

COMMERCIALIZATION OF SURROGACY IN INDIA

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INTRODUCTION

Surrogacy is a method of assisted reproduction. The meaning of the word “surrogate” is “deputy or substitute”² and this word originates from Latin word surrogates which means “to act in the place of” or “substitution” in English. So, this means that surrogate mother is virtually a “substitute mother”. The term surrogacy is used when a woman carries a pregnancy and gives birth to a baby for another women who are unable to conceive and carry a child for various reasons such as, the failure of the embryo to implant, pelvic disorder, repeated miscarriages, high blood pressure, hysterectomy, heart and liver diseases.³ In such cases, the conventional is to go for adoption or the unconventional is Assisted Reproductive Technology (ART) in which pregnancy is caused by artificial or partially artificial means. The most commonly used ART procedures are Intrauterine Insemination (IUI), Tubal Embryo Transfer (TET), In Vitro Fertilization (IVF), Zygote Intra fallopian Transfer (ZIFT), Zygote Intra fallopian Transfer (GIFT) and Gestational Surrogacy.⁴ According to the Artificial Reproductive Technique (ART) Guidelines,

“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 her husband, with the intention of carrying it to term and handing over the child to the person or persons for whom she is acting as surrogate; and a “surrogate mother” 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 to carry the pregnancy to full term and deliver the child to its biological parents(s)”⁵”

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² Malini Karkal , “Surrogacy from a feminist perspective”, Indian Journal of Medical Science (IJME)

³ Pratibha Ganesh Chavan, “Psychological and Legal aspects of Surrogate Motherhood” AIR 2008 Journal 103 at 104.

⁴ Victoria Clay Wright, “Assisted Reproductive Technology Surveillance — United States, 2004”, Vol. 56, No. SS-6 (June 8, 2007)

⁵ The Assisted Reproductive Technologies (Regulation) Bill-2010, Indian Council of Medical Research (ICMR), Ministry of Health & Family Welfare, Govt. of India, pg. 4 (aa).

This practice of surrogacy is gaining popularity because adoption process is a long drawn out process and surrogacy facilitates the couple to have their own child. There are several types of surrogacy that are identified but the two most common types of surrogacy are traditional (Natural / Straight)) surrogacy in which the woman who carries the baby is the child's genetic mother while the other is gestational surrogacy in which a woman have an embryo transferred to her uterus. Now, this gestational surrogacy has also spread out into two based on the amount that the surrogate mother is receiving. If she is receiving only the financial aid to meet out her health expenses and is offering the baby as a gift of love being a relative then it is termed as Altruistic surrogacy but if any woman is taking reasonable monetary benefit for doing the same then it is said to be commercial surrogacy.⁶ The foreigners coming to India in search of surrogate mothers and are giving a rise to commercial surrogacy because unlike the western countries the women in India from lower socio-economic backgrounds readily agree to become a surrogate mother in India in return for payment and the treatment in India is also very cheap in comparison to foreign countries⁷. The legal prohibition of surrogacy in some of the countries also leads people to come to India. The different types of surrogacy that may be widely understood are as follows:

- **NATURAL (TRADITIONAL/ STRAIGHT) SURROGACY**

In this arrangement, the surrogate mother is pregnant with the biological child of her own, but this child is being conceived by her with an intention of giving it to be raised by others such as the biological father and possibly his spouse or partner and thus the child that results is genetically related to the Surrogate mother.⁸ The child may be conceived in the mother's womb via sexual intercourse, home artificial insemination or impregnated via IUI (intrauterine insemination)/ ICI (intracervical insemination), which is performed at a fertility clinic.

- **GESTATIONAL SURROGACY**

In this type of surrogacy, a surrogate mother is only a carrier and she is not related to the child genetically or biologically. She is implanted with an embryo that is not her own and after birth,

⁶ Sharyn Roach Anleu, "Surrogacy: For Love but Not for Money?", Vol. 6, No. 1 (Mar., 1992) , pp. 30-48

⁷ Shuriah Niazi, "Surrogacy Boom" available at www.boloji.com/wfs6/wfs1027.html (last accessed, Sept. 25, 2015)

⁸ Elizabeth Anderson, "Is Women Labor a commodity?", *Philosophy and public affairs* 19, no.1 (1990)

she relinquishes the child to the biological mother and/or father to raise, or to the adoptive parents (in which case, the embryo would have been a donated embryo)⁹. So in this case the surrogate mother is referred to as a gestational carrier.

- **COMMERCIAL SURROGACY**

Commercial Surrogacy is a branch of gestational surrogacy in which a gestational carrier is paid to carry a child to maturity in her womb and is usually hired to by higher income infertile couples who can afford the cost convoluted or by people who want to complete their dream of becoming parents by saving or borrowing. Commercial surrogacy is also known as ‘wombs for rent’, ‘outsourced pregnancies’ or ‘baby farms’.¹⁰

- **ALTRUISTIC SURROGACY**

Altruistic surrogacy is also a branch of gestational surrogacy where all the expenses related with the pregnancy of the surrogate and birth of the child are paid by the intended parents such as medical expenses, accommodation, diet and other related expenses but the surrogate usually do not receive any financial gain or reward for her pregnancy or the relinquishment of the child.¹¹

INCIDENTS RELATED TO SURROGACY

The very first case that seek the attention of world media on the matter of surrogacy is **Baby M case**¹² in which a couple decided not to have children due to the wife’s illness. Hence, the husband entered a surrogacy agreement with another woman whereby he donated his sperm and asked her to deliver the child. The deal somehow broke down due to various reasons and the surrogate mother wanted to keep the child. Eventually the case went to the New Jersey

⁹ “Not an ‘Angel,’ Not a ‘Whore’: Surrogates as ‘Dirty’ Workers in India.” *Indian Journal of Gender Studies* 16(2):141–73

¹⁰ Amrita Pande, “Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker”, Vol. 35, No. 4 (Summer 2010), pp. 969-992

¹¹ Amrita Pande, "At Least I Am Not Sleeping with Anyone": Resisting the Stigma of Commercial Surrogacy in India, *Feminist Studies*, Vol. 36, No. 2, re-inventing mothers (Summer 2010), pp. 292-312

¹² 109 N.J. 396

Supreme Court which ruled that the surrogacy contract was invalid because it violated the law against exchange relating to obtaining a child. The court observed that any contract of surrogacy is against public policy and is immoral and therefore it is void in the eyes of law.

In India the concept of surrogacy is not new but the only thing is that it has not been given much importance. India's first gestational surrogacy took place in 1994 in Chennai.¹³ In 1997, a woman from Chandigarh agreed to carry a child for a sum of ₹50,000 in order to obtain medical treatment for her paralyzed husband.¹⁴ In the year 1999, an Indian newspaper carried the story of a villager in Gujarat who served as a surrogate for a German couple.¹⁵ It is estimated that the number of births through surrogacy doubled between 2003-2006 in India¹⁶ and estimates range from 100-290 each year¹⁷ (though it must be noted that no. of failed attempts is likely much higher) to as many as 3,000 in the last decade.¹⁸

On 29-9-2008 a case caught the attention of the Indian people, Baby Manji Yamada v. Union of India¹⁹. Commissioning parents of this surrogate child were a couple from Japan, who filed for divorce shortly before the child was born. The father wanted to take care of the child but he faced severe legal issues because the Indian law prohibits single men to adopt a child.²⁰ In this case the intended mother or the surrogated mother both of them didn't wanted to take custody of baby Manji. The baby was eventually permitted to leave for Japan after the Japanese government issued a one-year visa to her on the humanitarian grounds but her grandmother was directed to accompany the child because she was temporarily given custody over the baby.

This case resulted in intensified debate in India on the issue of surrogacy. Many controversies followed this case which brought in light several infirmities in the arrangement like the absence of a legal contract between the parties and it had the severe potential for exploitation of native surrogates. These types of problems exist because surrogacy contracts are made where one party i.e. surrogate mother is either illiterate or has very less knowledge and hence the contracts made are often not clear and hold no legal value.

¹³ Geeta Padmanabhan, "Hope in the Test Tube", The Hindu, Jan 19, 2006

¹⁴ Sandhya Srinivasan, Surrogacy Comes out of the Closet, Sunday Times of India, July 6, 1997

¹⁵ Jyotsna Agnihotri Gupta, "Towards Transnational Feminisms: Some reflections and Concerns in Relation to Globalization of Reproductive Technologies", 13 EUR.J Women's stud.23, 30 (2006)

¹⁶ Sudha Ramachandran, "India's New Outsourcing Business- Wombs", Asia Times online.

¹⁷ Kritivas Mukherjee, Rent-a-womb in India Fuels Surrogate Motherhood Debate, Reuters, Feb.12, 2007

¹⁸ Neeta Lal, A Labour of Love, KHALEEJ TIMES, Feb.29,2008

¹⁹ AIR 2009 SC 84

²⁰ CARA Guidelines, presently clause 6 (9) as according to CARA Guidelines 2015

Many countries including India lack specific surrogacy legislation and this could possibly be explained by the fact that until now reproductive technology has never needed any justification and everything in its regard was quite clear. Now various social, demographic, ethical, legal and philosophical issues have been raised with the commercialization of surrogacy.

COMMERCIALISATION OF SURROGACY ARRANGEMENT

The surrogacy arrangement can very well be termed as “the barren gets a baby, the broke gets a bonus”.²¹ The women has been conferred with the exclusive capacity to procreate a life but unfortunately, some women cannot give birth to their own child due to certain physiological conditions. The desire for motherhood leads them to search for alternative solutions in which a genuine want of having a child of their own leads them to surrogacy as a most convenient medium. The facility of surrogacy is being availed mainly from women who come from poor background²² and they act as surrogate mother because they are in need of money.²³ After the involvement of money this arrangement of surrogacy is dubbed as "rent-a-womb".²⁴ Surrogacy is a method of assisted reproduction in which the surrogate woman carries another's fertilized egg to a term, usually in cases where the biological mother's uterus is damaged.²⁵

The concept of surrogacy has revolved an ordinary biological function of the body of a woman into a commercial contract and hence the surrogate services are now even advertised.²⁶ Surrogates are being recruited and the operating agencies make huge profits.²⁷ The commercialization of surrogacy is giving rise to the new problem of baby selling and setting up of breeding farms which may turn impoverished women into baby producers.²⁸ Commercial surrogacy is degrading pregnancy to a service and the baby to a product and the studies shows

²¹ Dr. Ranjana Kumari, “The Surrogate Motherhood” pg 16

²² Lee, Ching Kwan. 1995. “Engendering the Worlds of Labor: Women Workers, Labor Markets, and Production Politics in the South China Economic Miracle.” *American Sociological Review* 60(3):378–97.

²³ Chang, Grace, “Disposable Domestics: Immigrant Women Workers in the Global Economy” Cambridge, 2000

²⁴ Low Cost Surrogacy in India, Medical Tourism Corporation, available at www.medicaltourismco.com/assisted-reproduction-fertility/low-cost-surrogacy-india.php, (last accessed Sept. 25, 2015)

²⁵ Mark Magnier, “A bundle of joy with baggage”, Los Angeles Crimes, 2011, available at www.webmd.com/infertility-and-reproduction/features/womb-rent-surrogate-mothers-india, (last accessed Sept. 25, 2015)

²⁶ Corea, Gena, “The Mother Machine: Reproductive Technologies from Artificial Insemination to Artificial Wombs”, New York: Harper & Row, 1986

²⁷ Gayatri Jayaraman, “The Baby Factory: Surrogacy, the blooming business in Gujarat” August 23, 2013

²⁸ Jyotsana Gupta, “Towards Transnational Feminisms: Some Reflections And Concerns in Relation to the globalization of reproductive technologies”, *European Journal of Women’s Studies* 13 no.1, 2006

that, as any other commercial dealing, the parents will now start negotiating down their conditions before entering into the contract.²⁹ Slowly but steadily India is emerging as a popular destination for surrogacy arrangements for many rich foreigners because of cheap medical facilities, advanced reproductive technological know-how, poor socio-economic conditions and a lack of regulatory laws.³⁰

Originally surrogacy happened within families and friends and the known surrogates would give birth for infertile family members or friend and this arrangement rarely involved any monetary transaction. Over the last few decades, there has been a noticeable trend of the commercialization of surrogacy because of the monetary involvement in this practice. On one hand, the intended parents who are not able to conceive their own child gets benefitted from this arrangement by ultimately having what they have desired for so long and on the other hand surrogate mothers are benefitted because they get to earn money to support their family and also serve a good cause.³¹

LEGALITY OF COMMERCIAL SURROGACY AROUND THE WORLD

There is a plethora of views regarding the issue of the birth of surrogate child in various countries. It is rather an unrestrained point of law as there are only a handful of nations recognizing it and there is also lack of uniformity in principles being followed in these nations with respect to the phenomenon of surrogate birth.³²

- In all jurisdictions of Australia though artificial conception was recognized³³ but surrogacy has recently become legal and that too only altruistic surrogacy. Even now arranging commercial surrogacy is a criminal offense in Australia.³⁴
- Even in Hong Kong, a city well known for adopting all the prevailing techniques in the world, commercial surrogacy is crime³⁵. The law are framed in such a manner that no

²⁹ Radin, Margaret Jane, "Contested Commodities: The Trouble with Trade in Sex, Children, Body Parts, and Other Things" (2001)

³⁰ Supra note 15

³¹ David R. Bromham, Surrogacy: Ethical, Legal and Social Aspects, *Journal of Assisted Reproduction and Genetics*, Volume 12, No. 8, 1995

³² Reetu and Basabdutta, "surrogate birth", AIR 2009 Jour 108.

³³ Artificial Conception Amendment Act, 2000

³⁴ Section 56 of Surrogacy Act, 2010 available as on <http://www.legislation.qld.gov.au/LEGISLTN/CURRENT/S/SurrogacyA10.pdf>

³⁵ Section 16 of Human Reproductive Technology Ordinance, 2000

one can pay a surrogate or arrange a commercial surrogacy, no matter within or outside the territory of Hong Kong. Generally only the gametes of the intended parents can be used.³⁶

- In Belgium also commercial surrogacy is illegal. The Court of Appeal also observed that the mother receiving monetary compensation for her services being rendered as a surrogate mother was a violation of public policy because it is clear that she selling her baby for money.³⁷
- In United Kingdom also commercial Surrogacy is illegal.³⁸ Even they were the first one to enact laws regarding abolition of commercial surrogacy.³⁹
- In Canada the Assisted Human Reproduction Act, 2004 prohibits Commercial Surrogacy. It states that, “No person shall pay consideration to a female person to be a surrogate mother, offer to pay such consideration or advertise that it will be paid”.⁴⁰ Any agreement related to money in lieu of surrogacy is illegal and unlawful in the eyes of Law.
- In USA also commercial surrogacy is illegal and all the agreements made regarding surrogacy are termed as immoral and against the public policy. The judgment of Supreme Court of New Jersey in Baby M case⁴¹ renders all surrogacy agreements as void stating that they are against public policy and immoral in eyes of Law.
- California has taken a different view and its policy is based on genetics whereby it accepts the surrogacy arrangements in which the couple seeking surrogacy has contributed some of the genetic material.⁴²

STATUS OF COMMERCIAL SURROGACY IN INDIA

India is very fastly becoming a commercial hub for surrogacy and it may sound very astonishing to say that, but there is no law to regulate the same till date.⁴³ This whole

³⁶ Section 17 of Human Reproductive Technology Ordinance, 2000

³⁷ Patrick Wautelet, Belgian Judgment on Surrogate Motherhood, Conflict of laws.net

³⁸ Available at ukinindia.fco.gov.uk/en/help-for-british-nationals/living-in-india/SurrogacyAndAdoption

³⁹ Surrogacy arrangements act,1985

⁴⁰ Section 6(1) of Assisted Human Reproduction Act, 2004

⁴¹ Supra note 11

⁴² Hari Dev Kohli, “Law And Illegitimate Child”, Anmol Publishers, New Delhi 2003

⁴³ Kari Points, “Commercial Surrogacy and Fertility Tourism in India”, <https://web.duke.edu/kenanethics/CaseStudies/BabyManji.pdf>, last accessed on sept. 25, 2015

arrangement is being regulated on the basis of certain guidelines only, which came after realizing the dire need for the same in the current situation.

ICMR GUIDELINES

- In 2006, the Indian Council of Medical Research (ICMR) published guidelines for accreditation, supervision and regulation of ART clinics in India.⁴⁴ These guidelines were mainly focused on these points :
- Surrogacy should normally only be an option for patients for whom it would be physically or medically impossible or undesirable to carry a baby to term.
- The payments received by the surrogate mothers should be documented and cover all genuine expenses related with her pregnancy.
- A surrogate mother should not be over 45 years of age. The ART clinic should ensure that the surrogate woman is satisfying all the testable criteria to go through a successful full-term pregnancy.
- Guidelines also says that no woman may act as a surrogate more than three times in her lifetime.
- A relative who may be a known or unknown person to the couple, may act as a surrogate mother for the couple.

ART GUIDELINES

Renting of womb is presumed to be legal in India but as on today there is no law at present to regulate surrogacy. The Assisted Reproduction Technology (ART) Bill is pending in the parliament of India which will decide the legal status of commercial surrogacy in India. ART guidelines states that the parents intending to have a child can give money to the surrogate mother, making the transaction commercial in nature.⁴⁵ Therefore, ART guidelines recognize commercial surrogacy as legal in India. As there is no law at present to regulate the surrogacy

⁴⁴ Ethical Guidelines For Biomedical Research On Human Participants, published by Indian Council of Medical Research, 2006

⁴⁵ Available at <http://icmr.nic.in/guide/ART%20REGULATION%20Draft%20Bill1.pdf> last accessed on sept. 25, 2015

agreements guidelines are acting in persuasive authority and making the transaction legal in eyes of Law.

CONCLUSION AND SUGGESTIONS

In the absence of any law relating to surrogacy and this practice increasing in India, many activists, social workers etc. possess very contradicting views regarding the same. Some people are seeing it as noble work where a couple who is not able to conceive a child on their own, gets their dreams fulfilled while on the other side some see it as selling of a child or selling of womb, making them commercial commodities.⁴⁶ According to senior advocate Kirti Gupta, "At present, it is not difficult to have a baby through surrogacy in India because there is no law to control or regulate it. The technique is cheap, when compared to other countries, and surrogate mothers here charge comparatively less for the services"⁴⁷

Some people argue that surrogacy may bring about the reformation in the society on lines of a 'reproductive brothel model' in which women can sell reproductive capacities the same way old time prostitutes sold sexual ones and hence they put emphasis on the need for implementation of clear and enforceable laws.⁴⁸

India is becoming the surrogacy capital of the world because here surrogacy is unpretentious and more cost effective than any other country in the world. The poor women in India agree to carry the child in their womb in order to earn some amount of money with which they can support their family and children.⁴⁹ Nowadays a competition is going between the women in many parts of India like Anand etc. where the practice is prevalent at a large scale and women are willing to become surrogate in order to earn money. This has also led in reduction in cost for carrying child.⁵⁰ There has been a significant increase around the world in going for surrogacy in India after the Supreme Court, 2008 judgement in which it allowed commercial surrogacy in India.⁵¹ However, there are many reports that are not even catching the attention

⁴⁶ Mulay, Shree, and Emily Gibson, "Marketing of Assisted Human Reproduction and the Indian State." *Development*, 49(4): 84, 2006

⁴⁷ *Supra* note 6

⁴⁸ Sehgal, Priti. *Reproductive Tourism Soars in India: Adoption and Surrogacy Laws Have Yet to Catch Up.* The Women's International Perspective, October 7, 2008.

⁴⁹ Anshika "Rizvi Law College to Host Moot Court on Surrogacy" *Daily News & Analysis* August 21, 2008.

⁵⁰ *Supra* note 9

⁵¹ "Surrogate Baby Born in India Arrives in Japan." *Hindustan Times*, November 3, 2008.

of media, in which the surrogate mother is being exploited by the commissioning parents due to a lack of regulatory mechanisms and proper laws.⁵²

As discussed earlier surrogacy arrangements could be gratuitous or paid as any commercial transaction as according to the agreement between the commissioning couple and the surrogate. Now the question arises Is Altruistic surrogacy, the best form of Surrogacy but the people who are in favour of other forms of surrogacy may argue that what is wrong if the surrogate mother receives gives or financial aid from the people whom she made happy and provided with a child who is of their own.⁵³ Commercial surrogacy has to face many ethical questions such as the status of the surrogacy contract in case of miscarriage, custody of baby if born with serious disabilities and thus unwanted, nationality of the child, or a basic question that what will happen if the commissioning couple change their mind or conceives a baby of their own in the meantime or responsibility of surrogate if she dies during childbirth.⁵⁴ These ethical issues have been emerging from a long time and there is no set rules to settle them.⁵⁵ Now, even if we negotiate these ethical issues can we welcome commercial surrogacy as an effective means of supporting infertile couples whilst at the same time giving convincing financial reward to those women prepared to help them?⁵⁶

For India it is now the high time to come up with the laws related to surrogacy so that this arrangement could be regulated and a greater harm to the society could be prevented. This agreement should be made void if it is only done in order to earn money or is being used as a business as it will lead to selling of babies for money.⁵⁷ So, at the end we can say that even after having certain guidelines, even after having judicial interpretations recognizing commercial surrogacy as a practice, we need to have strict and elaborate laws to regulate this issue of surrogacy in India in order to regulate this noble practice which can be misused in form of selling child for money.⁵⁸

⁵² Vinita Kacher, "The Legal Waters of Surrogate Motherhood will continue to be Murky as there are no Laws or Guidelines in India as yet", All L.J.99.

⁵³ Anil Malhotra, "Commercial Surrogacy in India—Bane or Boon?" Law Gazette, March 2009

⁵⁴ Michael Kirby J., "Health, Law and Ethics", 5 JLM. 31, 1997

⁵⁵ Sandhya Srinivasan, Surrogacy Comes out of the Closet, Sunday Times of India, July 6, 1997, at 1.

⁵⁶ Kusum Jain, "Surrogate Motherhood; Some Legal and Moral Problems in Bio-ethics" JILI, 1983 p546.

⁵⁷ Babu Sarkar, "Commercial Surrogacy: Is it Morally and Ethically acceptable in India?" 2011 PL Decemeber S 11

⁵⁸ Sarojini, N.B., and Aastha Sharma. "Guidelines not enough, enact surrogacy laws." Hindustan Times, August 7, 2008.