

# Surrogacy Act: Need of the Hour

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**Abstract**—There are fundamental rights for every citizen in India. Article 14 to Article 23 of our Constitution stating that you cannot exploit anybody. But when I converse about surrogacy in India the commercial surrogacy is practiced at very high scale because we are a poor country and the surrogate mothers were being exploited for money. Because, at the present the surrogacy is not only a hope for few but became an uncomplicated way to have a child. It “Was started for convenience but has become a luxury”. Surrogacy means when another woman carries and gives birth to a baby for the couple who want to have a child. As there is no Surrogacy Act in India people have commercial surrogacy by signing a contract between the surrogate mother and the couple who want to have children, which states that the surrogate mother will not be able to see the child after she delivers the baby. This is quite unusual for a mother who bears the child for nine months. For example, a couple came from abroad and got their baby after the mother delivered the child. Unfortunately the mother died during delivery. But the couple refused to pay any compensation because they said they had a contract only with the dead mother. The woman became a surrogate mother to support her own children financially and safeguard their future. This shows that now this is a time to have a Surrogacy Act so that we can save rights of thousands of mother who are giving their womb on rent just for survival.

**Keywords:** Commercial Surrogacy, Exploitation, Surrogacy Act, safeguard.

## 1. INTRODUCTION-

The word surrogate origin from Latin word called surrogates, meaning a substitute, that is, a person appointed to act in the place of another. Therefore surrogate mother is a woman who bears a child on behalf of another woman, either from her own egg or from the implantation in her womb of a fertilized egg from other women [1]. Surrogacy is an arrangement whereby a woman agrees to become pregnant and deliver a child for a contracted party. There are two types of surrogacy such as traditional surrogacy and gestational surrogacy. Usually surrogate mother perform this act for financial necessity only but their rights, protection and the social status were the important issues in the very modern and rapidly growing economy. In availability of women for hiring as surrogate mother is sufficient as compare to other country. It is just because of in India surrogacy has been commercially legalised in 2002 [2]

**Commercial surrogacy** has been legal in India since 2002. India is emerging as a leader in international surrogacy and a sought after destination in surrogacy-related fertility tourism. While in other countries such as USA and Australia commercial surrogacy is totally prohibited in any manner but in United Kingdom and Canada surrogacy is legalized without involving payment of money. While involvement of money only for expenses reasonably incurred by the surrogate mother is legal in United Kingdom [4]. Indian surrogates have been increasingly popular with fertile couples in industrialized nations because of the relatively low cost. Indian clinics are at the same time becoming more competitive, not just in the pricing, but in the hiring and retention of Indian females as surrogates. While India earn \$ 400 million a year through 3,000 fertility clinics across India and due to high inflow of foreign currency, India witness 30% growth in 2000 in growing medical tourism industry”[3]. In India, these business places are called “baby factories” simply bringing this down to mere “production” and “delivery of the product” for which laborers simply labor. This can also be seen, for instance, in the fact that Indian surrogate mothers receive far less payment than the remuneration that surrogate mothers receive in western countries, such as the United States.

## 2. ISSUES AROUND SURROGACY-

### 2.1 Surrogacy treatment

The surrogate mother may face obstetrical or medical complications during the pregnancy and there is no treatment for them.

- Miscarriage is very ordinary in surrogate pregnancy.
- Since in most cases, more than one embryo is entrenched in the uterus to augment the chances of successful pregnancy. Often, this becomes crucial for the mother’s health as well as that of the unborn babies.

For instance, Bhavna, a surrogate mother who lives in a hostel for surrogate mothers connected to the clinics, says it is her second surrogacy. She has been living a secluded life, except for seeing those who stop by for periodic checkups, and is looking forward to receiving her check and being done with it.

## 2.2 Medical Complications:

In India motherhood is traditionally well thought-out a most precious gift from God and is deemed the most gratifying experience in the life of a woman. Motherhood is also considered as a second birth for a woman, the amount of risk involved in childbearing in spite of medical advancement and aid. Just as motherhood is perilous, surrogate motherhood is also. They may have severe complications despite the medical assistance and concern that they may receive. In India Hyderabad is become global hub of surrogate pregnancies, where fertility experts pointed out that the high success rate coupled with affordable costs and easy legal documentation which made the India the most economical destination for surrogacy. While according to the guidelines of Indian Council of Medical Research, Voluntary surrogacy is permitted only if hospitals should not hire prospective surrogate mother or advertise about surrogacy. Whereas the ground reality is different, many hospitals do not follow these rules. In Hyderabad only 500 foreign couple engage surrogate mother every year and the success rate in the city is between 25 to 30% [2]. The other side of the story is indifferent, after commercialization of surrogacy, the growing medical industry of India faced some serious problems like clinics are not follow the guidelines of Indian Council of Medical Research as mentioned above, surrogate service are advertised, surrogates are recruited and operating agencies make huge profits. Along with these problems, black marketing, baby selling and breeding farms turning impoverished women into baby producers with possibility of selective breeding at a price are also affecting the health industry in India. Many women undergoing Artificial insemination also take fertility treatments, increasing the likelihood of an adverse reaction and risks involved with the procedure. [5][6][7]. Issues such as premature delivery, genetic malformation and infections which lead to increased hospitalization of newborn are important issues to be considered in surrogacy contract. [6][7]. Many surrogate mother's breastfeed the newborns during the first few hours following birth. However, parents find difficulty in initiating the breast feeding and in establishing the bonding between mother and child in case of surrogacy. [7]. One of the major draw backs of induced lactation in most surrogates or adopting mothers rarely produced the same quantity of breast milk as a new mother immediately following child birth. This presents a problem in terms of infant nutrition. [8]

## 2.3 Legal issues

- 1 Many Countries that outlaw **commercial surrogacy**. Even the surrogacy is against the law in some American states, as well as in many other countries.
- 2 In certain states it can be a multifaceted process for the anticipated mother to be named as the parent, more than ever in cases where the surrogate is the biological mother.
- 3 If doctors ascertain that the fetus has latent birth defects or some other health problems, then the anticipated parents might

make a decision to discontinue the pregnancy. This can give ascend to several legal problems, predominantly if they use the sperm from a donor that does not belong to the surrogate for pregnancy. In this case, the dilemma is who gets to fix on whether the pregnancy should be conceded on or terminated. Hence, there are number of ethical, social, legal and psychological issues associated with surrogacy, which require urgent need for framing and implementation of law. [9]. The law commission of India has submitted the 228<sup>th</sup> Report on "Need for Legislation to Regulate Assisted Reproductive Technology Clinics as well as Rights and Obligation of Parties to an surrogacy." [10] The main observations had been made by the law commission are as: Surrogacy arrangements will continue to be governed by contracts amongst parties, but such an arrangement should not be for commercial purposes. A surrogacy arrangement should provide for the financial support for surrogate child in the event of death of the commissioning couple or individual before delivery of the child. A surrogacy contract should necessarily take care of life insurance cover for surrogate mother. Legislation itself should recognize surrogate child to be legitimate child. The birth certificate of the surrogate child should contain the name(s) of the commissioning parent(s) only. Right to privacy of donor as well as surrogate mother should be protected. Sex selective surrogacy should be prohibited. Cases of abortion should be governed by Medical Termination of Pregnancy act 1971 only. [11][12]

## 2.4 The Ethical Issues

As there are various religious organizations that frown upon the process of surrogacy, this concept is oftentimes the only option for some individuals to start a family. Because of this rationale, some immensely controversial and key ethical issues are addressed. Like. While for the protection of women in above mention aspects the government of India banned foreigner from having children through surrogate mother in India in late 2015 but for married infertile Indian couples commercial surrogacy is allow [3]

**2.4(a) Connection with the Surrogate Mother** – In a surrogate situation, the surrogate mother is the woman who carries the baby in her womb for nine months. This can be a very strenuous process both physically and emotionally – and matchless in that after carrying a baby throughout the pregnancy, she is compel to physically and emotionally detach herself from the child once it is born just for some amount.

**2.4(b) Uniqueness of the Child** – There are also ethical considerations that are brought to mind in terms of informing the child of his or her surrogate mother, as doing so may have an effect on the child's self-identity.

## 2.5 Breach of Contract

Breach of contract can be ended by either of the parties, be it the anticipated parents or the surrogate. Some of the examples of surrogacy contract breaches include:

- Deliberate abortion by the surrogate without the approval of intended parents. Or the surrogate's denial to go for an abortion following the presence physician's recommendation.
  - The surrogate mother can breach the contract by deteriorating to follow certain behavioral limitations (by having the drug or alcohol consumption for example) during the gestation period.
- 3. SURROGATES MOTHER NEGATIVE RESPONSE TO GIVE THE CHILD**

After having a child in her womb it is incredibly evident that surrogate mothers have developed a strong attachment to the baby, and thus refused to give away the child on birth. In some cases, the surrogates, being biological mothers, have won the case. On the other hand, in states where surrogacy is permissible, this has gone against them and they have lost their visitation rights. Although it is acknowledged that some women experience emotional problems in handing over the baby or as a result of the reactions around them, these feelings appeared to lessen during the weeks following the birth. [13][14][15]

#### **4. NEED OF SURROGACY ACT-**

Now the time has come when there is need of Surrogacy act. Because now this 'convenience is converted into luxury' for example- Bollywood celebrities such as Shah Rukh and Gauri Khan, Aamir and Kiran Rao Khan, and Sohail and Seema Sachdeva Khan have all turned to surrogates to expand their families.<sup>1</sup> To accumulate the interest of Parties to the contract and that unborn adolescent there is a need of an Act.

#### **5. SUPPORTING STATEMENTS-**

**The Law Commission of India <sup>2</sup>has submitted the 228th Report on** "Need for legislation to regulate assisted reproductive technology clinics as well as rights and obligations of parties to a surrogacy."

The **following main observations** had been made by the Law Commission: -

- Surrogacy arrangement will continue to be governed by contract amongst parties, which will contain all the terms requiring consent of surrogate mother to bear child, agreement of her husband and other family members for the same, medical procedures of artificial insemination, reimbursement of all reasonable expenses for carrying child to full term, willingness to hand over the child born to the commissioning parent(s), etc. But such an arrangement should not be for commercial purposes.*
- A surrogacy arrangement should provide for financial support for surrogate child in the event of death of the

commissioning couple or individual before delivery of the child, or divorce between the intended parents and subsequent willingness of none to take delivery of the child.

(c) A surrogacy *contract should necessarily take care of life insurance* cover for surrogate mother.

(d) One of the intended parents should be a donor as well, because the bond of love and affection with a child primarily emanates from biological relationship. Also, the chances of various kinds of child-abuse, which have been noticed in cases of adoptions, will be reduced.

(e) The *birth certificate of the surrogate child should contain the name(s) of the commissioning parent(s) only.*

(h) *Sex-selective surrogacy should be prohibited.*

Horsburgh (1993) believes surrogates are physically exploited once they have signed contracts agreeing to give birth to babies for clients. To make matters worse, if the pregnancy is indeed aborted, the surrogates often receive just a fraction of the original payment. The contracts can also place liability on the mother for risks including pregnancy-induced diseases, death and post-partum complications. [15]

#### **6. LANDMARK JUDGEMENTS ON SURROGACY**

##### **1) Baby Manji Yamada vs. Union of India:**

In the Landmark case Baby Manji Yamada, a Japanese couple, Dr. Ikufumi Yamada and his wife, intended to have a baby and made a surrogacy contract with an Indian woman in Anand, a city in the state of Gujarat. The couple went through matrimonial discord but the father still insisted on having custody of the child. Under Indian Law a single father cannot adopt a girl child. He sent his mother in his stead and a petition was filed before the Supreme Court. The Government seemed to be helpless in this matter as there were no laws governing the effect of surrogacy. The Apex Court directed that the National Commission for Protection of Child Rights was the apt body to deal with this issue. Justice Arijit Pasayat and Justice Mukundakan Sharma of the Supreme Court held that the father was the genetic father of the child and he was given custodial rights of the child. The Government was instructed to issue the passport to Manaji Yamada and she returned with her grand –mother. Most importantly, the Supreme Court held that the Surrogacy Agreement was valid in India. What is most noticeable in the Baby Manji Yamada case is that the stance of the Court was not only pro-surrogacy it was also extremely pro-contract. The contract was held to be valid and therefore of most importance even though what the Court granted went against a particular legislation in the country.

##### **2) Jan Balaz v. Anand Municipality:**

More recently in the matter of Jan Balaz v. Anand Municipality, a German couple entered into a contract with a surrogate mother named Marthaben Immanuel Khristi. Twin children were born. The German couple was working in the

United Kingdom and the children required Indian passports to travel. Since their citizenship was being litigated in the courts the passport authorities withheld the passports. Germany, the parent state of the German couple did not recognize surrogacy. The Supreme Court denied the passports but granted an exit permit to the children and the German authorities decided to give the couple an opportunity to adopt the children and fight for their rights. The Supreme Court of India also recommended the emergent legislation of a law on surrogacy. The Bench headed by Justice G.S. Singhvi and Justice C.K. Prasad said that no surrogate child should undergo the difficulties faced by Nicolas and Leonard who were already two years of age by the time this decision was made and had still not been granted citizenship in any country. It is clear that in the case of Jan Balaz the contract proved to be insufficient in demarcating the rights of the parties and it also brought out residual issues such as citizenship and identity that are matters of vital importance to the children but do not find place in the surrogacy agreement.<sup>3</sup>

## 7. CONCLUSION & SUGGESTION

1. In reality, “commercial surrogacy” means that a woman goes through exactly as a natural mother, but gets nothing in return. It demands of the woman to carry a child for nine months and then give it away. She has to change her behavior and risk infertility, a number of pregnancy-related problems, and even death. She is still used as a vessel, even if told she is an angel. The only thing she gets is the halo of altruism, which is a very low price for the effort and can only be attractive in a society where women are valued for how much they sacrifice, not what they achieve.

2. Commercial surrogacy, abandoning the surrogate child, exploitation of surrogate mother, selling/ import of human embryo have all been deemed as violations that are punishable by a jail term of at least 10 years and a fine of up to Rs 10 lakhs. Clinics have to maintain records of surrogacy for 25 years.

3. The rights of the surrogate child will be the same as that of a biological child.

### REFERENCE:

- 1) Kiran Rai (2011), Law for surrogacy: need for the 21<sup>st</sup> century, Published in International Journal of Research in Commerce, Economic and Management. Vol. 1, issue 6. (ISSN 22314245)
- 2) Poonam Pariya (2015), Womb on Rent: Surrogacy Tourism in India-Ethical or Commercial, Published in International Journal of Recent Research in Commerce Economic and Management, Vol. 2, Issue 4, (ISSN: 23497807)
- 3) Shaista Amin and Asma Rehman (2014), Surrogacy in India and Its Legal and Ethical Implication, Published in Journal of

International Academic Research for Multidisciplinary, Vol. 2, Issue 4, (ISSN: 23205083)

4) Dalia Bhattacharjee (2016), Commercial Surrogacy in India: Bans, Altruism and the Women Involved, Published in Economic and Political Weekly (EPW) April 2, Vol. 14.

5) Kevin T. The ethics of surrogacy contracts and nebraska's surrogacy law. Vol. 41. Creighton Law Review; 2008. p. 185-206.

6) Commercial surrogacy and fertility tourism in India, The Case of Baby Manji, The Kenan Institute for Ethics at Duke University. The case studies in ethics. Available from: <https://web.duke.edu/kenanethics/CaseStudies/BabyManji.pdf> [Last accessed on 2012 Nov 14]. ↑

7) Jacobsson B, Ladfors L, Milsom I. Advanced maternal age and adverse perinatal outcome. *Obstet Gynecol* 2004;104:727-33. ↑

8) van den Akker OB. Psychological trait and state characteristics, social support and attitudes to the surrogate pregnancy and baby. *Hum Reprod* 2007;22:2287-95.

9) Jadva V, Murray C, Lycett E, MacCallum F, Golombok S. Surrogacy: The experiences of surrogate mothers. *Hum Reprod* 2003;18:2196-204.

10) Law commission of India. Report 228. 2009. Available from <http://surrogacylawsindia.com/admin/userfiles/file/report228.pdf>. [Last accessed on 2012 Nov 19].

11) Available from: [http://www.nt.gov.au/justice/policycoord/documents/polcoord\\_surrogacy\\_consultationpaper.pdf.pdf#search=%22Surrogacy%22](http://www.nt.gov.au/justice/policycoord/documents/polcoord_surrogacy_consultationpaper.pdf.pdf#search=%22Surrogacy%22). [Last Accessed on 2012 Nov 5].

12) Government of India, MOH&FW, ICMR: 2008, ART (Regulatory) Bill, Ch. II, V, VII., Part I. and Schedule I, Part 7 on Forms, 2008. p. 6-11, 20-2, 25-9, 81-135. ↑

13) Surrogate Motherhood-Ethical or Commercial, Centre for Social Research (CSR) 2, Nelson Mandela Marg, Vasant Kunj- 110070. Available from: <http://www.womenleadership.in/Csr/SurrogacyReport.pdf>. [Last accessed on 2012 Nov 6].

14) Singh KK. Human genome and human rights: An overview. *J Indian Law Inst* 2008;50:67-80.

15) Surrogate Motherhood-Ethical or Commercial, Centre for Social Research (CSR) 2, Nelson Mandela Marg, Vasant Kunj- 110070. Available from: <http://www.womenleadership.in/Csr/SurrogacyReport.pdf>. [Last accessed on 2012 Nov 6].