INDIAN LAW AND POLICY ON SURROGACY: A SOCIO-LEGAL STUDY WITH SPECIAL REFERENCE TO BAREILLY AND MORADABAD

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INTRODUCTION:

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.¹ 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’

…Black’s Law Dictionary.

Despite controversial and Ethical issues arising out of surrogacy. It has been gaining popularity all over the world especially in the west, where adoption is not easy to come by. India is the only country in the world which has legalized commercial surrogacy.² Surrogacy refers to a Contract in which a woman carries a pregnancy for another couple number of infertile couples from all over the world approach India where Commercial Surrogacy is legal. Surrogacy comes as an alter-native when the infertile women or couple is not able to reproduce.

The words ‘surrogate’ has been derived from the Latin word ‘subrogare’ which means appointed to act in place of other. It is considered as a ‘blessing’ and ‘Miracle of Science’ this concept dwells for its legality to Article 16(1) of Universal Declaration of Human Rights, 1948,³ which stipulates that men and women of foliage and without any limitation due to race, nationality or religion have the right to marry and to found a family. In Medical parlance surrogacy means, using of a substitute mother in the place of natural mother.

Thus Surrogate Mother is a woman who bears a child on behalf of another woman either from her own egg or from the implantation in her womb of fertilized egg from another woman.

² Problem of surrogacy-A critical study-Article By Rekha and Pahuja
³ Article 16(1) of Universal Declaration of Human Rights, 1948
According to Black’s Law Dictionary: Surrogacy means ‘the process of carrying and delivering a child for another person’.

In Vitro-Fertilization (IVF) and Embryo Transfer commonly known as ‘Test Tube Babies’, it requires fertilization of an ovum outside the body and consequently transfer of the embryo into the uterus of the woman. In vitro is why it is known as test tube baby”. India has played a great role in the development of IVF technology. Louise Brown, the world’s first test tube baby, was born by this method on 25th July, 1978 in England and India’s first test tube baby, Durga was born in Kolkata of 3rd October 1978.

Hindu Mythology also offers intensity of surrogacy and reflects the secrecy that still surrounds surrogacy practice. Surrogacy in a very knotty issue in India due to not intervention of law. At present surrogate motherhood in India involves a business of 445 billion. The past few years have seen more than 150% rise in surrogacy cases in India. The Anand town in Gujrat State is a hub of surrogate mothers. Not, Only the Indore city in Madhya Pradesh, Pune, Mumbai in Maharashtra State, Delhi, Kolkata and Tiruvanantpuramcentre as many childless NRI’s from all over the world.

**LITERATURE REVIEW**

The following background information on the subject has been gathered by reviewing already available literature for a better understanding of the concept of surrogacy. The Indians were not the only civilization to use surrogate mothers to carry on the family name and bloodline. Back in recent European history it has been heard of especially in Spain, where the kings took services of surrogate mothers until they got a son. The surrogate mother of the child became “nanny” for the royal children, believing them to be genetically related

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4 According to Black’s Law Dictionary  
5 Law Morality and Surrogacy with Special Reference to Assisted Reproductive technology-justice B.S Chauhan (Nyaydeep Journal)
to the king and queen, never knowing the truth. Obviously, these things kept secret, so that no question would be raised over their right to the throne.

The history of surrogate motherland gay back to biblical times. Some people even say about its origin dated back to Sarah and Abraham. Others say that it started even before that time, though off records. Numerous religions and civilizations have actually celebrated surrogate mothers for their good deeds and services. During 1980, surrogate mothers were used by the gay community to build their families, then, it was frowned upon by the Society. The Indians were the first ones to truely begin the surrogate mother history in this part of the world. So we are looking back to the 1899’s for the beginning of this part of the story If an Indian woman was found to be infertile despite all medicines, then her husband used to visit the chief of his tribe for help, so that the husband may be allowed to make pregnant another woman, hopefully, for fathering a son to carry on his tribe. The barren wife had no relation with the child.

In Mahabharat Gandhari did not deliver a child rather delivered a semi Solid material which was devided by Mahirishi Vyas into 100 pieces and planted them in different pans. Thus, the 100 Kaurvas was born. These could also be referred to as test tube babies.

In the case of surrogacy there may be a question about enforcing a contract with the Surrogate mother, whether such contracts may be valid in views of the provisions of public policy, particularly under section 23 of the Indian contract Act 1872, whether the child tube handed over can be considered a saleable commodity for consideration. Surrogacy contracts are the same as other contracts. It raises a very serious issue of morality and gives rise to

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6Law Morality and Surrogacy with Special Reference to Assisted Reproductive technology-justice B.S Chauhan (Nyaydeep Journal) 58
question of adultery. In Oxford v. Oxford: a Canadian Court held that as the wife was a surrogate mother, it was a clear-cut case of adultery by the wife\textsuperscript{7}.

In Baby Manji Yamada v. Union of India & Another an identified woman donated the egg, which after fertilization with the sperm of Mr. Yamada was introduced into the body of Surrogate mother. Thus, it was not a case of involvement of ‘couple’. Mrs Yamada had no contribution in the birth of the child\textsuperscript{8}.

In \textbf{Jan Balaz case}, the legal issue was centered of whether the surrogate mother was the legal mother of the child\textsuperscript{9}.

It Roe v. Wade, the Court had decided that every woman has the right to take a decision with respect to how her body is to be used, and therefore a woman has the right to enter into a contract of commercial surrogacy\textsuperscript{10}.

In the 228\textsuperscript{th} report submitted by the Law Commission of India in August 2009 titled “Need for legislation to regulate assisted reproductive technology clinics as well as rights and obligations of parties to a surrogacy. “surrogate child should be recognized as the legitimate child of the commissioning parents and the birth certificate of the surrogated child should contain the names of the commissioning parents only. The Indian government has drafted a legislation earlier floated in 2008finally framed as ART (Assisted Reproductive Technology (Regulation) Bill 2010 is still pending with Government and has not been presented in the Parliament of various aspects including interests of intended parents and Surrogate mother\textsuperscript{11}. The light of this, the surrogacy (Regulation) Bill 2016 was introduced in Loksabha in November. The Cabinet approved bill, however has not been passed yet\textsuperscript{12}.

\textsuperscript{7}(58 O.L.R. 251 (1921)  
\textsuperscript{8}A.I.R 2009 S.C.  
\textsuperscript{9}A.I.R 2010 Gujrat 21  
\textsuperscript{10}410 U.S. 113 (1973)  
\textsuperscript{11}Assisted Reproductive Technology (Regulation) Bill 2010  
\textsuperscript{12}The surrogacy (Regulation) Bill 2016
According to Union Minister for external affairs Sushma Swaraj the need for the Surrogacy (Regulation) Bill 2016 came after India emerged as a surrogacy hub for couples and the increased number of incidents reported of unethical practices. The bill is to completely abolish commercial Surrogacy which includes stopping foreigners from commissioning Surrogacy in India, while making it illegal for single parents, gay couples and those in live-in-relationship for surrogacy.

In Anna Johnson v. Mark Calvert, the genetic parents brought a suit, seeking a declaration that they were legal parents of a child born of a surrogate mother, The Supreme Court of Orange Country held that the woman was not the "natural mother" of the child for the reason that it was not her egg that was fertilized before the same was implanted in her womb.\textsuperscript{13}

In St. Theresa's Tender Loving Care Home, v. Government of, the Supreme Court followed the decision in Lakshmi Kant Pandey's case and stressed the importance of regulating inter-country adoptions, to avoid the sale of children as if they were commodities, and held that the best interests of the child must always be considered by the courts in cases of adoption.\textsuperscript{14}

In Central Inland Water Transport Corporation Limited &Anr. V. Borjo Nath Ganguly&Anr the Supreme Court stated that the type of contract to which the principles formulated applies, contains terms which are so unfair and unreasonable that they shock the conscience of the court. Thus, the term 'public policy' has acquired new shaded of meaning over a period of time.\textsuperscript{15}

Surrogacy is an ‘arrangement’ in which a woman agrees to a pregnancy, achieved through assisted reproductive technology, in which neither of the gametes belong to her or

\textsuperscript{13}(1993) 5 Cal 4th 84-851 P.2d 776
\textsuperscript{14}(2003) 11 SCC 737.
\textsuperscript{15}AIR 1986 SC 1571
her husband, with the intention of carrying it to term and handing over the child to the person(s) for whom she is acting as surrogate. The surrogate is a woman who agrees to have an embryo generated from the sperm of a man who is not her husband, and the oocyte for another woman implanted in her womb to carry the pregnancy to full term and deliver the child to its biological parent(s). In medical parlance, the term ‘surrogacy’ means using of a substitute mother in the place of the natural mother. The surrogate mother bears a child on behalf of another woman, either from her own egg, wherein the procedure is called ‘straight or partial surrogacy’ or from the implantation in her womb of a fertilized embryo from another woman, wherein the procedure is called ‘gestational/full/host/IVF surrogacy’.

**Hon’ble Dr. Justice B.S. Chauhan**\(^\text{16}\) in his article has made a comparison of law and morality with surrogacy. In-vitro fertilization, artificial insemination and surrogate motherhood has posed new challenges to marital relations between the spouses and may have a serious impact on ethical and moral standards of the society. The author has examined the issue of infertility in the light of constitutional rights guaranteed to every citizen irrespective of his/her gender or his/her nationality. Article 21 of the Constitution of India has been given a very expensive interpretation. The concept of surrogacy has been explained through the ratios of the decided case laws of the courts in India. He has also discussed 228\(^\text{th}\) report of the Law Commission of India on ‘need for legislation to regulate assisted reproductive technology clinics as well as rights and obligations of parties to surrogacy’ and the Assisted Reproductive Technologies (Regulation) Bill, 2010, which is pending for consideration before the Indian Parliament.

Dr. C. R. Jilova\textsuperscript{17} in his article analyzed that the gift of motherhood regrettably is not distributed by God evenly to every woman. Though the case of infertility can be found in men, women or in both. But with the advancement in scientific technology there are many options for the infertile couples now, in comparison to earlier times, though process of adoption is still favoured but the desire to have own blood and flesh has made surrogacy an excellent option for the infertile couples. In India, surrogacy is a booming industry of reproductive tourism, notwithstanding the fact that the Humans Organ Act, 1994 bans the sale of ‘human organs’, loaning of organs and any commercialization of trade of human organs. Surrogacy involves a procedure of reproduction wherein a woman gives birth to a child for an infertile couple who are unable to have a child of their own for medical reasons but who desire to have their own children.

Geneuiere H. Reyes and Hazel Rose B. See\textsuperscript{18} examined the Artificial Reproductive Technology (ART) contracts in the light of Philippine civil law, especially, contract law. The paper outlined the different ART methods most familiar to Filipino couples seeking fertility treatments, i.e., artificial insemination, in-vitro fertilization and surrogacy. It also described what an ART contract is in general, as well as the specific contracts that are executed for each ART procedure. The article also analyzed ART contracts using a specific framework, the essential requisites of a contract and the probable liabilities for breach of the contract. It concluded with an assessment of the applicability of existing contract law to an ART contract.

Indo-Asian News Service\textsuperscript{19} describes that surrogacy in India is estimated to be a $445 million business with India being the foremost in the world for the practice because of the low cost of treatment and the ready availability of women willing to rent their wombs to childless couples. Sooner or later, India needs to have laws enacted to protect the Indian surrogate mothers and also to protect the foreigners who come here for treatment. It was noted that in India surrogacy costs about $12,000 compared to $70,000 in the US. In this article, the views of participants at a moot court competition at Rizvi Law College were gathered.

The participants discussed the main issue which shot the limelight, i.e., a surrogate mother in Gujarat’s Anand town giving birth to a girl named Baby Manji who got entangled in a legal battle as her Japanese parents had divorced before she was born. Her father claimed her custody but the Indian laws did not permit this. He approached the Supreme Court of India and it granted Manji’s custody to her 74-year old grandmother Emiko Yamada.

This article made the researcher analyze the actual situation of surrogate mothers and the children born through such arrangements in India, which is reflected throughout the thesis. The lack of laws in India has led to violation of the rights of the surrogate mothers as well as the children born through such arrangements. Even the people of India are throwing a light upon such an arrangement and discussions are happening at length between the law students, the legal fraternity and the general public.

M. Srinivas\textsuperscript{20} observed that the feeling of motherhood is something incomparable with any other experience in any society throughout the world. In a country like India, with traditional taboos, a woman is respected as a wife only if she is mother of a child. Because of infertility related problems couples are not able to conceive a child of their own, reproductive


technologies like artificial insemination, in-vitro fertilization and surrogacy becomes a ray of hope for these couples. Reproductive technology is treated as a remedy for many problems which offers a wide range of choices. These methods are in recognition of the fact that infertility as a medical condition is a huge impediment in the overall well-being of couples and cannot be overlooked especially in a patriarchal society like India.

Majdah Zawawi\textsuperscript{21} analyzed that at a time when choices were limited infertility was a malady that was feared by many and for a long time much could not be done to alleviate the sufferings that infertility brought on many unfortunate couples. However, with every suffering Allah has provided a cure as he promised: ‘for every disease there is a treatment’. Indeed, man has proven the truth of this promise with the advancement in science and technology. Although the problem of infertility has not been totally eliminated, scientists have been able to come up with better ways to help childless couples fulfill their dreams of having a child. Moving from the more traditional use of herbal concoctions, mankind can now depend on various forms of reproductive technologies to assist them in their plight against infertility, with better accuracy.

Dr. Monica Chawla\textsuperscript{22} in her article, felt a need for a new law. Surrogacy is often seen as alternative to adoption, although adoption may be a part of the process. The author talked about the definition of surrogacy, its kinds (traditional/partial and gestational/total) and the problems involved in it. The concept of ‘rent a uterus’ in fact may be readily acceptable in the more analytical frame of the mind with the argument that ‘at least the baby is made with our gametes, even though nourished in a rented body’. Although offering to become a surrogate mother for an infertile couple might appear to be an uncomplicated altruistic act, it is not an


easy course or action. Equally the intended parents may see surrogacy as the answer to their prayers; but they are also likely to have concerns over the implication or their decision before proceeding.

The problems which confront surrogacy agreements pose a series of social, ethical and legal issues which are evaluated carefully by the author in this article. There is always a risk of transmitting infection, such as HIV or Hepatitis, to the surrogate mother from the infected parents. A problem may arise in case of miscarriage or multiple births. In full surrogacy, when more than one embryo is implanted into the surrogate mother’s uterus, the risk of multiple pregnancy increases. Around 20 to 25% of pregnancies resulting from in vitro fertilization will result in a multiple pregnancy of twins or triplets, depending upon the number of embryos implanted. This carries associated risks for both mother and babies and there are serious implications for the intended parents of raising child from a multiple pregnancy.

The author also discussed the lack of law regarding surrogacy in India. There is only National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India issued by Indian Council of Medical Research (ICMR) in 2005. But these guidelines are legally non-binding. The clinics that provide ART facilities take recourse to these guidelines that state that the surrogate mother has to sign a contract with the childless couple. But even then, it is not clear whether such a contract has any legal sanctity.

Mamta Rao talks about the origin of the term surrogacy, having origin in the Latin word ‘surrogatus’, which means a substitute, i.e., a person appointed to act in the place of another. A surrogate mother is a woman who gestates, conceives and carries a baby within her uterus on behalf of another woman, either from her own egg or from the implantation in her womb of a fertilized egg from another woman, on the agreement of handing over the child to the person after birth. The author discussed that infertility of either of the partners
and the desire to have a child of their own, has led to these alternate ways of procreation. She also discussed the meaning of surrogacy, various types of surrogacy, i.e., partial/ traditional and total/gestational surrogacy.

Donor surrogacy is also discussed in this article, wherein there is no genetic relationship between the child and the commissioning parents, as the surrogate is inseminated with the sperm of an outside donor and not of the intended father. The author even talked about ‘commercial or altruistic’ surrogacy arrangements. In the former, the carrier gets compensated for carrying or delivering the child, apart from being compensated for medical and other reasonable expenses. This is termed as ‘wombs for rent’, ‘outsourced pregnancy’ or ‘baby farms’. In the latter, the carrier receives no compensation besides medical and other expenses for carrying and delivering the child. This is generally done by a friend or close relative, who is paid only the necessary related expenses and there is no reward given to the surrogate.

The author also made a comparative analysis of surrogacy within India and international scenario, as surrogacy laws are unsettled and vary from State to State. She talked about surrogacy laws in Australia, United Kingdom, United States of America, Canada, and last but not the least India. Through the ratios of decided case laws, report of the Law Commission of India, Assisted Reproductive Technology (Regulation) Bill, 2010, the author has tried to portray the Indian legal scenario on surrogacy.

Nandita Adhikari has emphasized the relationship of medicine with law which is age old and multi-faceted. Law and Medicine are both subjects with inherent dynamism. They evolve with ongoing research and advancement in technology expanding the dimensions further. This book is designed to provide a fundamental understanding of the relationship of law with medicine and its eventual growth. An attempt is made to address the new and emerging areas in this field such as surrogacy, donation and transplantation of human organs,
management of bio-medical waste, etc. All relevant legislations, case laws and international
documents in the field have also been made part of this work.

**Jwala D. Thapa** observed that the Assisted Reproductive Technologies (Regulation) Bill, 2010 framed by the Indian Parliament is a new legislation that aims to regulate the surrogacy industry for which India has become a preferred destination by foreign citizens looking for “wombs for rent”. The paper aimed to descriptively analyze the place of a surrogate in the general scheme of the Bill which focuses on the assisted reproductive technology industry as such and of which surrogates are a part. The author through this paper concluded that the Bill neglects most of the issues pertinent to the interest of a surrogate making her a small player in the billion dollar industry but to which she is a major contributor. In explaining this position, the author has analyzed other aspects of the Bill also in detail while concluding generally that the Bill mainly thrusts the power of regulating commercial surrogacy in private players of the ART industry instead of giving her an independent berth. In fact, the Bill has been framed according to the processes in which the industry runs at present and to which the surrogates thrust themselves for money. Other ancillary shortcomings of the Bill, necessary to understanding the role of a surrogate has also been dealt with in the paper by the author.

**OBJECTIVE OF THE STUDY**

1. To change the attitude of the society in respect of women.
2. To describe the problems relating to surrogacy in India.
3. To study the related loss and procedure regarding surrogacy.
4. To examine the elements of surrogacy in India.
5. To understand the real concept of surrogacy.
6. To know the need of surrogacy.
7. To know Main reason to adopt surrogacy.

8. To give solution to the problem of commercialization of surrogacy.

9. To describe the impact of surrogacy in society of India.

HYPOTHESIS

The Hypothesis of the study is:

1. Surrogacy is affecting the reproductive rights in general and health rights.

2. There is a need of performance to surrogacy agreement between all the parties to surrogacy achievements.

3. There is a need of comprehensive legislation for regulation and control of various types of surrogacy.

4. To know the impact and utilization of this issue.

WORK PLAN & RESEARCH METHODOLOGY –

For the purpose of the present study will be based upon partly doctrinal, analytical & interviews methods. In this connection, all the relevant data have been collected from various books, journals, articles, news-paper, magazines internet, library & Judicial decisions. Basically, the study is based on primary and secondary sources. Interviews techniques to be used collect to the information about the research problem. The Conclusion will be drawn on the basis of Judicial decisions and relevant provisions.

IMPACT & UTILITY OF RESEARCH WORK

Woman are an important part of humanity. They are almost 50% of the world’s population. The main utilization of the research work is the counseling of surrogate mothers during and after pregnancy. Our study shows mainly the positive experience of surrogate mothers however, surrogacy needs special care in various aspect that its management is very
important and requires deep consultation. The focus needs to be given on realizing altruistic surrogacy. It is advisable to protect over Asian poverty and stop the exploitation of poor women being used as machines. Morality is the surviving force that supports law and eventually disciplines life. The concept of living life decently, and protecting it from men oriented invasions, has been the magically introduced through Judicial pronouncements by our courts, while explaining the dimensions of life and liberty guaranteed under Article 21 of the Constitution of India.

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CERTIFICATE
This is to certify that Sushma Sagar is a research scholar in law, Registration No. 338/2017 5859, Session 2014-15, at Faculty of Law, Agra College, Agra (Dr. B.R. Ambedkar University, Agra, U.P.). She has prepared the revised synopsis on the topic titled “Indian Law and Policy on Surrogacy: A Scoio-Legal Study with Special Reference to Bareilly and Moradabad” as per suggestion laid by Research Degree Committee, under the supervision and guidance. This synopsis has embodied original work of the candidate and has not been submitted anywhere else for the award of any other Degree or Diploma in this or any other University or Institute.

I have no objection to guide the candidate on the topic mentioned above.

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DECLARATION

I, Sushma Sagar declare that the work embodied in this Ph.D. Synopsis on the topic titled “Indian Law and Policy on Surrogacy: A Socio-Legal Study with Special Reference to Bareilly and Moradabad” is my own my bonafide work carried out by me under the supervision of Dr. Umesh Kumar (Associate Professor) Faculty of Law, Agra College, Agra (Dr. B.R. Ambedkar University, Agra, U.P.) in session 2014-15 the matter embodied in this Ph.D. synopsis has not been submitted previously for the award of any degree or diploma in any other university or Institute.

I declare that I have been faithfully acknowledged given credit and referred to the research workers where ever their works have been sited in the text and body of the synopsis.

Date : Signature of Candidate