

## REGULATION OF COMMERCIAL SURROGACY IN INDIA: SOME SUGGESTIONS

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### **I. Introduction**

Of all the Assisted Reproductive Techniques available, it is surrogacy which has caught the public eye and has brought India on the world map in terms of reproductive tourism. Surrogacy can be commercial or altruistic. In the former the surrogate mother is paid for bearing the child to full term whereas in the latter she is simply reimbursed for only the medical expenses. Sociologists often say that the parents construct child biologically, while the child constructs the parents socially. While technology has broadened the ambit of Alternate Reproduction Possibilities, it has opened the floodgates for complicated multi-party, inter-national agreements where womb is used for rent. Commercial surrogacy in India is legal. The availability of medical infrastructure and potential surrogates, combined with international demand, has fuelled the growth of the industry. The economic scale of surrogacy in India is unknown, but study backed by the United Nations in July 2012 estimated the business at more than \$400 million a year, with over 3,000 fertility clinics across India. Surrogate mothers receive medical, nutritional and overall health care through surrogacy agreements.<sup>3</sup> The usual fee is around \$25,000 to \$30,000 in India which is around 1/3rd of that in developed countries like the USA.<sup>4</sup>

Surrogacy, or a woman gestating and birthing a baby for another woman, is not a new social phenomenon. There are excerpts from the Bible in which maids are forced to bear the children of their mistresses, implying that people of ancient times might have practiced surrogacy. The Old Testament examples of Abraham and Sarah and their servant, Hagar, and Jacob's two wives, Rachael and Leah, whose maids underwent pregnancies for them are the earliest recorded incidences of surrogacy (Genesis 16, 1-6;

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<sup>3</sup> [http://en.wikipedia.org/wiki/Commercial\\_surrogacy\\_in\\_India](http://en.wikipedia.org/wiki/Commercial_surrogacy_in_India)

<sup>4</sup> Law Commission of India 228<sup>th</sup> Report on Need for Legislation to Regulate Assisted reproductive Technology Clinics as well as Rights and Obligations of Parties to a Surrogacy (2009)

30, 1-24).<sup>5</sup> Babylonian law and custom allowed this practice and infertile woman could use the practice to avoid a divorce, which would otherwise be inevitable.<sup>6</sup> However, in its present modern form Commercial surrogacy begins in the 1970s using artificial insemination. Before IVF - the surrogate contributed her own eggs as well as gestating the child. In 1985, a woman carried the first successful gestational surrogate pregnancy.

The laws relating to Commercial Surrogacy differ from one jurisdiction to another. Commercial surrogacy is legal in India. India is emerging as a leader in international surrogacy and a destination in surrogacy-related fertility tourism. Indian surrogates have been increasingly popular with infertile couples in industrialized nations because of the relatively low cost. The Honourable Supreme Court of India has given the verdict that the citizenship of the child born through this process will have the citizenship of its surrogate mother. In 2013 India introduced legislation banning surrogacy to unmarried couples, single persons and other groups. The draft Assisted Reproductive Technology Bill which would clearly recognize the legality of the surrogacy agreements is expected to be passed (yet not passed).

## II. Objections and Issues Relating to Commercial Surrogacy

Voluntary surrogacy has received societal acceptance in most parts of the world however when it involves monetary consideration it raises various controversial questions. Feminists have denounced surrogacy as the ultimate form of “medicalization”, “commodification” and technological colonization of the female body, and as a form of prostitution and slavery resulting from the economic and patriarchal exploitation of women.<sup>7</sup> 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>8</sup> In USA too Surrogacy laws vary greatly from state to state. 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. States generally

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<sup>5</sup> Sharyn Roach Anleu, “Surrogacy: For love but not for money”, 6, *Gender and Society*, 30 (March, 1992)

<sup>6</sup> J.N Postgate, *Early Mesopotamia Society and Economy at the Dawn of History*, 105 (Routledge, 1992)

<sup>7</sup> Amrita Pande, “Resisting the Stigma of Commercial Surrogacy”, 36 *Feminist Studies*, 293 (2010).

<sup>8</sup> French Civil Code

considered to be surrogacy friendly include California, Illinois, Arkansas, Maryland, and New Hampshire among others. In all jurisdictions of Australia, altruistic surrogacy has been the only recently recognized surrogacy that has become legal. However, in all states and the Australian Capital Territory arranging commercial surrogacy is a criminal offense, although the Northern Territory has no legislation governing surrogacy at all and there are no plans to introduce laws on surrogacy into the Northern Territory Legislative Assembly in the near future.<sup>9</sup> Moreover New South Wales, Queensland and the Australian Capital Territory have made it an offence for residents to enter into international commercial surrogacy arrangements with potential penalties extending to imprisonment for up to two years.<sup>10</sup> Such a strict approach in these countries emanates from the realization that the whole process associated with surrogacy goes beyond a contract. At the centre of this entire industry is human life, which cannot be treated as a commodity. The transaction involves human emotions and laws need to be sensitive enough to recognize this peculiarity. Technological advancements should be welcomed, however at the same time; laws need to play a crucial role to regulate technology in a manner that human dignity of one section is ensured but not at the cost of another.

The issues surrounding the practice of Commercial Surrogacy are complex and range from moral and ethical to legal. Some of the often raised issues can be summarized as:

- Is Commercial Surrogate motherhood immoral?
- How would law deal with a case where a surrogate ends up developing a strong bond with the child?
- To what extent is it a woman's human right to make contracts regarding the use of her body?
- If the child is born with physical defects and the foreign parents avoid their responsibility, who will take care of the child and the mother?
- What are the various laws in other countries and their effect on India? With the divergent viewpoint on surrogacy laws throughout the world, how would Indian law would be able to cope up with the multiple issues regarding surrogacy?
- After reaching an agreement, if the Intended or Commissioning parents die, what will happen to surrogate mother?

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<sup>9</sup> [dcm.nt.gov.au](http://dcm.nt.gov.au)

<sup>10</sup> <http://www.immi.gov.au/media/fact-sheets/36a-surrogacy.htm>

- Is contracting for surrogacy more like contracting for employment/labour, or more like contracting for slavery?

Two cases i.e. the Baby Manji Case<sup>11</sup> and Jan Balaz case<sup>12</sup> highlight an important issue of citizenship of the child born through surrogacy to commissioning parents who are non-Indians. In the Baby Manji case, a Japanese couple Mr. and Mrs. Yamada hired the services of an Indian surrogate mother to bear a child for them who would be genetically related to Mr. Yamada. However, after the birth of Baby Manji Yamada, the commissioning couple got divorced and the commissioning mother made no claim to the baby. A birth certificate was issued by the Anand Municipal Office bearing only the name of the commissioning father. He was informed by the Japanese authorities that the baby could be permitted to enter Japan only if he adopts Baby Manji in compliance with the Indian as well as Japanese laws and secure an Indian Passport. The biggest impact of the Baby Manji decision has been that it spurred the government of India to enact a law regulating surrogacy.

In the Jan Balaz case a German couple hired an Indian surrogate mother and the twins born to her were genetically related to the commissioning father. But the German authorities refused to recognize the parentage and nationality of the twins as surrogacy is illegal in Germany. Indian Passport authorities however issued passports to the twins on the ground of the children having an Indian mother. Following this the German Embassy issued visas to the children on the condition that the commissioning parents would duly adopt the children as per German law on arrival.

To deal with these fundamental issues surrounding surrogacy wherein the foreign commissioning couple's nation doesn't allow surrogacy, the M/O Home Affairs brought about a change in visa regulations. In 2013<sup>13</sup>, the Govt. in its Order stated that a tourist visa which is most commonly and frequently used by foreign nationals is an inappropriate one. It said that all such couples must obtain medical visa for such purposes which may be granted upon the fulfillment of certain conditions, the most important being "the couple must have the a letter from their embassy enclosed with the visa application stating that their country recognizes surrogacy and the child/children to be born to the commissioning parents through the Indian surrogate mother will be permitted entry into their country as the biological child of the commissioning couple."<sup>14</sup>

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<sup>11</sup> *Baby Manji Yamada V. Union of India & Anr.* [2008] INSC 1656

<sup>12</sup> *Jan Balaz V. Union of India* (2008) 13 SCC 518

<sup>13</sup> With effect from Nov. 1, 2013

<sup>14</sup> <http://mha1.nic.in/pdfs/CS=GrntVISA-291112.pdf>

### III. Making a Case in Favour of Commercial Surrogacy

The practice of commercial surrogacy should be legally permissible and those who advocate a ban on this practice should first evaluate the consequences of such a ban. Seen from a material angle the practice of Commercial Surrogacy does not cause the society or parties involved in such an agreement any substantial loss. In fact, banning this practice will result in greater harm because will lead to an opening up of a black market where surrogates will be more vulnerable and more in danger as compared to the current scenario. So, in view of this, Commercial surrogacy should be tightly state-controlled as in Israel, South Africa and Russia. In March 1996, the Israeli government legalized gestational surrogacy under the "Embryo Carrying Agreements Law." This law made Israel the first country in the world to implement a form of state-controlled surrogacy in which each and every contract must be approved directly by the state.<sup>15</sup> A state-appointed committee permits surrogacy arrangements to be filed only by Israeli citizens who share the same religion. Surrogates must be single, widowed or divorced and only infertile heterosexual couples are allowed to hire surrogates.<sup>16</sup> The numerous restrictions on surrogacy under Israeli law have prompted some intended parents to turn to surrogates outside of the country. 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>17</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. 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>18</sup> Commercial Surrogacy is legal in Russia. The first surrogacy program in Russia was successfully implemented in 1995 at the IVF centre

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<sup>15</sup> Elly Teman, *Birthing a mother: The Surrogate Body and the Pregnant Self*, (University of California Press, March, 2010)

<sup>16</sup> Kelly D. Weisberg, *The Birth of Surrogacy in Israel*, (University of Florida Press, 2005)

<sup>17</sup> [http://www.bionews.org.uk/page\\_116639.asp](http://www.bionews.org.uk/page_116639.asp)

<sup>18</sup> South Africa Children's Act, 2005.

of the Obstetrics and Gynaecology Institute in St. Petersburg. 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, neither 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. Foreigners have the same rights as for assisted reproduction as Russian citizens. Within 3 days after the birth the commissioning parents obtain a Russian birth certificate with both their names on it.<sup>19</sup> Therefore, the Draft Bill on Surrogacy should be enacted into law as soon as possible drawing valuable lessons from Israel, South Africa and Russia.

Opponents of paid surrogacy point to the intrinsic indignity and perhaps in-decency of the practice from the standpoint of the woman who is paid to bear children and also say that it leads to the commoditization of children. Here the observations made by the Supreme Court of California assume importance. The Supreme Court in *Johnson V. Calvert*<sup>20</sup> in 1993 observed that: "Women who agree to become surrogates for economic reasons don't do it for fun. Economic necessity is a reality for many women who become surrogate mothers and this economic reason does not make the surrogacy arrangements indecent or undignified. "The Supreme Court further observed that "surrogacy does not turn children into commodities despite the fact that they are effectively the subject of a contract."

Nothing is as fatal to human dignity and as indecent as abject poverty. It is easier, rather luxurious for us to engage in the rhetoric of morality and ethics of surrogate motherhood as compared to the woman who loses her dignity inch by inch when she faces poverty everyday. Amrita Pande interviewed various women undergoing paid surrogacy and recorded their responses. She records that many surrogate women had husbands employed in informal sector or not employed at all. For most women who worked as surrogates, the 3000 U.S dollars earned was equivalent to 4-5 years of family income. One of the surrogate women even went on to say that "Prestige won't fill an empty stomach".<sup>21</sup>

Another opposition to this practice is the claim that since the potential surrogate is likely to be poor, she is being tempted to a choice that is against her best interests and also that she occupies a weak bargaining position vis-à-vis other stakeholders. We admit that this a very well founded fear and this is why the State must step in to assume its paternalistic role and enact a robust legislation so that this and certain other well founded fears

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<sup>19</sup> [http://humrep.oxfordjournals.org/content/25/suppl\\_1/i235](http://humrep.oxfordjournals.org/content/25/suppl_1/i235)

<sup>20</sup> *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993)

<sup>21</sup> Supra note at 5, p 37

must be addressed. But to say that the poor women who choose surrogacy are too incompetent to be entrusted to make their own decisions in this sphere has an ugly and elitist sound to it.

In India the existence of ICMR Guidelines and a Draft Assisted Reproductive Technology (Regulation) Bill 2010 amply tell that the Legislative intention is present not to do away with the practice but to regulate it. So the need of the hour is to deal with surrogacy as it exists today, to make it tightly state-controlled. The Assisted Reproductive Technology Bill, 2013 has been pending for quite a while and it has not been presented in the Indian Parliament. Certain sections of the Draft Bill deserve a mention because they go on to show that if the Bill be enacted into a law then adequate safeguards will be accorded to both the surrogate mother and the child born out of surrogacy. “These sections are:

1. No woman less than 21 years of age and over 35 years of age shall be eligible to act as a surrogate mother under this Act. No woman shall act as a surrogate for more than five live births in her lifetime including her own children.
2. No surrogate mother shall undergo an embryo transfer for more than 3 times for the same couple.
3. The birth certificate issued in respect of a baby born through surrogacy shall bear the name of individuals who commissioned the surrogacy as parents.
4. The persons who have availed the services of the surrogate mother shall be legally bound to accept the custody of the child irrespective of any abnormality that the child may have and the refusal to do so shall constitute an offence under this Act.
5. A couple shall not avail the service of more than one surrogate at any given time.
6. The commissioning parents shall ensure that the surrogate mother and the child are appropriately insured till the child is handed over to the commissioning parents and till the surrogate mother is free of all health complications arising out of surrogacy.
7. In case a married or unmarried couple separates or gets divorced, as the case may be, after both parties consented to the assisted reproductive technology treatment but before the child is born, the child shall be the legitimate child of the couple.
8. Every offence under this Act shall be cognizable.”<sup>22</sup>

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<sup>22</sup> Draft Assisted Reproductive Technology (Regulation) Bill, 2010.

#### **IV. Conclusion and Suggestions**

There are few suggestions which can make a Bill even more robust. For instance, the Foreign couple who wishes to avail surrogacy in India must be apprised of the law on surrogacy and must be made to fill an undertaking at the time of applying for a medical visa that they are well aware of the law with special emphasis on the fact that in the event of any abnormality which a child may have, they will be bound to take the custody of the child. This provision will dissuade rather than encourage many of the foreign couples who intend to avail surrogacy services in India. The pattern of payment to surrogates must be clearly stated in the Bill. Psychological assistance must be mandatorily given to the women who intend to be surrogates and who are undergoing surrogacy at all the registered ART centres so that the giving away of the child as per the surrogacy agreement can be less painful.

Moreover, sex-selective surrogacy should be prohibited. The status of the child in case of death of the couple commissioning surrogacy needs to be taken cognizance of in the proposed Bill. However, this eventuality of human mortality can strike even the normal parents and in case of such eventuality the child born through surrogacy may be sent to the concerned authorities for care and to be put up for adoption.

In the end it can be said that surrogacy if banned will lead to more disastrous consequences than if we allow this practice to operate in a tightly controlled legal framework. One of the biggest consequences will be that it will lead to an opening up of a black market where surrogates will be more vulnerable and more in danger as compared to the current scenario. Careful empirical work that goes beyond hunches and beyond what we often call “bourgeois ethos and mentality” regarding any ill effects commercial surrogacy has on society, must be done before one takes a stand that Surrogacy should be banned.