

INDIA AS A FIELD FOR COMMERCIAL SURROGACY

Written by **Jyoti kukreja*** & **Abhishek Srivastava****

* Assistant Professor Of Law, Chander Prabhu Jain College Of Higher Studies And School Of Law, Narela

** Assistant Professor Of Law, Chander Prabhu Jain College Of Higher Studies And School Of Law, Narela

Nature has gifted Women the beautiful capacity to procreate a life and every woman is blessed to feel the experience of motherhood. Unfortunately, some women are exceptional as they cannot give birth to their own off-spring, might be because of certain physiological conditions. Their desire for motherhood make them search for any substitution, and surrogacy can be suited as the most feasible alternative.

The method of surrogacy has given expectation to many infertile couples, who are not blessed with a child of their own. Due to advanced medical facilities, such couples seek substitutive methods like Artificial Reproductive Technology (ART), In-Vitro Fertilization (IVF) and, Intra-Uterine Injections (IUI), in the hope of having a child of their own.

The very word 'surrogate' means 'substitute'.¹ Thus it means that a surrogate mother could be called as the genetic-biological mother's substitute. In common language, a surrogate mother is the lady who is hired to bear a child in her womb, which she hands over to her employer at birth of that child.

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

¹Surrogacy from a feminist perspective' by MaliniKarkal, published in Indian Journal of Medical Science (IJME), Oct.- Dec. 1997 – 5(4), link; <http://www.Issuesinmedicaethics.org/054mi15.html>. Also in Nelson Hilde Lindemann, Nelson James Lindemann: *Cutting motherhood in two : some suspicions concerning surrogacy. In: Holmes Helen Bequaert, Purdy Laura (Eds.): Feminist perspectives in medical ethics. New York: Hypatia Inc., 1992.*

the oocyte for another woman implanted in her to carry the pregnancy to full term and deliver the child to its biological parents(s)”.²

Earlier the surrogacy arrangements were generally confined to known persons but with the introduction of monetary transactions in the process, surrogacy has extended its network beyond known and even across the country. Now the concept of surrogacy has been transformed from a basic biological function of a woman into a commercial contract. Nowadays, we can come across various advertisements of Surrogate services. It has now become a source of making huge profits. Also surrogated mothers could be recruited. India is now considered as a popular platform for surrogacy arrangements”. Rich foreigners are involved in such activities.

The reasons behind people coming to India for the purpose of Surrogacy might be that in other countries this concept is quite expensive and it could be illegal that in few countries. Infact, Surrogated women usually come from poor or middle class backgrounds, might be married, and often in want for money. Their need for money is so dreadful that childless couples can negotiate a better price.

Such practice could be better called as outsourcing pregnancy. There are innumerable cases of surrogacy which are rapidly increasing. In the last few years, this practice has been increased. Basically, good looking and educated young women become surrogate mothers for foreign couples. Normally women from small towns are selected for outsourcing pregnancy.³

Initiatives taken by the Government

To address such issues and to regulate surrogacy arrangements, the Government of India has taken certain steps including the introduction and implementation of National Guidelines for Accreditation, Supervision, and Regulation of Assisted Reproductive Technology (ART) Clinics in 2006, and guidelines have been issued by the Indian Council of Medical Research (ICMR) under the Ministry of Health and Family Welfare, Government of India.⁴

² The Assisted Reproductive Technologies (Regulation) Bill-2010, Indian Council of Medical Research (ICMR), Ministry of Health & Family Welfare, Govt. of India, pg. 4 (aa).

³ Surrogate mothers: ‘Outsourcing pregnancy in India’ article by Joseph Gothia, 26th June 2008, link: <http://india.merineews.com/cat Full.jsp?articleID= 136421>

⁴ National Guidelines for Assisted Reproductive Technology: ‘Ethical issues in Surrogacy’- Paper presented by Dr. R.S. Sharma, DDG (SG), Division of RHN, Indian Council of Medical research, New Delhi at the meeting-

However, till now there is no legal provision dealing directly with surrogacy laws to protect the rights and interests of the surrogate mother, the child, or the commissioning parents. Nonetheless, Assistant Reproductive Technique (ART) Regulation Bill, 2010⁵ lays down few guidelines which are discussed as follows:

A. Rights and duties in relation to surrogacy:

- (1) Both the couple or individual seeking surrogacy through the use of assisted reproductive technology, and the surrogate mother, shall enter into a surrogacy agreement which shall be legally enforceable.
- (2) All expenses, including those related to insurance if available, of the surrogate related to a pregnancy achieved in furtherance of assisted reproductive technology shall, during the period of pregnancy and after delivery as per medical advice, and till the child is ready to be delivered as per medical advice, to the biological parent or parents, shall be borne by the couple or individual seeking surrogacy.
- (3) Notwithstanding anything contained in sub-section (2) of this section and subject to the surrogacy agreement, the surrogate mother may also receive monetary compensation from the couple or individual, as the case may be, for agreeing to act as such surrogate.
- (4) A surrogate mother shall relinquish all parental rights over the child.
- (5) No woman less than twenty one years of age and over thirty five years of age shall be eligible to act as a surrogate mother under this Act, provided that no woman shall act as a surrogate for more than five successful live births in her life, including her own children.
- (6) Any woman seeking or agreeing to act as a surrogate mother shall be medically tested for such diseases, sexually transmitted or otherwise, as may be prescribed, and all other

cum-workshop organized by the Ministry of Women and Child Development, Govt. of India on 25th June 2008 at India Islamic Centre, New Delhi.

⁵ ART (Regulation) Bill 2010, n. 2, Chapter V, pg. 20-35

communicable diseases which may endanger the health of the child, and must declare in writing that she has not received a blood transfusion or a blood product in the last six months.

- (7) Individuals or couples may obtain the service of a surrogate through an ART bank, which may advertise to seek surrogacy provided that no such advertisement shall contain any details relating to the caste, ethnic identity or descent of any of the parties involved in such surrogacy. No assisted reproductive technology clinic shall advertise to seek surrogacy for its clients.
- (8) A surrogate mother shall, in respect of all medical treatments or procedures in relation to the concerned child, register at the hospital or such medical facility in her own name, clearly declare herself to be a surrogate mother, and provide the name or names and addresses of the person or persons, as the case maybe, for whom she is acting as a surrogate, along with a copy of the certificate mentioned in clause 17 below.
- (9) If the first embryo transfer has failed in a surrogate mother, she may, if she wishes, decide to accept on mutually agreed financial terms, at most two more successful embryo transfers for the same couple that had engaged her services in the first instance. No surrogate mother shall undergo embryo transfer more than three times for the same couple.
- (10) The birth certificate issued in respect of a baby born through surrogacy shall bear the name(s) of individual / individuals who commissioned the surrogacy, as parents.
- (11) The person or persons who have availed of the services of a surrogate mother shall be legally bound to accept the custody of the child / children irrespective of any abnormality that the child / children may have, and the refusal to do so shall constitute an offence under this Act.
- (12) Subject to the provisions of this Act, all information about the surrogate shall be kept confidential and information about the surrogacy shall not be disclosed to

anyone other than the central database of the Department of Health Research, except by an order of a court of competent jurisdiction.

(13) A surrogate mother shall not act as an oocyte donor for the couple or individual, as the case may be, seeking surrogacy.

(14) No assisted reproductive technology clinic shall provide information on or about surrogate mothers or potential surrogate mothers to any person.

(15) Any assisted reproductive technology clinic acting in contravention of subsection 14 of this section shall be deemed to have committed an offence under this Act.

5

(16) In the event that the woman intending to be a surrogate is married, the consent of her spouse shall be required before she may act as such surrogate.

(17) A surrogate mother shall be given a certificate by the person or persons who have availed of her services, stating unambiguously that she has acted as a surrogate for them.

(18) A relative, a known person, as well as a person unknown to the couple may act as a surrogate mother for the couple/ individual. In the case of a relative acting as a surrogate, the relative should belong to the same generation as the women desiring the surrogate.

(19) A foreigner or foreign couple not resident in India, or a non-resident Indian individual or couple, seeking surrogacy in India shall appoint a local guardian who will be legally responsible for taking care of the surrogate during and after the pregnancy as per clause 34.2, till the child / children are delivered to the foreigner or foreign couple or the local guardian. Further, the party seeking the surrogacy must ensure and establish to the assisted reproductive technology clinic through proper documentation (a letter from either the embassy of the Country in India or from the foreign ministry of the Country, clearly and unambiguously stating that (a) the country permits surrogacy, and

(b) the child born through surrogacy in India, will be permitted entry in the Country as a biological child of the commissioning couple/individual) that the party would be able to take the child / children born through surrogacy, including where the embryo was a consequence of donation of an oocyte or sperm, outside of India to the country of the party's origin or residence as the case may be. If the foreign party seeking surrogacy fails to take delivery of the child born to the surrogate mother commissioned by the foreign party, the local guardian shall be legally obliged to take delivery of the child and be free to hand the child over to an adoption agency, if the commissioned party or their legal representative fails to claim the child within one months of the birth of the child. During the transition period, the local guardian shall be responsible for the well-being of the child. In case of adoption or the legal guardian having to bring up the child, the child will be given Indian citizenship.

- (20) A couple or an individual shall not have the service of more than one surrogate at any given time.
- (21) A couple shall not have simultaneous transfer of embryos in the woman and in a surrogate.
- (22) Only Indian citizens shall have a right to act as a surrogate, and no ART bank/ART clinics shall receive or send an Indian for surrogacy abroad.
- (23) Any woman agreeing to act as a surrogate shall be duty-bound not to engage in any act that would harm the foetus during pregnancy and the child after birth, until the time the child is handed over to the designated person(s).

6

- (24) The commissioning parent(s) shall ensure that the surrogate mother and the child she deliver are appropriately insured until the time the child is handed over to the commissioning parent(s) or any other person as per the agreement and till the surrogate mother is free of all health complications arising out of surrogacy.

Commercialisation

Originally surrogacy used to take place within known people. Earlier these surrogates were not paid for it. Over the last few decades it has become trend of the commercialization of surrogacy.

Some say that it is undesirable as giving birth to a child should not be regarded as the commercial thing. It is felt that surrogacy is similar to buying and selling of baby.

On the one hand, the parents who are in want of child are benefitted with what they have desired for so long. At the same time, surrogate mothers get profit from the agreement through the opportunity to increase their economic situation and are thus able to take better care of their themselves and families. Therefore the needs of both could be met in a surrogacy transaction.

Most people agree the important aspects of who we are, what we know, believe or feel and how we function in our societies, is not decided by genetics. It is even less likely that the uterine environment in which we grew as embryos and foetus determines these aspects. The general perception is the way we are raised, the care and guidance we received and the experiences we encountered during this period are far more important for determining what kind of human being we turn into. This perception leaves little doubt of the prime value of parental nurturing. Bromham (1995) states this issue was stressed many years before the issue arose with gestational surrogacy, for instance when men became fathers following donor insemination.

Although society appreciates the importance of parenting and raising a child well, very few individuals question the position of surrogates for parental functions, such as nannies, wet-nurses and boarding schools, even though it seems reasonable to say that these functions are far more valuable to the development of the child than the initial uterine or even genetic origins (Bromham, 1995). Then why are so many people opposed to surrogacy?

Womb on sale : Madhu Makwan asks a reporter to translate a card she received from a Canadian couple for whom the Indian laborer willfully agreed to spend nine months gestating their son for them. The letter reads in part: "Without your help and sacrifice, we would not be able to have our family. Please know that we will tell him about you and how special you are to us. We will never forget you, you will always be in our hearts." When asked what she felt about giving away her child to strangers, she said: "Of course I feel bad – I kept the child in my womb for nine months," she said. "But she needs a child, I need money." Thousands of

financially handicapped women like Madhu are unknowingly opting for commercial surrogacy every day, renting the only asset they own: their wombs. Demographically, surrogate mothers usually come from the lower economic strata and for these women, a sum of \$5000 – \$8000 would make an unimaginable difference. Anandhi, of the Indian city of Chennai, hoped to make a quick buck by volunteering to become a surrogate mother. “I work as a domestic cook in a distant locality and stay away from my children for long hours. I decided to become a surrogate mother with a hope that the payment from the couple would help me start a shop near my house.” She delivered a healthy child, but her hopes bore little fruit for herself. She was promised \$3306 but at the end received only \$1653, with an auto-rickshaw driver who served as a middleman, taking a fifty-percent cut.

Women everyday are exploited in the name of surrogacy by the highly secretive and largely unregulated ‘baby factories’ dressed up very cleverly as legitimate IVF clinics. These clinics care less about the health and medical complications involved with the surrogate mother. The only thing that matters to them is the end product: the child. Often medications like Lupron, oestrogen and progesterone are administered to help achieve the pregnancy, but they have serious side effects on the expecting mothers. Premila Vaghela, a 30-year-old poor surrogate mother lost her life while reportedly waiting for a routine examination at a hospital in Ahmedabad, India. The news was barely covered by the media – after all, she had completed the task that she had been contracted for, and the eight-month-old foetus meant for an American “commissioning” parent survived. In fact, Premila is like many other economically marginalized surrogates, who may suffer or even lose their lives while carrying a child, and are quickly forgotten. These women do not understand the value of life. The only value they understand is the value of money. There are more than 50 million infertile couples in the world and some of them head to India and Thailand to rent wombs. It turned the two countries into the world’s biggest hubs for commercial surrogacy over just the past decade! What was once a mode of convenience, is now a booming \$2.3 Billion commercial industry.


Thailand, however, banned commercial surrogacy for foreign couples after an Australian couple left a twin boy with his birth mother when it was discovered. Yet another case which puts the industry’s ugly under belly in the spot light, was when another Australian couple went home in 2014 with just one of the twin born out of surrogacy, because they wanted a girl. Such cases not only question the ethics of surrogacy, but also highlight the extent of exploitation and

misuse of the practice. Despite of all of these cases, surrogacy is on the rise, not just in India and Thailand, but in the UK and in the United States as well, where some states allow commercial surrogacy and command the highest fees in the world. In addition surrogacy has become the option of choice for gay couples, transgender people, and single men wanting a biogenetically related child.⁶

Surrogacy: Human Right or Reproductive Exploitation?

In order to put an end to this rapidly growing industry we need to understand the reality of what surrogacy entails. Commercial surrogacy breeds exploitation, abuse and misery. Although the poster girl of surrogates is typically a white, blonde, smiling woman who is pregnant with the hopes of making a childless couple happy, the truth is far less palatable.

Women are often pimped by their husbands into renting their wombs to rich Western couples in greed for money. The reason behind the industry's boom and success in India is the fact that foreign couples find it considerably cheaper than the rest of the world, with many couples admitting that it was reassuring that the surrogates in India are required to live in a clinic for the duration of the pregnancy so they can be easily monitored by the 'brokers' throughout.



Isha Devi, 30, became a surrogate to help keep her family afloat. Her husband, a rickshaw driver, couldn't work after an accident with a bus — and medical bills began mounting up. Cost of surrogacy varies by the country in which it is achieved. A successful pregnancy in Thailand and India can cost up to \$72,000, and up to \$225,000 in the US, and absence of international regulation leaves surrogacy largely up to the brokers and vulnerable parties. India has, however, initiated a bill in its parliament that claims to protect the interest of the surrogate mothers. According to this bill, surrogacy shall be allowed in altruistic form. Altruistic surrogacy is different from commercial surrogacy as it the process of bearing a child without

⁶ Womb for Sale, Iny Mny , Manal Siddiquie, retrieved on 27th November 2017

the involvement of any monetary compensation; a surrogacy done out of good will. The country shall allow altruistic surrogacy for Indian Nationals only, married for at least five years and medically certified as infertile. Also, only woman between the ages of 25-35 years of age, who are close relatives to the infertile couple, can act as surrogates. The bill excludes homosexuals and single parents from the procedure, considering it against the 'Indian ethos'.⁷

This bill, however fruitful it may sound, poses many limitations. It not only bans homosexuals from opting for surrogacy, but also makes it difficult for the heterosexual couples with medical indication for surrogacy. For a childless couple to have progeny is not a luxury, but a necessity. They're the ones who'll be affected most by the law. Instead of regulating commercial surrogacy, doctors believe that this law is only going to drive the already booming industry underground, thus putting the rights and safety of surrogate mothers at risk and in the hands of the so called unscrupulous brokers. The need of the hour is a law that provides a platform where the risks of things going wrong can be diminished, and where middlemen cannot ethically profit from the surrogacy arrangement. However, in countries like India where babies are considered a blessing and requirements to start a family, and childlessness viewed as a stigma, it is but difficult to limit surrogacy. Furthermore, criminalization of it leaves anxious couples open to abuse by black markets, discovered that he suffered from Down's Syndrome.

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.⁸ In all jurisdictions of Australia though artificial conception was recognized⁹ but surrogacy has recently become legal and that too only altruistic surrogacy. Even now arranging commercial surrogacy is a criminal offense in

⁷ Womb for Sale, Iny Mny, Manal Siddiquie, retrieved on 27th November 2017

⁸ Reetu and Basabdutta, "surrogate birth", AIR 2009 Jour 108

⁹ Artificial Conception Amendment Act, 2000

Australia.¹⁰ Even in Hong Kong, a city well known for adopting all the prevailing techniques in the world, commercial surrogacy is crime¹¹. The law are framed in such a manner that noone 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.¹² 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.¹³ In United Kingdom also commercial Surrogacy is illegal.¹⁴ Even they were the first one to enact laws regarding abolition of commercial surrogacy.¹⁵ 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”.¹⁶ 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 case¹⁷ 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. 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. 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 money¹⁸. In United Kingdom also commercial Surrogacy is illegal. Even they were the first one to enact laws regarding abolition of commercial surrogacy. 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

¹⁰ Section 56 of Surrogacy Act, 2010 available as on 27th November 2017

¹¹ Section 16 of Human Reproductive Technology Ordinance, 2000

¹² Section 17 of Human Reproductive Technology Ordinance, 2000

¹³ Patrick Wautelet, Belgian Judgment on Surrogate Motherhood, Conflict of laws.net

¹⁴ Available at ukinindia.fco.gov.uk/en/help-for-british-nationals/living-in-india/SurrogacyAndAdoption

¹⁵ Surrogacy arrangements act, 1985

¹⁶ Section 6(1) of Assisted Human Reproduction Act, 2004

¹⁷ Supra

¹⁸ Ethical Guidelines For Biomedical Research On Human Participants, published by Indian Council of Medical Research, 2006

paid". 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 case 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 of media, in which the surrogate mother is being exploited by the commissioning parents due to a lack of regulatory mechanisms and proper laws¹⁹. 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.²⁰ 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.²¹ 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 childbirth²². These ethical issues have been emerging from a long time and there is no set rules to settle them²³. 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? 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. 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

¹⁹ Available at <http://icmr.nic.in/guide/ART%20REGULATION%20Draft%20Bill1.pdf> last accessed on sept. 25, 2015

²⁰ Hari Dev Kohli, "Law And Illegitimate Child", Anmol Publishers, New Delhi 2003

²¹ Mulay, Shree, and Emily Gibson, "Marketing of Assisted Human Reproduction and the Indian State." Development, 49(4): 84, 2006

²² Surrogate Baby Born in India Arrives in Japan." Hindustan Times, November 3, 2008.

²³ 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.

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.

