

# INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

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Volume 3 | Issue 6

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2020

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# The Suffering Womb: Analyzing Commercial Surrogacy in India

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SUSHMA SAGAR<sup>1</sup> AND DR. UMESH KUMAR<sup>2</sup>

## ABSTRACT

*Surrogacy as concept is neither known much and nor practiced The draft bill of 2008 along with the ICMR(Indian Council of medical research) guidelines give the rules for functioning of the fertility clinics. The research paper seeks to evaluate the viability of the draft bill in the new developing industry of surrogacy with a slight reference to the upcoming bill (The surrogacy regulation bill, 2019). This doctrinal research involves the analyzing of fundamental laws regulating surrogacy and their impact on existing circumstances and various stakeholders. This research also lays slight emphasis on the pending bill which tends to regulate commercial surrogacy and to what extent this bill tries to control the strategic impediments existing till date. This study finally suggests that Legislation has to be brought in as soon as possible to solve the existing issues. Every care should be taken to eliminate the role of touts and brokers in surrogacy cases. Fertility clinics should also come under the Government scanner to have a check in respect of specific methods, used for fertilization, medication, pre-natal and post-natal care.*

With Often a situation arise when a woman is happy and more than willing to lend her womb to another with altruist interests, hoping to let her also enjoy the bliss of motherhood the gesture is celebrated. However, she is criticized when she wishes or asks for some monetary benefits in lieu of the help she has offered, it boils down the whole transaction to that of a 'service'. This has been the bone of contention for years relating to the concept of surrogacy in India. In a developing country the concept of commercial surrogacy may be cherished but those who favour it have failed to look through the veil. It is wrong to term it empowerment when a woman becomes surrogate for money at cost of her health and life.

In light of the concerns mentioned above the author specifically seeks to discuss the rights and status of woman as inscribed under draft ART bill of 2010. The scheme of paper goes as follows: In the first part a brief introduction of the practice of commercial surrogacy is dealt.

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<sup>1</sup> Author is a Research scholar (Law) at Dr. Bhimrao Ambedkar University Agra, India.

<sup>2</sup> Author is an Associate professor of Law at Faculty of law Agra College, Agra, India.

The second gives the account of present condition and the status as envisaged under the draft bill. Third part being most important critically evaluates the economic, legal and ethical considerations as well as the impact on the health of women. The last part tries to ignite a discourse on the same.

## I. INTRODUCTION

Artificial Insemination, the oldest and most common ART procedure, is a process whereby a sperm sample is directly inserted into the uterus via a catheter.<sup>3</sup> It is commonly practiced as In-vitro fertilization wherein an egg is manually combined with sperm in a laboratory dish.<sup>4</sup> When the IVF procedure is successful, the process is combined with a procedure known as embryo transfer, which involves physically placing the embryo in the uterus.<sup>5</sup> This procedure is not only used for the purpose of surrogacy but also in cases where a woman is not able to conceive by the biological process. Surrogacy as the dictionary meaning suggests a deputy or substitute. In surrogacy a woman bears through her womb the genetic or biological child of another woman, who is unable to conceive successfully, bear for the full term and deliver the child.

This is an arrangement between the two women, i.e. the childless woman and the surrogate.<sup>6</sup> This may be done through some relatives or for some material consideration. The Supreme Court has very well defined in the Baby Manji Yamada's case as "a well-known method of reproduction whereby a woman agrees to become pregnant for the purpose of gestating and giving birth to a child she will not raise but hand over to a contracted party. She may be the child's genetic mother (the more traditional form for surrogacy) or she may as a gestational carrier carry the pregnancy to delivery after having been implanted with an embryo."<sup>7</sup>

Surrogacy has been primarily of two types as also is comprehensible from the above lines. The first being Traditional method, here the surrogate mother is also the biological mother of the child wherein the sperm of the commissioning father is fertilized either by procreation or artificially with the egg of the surrogate. This practice is generally used in cases of commissioning mother being sterile. The other one which is more prevalent in the contemporary times is gestational surrogacy. In this method the surrogate gets into an

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<sup>3</sup> Medicine.net, *Definition of Artificial Insemination*, <http://www.medterms.com/script/main/art.asp?articlekey-7001>

<sup>4</sup>Kristine Schanbacher, *India's Gestational Surrogacy Market: An Exploitation of Poor, Uneducated Women*, 25 *Hastings Women's L.J.* 201 2014

<sup>5</sup>Ibid

<sup>6</sup> Jaya Kumar F DR. Yegudala, *Socio-legal aspects of surrogacy in India*, Associate Professor and Head, Department of Law, Osmania University, Hyderabad 500007

<sup>7</sup>*AIR (SCW) 2008 P 6964. Para-5*

agreement with the commissioning parents for an embryo transfer and keeps it till it's born. The major difference in both being, that in the latter the surrogate is not the biological mother of the child.

Gestational surrogacy may reduce the risk of custody disputes between surrogate mothers and commissioning parents because the surrogate mother is not genetically related to the child she bears.<sup>8</sup> It can be understood that the very reason why the couples go for surrogacy over adoption is to have a child of their own, then gestational surrogacy which cut offs the genetic link as present in traditional surrogacy comes with an advantage. Another reason to opt for gestational surrogacy instead is that some people might feel comfortable with their children having half siblings out and about in the world.<sup>9</sup>

This being the case for gestational surrogacy. However, proponents of traditional surrogacy argue that the procedure so involved is very easy and less painful when compared to that of gestational one. In the United States surrogates usually receive daily injections for weeks. Firstly the surrogate own ovulatory cycle has to be suppressed. This is done by taking birth control pills and hormone shots. This procedure will be followed by oestrogen shots to build her uterine lining. Once she is impregnated the surrogate must take daily injections of progesterone until her body realizes it is pregnant so it can sustain pregnancy on its own. These medications often have significant side effects the surrogate must live with. Examples are mood swings, headaches, hot flashes and drowsiness.<sup>10</sup> In addition to this the success rate of traditional surrogacy are very high when surrogate is fertile. The gestational surrogacy contracts are often expensive due to the complexities involved in turn causing medical tourism in countries like India which offer cheap medical facilities and surrogates.

## II. GUIDELINES AND REGULATIONS RELATED TO SURROGACY IN INDIA

Relative affordability combined with loose legal restrictions makes India an ideal choice for many prospective parents abroad, and the high rates of compensation for willing Indian birth mothers have created a growing pool of suppliers for the industry.<sup>11</sup> Law being the machinery for social control in the public sphere plays a very important role when it comes to regulation. Any vacuum in this foray will bring lack of order and ultimately lead to chaos in the society. As society changes the law has to be made contemporaneous with these changes to make it dynamic and functional. The state has realised this concern time and again one of

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<sup>8</sup> Kristine, *supra* note 2

<sup>9</sup> Centre for social research report, Surrogate motherhood ethical or commercial

<sup>10</sup> Ibid

<sup>11</sup> Mina Chang, Harvard International Review, Vol. 31, No. 1 (SPRING 2009), pp. 11-12

instance is such. In 2013 after the Delhi Gang-rape case that crippled the life of an innocent girl, with the public uproar and concerns posited by social activists the government brought amendment to the Criminal law which was a century and a half old legislation and made the punishment for rape stricter. In the case of surrogacy also the lack of legal infrastructure is leading to exploitation of 'some' at the hand of others.

In 1984 the world saw the first successful birth through gestational surrogacy. Ten years later, in Chennai, this happened for the first time in India.<sup>12</sup> In the past couple of years, the number of births through surrogacy doubled with estimates ranging from 200 up to 350 in 2008 alone. Previously the section 10 of the Indian contract act, gave enforcement to surrogacy which reads as follows:

*'10. What agreements are contracts - All agreements are contracts if they are made **by** the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.'*

So any surrogacy agreement which fulfilled the essentials herein mentioned relating to free consent of the parties involved, lawful consideration and object were legal and executed under this provision. Moreover section 9 of the civil procedure code, 1908 allows such matter to be one of 'civil nature' the cognizance of which can be taken by a civil court. The subsequently in 2002 the Supreme Court explicitly declared the practice of surrogacy legal. The Baby Manji judgement delivered in 2008 further defined and clarified the concept of surrogacy. Today as of now the guidelines framed by the Indian council of medical research (ICMR) are one driving force that is regulating surrogacy. However it does not have much binding force in dearth of any laws. The draft bill on Assisted Reproductive techniques of 2010 which is reformed version of 2008 draft has tried to resolve concerns of many stakeholders.

First of all it makes rules to regulate only gestational surrogacy and not traditional one. This at its outset solves the problem of custody of child. The ban on partial surrogacy facilitates the process of establishing parental rights over the child born through surrogacy because it guarantees that at least one member among the commissioning participants will bear a genetic relationship to the child and that the surrogate mother will not have a rivalling claim to parentage - on genetic grounds at least.<sup>13</sup>

Secondly, it makes it a pre-requisite to obtain a certificate from the country of commissioning

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<sup>12</sup>Supra note 7

<sup>13</sup> Amy M. Larkey, *Redefining Motherhood: Determining Legal Maternity in Gestational Surrogacy Contracts*, 51 DRAKE L. REV. 605, 608 (2003)

parents granting citizenship to the child before entering into surrogacy agreement ensuring that the child does not suffer.<sup>14</sup> This problem was the main question in Baby Manji case which is now settled owing to the guidelines in draft bill.

Thirdly, the Guidelines require that surrogate mothers relinquish in writing all parental rights concerning their offspring,<sup>15</sup> but no time frame is given for when this must occur and no discussion is of whether the gestational mother can refuse to relinquish the child.<sup>16</sup> It is a question of very great concern as to how it can be expected from a mother who has kept a child for 9 months to relinquish any interest in it after it being born. Further it is also considered detrimental for the psychological and physical health of the new-born.

Fourthly, The Guidelines stipulate that financial "negotiations between a couple and the surrogate mother must be conducted independently between them."<sup>17</sup> Now as the surrogacy agreement provides for medical expenses in addition with the compensation to the gestational mother it is not so beneficial to her economically. The cause for fertility tourism in India is that the surrogates can be procured at cheap rates. The major chunk of surrogates come from poor and marginalised households and lack bargaining power. One side being educated and well-off customers and on the other illiterate and often exploited seller makes the deal unfair. The infertility clinics are however kept away from the agreement which is a good step. The draft needs to specify a minimum amount which is apt and mandatorily paid as compensation to the surrogate by evaluating the average industry practice and other factors.

Fifthly, in spite of the punitive application of a two-child norm in other contexts, the bill permits three surrogate pregnancies for a woman. A closer inspection of the procedures involved reveals that it actually permits up to three cycles for attempting a pregnancy per couple, which would add up to as many as nine pregnancies, not counting a surrogate mother's own children. And that also from the very same ministry that is responsible for women's reproductive health.<sup>18</sup> The number of surrogate pregnancies should be limited to two as the practice is prevalent in U.S.A. in light of the health of women getting pregnant.

In presence of problems with the practice the industry can be organised in much better way if the above-mentioned ambiguities are eliminated and the bill is brought in action as soon as possible.

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<sup>14</sup> ART Bill ch. VII(34)(19)

<sup>15</sup> Guidelines § 3.10.1.

<sup>16</sup> Jennifer Rimm, Booming Baby business: Regulating Commercial surrogacy in India, 30 U. Pa. J. Int'l L. 1429 2008-2009

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<sup>18</sup> Imrana Qadeer and Mary E. John, Economic and Political Weekly, Vol. 44, No. 2 (Jan. 10 - 16, 2009), pp. 10-12 <http://www.jstor.org/stable/40278374> Accessed: 12-07-2015 09:13 UTC

### III. IMPEDIMENTS AND PROBLEMS IN PRESENT TIMES

The practice of surrogacy is not all that good as it looks. The concept has to be studied from the point of view of various stakeholders involved and women being most important of all. At the behest of getting someone baby one cannot undermine rights of others.

In India primarily a country of many cultures all of which have held high the institution of family and mother hood the practice of surrogacy in some way offends its sanctity. It separates the unity of one couple in the involvement of a third person within the potential family relationship.<sup>19</sup> Thus in cases when the couple are fertile to do so but don't opt for it only for the reason that gestational mother is better option should not be allowed to do so.

There exists a wide class divide in India more specifically in the economic foray. The couples who are infertile belong to every class of society and are more prominent in the poor and marginalised class but the surrogacy and such treatment are provided only to those who have big pocket to pay. In this way the very justice that is meant to be given by the state is only restricted to either foreign couples or those belonging to upper-middle or rich class. The fact being ignored that in lower classes couples are reluctant to come out with infertility issues as there is lot of social stigma attached to it. Moreover they should also be equally destined to avail the facilities that other are availing. Thus it can be seen that more or less the practice is in turn widening the class divide making opportunities available to some only.

Several academics argue that India's gestational surrogacy market commodifies women because it creates strictly commercial arrangements.<sup>20</sup> In commercial surrogacy arrangements, "payment is made to the gestational women for her services, and may also be made to a third party broker or agent who brought the commissioners and gestational women together."<sup>21</sup> This has led to the very process of commoditisation of women. It is more or less becoming a transaction wherein you buy a commodity in turn for money. However no woman is a commodity. The problem that pops up when we treat human as commodity is that we often fail to realise the very dignity attached to it being a human. Commodifying pregnancy is harmful because it "replaces the parental norms which usually govern the practice of gestating children with the economic norms which govern the ordinary production process. The application of commercial norms to women's labour reduces the surrogate mothers from

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<sup>19</sup> Olga van den Akker, *The Importance of a Genetic Link in Mothers Commissioning a Surrogate Baby in the UK*, 15 HUMAN REPROD. 1849, 1849 (2000)

<sup>20</sup> Ishika Arora, *Wombs for Rent: Outsourcing Surrogacy to India* (2012), <http://prospectjournal.org/2012/01/10/wombs-for-rent-outsourcing-surrogacy-to-india-2/>.

<sup>21</sup> Jenniifer, *Supra* note 14, page

persons worthy of respect and consideration to objects of mere use."<sup>22</sup>The women who want to give eggs or become surrogate mother have to go through a very inquisitive process. The first step is a never ending questionnaire covering all aspects of the applicant's life: physical appearance (colour of skin, hair and eyes, quality of hair, height, weight etc.), medical background of the applicant and her family, including the age and cause of death of her grand-parents, education, occupation, career goals, education and occupation of the parents and siblings, religion, musical abilities, sexual life and personal questions of all kinds.<sup>23</sup> Such kind of information extraction and then selection is no more than looking for goods of your choice.

Another criticism with relation to surrogacy is that in Indian context the women are not the masters of their own mind. They are often subjugated to do things which they would not have done had the circumstance been different. The Ethics Committee of the American Society for Reproductive Medicine asserts that "underlying financial arrangements affect the issue of informed consent."<sup>24</sup> The women being economically distressed see it as a window of opportunity to solve all their problems fail to think about its pros and cons. One such example is of s Nirmala, a woman from Chandigarh, India, acted under economic compulsion when she decided to become a gestational surrogate, as she became a gestational surrogate in order to "procure much needed medical treatment for her paralyzed husband."<sup>25</sup> Thus, as is evident from the particular instance that women are not having autonomy and the say which becomes an impediment when claiming for their rights.

Lastly, in a conservative and orthodox society like India the practice of surrogacy is not seen with good eyes. There is lot of social stigma attached to it, especially in lower and marginalised classes which make it difficult for the surrogate women as well as the child that is born out of such agreement to live life which is dignified.

#### **IV. THE SURROGACY (REGULATION) BILL, 2019<sup>26</sup>**

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)

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<sup>22</sup> Elizabeth S. Anderson, *Is Women's Labor a Commodity?*, 19PHIL. & PUB. AFF. 71, 80 (1990)

<sup>23</sup> Report of European centre for law and justice, *Surrogate Motherhood: A violation of human rights*

<sup>24</sup> Kristine, *Supranote 2*, Page 213

<sup>25</sup> Emily Stehr, Note, *International Surrogacy Contract Regulation: National Governments' and International Bodies' Misguided Quests to Prevent Exploitation*, 35 HASTINGS INT'L & COMP. L. REV. 253, 254 (2012).

<sup>26</sup> <https://www.prsindia.org/billtrack/surrogacy-regulation-bill-2019>

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;
  - (v) for any condition or disease specified through regulations.

The Surrogacy (Regulation) Bill 2019 stipulates that "a married woman between the ages of 25 and 35 who has a child of her own can be a surrogate or can help in surrogacy by donating her egg". It also makes the case for altruistic surrogacy by stating that the surrogate mother should be a close relative of the "intending couple" and must only become a surrogate once in her lifetime. Also, under the new law, a woman is disallowed from becoming a surrogate mother by providing her own gametes (unfertilised eggs).

- **Eligibility criteria for intending couple:** The intending couple should have a 'certificate of essentiality' and a 'certificate of eligibility' issued by the appropriate authority
- **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
- **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.

## **V. CONCLUSION**

In conclusion, it is submitted that, the very concept of surrogacy and its wide spread prevalence in many parts of the world, poses a challenge to inventive creativity of socio-legal policy makers. India's gestational surrogacy market utterly fails to uphold the four principles of medical ethics. In fact, it further oppresses a class of women who desperately need empowerment. And though India's surrogacy market provides Indian surrogates with a significant source of income that they could not otherwise obtain in such a short amount of time, this benefit is starkly outweighed by the harms associated with commercial surrogacy the commodification and exploitation of India's poor uneducated women.<sup>27</sup> Legislation has to be brought in as soon as possible to solve the issues as mentioned above. Every care should be taken to eliminate the role of touts and brokers in surrogacy cases. Fertility clinics should also come under the Government scanner to have a check in respect of specific methods, used for fertilization, medication, pre-natal and post-natal care.

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<sup>27</sup> Kristine, *Supra* note 2, page 219