

# The Ethics of Renting a Womb

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## ABSTRACT:

Surrogacy is an important discussion that needs to take place. It is often perceived as an ethical grey area. Often commercial surrogacy is related to prostitution. The surrogate mothers are stripped off their dignities and their morality are questioned. Through this paper the authors have tried to analyse the nature of surrogacy and how it plays in a role in our morality. The various statute governing surrogacy have also been analysed.

Surrogacy has numerous advantages, from the medical point of view as well as from the social point of view. But it is very vulnerable to exploitation as well. The surrogate mothers are the most vulnerable. Thus, the Parliament of India promulgated the Surrogacy (Regulation) Bill, 2016 to protect such surrogate mothers. This paper provides an analysis of that Bill as well.

**Keywords:** Surrogacy, surrogate mother, Child, Surrogacy Bill

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## I. INTRODUCTION

In recent years commercial surrogacy has become a common practice, for the parents who cannot bear a child and India has become one of the favoured destinations for surrogacy since the Supreme Court legalized the practice in 2002, because the cost involved for surrogacy in India is one-third the cost incurred in America.

A surrogate mother is one who is hired to bear a child that she turns over at birth to her employer. The word 'surrogate' means 'substitute'.

According to the Artificial Reproductive Technique (ART) Guidelines, surrogacy is an "arrangement in which a woman agrees to a pregnancy, achieved through assisted reproductive technology, in which neither of the gametes belong to her or her husband, with the intention of carrying it to term and handing over the child to the person or persons for whom she is acting as surrogate; and a 'surrogate mother' is a woman who agrees to have an embryo generated from the sperm of a man who is not her husband, and the oocyte for another woman implanted in her to carry the pregnancy to full term and deliver the child to its biological parents(s)".

Surrogacy is of different types as well. On the basis of embryo's, it is traditional and gestational. In 'traditional surrogacy' the mother contributes with her own egg while in 'Gestational surrogacy', a fertilized egg is implanted in the body of surrogate. On the basis of surrogate mother, it is Altruistic or Commercial. In An 'Altruistic' surrogacy the surrogate mother receives no financial rewards for her pregnancy or the relinquishment of the child to the genetic parents while in 'Commercial' surrogacy

Nature has blessed a woman to conceive a life within herself, and every woman wants to cherish the feeling of motherhood but unfortunately, some women due to physiological conditions are unable to give birth. Here the need arises of some alternative solutions like test tube babies, IVF, surrogacy etc. Moreover, the research paper will primarily focus on the need of surrogacy in India for infertile couples.

But like every coin has two sides, surrogacy also comes with some problems. With the entry of financial arrangements in exchange of the surrogate child, where the child becomes a 'saleable commodity' complications arise and issues get involved such as the rights of the surrogate mother, the child and the commissioning parents. The paper will also throw light on such issues.

Since there is an increase in the practice of surrogacy there is an urgent need for the government to regulate it due to large-scale exploitation of the practice in India. The Government has recently passed a bill to regulate commercial surrogacy but there are other statutes too which are dealt by the author in latter part.

## II. ADVENT AND HISTORY OF COMMERCIAL SURROGACY IN INDIA

The concept of surrogacy has come into the limelight, since the case of Elizabeth Kane in 1980. This technology focuses on fulfilling the want and dream of individuals to have their own biological child with the help of another individual by using scientific advancements.

The history of modern surrogacy methods can be traced back to 1899. It is to be noted that the various practices, customs and traditions followed by different communities all over the world have had a great influence on the development of surrogacy as a form of Assisted Human Conception. The development of science and technology in the medical field gave rise to the modern surrogacy methods, which involves integration of science and technology with the natural process of human conception.

The successful birth of Louise Brown with the help of in-vitro fertilization in 1978 in England established the thoughts of scientists and medical experts that a woman other than the genetic mother could be used to carry the foetus and deliver it. In 1979, Dr. Richard Levin, gave the suggestion to an infertile couple to use a woman as a donor as well as to carry the resulting foetus and deliver the child. The surrogate mother was artificially inseminated in the early 1980s and she conceived within the first month. The pseudonym of the surrogate woman involved in this case was Elizabeth Kane, who agreed to give birth as a traditional surrogate mother for a financial compensation of \$10,000. This case is considered world's first case of planned, commercial surrogacy.

In India, the first gestational surrogacy took place in 1994 in Chennai.<sup>1</sup> In 1997, the first commercial surrogacy

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<sup>1</sup>Geeta Padmanabhan case; "Hope in the Test Tube", The Hindu, January 19, 2006, <http://www.thehindu.com/thehindu/mp/2006/01/19/stories/2006011900540200.htm>

was reported in India. A woman from Chandigarh agreed to carry a child for Rs. 50,000 in order to obtain medical treatment for her paralysed husband<sup>2</sup>. Further in 1999, an Indian newspaper reported the story of a village woman in Gujarat who served as a surrogate for a German couple<sup>3</sup>. It is estimated that, in India, the number of births through surrogacy has doubled between 2003-2006, and estimates range from 100-290 each year to as many as 3,000 in the last decade.<sup>4</sup>

### III. STATUTES REGULATING SURROGACY IN INDIA

Beside the proposed Surrogacy Bill, there are several other legislations governing the same.

1. Indian Contract Act, 1872- Since surrogacy is a contract, the formation and consequences in case of breach will be determined by ICA.
2. Transplantation of Human Organ Act, 1994 which bans the sale, loaning and commercialization of trade of human organs.
3. Assisted Reproductive Technology (Regulation) Bill, 2010
4. Indian Council for Medical Research Guidelines, 2005, for promoting commercial surrogacy, which allows hiring of sperms, eggs and wombs through civil contracts for manufacturing babies.
5. the Medical Visa Regulations, 2012 has decided that only foreign married men and women with a subsisting marriage of over two years will be permitted to enter into surrogacy agreements in India on medical visa on strict terms and conditions
6. The Surrogacy (Regulation) Bill, 2019

### IV. ARGUMENTS IN FAVOUR

Procreation, is the basic human desire and fundamental human drive. Surrogacy thus provides an opportunity to couples to beget a child who are unable to conceive naturally. The major benefits of surrogacy can be classified as follows:

#### 1. Genetic Link

The most significant benefit of surrogacy is that it helps a couple to conceive a kid that is genetically related to at least one parent. This helps to fulfil the natural predisposition and willingness to have a biological kid. The

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<sup>2</sup> Sandhya Srinivasan, "Surrogacy Comes Out of The Closet", Sunday Times of India, July 6, 1997

<sup>3</sup> Jyotsna Agnihotri Gupta, "Towards Transnational Feminisms: Some Reflections and Concerns in Relation to Globalization of Reproductive Technologies", 13 Eur. J. Women's Stud. 23 (2006), at pg. 30

<sup>4</sup> Sudha Ramchandran, "India's New Outsourcing Business- Wombs", Asia Times Online, June 16, 2006 [http://www.atimes.com/atimes/south\\_asia/hf16df03.html](http://www.atimes.com/atimes/south_asia/hf16df03.html)

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urge to procreate generally includes a willingness to pass on one's own genetic heritage to the kid and to engage in gestation and reproduction. It therefore provides a higher benefit for childless couples compared to the traditional adoption alternative.

## **2. Prevention of Hereditary Diseases**

The second significant benefit of substitutes is that an person can stop hereditary diseases being transmitted to his biological baby with the help of these techniques. Individuals who have a history of genetic diseases or who have given birth to kids with genetic diseases may, with the assistance of genetic screening, find out whether they can transfer harmful traits to the offspring, discourage such transmission by choosing a surrogate mother and using genetic material from a male donor or a woman donor as needed.

## **3. To Overcome Medical Risks**

Surrogacy is the only choice accessible to couples who are fertile but unable to conceive of a kid due to the risk variables engaged in pregnancy. It should be noted that some pregnancies involve high risks due to the mother's medical complications and may pose serious difficulties of premature birth leading to childhood deformities, or sometimes such pregnancy may pose a danger to the mother's or child's life or both. Also, conceiving a kid can be risky in the event of females suffering from AIDS and is also hazardous for the future kid.

## **4. To Satisfy the desire of Single, Divorced, Lesbians, and Gay Couples**

Surrogacy agreements make it possible for non-traditional families to be established. In contemporary times, even single men and women, gay and lesbian couples may want to have a kid. In the event of gay, lesbian and transgender couples, the method of procreation may not naturally be feasible owing to intrinsic biological factors. Also, single men / women, divorced individuals or in instances where one of the spouses is no longer alive, are also deprived of their right to procreate on the basis of social circumstances. In these circumstances, surrogacy can be very helpful in helping these people.

## **5. To Avoid Problems Related to Infertility Treatments**

Surrogacy is not an infertility treatment, but it is a child-bearing agreement. Therefore, owing to the extended and sometimes unsuccessful infertility treatments, it can prevent the physical and mental suffering caused to infertile couples. The surrogacy method thus offers new ways to become parents for infertile and other individuals / couples. It promotes the pursuit of biological parenthood and in many instances where couples / individuals have chosen surrogacy, it has brought tremendous pleasure into their life by assisting them to conceive of a baby they never believed they would.

## **6. It Provides Benefit to Everyone**

Both the contracting parties have a lot at stake and they have a lot to gain from the contract as stakeholders. While one party is enriched monetarily with gifts, respect, gratitude, and money, the other party has the joy of having a child of its own. Since Indian surrogates are poor, they can use the money to help pay off their debts or fund their children's education. It's huge money, the kind of money that most surrogate mothers couldn't consider earning due to their absence of ability or absence of chance access. It makes these self-sufficient and self-efficient surrogate mothers independent.

## V. ARGUMENTS AGAINST

### 1. Exploitation-

Exploitation essentially implies taking benefit of one party over' another.' The argument for exploitation takes two forms— firstly, the exploitation of poor women, who may be exploited because of their susceptibility. Secondly, gender inequality: in a society where gender affects the opportunities that people can have in their lives, it is objectionable to commodify women's reproductive capacity: women can be seen as mere reproductive tools, thus perpetuating gender stereotypes.

### 2. Commodification-

Another argument is commodification of children, which is ethically as well as legally deplorable. International law clearly prohibits the sale of children. Article 35 of the Convention on the Rights of the Child (CRC) provides that 'States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.'<sup>5</sup> Also, Article 2 (a) of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, child prostitution and child pornography states that: 'Sale of children means any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration.'<sup>6</sup> As per these conventions, selling of a child should be banned. But again, these rules are subject to interpretation.

### 3. Health

Health of the surrogate baby is also one of the major concerns in commercial surrogacy. When a couple from foreign land decides to undertake traditional surrogacy involving the mother's ovum, the risk to the health of the baby increases as it is only partly equipped with the genes to survive in the country in which he will be

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<sup>5</sup>Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, art. 35; Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, art. 1, U.N. General Assembly Resolution 54/263 (May 25, 2000) quoted in Tobin, *supra* note 2.

<sup>6</sup>Optional Protocol to the Convention on the Rights of the Child on the Sale of children, child prostitution and child pornography, *supra* note 34, art. 2 (a).

brought up. This leads to problems in the initial phase of life of the baby as he has to undergo major changes with respect to the climate, weather, temperature he is born in and the same in which he will be raised.

Of surrogate mother- Reproduction is an exceedingly energy-consuming process and it takes a lot out of a woman. It is physically and emotionally challenging. The body needs time to recover and the requirement of money may make women to overlook that. This may lead to complications in delivering the baby which poses risk not only to the baby but also to the mother. The practice of bearing children repetitively makes a woman vulnerable to miscarriages.

#### **4. Consent**

How free is the Free Consent?

One argument in counter to this is women are exploited by their families for money. Moreover, in India consent of women is considered irrelevant. Indian society is class-dominated society. The incentive for poor women to accept such a request to carry a baby for someone she has never seen, met or related with is dominated with material gains. She is showered with money and gifts and in return has to carry a baby which is not hers, undergo the hormonal changes, nurture the baby for 9 months and then give it up. She does this because the money she will obtain will help her educate her children, pay off debts or even have her own house.

#### **5. Harm Argument**

It is argued that the two recommended versions of the harm argument survive the current criticism against the standard harm argument. The first version argues that the child is harmed by being separated from the biological mother. The second version directs attention to the fact that surrogacy involves great incentives to keep the biological mother's level of maternal-foetal attachment low, which tends to increase the risk of harm to the child. While neither of the two arguments is conclusive concerning the moral status of surrogacy, both constitute important deliberations that are often ignored.<sup>7</sup>

## **VI. ANALYSIS OF THE SURROGACY BILL**

The surrogacy (regulation) bill, 2016 is considered as an important step towards the regulation of surrogacy practices in india. The bill focuses on preventing commercial surrogacy, exploitation of surrogate mothers and child born through surrogacy. It additionally provides an in depth restrictive framework for surrogacy clinics. However, this bill raises several questions and concerns.

**(i) Ban on commercial surrogacy:**

In the escalating era of human rights jurisprudence, one can trace the foundation of right to use surrogacy and be an intended couple as a part of Right to Personal liberty, Right to sexual practice, Right to Found a Family and Right to Privacy. The right to reproduction and the right to make reproductive choices are also increasingly seen as a vital component of individual or personal autonomy. The ban on industrial surrogacy is merely because of the actual fact that there's an opportunity of exploitation of mother. It is to be noted that there are various filed of activities were there is a chance for exploitation, the best way to prevent such exploitation is not prohibiting the activity per se rather a powerful regulation will beware of such issues. Therefore, the ban on commercial surrogacy on the ground of exploitation is irrational and is a direct infringement on the couples right to reproduction.

Further, the enjoyment of benefits of scientific and technological progress and its application is recognized as a human right and is included in the Universal Declaration of Human Rights (Article 27) and the International Covenant on Economic, Social and Cultural Rights (Article 15), etc. One of the blessings of the modern-day advancements in medical science and technology is the development of Assisted Human Reproductive Technologies including surrogacy. These technologies are helpful to infertile couples as well as any other individuals who wish to conceive children. Since there is a right which allows an individual to enjoy the benefits of scientific and technological progress, undoubtedly individuals can take the benefit of these technologies for producing a child. Hence it may be fairly argued that surrogacy that could be a gift of scientific technology can even be utilized by a personal for begetting a baby. Any restriction on such right ought to be thought of as a violation of his right to get pleasure from the advantages of scientific and technological progress. Further ban on industrial surrogacy can adversely have an effect on the interests of prospective surrogate mothers. Most of the girl World Health Organization agrees to act as a surrogate is because of their money necessity. The planned ban on industrial surrogacy can forestall those ladies from acting as a surrogate and thereby acquire the specified cash. It may force such women to do other illegal acts such as prostitution or theft for finding the money.

**(ii) Restriction for international surrogacy:**

As a result of globalisation and liberalisation the practice of procreative tourism has been established. Procreative business could be a follow within which individuals go abroad for aided generative technology services and have a baby through the aforesaid method. Not only the negligence of legal framework but also the less cost, more efficient, or availability of a wider range of services is also a reason for development of procreative tourism. Among various categories of cross-border reproductive services, international surrogacy, that is the act of infertile parents travelling internationally to engage the paid services of foreign surrogates to

carry their babies to term is more being practiced. India is chop-chop developing as a significant destination for fruitful business significantly for surrogacy practices. Hence, limiting surrogacy only to Indian citizens is a measure which is against the contemporary developments in international trade relations.

**(iii) Close relative:**

The Bill specifies that, only a 'close relative' of intended couple can act as a surrogate mother. However, the Bill doesn't outline the term 'close relative'. There could also be couples whose shut relatives might not be willing to act as a surrogate or such relatives doesn't satisfy alternative eligibility conditions mentioned within the Bill. In such cases the meant couples won't be able to get pleasure from the advantages of surrogacy procedures and to satisfy their joy of getting a baby genetically associated with them. Further, when close relatives act as a surrogate it is obvious that both surrogate mother and child will know about the facts of surrogacy. It may cause family issues at a later stage between the surrogate kid and also the mother. The information concerning surrogacy and mother may additionally cause psychological issues to surrogate kid.

**(iv) Waiting period of five years:**

It is to be noted that medical infertility is usually defined as the inability to achieve pregnancy after a year or two of trying to conceive a child through regular sexual intercourse. Hence, there is no reason to compel the intended couple to wait for a period of five years for availing the surrogacy service.

**(v) Maternity relief:**

The issue of maternity relief for meant couple additionally because the mother has already been mentioned by completely different High Courts in Asian country. However, the Bill is silent about this issue.

**(vi) Designer baby:**

One of the major criticisms against surrogacy is that, it may be used to produce children of desired sex and with desired characteristics, i.e. surrogacy may be used for the creation of designer babies. However, the Bill is silent about this issue.

**(vii) Certificate of eligibility:**

The Bill specifies that so as to initiate a surrogacy procedure, the surrogate mother and the couple intending to commission the surrogacy are required to obtain certificates of eligibility and essentialness from the relevant applicable authorities at the centre or state. However, the Bill doesn't specify a period of time by that the acceptable authority can grant these certificates. Further, the Bill doesn't specify a review or charm procedure just in case the applying for the certificates is rejected.



**(viii) Rights of Intended Couples:**

In a surrogacy practice the following rights of the intended couple have been identified as essential, (a) the right to select surrogate mother of their own choice subject to restrictions by the State on grounds of public interest; (b) right to impose reasonable restrictions upon surrogate mother as are necessary for the normal development of the child; (c) right to information and visit surrogate mother during pregnancy; (d) right to custody of the child within 72 hours of its birth. However, the Bill does not make any reference about these rights

**Breach of Surrogacy Contracts:**

**(ix)** The Bill is silent about the issue of a beach of terms and conditions of surrogacy by surrogate or indented couple during the surrogacy process or afterwards.

**VII. CONCLUSION**

The method of surrogacy for procuring a biologically related child is extensively being used all over the world and particularly in India. Surrogacy has been appreciated as well as criticised. Regardless of its benefits, surrogacy has also generated considerable legal, moral, and ethical discussion. Due to the uncertainty prevailing over the various issues surrounding surrogacy, it is considered as a legal and ethical minefield. The adoption of the 2019 Surrogacy (Regulation) Bill lays down a regulatory framework for good surrogacy practices in India. However, the suggested ban on commercial surrogacy enforced by the Bill and the exclusion of overseas couples from the availability of surrogacy facilities is regarded as this Bill's greatest flaw. The possibility of exploiting surrogate woman and protecting surrogate and surrogate child interests could have been effectively ensured through a proper framework.

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