it is done in order to help a mother who cannot herself give birth to a child.

## **NATIONAL AND INTERNATIONAL POSITION OF SURROGACY**

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France, Germany, Italy, Spain, Portugal and Bulgaria are countries that are not in favor of any of the forms of Surrogacy.

On the other hand, Commercial Surrogacy is legal in some states of US and in countries like India, Russia and Ukraine. While, Altruistic Surrogacy is permitted in Australia and New Zealand.

Georgia, Mexico, Nepal and Poland are among the countries that are described to have possibilities for Surrogacy arrangements.

Surrogacy is now-a-days being accept in India as well as at international level. Some of the famous personalities have practiced Surrogacy. The examples of which are:

In India:

- One of the most famous actors, also known as the king of the hearts ' Shah Rukh Khan' had opted for Surrogacy and thereafter Abram was born.
- The next famous actor also known as Mr. Perfectionist ' Aamir Khan ' also became the father of Azad Rao Khan through Surrogacy.
- Seema Sachdeva Khan, wife of Sohail Khan also opted for Surrogacy after giving birth to a boy.
- Apart from actors and actresses, a couple from a well-known lawyer's family Mahesh Jethmalani and Haseena Jethmalani had twins through Surrogacy.

The list is followed by some International Personalities as well:

- Nicole Kidman (Oscar- Winning Actress) also welcomed a child through Surrogacy.
- Another best example is twin's daughter through Surrogacy of Sarah Jessica Parker and her husband Matthew Broderick.

- Robert Di Niro and his wife Grace Hightower (58-year old) welcomed a baby girl through Surrogacy.
- Now coming to the most famous personality all over the world ' Michael Jackson'. Michael Jackson's third child was born through Surrogacy.
- Harris and his partner David Burtka also had twins via Surrogacy.
- Sir Elton John and David Furnish welcomed their second son through Surrogacy.
- Ricky Martin welcomed twin sons through Surrogacy.

The list does not end here. There are many other famous personalities that have opted for Surrogacy.

Surrogacy is practiced not only in India but at International Level as well.

## **CONCLUSION**

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Every species on the earth has by nature the desire to continue their generation, to which human is not an exception. But there are circumstances where some women are not capable of bearing children due to physical or medical conditions. At this time, Surrogacy is the best option.

Surrogacy is still a topic of discussion. It is coming in the trend now-a-days. Unlike all other aspects, Surrogacy also has its pros and cons. But it is seen that a part of the society is accepting Surrogacy seeing its various benefits. While the other still consider it to be against the religion as they relate it to renting of womb and selling of baby for financial gain. Part of society in favour of the concept regards Surrogacy as a boon for childless parents who wish to have a child of their genes.

Surrogacy is an ethical and moral act that gives happiness to the childless couples.

## SUGGESTIONS:

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This a positive step of the legislature to permit Altruistic Surrogacy. But there are chances that the family, friends and close relatives might not be in favor of Surrogacy, because our Indian society has not yet accepted the concept of Surrogacy completely. In such instances, where would the intended couple seek help from? Therefore, there should not be complete ban on Commercial Surrogacy, instead some strict guidelines can be set to regulate Commercial Surrogacy

It has been seen that when a new concept comes in practice, initially people focus on the negative aspects of it. Why not this time let's think something positive and accept the concept? Surrogacy is a new hope for the childless women, so let's accept it unconditionally for our sisters, wives, etc.

Isn't it the duty of the society to think for the welfare of the childless women? Let's just consider the happiness that Surrogacy brings to childless parents and keeping the social issues aside accept Surrogacy whole-heartedly.

India is now-a-days adopting modernization and westernization. Then, why isn't the society being able to accept the concept of Surrogacy considering its advantages? This is the peak time, the society should instead of being orthodox, accept the concept of Surrogacy. This is the time the society will have to decide whether the outdated norms that were set according to the need of the time that they were set in are necessary to be followed and Surrogacy is to therefore to be unaccepted or whether seeing the need of the clock at present accept the concept positively.

***"MOTHERHOOD IS THE SECOND LIFE TO A WOMAN".***

So, let's help the infertile couples to get the feeling of parenthood and mothers to experience motherhood.

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