

## INTERNATIONAL COMMERCIAL SURROGACY

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### ABSTRACT

Surrogacy is an arrangement of artificially obtaining a child by getting another woman to bear it for the commissioning couple and is usually supported by a legal agreement. When such a woman agrees to bear the child in return for compensation then it is said to be 'commercial surrogacy' and when this surrogacy is carried out across different nations, the arrangement is termed as international commercial surrogacy.

Different jurisdictions have different takes on the legality of the arrangement. Some just allow altruistic surrogacy, some allow both altruistic and commercial while some jurisdictions consider all kinds of surrogacy illegal. This difference in legality of the arrangement attracts people to go for cross border surrogacy. The commissioning parents look for women who are economically weaker as compared to them which places them on a position of power and in the absence of any international instrument on the same, these parents or the middlemen involved in the arrangement tend to exploit the children born out of such arrangements who are 'extra' or do not meet the expectations of the commissioning parents as they are often abandoned. Such an arrangement instead of helping the economically weaker women improve their social and economic conditions, leads to their exploitation as well by the middlemen or the commissioning parents as they are often paid less than what should be paid to them and in case the children born out are disabled, they aren't paid at all. This calls for the need to have an international instrument regulating the procedure so that no child is left stateless and without due care; and that no woman is exploited.

## INTRODUCTION

Surrogacy is an arrangement, often supported by a legal agreement, whereby a woman (the surrogate mother) agrees to bear a child for another person or persons, who will become the child's parent(s) after birth<sup>i</sup>. Usually people seek a surrogacy arrangement when pregnancy is medically impossible, when pregnancy involves risks that are too dangerous for the intended mother, or when a single man or a male couple wish to have a child. When intended parents consider surrogacy, it's usually because it's one of their last options for having a child that is biologically related to them. However, surrogacy is a matter of choice and a couple be it female or heterosexual, which is medically fit for pregnancy may also opt for surrogacy. Surrogacy is considered one of many assisted reproductive technologies. In surrogacy arrangements, monetary compensation may or may not be involved. When such a monetary compensation is involved in the arrangement it is known as **commercial surrogacy**. In other words, the surrogate mother, in this case, treats the surrogacy similar to a product or service, in which not only are costs covered, but a profit is involved as well. Another and one of the more common types of surrogate motherhood and one that is widely practiced in many different countries is known as **altruistic surrogacy**. As with other types of surrogate motherhood, a candidate surrogate mother agrees to allow her uterus to be used in letting a baby safely grow until the time of birth. However, the surrogate mother in this scenario is agreeing to do this out of "the goodness of her own heart." This is an act of charity with the sole goal being to help a couple that wants to have a child but is, for some reason, unable to.

Surrogacy may be either traditional or gestational, which are differentiated by the genetic origin of the egg. Gestational surrogacy tends to be more common than traditional surrogacy and is considered less legally complex<sup>ii</sup>.

### ***Traditional***

A traditional surrogacy (also known as partial, natural, or straight surrogacy) is one where the surrogate's egg is fertilised *in vivo* by the intended father's or a donor's sperm. Insemination of the surrogate can be either through natural or artificial insemination. Using the sperm of a donor results in a child who is not genetically related to the intended parent(s). If the intended father's sperm is used in the insemination, the resulting child is genetically related to both the intended father and the surrogate<sup>iii</sup>.

In some cases, insemination may be performed privately by the parties without the intervention of a doctor or physician. In some jurisdictions, the intended parents using donor sperm need to go through an adoption process to have legal parental rights of the resulting child. Many fertility centres that provide for surrogacy assist the parties through the legal process.

### ***Gestational***

Gestational surrogacy (also known as host or full surrogacy<sup>iv</sup>) was first achieved in April 1986<sup>v</sup>. It takes place when an embryo created by *in vitro* fertilization (IVF) technology is implanted in a surrogate, sometimes called a gestational carrier. Gestational surrogacy has several forms, and in each form, the resulting child is genetically unrelated to the surrogate:

- The embryo is created using the intended father's sperm and the intended mother's eggs;
- The embryo is created using the intended father's sperm and a donor egg;
- The embryo is created using the intended mother's egg and donor sperm;
- A donor embryo is transferred to a surrogate. Such an embryo may be available when others undergoing IVF have embryos left over, which they donate to others. The resulting child is genetically unrelated to the intended parent(s)<sup>vi</sup>.

## **HISTORY AND EVOLUTION OF SURROGACY**

Surrogacy as we know it today has only been around for the last 30 years. However, the idea of surrogacy has been around for a lot longer, even tracing back to Biblical times. The first mention of surrogacy can be found in “The Book of Genesis” in the story of Sarah and Abraham<sup>vii</sup>. Sarah and Abraham were married but could not conceive a child of their own, so Sarah turned to her servant Hagar to be the mother of Abraham’s child. This is a case of traditional surrogacy, where the surrogate uses her own egg in the child she’s carrying for intended parents. Even though Sarah was not biologically related to the baby, she and Abraham both claimed the child as their own. Up until about 30 years ago, traditional surrogacies like these were the only way intended parents could create a child through surrogacy. Traditional surrogacy remained a taboo topic up until the twentieth century due to the stigmas associated

with infertility and “illegitimate” children. During this time, surrogate pregnancies would have been conceived naturally — which would be shameful for married couples.

Many developments in medicine, social customs, and legal proceedings around the world paved the way for modern surrogacy:<sup>viii</sup>

- **1936** – In the U.S., drug companies Schering-Kahlbaum and Parke-Davis started the pharmaceutical production of estrogen.
- **1944** – Harvard Medical School professor John Rock became the first person to fertilize human ovum outside the uterus.
- **1953** – Researchers successfully performed the first cryopreservation of sperm.
- **1976** – Michigan lawyer Noel Keane wrote the first surrogacy contract in the United States<sup>ix</sup>.
- **1978** – Louise Brown, the first “test-tube baby”, was born in England, the product of the first successful IVF procedure.
- **1985–1986** – A woman carried the first successful gestational surrogate pregnancy<sup>x</sup>.
- **1986** – Melissa Stern, otherwise known as “Baby M,” was born in the U.S. The surrogate and biological mother, Mary Beth Whitehead, refused to give up custody of Melissa to the couple with whom she made the surrogacy agreement. The courts of New Jersey found that Whitehead was the child's legal mother and declared contracts for surrogate motherhood illegal and invalid. However, the court found it in the best interest of the infant to award custody of Melissa to the child's biological father, William Stern, and his wife Elizabeth Stern, rather than to Whitehead, the surrogate mother<sup>xi</sup>.
- **1990** – In California, gestational carrier Anna Johnson refused to give up the baby to intended parents Mark and Crispina Calvert. The couple sued her for custody (*Calvert v. Johnson*), and the court upheld their parental rights. In doing so, it legally defined the true mother as the woman who, according to the surrogacy agreement, intends to create and raise a child.

Clearly, surrogacy has come a long way from where it was before the late twentieth century. Today, the combination of rapidly advancing medicines and the different types of surrogacy available make it easier than ever for intended parents to complete their family and for prospective surrogates to change the lives of others forever.

## INTERNATIONAL COMMERCIAL SURROGACY

When the intended parents and the surrogate mother belong to different countries and a contract for surrogacy is concluded between them for a monetary consideration, the arrangement comes within the purview of international commercial surrogacy. Since legality of surrogacy varies from country to country, it becomes important to understand as to why there is a need of an international legal instrument governing the arrangements of surrogacy common to all the state parties acceding and ratifying to it.

## LEGAL STATUS OF SURROGACY

There are several ethical, social, psychological and legal issues associated with commercial surrogacy.<sup>xiii</sup> These issues have worked as deterrent for its worldwide acceptance and for that reason commercial surrogacy is not legal in all the countries. Of the countries which allow surrogacy, many have residency or citizenship requirements for the intended parent(s) and/or the surrogate. Countries without such requirements often attract persons from abroad, being destinations for fertility tourism. In some countries, such as the United States, Canada or Australia, laws vary by state/territory.

### *Australia*

In Australia, all jurisdictions except the Northern Territory allow altruistic surrogacy; with commercial surrogacy being a criminal offense. The Northern Territory has no legislation governing surrogacy.<sup>xiii</sup> In New South Wales, Queensland and the Australian Capital Territory it is an offence to enter into international commercial surrogacy arrangements with potential penalties extending to imprisonment for up to one year in Australian Capital Territory, up to two years imprisonment in New South Wales and up to three years imprisonment in Queensland. In 2004, the Australian Capital Territory made only altruistic surrogacy legal.<sup>xiv</sup>

In 2006, Australian senator Stephen Conroy and his wife Paula Benson announced that they had arranged for a child to be born through egg donation and gestational surrogacy. Unusually, Conroy was put on the birth certificate as the father of the child. Previously, couples who used to make surrogacy arrangements in Australia had to adopt the child after it was registered as born to the natural mother; rather than being recognized as birth parents, however now that

surrogacy is more regular practice for childless parents; most states have switched to such arrangements to give the intended parents proper rights.<sup>xvixvi</sup> After the announcement, Victoria passed the *Assisted Reproductive Treatment Act 2008*, effective since 1 January 2010 to make only altruistic surrogacy legal.<sup>xvii</sup>

In 2009, Western Australia<sup>xviii</sup> passed a law to allow only altruistic surrogacy for couples of the opposite-sex only, and to prohibit it for single people and same-sex couples. In 2010, Queensland made only altruistic surrogacy legal,<sup>xix</sup> as did New South Wales,<sup>xx</sup> and Tasmania did the same in 2013 with the *Surrogacy Act No 34* and the *Surrogacy (Consequential Amendments) Act No 31*<sup>xxi</sup>

In 2017, South Australia passed a bill to allow gay couples equal access to both surrogacy and IVF. The bill received royal assent on 15 March 2017 and went into effect on 21 March 2017.<sup>xxii</sup>

### ***People's Republic of China***

Surrogacy is neither forbidden nor expressly permitted by law in the People's Republic of China. The Ministry of Health has established "departmental rules" which prohibit medical professionals from performing surrogacy procedures, with violations punished by fines (but not criminal liabilities). In practice, surrogacy arrangements are common in the Mainland China with an underground market for commercial surrogacy estimated to encompass between 400 and 500 agencies in 2012.<sup>xxiii</sup>

### ***Japan***

Although not a crime, surrogacy is currently prohibited by the Society of Obstetrics and Gynaecology in Japan after concerns over safety, custody battles and distress caused during the process were raised<sup>xxiv</sup>. In March 2008, the Science Council of Japan proposed a ban on surrogacy and said that doctors, agents and their clients should be punished for commercial surrogacy arrangements.

### ***Russia***

Gestational surrogacy, even commercial, is legal in Russia<sup>xxv</sup>, being available to practically all adults willing to be parents.<sup>xxvi</sup> There must be one of several medical indications for surrogacy: absence of uterus, deformity of the uterine cavity or cervix, uterine cavity synechia, somatic diseases contraindicating child bearing, or repeated failure of IVF despite high-quality embryos.<sup>24</sup>

The first surrogacy program in Russia was successfully implemented in 1995 at the IVF centre of the Obstetrics and Gynecology Institute in St. Petersburg.<sup>xxvii</sup>

Registration of children born through surrogacy is regulated by the Family Code of Russia (art. 51-52) and the Law on Acts on Civil Status (art. 16). A surrogate's consent is needed for that. Apart from that consent, no adoption nor court decision is required. The surrogate's name is never listed on the birth certificate. There is no requirement for the child to be genetically related to at least one of the commissioning parents.<sup>xxviii</sup> Children born to heterosexual couples who are not officially married or single intended parents through gestational surrogacy are registered in accordance to analogy of jus (art. 5 of the Family Code). A court decision in that respect may be needed.

### ***South Africa***

The South Africa Children's Act of 2005 (which came fully into force in 2010) enabled the "commissioning parents" and the surrogate to have their surrogacy agreement validated by the High Court even before fertilization. This allows the commissioning parents to be recognized as legal parents from the outset of the process and helps prevent uncertainty - although if the surrogate mother is the genetic mother she has until 60 days after the birth of the child to change her mind. The law permits single people and gay couples to be commissioning parents.<sup>xxix</sup> However, only those domiciled in South Africa benefit from the protection of the law, no non-validated agreements will be enforced, and agreements must be altruistic rather than commercial. If there is only one commissioning parent, s/he must be genetically related to the child. If there are two, they must both be genetically related to the child unless that is physically impossible due to infertility or sex (as in the case of a same sex couple). The Commissioning parent or parents must be physically unable to birth a child independently. The surrogate mother must have had at least one pregnancy and viable delivery

and have at least one living child. The surrogate mother has the right to unilaterally terminate the pregnancy, but she must consult with and inform the commissioning parents, and if she is terminating for a non-medical reason, may be obliged to refund any medical reimbursements she had received.<sup>xxx</sup>

### ***United Kingdom***

Commercial surrogacy arrangements are not legal in the United Kingdom. Such arrangements were prohibited by the Surrogacy Arrangements Act 1985.<sup>xxxii</sup> Whilst it is illegal in the UK to pay more than expenses for a surrogacy, the relationship is recognised under section 30 of the Human Fertilisation and Embryology Act 1990. Regardless of contractual or financial consideration for expenses, surrogacy arrangements are not legally enforceable so a surrogate mother maintains the legal right of determination for the child, even if they are genetically unrelated. Unless a parental order or adoption order is made, the surrogate mother remains the legal mother of the child.<sup>xxxii xxxiii</sup>

### ***United States***

Surrogacy and its attendant legal issues fall under state jurisdiction and the legal situation for surrogacy varies greatly from state to state. Some states have written legislation, while others have developed common law regimes for dealing with surrogacy issues. Some states facilitate surrogacy and surrogacy contracts, others simply refuse to enforce them, and some penalize commercial surrogacy. Surrogacy friendly states tend to enforce both commercial and altruistic surrogacy contracts and facilitate straightforward ways for the intended parents to be recognized as the child's legal parents. Some relatively surrogacy friendly states only offer support for married heterosexual couples. Generally, only gestational surrogacy is supported and traditional surrogacy finds little to no legal support.

States generally considered to be surrogacy friendly include California,<sup>xxxiv</sup> Illinois,<sup>xxxv</sup> Arkansas,<sup>xxxvi</sup> Maryland, Washington D.C., Oregon,<sup>xxxvii</sup> and New Hampshire<sup>xxxviii</sup> among others. Both New Jersey and Washington state commercial surrogacy laws became effective from 1/1/2019.

For legal purposes, key factors are where the contract is completed, where the surrogate mother resides, and where the birth takes place. Therefore, individuals living in a non-friendly state can still benefit from the policies of surrogacy friendly states by working with a surrogate who lives and will give birth in a friendly state. The variations in policy mean that employee surrogacy benefits, which an increasing number of employers offer, can only be enjoyed in certain jurisdictions.<sup>xxxix</sup>

### 1. Arkansas

Arkansas was one of the first states to enact surrogacy friendly laws. In 1989, under then Governor Bill Clinton, it passed Act 647, which states that in a surrogacy arrangement, the biological father and his wife will be recognized as the child's legal parents from birth, even if his wife is not genetically related to the child (i.e., in a traditional surrogacy arrangement). If he is unmarried, he alone will be recognized as the legal parent. A woman may also be recognized as the legal mother of the surrogate's genetic child as long as that child was conceived with anonymous donor sperm<sup>xl</sup>. On the other hand, it is unclear how or whether same sex couples could benefit these laws, since the 2008 ballot measure that made it illegal for unmarried, cohabiting individuals to adopt or provide foster care to minors.<sup>xli</sup> On 26 June 2015, the 2008 ballot issue is moot because of *Obergefell v. Hodges*<sup>xlii</sup>.

### 2. California

California is known to be a surrogacy-friendly state. It permits commercial surrogacy, regularly enforces gestational surrogacy contracts, and makes it possible for all intended parents, regardless of marital status or sexual orientation, to establish their legal parentage prior to the birth and without adoption proceedings (pre-birth orders).<sup>xliii xliv</sup>

### 3. Michigan

Michigan forbids absolutely all surrogacy agreements. It is a felony to enter into such an agreement, punishable by a fine of up to \$50,000 and up to five years in prison. The law makes surrogacy agreements unenforceable.<sup>xlv</sup>

### 4. New Hampshire

Since 2014, New Hampshire is recognized as a surrogacy friendly state, with laws in place to protect all parties to a surrogacy arrangement. All intended parents, irrespective of marital status, sexual orientation, or a genetic connection to the child, are able to establish their legal

parental rights through pre-birth orders placing their names directly on the child's initial birth certificate. Reasonable compensation to the surrogate is permitted by statute.<sup>xlvi</sup>

#### 5. New York

New York law holds that commercial surrogacy contracts contravene public policy and provides for civil penalties for those who participate in or facilitate a commercial surrogacy contract in New York.<sup>xlvii</sup> Altruistic surrogacy contracts are not penalized, but neither are they enforced. New York does recognize pre-birth orders from other states, and has provided a post-birth adoption alternative for altruistic surrogate parents via orders of maternal and paternal filiation.<sup>xlviii</sup>

#### 6. Oklahoma

On 23 May 2019, Gov. Kevin Stitt signed into law HB2468,<sup>xliv</sup> which legalizes and recognizes the validity of both compensated and uncompensated gestational surrogacy agreements. Under the bill, a comprehensive court procedure is created to validate all gestational agreements. The bill also allows a court to enter pre-birth orders establishing parentage prior to the birth of the child. The bill applies to gestational agreements entered into by single individuals, as well as heterosexual and homosexual couples, who wish to become parents.<sup>1</sup>

#### *France*

In France, since 1994, any surrogacy arrangement that is commercial or altruistic, is illegal or unlawful and is not sanctioned by the law (art 16-7 of the Code Civil).<sup>li</sup> The French Court of Cassation already took this point of view in 1991. It held that if any couple makes an agreement or arranges with another person that she is to bear the husband's child and surrender it on birth to the couple, and that she is choosing that she will not keep the child, the couple making such an agreement or arrangement is not allowed to adopt the child. In its judgement the court held that such an agreement is illegal on the basis of articles 6, 353 and 1128 of the Code Civil.<sup>lii</sup>

### **Germany**

All surrogacy arrangements (both commercial and altruistic) are illegal. The German Free Democratic Party wants to allow altruistic surrogacy.<sup>liii</sup> According to the German Civil Code, the legal mother is always the woman who gave birth to the child.<sup>liv</sup>

## **LEGAL POSITION OF SURROGACY IN INDIA**

There is no such legislation currently in India that regulates ART (Assisted Reproductive Technologies). In 2002, the Indian Council of Medical Research (ICMR) laid out the guidelines for surrogacy in India. Further, in 2005, the ICMR issued the ‘National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India’ (ICMR Guidelines), which *inter alia*, prescribed the conditions that ART clinics need to comply with<sup>lv</sup>. Both the above initiatives did not have any legislative backing.<sup>lvi</sup>

In *Consumer Education and Research center and Ors. v. Union of India*<sup>lvii</sup>, the Supreme Court stated that the expression ‘life’ assured in Article 21 of the Constitution has a much wider meaning and includes right to livelihood. This principle was recognized in *Olga Tellis v. Bombay Municipal Corporation*<sup>lviii</sup> as well. At a time when women are still denied access to education and jobs, should monetary options for women be snatched away statutorily as well? The way forward on this issue requires sensitive handling.

The Supreme Court in *Murlidhar Aggarwal & Anr v. State of U.P.*<sup>lix</sup> had remarked that public policy does not remain static in any given community and may vary from generation to generation and even in the same generation. Without abrogating the right to legislate on issues of public welfare and policy such as that of the rights of a surrogate mother or that of the child, it is important to ask whether the State has any business in regulating the reproductive choices of society. The Government should enact laws that are compliant with fundamental rights of citizens and reflect the changing social mores.

The Supreme Court of India formally legalized commercial surrogacy in the landmark case *Baby Manaji Yamanda v. Union of India*<sup>lx</sup> In this case the Court defined “commercial surrogacy as a form of surrogacy in which a gestational carrier is paid to carry a child to maturity in her womb” and the related aspects as surrogacy agreement, the stakeholders or

parties who may enter, and directed for enactment of a statutory law on the same. The supreme court admitted not only the void in law but also the irregularities taking place in the absence of law by calling surrogacy as money making racket.

In *Suchita Srivastava v. Chandigarh Administration*<sup>lxi</sup>, the Supreme Court equated the right to make a choice in relation to reproduction with personal liberty under Article 21 and clarified that such right includes within it the ‘*privacy, dignity and bodily integrity*’ of the woman and further stated that ‘*taken to its logical conclusion, reproductive rights includes a woman’s entitlement to carry a pregnancy to its full term, to give birth and to subsequently raise children*’.

However, during the course of adjudication of both these cases the court opined that there was an absence of a regulatory statutory law to address issues and concerns arising out of or related to the conduct of surrogacy in India. The Court directed for the early enactment of a statute for the same considering its large-scale commercial practice in India. Following the Court’s direction, the Indian Council of Medical Research (ICMR), under the aegis of Ministry of Health & Family Welfare, Government of India, formulated the Assisted Reproductive Technologies (Regulations), ART Bill, 2008.<sup>lxii</sup> The bill has undergone periodic revisions and necessary changes in 2010 and subsequently in 2013. Surrogacy agreement is defined as “a contract between the person(s) availing of assisted reproductive technology and the surrogate mother” under Section 2(cc), ART Bill 2010.

Thereafter, the Surrogacy (Regulation) Bill, 2019 (Surrogacy Bill) was passed by the Lok Sabha in July, 2019 and is currently pending Rajya Sabha approval.

Surrogacy (Regulation) Bill, 2019<sup>lxiii</sup>

- The Surrogacy (Regulation) Bill, 2019 was introduced by the Minister of Health and Family Welfare, Dr. Harsh Vardhan in Lok Sabha on July 15, 2019. The Bill defines surrogacy as a practice where a woman gives birth to a child for an intending couple with the intention to hand over the child after the birth to the intending couple.
- **Regulation of surrogacy:** The Bill prohibits commercial surrogacy, but allows altruistic surrogacy. Altruistic surrogacy involves no monetary compensation to the

surrogate mother other than the medical expenses and insurance coverage during the pregnancy. Commercial surrogacy includes surrogacy or its related procedures undertaken for a monetary benefit or reward (in cash or kind) exceeding the basic medical expenses and insurance coverage.

- **Purposes for which surrogacy is permitted:** Surrogacy is permitted when it is: (i) for intending couples who suffer from proven infertility; (ii) altruistic; (iii) not for commercial purposes; (iv) not for producing children for sale, prostitution or other forms of exploitation; and (v) for any condition or disease specified through regulations.
- **Eligibility criteria for intending couple:** The intending couple should have a 'certificate of essentiality' and a 'certificate of eligibility' issued by the appropriate authority.
- A certificate of essentiality will be issued upon fulfilment of the following conditions: (i) a certificate of proven infertility of one or both members of the intending couple from a District Medical Board; (ii) an order of parentage and custody of the surrogate child passed by a Magistrate's court; and (iii) insurance coverage for a period of 16 months covering postpartum delivery complications for the surrogate.
- The certificate of eligibility to the intending couple is issued upon fulfilment of the following conditions: (i) the couple being Indian citizens and married for at least five years; (ii) between 23 to 50 years old (wife) and 26 to 55 years old (husband); (iii) they do not have any surviving child (biological, adopted or surrogate); this would not include a child who is mentally or physically challenged or suffers from life threatening disorder or fatal illness; and (iv) other conditions that may be specified by regulations.
- **Eligibility criteria for surrogate mother:** To obtain a certificate of eligibility from the appropriate authority, the surrogate mother has to be: (i) a close relative of the intending couple; (ii) a married woman having a child of her own; (iii) 25 to 35 years old; (iv) a surrogate only once in her lifetime; and (v) possess a certificate of medical and psychological fitness for surrogacy. Further, the surrogate mother cannot provide her own gametes for surrogacy.
- **Appropriate authority:** The central and state governments shall appoint one or more appropriate authorities within 90 days of the Bill becoming an Act. The functions of the appropriate authority include; (i) granting, suspending or cancelling registration of surrogacy clinics; (ii) enforcing standards for surrogacy clinics; (iii) investigating and

taking action against breach of the provisions of the Bill; (iv) recommending modifications to the rules and regulations.

- **Registration of surrogacy clinics:** Surrogacy clinics cannot undertake surrogacy related procedures unless they are registered by the appropriate authority. Clinics must apply for registration within a period of 60 days from the date of appointment of the appropriate authority.
- **National and State Surrogacy Boards:** The central and the state governments shall constitute the National Surrogacy Board (NSB) and the State Surrogacy Boards (SSB), respectively. Functions of the NSB include, (i) advising the central government on policy matters relating to surrogacy; (ii) laying down the code of conduct of surrogacy clinics; and (iii) supervising the functioning of SSBs.
- **Parentage and abortion of surrogate child:** A child born out of a surrogacy procedure will be deemed to be the biological child of the intending couple. An abortion of the surrogate child requires the written consent of the surrogate mother and the authorization of the appropriate authority. This authorization must be compliant with the Medical Termination of Pregnancy Act, 1971. Further, the surrogate mother will have an option to withdraw from surrogacy before the embryo is implanted in her womb.
- **Offences and penalties:** The offences under the Bill include: (i) undertaking or advertising commercial surrogacy; (ii) exploiting the surrogate mother; (iii) abandoning, exploiting or disowning a surrogate child; and (iv) selling or importing human embryo or gametes for surrogacy. The penalty for such offences is imprisonment up to 10 years and a fine up to 10 lakh rupees. The Bill specifies a range of offences and penalties for other contraventions of the provisions of the Bill.

## ISSUES INVOLVED

At a glance, surrogacy seems like an effective alternative as a surrogate mother gets much needed money, an infertile couple gets their long-desired biologically related child and the country earns foreign exchange. However, one cannot be naive towards the flip side of the coin. Due to lack of proper legislation, both surrogate mothers and intended parents are somehow exploited and the profit is earned by middlemen or commercial agencies.

Children are the most vulnerable in (International Commercial Surrogacy) ICS arrangements. Ethical and legal concerns are raised in relation to the actions of adults that jeopardize children's rights to citizenship and parentage; and cause exploitation of the surrogate mother. Providers and commissioning parents have taken advantage of the absence of regulations, broken laws, or circumvented them to force governments to act on their behalf.<sup>lxiv</sup> Unfortunately, the consequences of these actions have negatively impacted children, who have been left stateless, unable to leave their countries of birth for extended periods, and unable to enter the country of the commissioning parents leaving unresolved citizenship and parentage issues owing to the differential legality of the arrangement.<sup>lxvi lxvii</sup>

In ICS, the interests and well-being of children are assumed to be assured in the care of commissioning parents. Although likely to be the case with the majority of commissioning parents, there is a dearth of research in this area to confirm otherwise. Many more commissioning parents abandon children in their country of birth when their circumstances change such as their divorce or children born do not meet their expectations.<sup>lxviii</sup> There is no preparation or screening of commissioning parents. The focus is always on the evaluation of surrogate mothers to ensure compliance. There is no absolute record of the number of children born to surrogacy who have become victim to abuse. For example, there are known pedophiles in Israel and Australia who had the custody of their surrogate children and others, and are now in prison.<sup>lxix lxx</sup> In the disputed Baby Gammy case, David Farnell, a convicted pedophile with a preference for girls, and his wife brought a baby girl home and left an unwanted twin, a boy with Down's syndrome, in Thailand.<sup>lxxi lxxii</sup> Baby Gammy and the case of the Mitsutoki Shigeta who was investigated for human trafficking and child exploitation fathered 16 children with 11 surrogate women precipitated the ban on surrogacy arrangements in Thailand.<sup>lxxiii</sup> Some children have been subjected to abuse for years.<sup>6</sup> It is naive to assume that ICS has not been used more widely for the explicit purposes of child abuse.

There are more cases of concern where children with disabilities or "extra" children were rejected and commissioning parents who got separated or changed their minds refused to accept parental responsibility. The fate of children abandoned in their country of birth is generally unknown and is often left on agents to resolve. In the absence of international regulations, inter country co-operation, and developing, monitoring, and maintaining standards, any well-

resourced person can commission a surrogate without minimum police checks or suitability assessments.

Legal questions exist as to whether an ICS arrangement constitutes the sale of children, which violates children's rights and whether enforcing contracts violates the human rights of surrogate mothers who have lesser capacity to act on their rights even if bestowed.<sup>lxxiv</sup> <sup>lxxv</sup> Regardless, there are views that consider that children are treated as commodities or property in these commercial transactions juxtapose arguments that ICS is merely a fertility treatment.<sup>lxxvi</sup> <sup>lxxvii</sup> Surrogate motherhood has been described as “a disaggregated process, where different components are mobilized to achieve the commissioned outcome [...] and is becoming increasingly commoditized”.<sup>lxxviii</sup>

Although ICS has been offered as a humanitarian act that functions to lift women out of poverty, the discourse of altruism functions to mask the interests and objectives in the surrogacy industry.<sup>lxxix</sup> <sup>lxxx</sup> In a legal sense, the “commercial” in surrogacy is defined by compensation to the surrogate mother. There exists a distinction between profit made by service providers and compensation given to the surrogate mothers. In ICS, the term compensation could be viewed as a misnomer as amounts received fall short of any real compensation for the surrogacy, its social impact, and its short- and long-term effects. In all countries, little is known about whether long-term financial benefits for surrogate mothers and their families are realized and there is some evidence that even short-term benefits are minimal in developing countries. Surrogate mothers may only be paid after the transfer of a healthy child, do not always get the compensation promised, or do not get paid at all if the child is born with a disability. Some clinics guarantee a full refund to commissioning parents if the surrogate fails to get pregnant which by implication means, the surrogate mother does not receive the promised compensation.<sup>14</sup> ICS is predicated on profit where producing a healthy, desired child is a necessary element. Profit made by providers of services is crucial to understand ICS and the ethical concerns that arise from its practice. Moreover, the conditions in which women are kept during and after pregnancy aren't assured to be healthy since these women belong to the poor strata of the society and are often illiterate or uneducated to demand for the same.

## NEED FOR REGULATIONS

Since different jurisdictions have different takes on the legality of commercial surrogacy, it becomes important to have a common code of conduct to prevent misuse by the agents or commissioning parents. The international community advocates basic rights that are fundamental in nature for human person and condemns any deprivation of the same. The injustices suffered by the surrogate mothers and the children born out of surrogacy in an unregulated arrangement is a violation of these basic rights. According to the preamble of UDHR (Universal Declaration of Human Rights) “the inherent dignity and the equal and inalienable rights of all members of the human family is believed to be the foundation of freedom, justice and peace in the world and that the member States have pledged themselves to achieve, in cooperation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms<sup>lxxxii</sup>” Other rights stipulated under UDHR<sup>lxxxiii</sup> are also infringed in an unsupervised arrangement which are as follows:

- Everyone has the right to life, liberty and security of person. (**Article 3**)
- No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms. (**Article 4**)
- Everyone has the right to a nationality. (2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality. (**Article 15**)
- Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international cooperation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality. (**Article 22**)
- Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment. (3) Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection. (**Article 23**)
- Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances

beyond his control. (2) Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection. (**Article 25**)

- Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized. (**Article 28**)

Also, according to ICCPR<sup>lxxxiii</sup> (International Convention on Civil and Political Rights):

- No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation. (**Article 7**)
- Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State. 2. Every child shall be registered immediately after birth and shall have a name. 3. Every child has the right to acquire a nationality. (**Article 24**)

According to ICESCR (International Covenant on Economic, Social and Cultural Rights)<sup>lxxxiv</sup>:

- The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular: (a) Remuneration which provides all workers, as a minimum, with: (i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work; (ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant; (b) Safe and healthy working conditions; (c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence; (d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays. (**Article 7**)
- The States Parties to the present Covenant recognize that: (2) Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits. (3) Special measures of protection and assistance should be

taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law.

**(Article 10)**

Further, the preamble of Convention on the Rights of the Child (CRC) provides that: “the United Nations has, in the Universal Declaration of Human Rights and in the International Covenants on Human Rights, proclaimed and agreed that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status; in the Universal Declaration of Human Rights, the United Nations has proclaimed that childhood is entitled to special care and assistance and that the family is the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community, and that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding<sup>lxxxv</sup>”

Also, according to CRC<sup>lxxxvi</sup>:

- States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures. **(Article 3(2))**
- States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation. **(Article 4)**

- 1. States Parties recognize that every child has the inherent right to life. 2. States Parties shall ensure to the maximum extent possible the survival and development of the child. **(Article 6)**
- 1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents. 2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless. **(Article 7)**
- 1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference. 2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity. **(Article 8)**
- States Parties shall protect the child against all other forms of exploitation prejudicial to any aspects of the child's welfare. **(Article 36)**

Further the **Article 3** of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)<sup>lxxxvii</sup> states that the “states parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men”.

## **UNITED NATION ON INTERNATIONAL COMMERCIAL SURROGACY**

The international regulatory vacuum that exists in relation to international surrogacy arrangements leaves children born through this method vulnerable to breaches of their rights, and the practice may often amount to the sale of children. With a growing industry driven by demand, surrogacy is an area of concern for the rights and protection of the child. There is also unease that the practice of engaging surrogate mothers in States with emerging economies to

bear children for more wealthy intending parents from other States entails power imbalances and thus risks for both the children and surrogate mothers<sup>lxxxviii</sup>.

During the 37th session of the Human Rights Council in March 2018, the Special Rapporteur Maud de Boer-Buquicchio presented her **thematic report** on surrogacy and the sale of children. The report presented by the Special Rapporteur on the sale and sexual exploitation of children to the Human Rights Council noted the presence of abusive practices in both unregulated and regulated contexts and provided analysis and recommendations on implementing the prohibition of the sale of children as it relates to surrogacy.

Some key recommendations from the report<sup>lxxxix</sup> are as follows:

- **Adopt clear and comprehensive legislation that prohibits the sale of children**, as defined by the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, **in the context of surrogacy**;
- Create safeguards to prevent the sale of children in the context of commercial surrogacy, **which should include either the prohibition of commercial surrogacy until and unless properly regulated systems are put in place to ensure that the prohibition on sale of children is upheld, or strict regulation of commercial surrogacy** which ensures that the surrogate mother retains parentage and parental responsibility at birth and that all payments made to the surrogate mother are made prior to any legal or physical transfer of the child and are non-reimbursable (except in cases of fraud) and which rejects the enforceability of contractual provisions regarding parentage, parental responsibility, or restricting the rights (e.g. to health and freedom of movement) of the surrogate mother;
- Create safeguards to **prevent the sale of children in the context of altruistic surrogacy**, which should include, where altruistic surrogacy is permitted, proper regulation of altruistic surrogacy (e.g. to ensure that all reimbursements and payments to surrogate mothers and intermediaries are reasonable and itemized and are subject to oversight by a court or other competent authority, and that the surrogate mother retains parentage and parental responsibility at birth);

- Ensure that in **all parentage and parental responsibility decisions involving a surrogacy arrangement, a court or competent authority makes a post-birth best interests of the child determination**, which should be the paramount consideration;
- Closely regulate, **monitor and limit the financial aspects of all surrogacy arrangements**, with a requirement for full disclosure of the financial aspects of all surrogacy arrangements to the court or competent authority reviewing the surrogacy arrangement;
- **Regulate all intermediaries involved in surrogacy arrangements**, in regard to the financial aspects, relevant competencies, use of contractual arrangements, and ethical standards;
- **Protect the rights of all surrogate-born children, regardless of the legal status of the surrogacy arrangement under national or international law**, including by protecting the best interests of the child, protecting rights to identity and to access to origins, and cooperating internationally to avoid statelessness;
- Ensure that any **international regulation developed in regard to surrogacy**, or in regard to legal recognition of parentage in international surrogacy arrangements, **focuses on both private international law and public international law**, providing in particular for the protection of the rights of the child, of surrogate mothers and of intending parents, and recognizing that there is no “right to a child” in international law;
- **Encourage other human rights mechanisms**, such as the Committee on the Rights of the Child and the Committee on the Elimination of Discrimination against Women, and United Nations entities **to contribute, with further research, to discussions on surrogacy** and its impact on the human rights of women and other stakeholders concerned, in order to develop human rights-based norms and standards and prevent abuses and violations.

## CONCLUSION

Although the commercial surrogacy arrangement helps infertile couples get their long-desired children and indigent women a source of income, it commodifies a child and thus violate his or her human rights. Also, an unregulated arrangement helps the commissioning parents and the agencies or the middlemen to exploit the economically weaker women who turn as surrogate mothers and until there are codes and regulations for the arrangement, cross border commercial surrogacy will have its ill effects on the children born out of the arrangements and on the women giving birth to them if such children do not meet the expectations of the commissioning parents. Thus, there is a need for a set of rules on an international level to regulate such an arrangement and ensure protection of the women and children concerned with the arrangement.

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