

# Surrogacy: Barbaric or Blessing

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## Abstract

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The very word 'surrogate' means 'substitute' that means a mother who is the substitute for the genetic - biological mother. In common language, a surrogate mother is the person who is hired to bear a child which she hands over to the employer at birth.

Surrogacy has been trending in recent years because of the increasing cases of infertile couples, gay couples and singles who wish to become parents. Mostly infertile couples opt for surrogacy. At present around 15% of couples around the world are estimated to be infertile and infertility rates over the last one and half decades spurred this human extractive industry euphemistically called "surrogacy".

In the present day India has become a surrogacy hub. The surrogacy business is estimated at 400 million pounds a year, with around 3000 fertility clinics operating across India. The reason for India to become a surrogacy hub is most Indian surrogates are paid "US\$3000-6000" for each gestational surrogacy. This is a significant amount of money for the majority Indian Citizens. In fact for some Indian women from the low socio- economic level \$6000 is equivalent to 15 years of wages. So the greed to earn has dehumanized the entire idea of surrogacy and reports show the post delivery of the child the women are tend to suffer both emotionally and physically and often suffer from long term depression. Surrogacy is a rigorous business women are pushed into it by their family members. Sometimes they are pushed to become surrogates despite of bad health conditions and there is no post delivery nurturing for these women.

On 24<sup>th</sup> August 2016 the cabinet approved surrogacy (regulation) bill 2016 banning commercial surrogacy and allowing altruistic surrogacy that to with conditions.

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## Introduction

*Today 15% of the couples around the globe are estimated to be infertile.* Infertility affects about 1 out of every 6 couples. This includes not just those who are unable to conceive after 12 months of trying, but also those of them who cannot carry a pregnancy to term.

Medical experts believe that women nowadays postpone childbearing because of career prospects and contraception. Consequently, women are older once they start trying to conceive a baby. Older women are generally less fertile because of age-related biological factors. Due to several reasons, such as the changing sexual practices, the use of intrauterine devices, more and more women suffer from pelvic inflammatory disease, which is a leading cause of female infertility however there are natural and health related issues like stress and other ailments which can result in infertility of a women.

For many infertile men and women, being unable to bear and raise children has severe emotional and psychological consequences. They often feel guilty, and experience a loss of self-worth and confidence. To many infertile people, their condition affects their most fundamental feelings about who they are and what their role in the family is. It influences one's personal identity and the extent of fulfilment. For that reason, infertility is regarded a major health problem. Also, it makes it clear why people who cannot have children the natural way look for other ways in order to become a parent.

Infertility Rates over the last one and half decade has spurred a human extractive industry euphemistically called "surrogacy" involving a huge amount of money, mostly at the cost of the surrogate, who typically belonged to poorer section of the society.

The very word "surrogate means substitute". That means a surrogate mother is the substitute for the genetic-biological mother. In common language, a surrogate mother is the person who is hired to bear a child, which she hands over to her employer at birth.

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)”.*

**The Black’s Law Dictionary categorizes surrogacy into two classes:**

‘Gestational surrogacy’ and ‘traditional surrogacy’. They are defined as follows:

### Gestational surrogacy

A pregnancy in which one woman (the genetic mother) provides the egg, which is fertilized, and another woman (the surrogate mother) carries the fetus and gives birth to the child.

### Traditional surrogacy

A pregnancy in which a woman provides her own egg, which is fertilized by artificial insemination, and carries the fetus and gives birth to a child for another person.

The world's second and India's first IVF (in vitro fertilization) baby, Kanupriya alias Durga was born in Kolkata on October 3, 1978 about two months after the world's first IVF boy, Louise Joy Brown born in Great Britain on July 25, 1978. Since then the field of assisted reproductive technology (ART) has developed rapidly

### Surrogacy as an commercial Act

*Surrogacy was originally was an altruistic deed done within the family and friends according to a 2012 united nations study quoted the surrogacy business was estimated 400 million pounds a year, with around 3000 fertility clinics operating across India. The ICMR had identified 1200 in vitro fertilisation clinic, of which 504 were listed just clinics*

### Legal Background

In February 2015, A supreme Court Advocate Jayshree wad, petitioned the Apex Court for order decreeing that commercial surrogacy was illegal and violated the

rights of Indian women and children under Article 21 of the constitution the petition contended that it was unethical and against public policy, amounted to the exploitation of womanhood and exposed the child to various risks. It sought BAN on all commercial surrogacy contracts and prohibition all doctors, Hospitals and other institution from aiding and abetting commercial surrogacy.

There is a growing demand for fair-skinned, educated young women to become surrogate mothers for foreign couples. Often, couples have to wait for as long as eight months to a year for their turn. Normally women from small towns are selected for outsourcing pregnancy<sup>4</sup>. In places like Anand, Surat, Jamnagar, Bhopal, Indore, a large number of couples from both within India and abroad travel to fulfill their desire for a child. Several American, Russian and British women are duly registered with the Akankshya Clinic of Anand and the Bhopal Test Tube Baby Centre for the procedure.

### **Health hazards related to surrogacy**

Health Risk of Surrogate Women Disregarded India's gestational surrogacy market far too frequently puts the health of the surrogate woman at risk. For example, "In the U.S., surrogates are given no more than two embryos for their safety, whereas in India, surrogates are implanted with up to five embryos in order to increase the chances of pregnancy."

By implanting up to five embryos, there is a high probability that more than one embryo will turn into a viable pregnancy.

surrogate woman becomes pregnant with more than one fetus and the commissioning parents do not choose to selectively abort the other fetuses, the surrogate woman faces severe health risks, including: preeclampsia (high blood pressure, which can lead to eclampsia, which is sometimes fatal); gestational diabetes (which has been linked to a greater likelihood of diabetes later in life); blood clots... an increased chance in having a C-section, especially if pregnant with more than two babies. Furthermore, the surrogate woman is at "a higher risk for postpartum complications, including: hemorrhaging, exhaustion, and postpartum depression."<sup>32</sup> Thus, the practice of implanting up to five embryos in Indian

surrogates clearly favors the commissioning couple over the surrogate woman, as this practice “maximize[s] the profit in a ‘Costco-size’ manner (most number of children per round of IVF)” while disregarding

### Art Regulation Bill, 2010

**Rights and duties in relation to surrogacy:** (1) Both the couple or individual seeking surrogacy through the use of assisted reproductive technology, and the surrogate mother, shall enter into a surrogacy agreement which shall be legally enforceable.

(2) All expenses, including those related to insurance if available, of the surrogate related to a pregnancy achieved in furtherance of assisted reproductive technology shall, during the period of pregnancy and after delivery as per medical advice, and till the child is ready to be delivered as per medical advice, to the biological parent or parents, shall be borne by the couple or individual seeking surrogacy.

(3) Notwithstanding anything contained in sub-section (2) of this section and subject to the surrogacy agreement, the surrogate mother may also receive monetary compensation from the couple or individual, as the case may be, for agreeing to act as such surrogate.

(4) A surrogate mother shall relinquish all parental rights over the child.

(5) No woman less than twenty one years of age and over thirty five years of age shall be eligible to act as a surrogate mother under this Act, provided that no woman shall act as a surrogate for more than five successful live births in her life, including her own children.

(6) Any woman seeking or agreeing to act as a surrogate mother shall be medically tested for such diseases, sexually transmitted or otherwise, as may be prescribed, and all other communicable diseases which may endanger the health of the child, and must declare in writing that she has not received a blood transfusion or a blood product in the last six months.

(7) Individuals or couples may obtain the service of a surrogate through an ART bank, which may advertise to seek surrogacy provided that no such advertisement shall contain any details relating to the caste, ethnic identity or descent of any of the

parties involved in such surrogacy. No assisted reproductive technology clinic shall advertise to seek surrogacy for its clients.

(8) A surrogate mother shall, in respect of all medical treatments or procedures in relation to the concerned child, register at the hospital or such medical facility in her own name, clearly declare herself to be a surrogate mother, and provide the name or names and addresses of the person or persons, as the case may be, for whom she is acting as a surrogate, along with a copy of the certificate mentioned in clause 17 below.

(9) If the first embryo transfer has failed in a surrogate mother, she may, if she wishes, decide to accept on mutually agreed financial terms, at most two more successful embryo transfers for the same couple that had engaged her services in the first instance. No surrogate mother shall undergo embryo transfer more than three times for the same couple.

(10) The birth certificate issued in respect of a baby born through surrogacy shall bear the name(s) of individual / individuals who commissioned the surrogacy, as parents.

(11) The person or persons who have availed of the services of a surrogate mother shall be legally bound to accept the custody of the child / children irrespective of any abnormality that the child / children may have, and the refusal to do so shall constitute an offence under this Act.

(12) Subject to the provisions of this Act, all information about the surrogate shall be kept confidential and information about the surrogacy shall not be disclosed to anyone other than the central database of the Department of Health Research, except by an order of a court of competent jurisdiction.

(13) A surrogate mother shall not act as an oocyte donor for the couple or individual, as the case may be, seeking surrogacy.

(14) No assisted reproductive technology clinic shall provide information on or about surrogate mothers or potential surrogate mothers to any person.

(15) Any assisted reproductive technology clinic acting in contravention of subsection 14 of this section shall be deemed to have committed an offence under this Act.

(16) In the event that the woman intending to be a surrogate is married, the consent of her spouse shall be required before she may act as such surrogate.

(17) A surrogate mother shall be given a certificate by the person or persons who have availed of her services, stating unambiguously that she has acted as a surrogate for them.

(18) A relative, a known person, as well as a person unknown to the couple may act as a surrogate mother for the couple/ individual. In the case of a relative acting as a surrogate, the relative should belong to the same generation as the women desiring the surrogate.

(19) A foreigner or foreign couple not resident in India, or a non-resident Indian individual or couple, seeking surrogacy in India shall appoint a local guardian who will be legally responsible for taking care of the surrogate during and after the pregnancy as per clause till the child / children are delivered to the foreigner or foreign couple or the local guardian.

(20) A couple or an individual shall not have the service of more than one surrogate at any given time.

(21) A couple shall not have simultaneous transfer of embryos in the woman and in a surrogate.

(22) Only Indian citizens shall have a right to act as a surrogate, and no ART bank/ ART clinics shall receive or send an Indian for surrogacy abroad.

(23) Any woman agreeing to act as a surrogate shall be duty-bound not to engage in any act that would harm the foetus during pregnancy and the child after birth, until the time the child is handed over to the designated person(s).

### **Surrogacy Regulation Bill 2016**

The Bill has been selectively carved out from the more comprehensive Assisted Reproductive Technology, or(ART) ,(Regulation),Bill ,2014, drafted by The Indian council of Medical Research(ICMR),2010,which viewed Surrogacy as a Medically

Accepted Practise and looked into the entire Gamut of Reproductive Technologies. Intensive Consultation involving public Health Experts and women's organisations were held on it, but it was never taken up by the parliament until August 24, 2016.

On 24<sup>th</sup> August, 2016 the govt. Approved, through a cabinet decision the introduction of surrogacy regulation bill, 2016. The Proposed piece of legislation bans all forms of commercial surrogacy and approves only ethical altruistic surrogacy. It will regulate surrogacy by establishing a national surrogacy board, State Surrogacy Board and other appropriate Authorities in states and union Territories. The Legislation is aimed at "Effective Regulation of surrogacy; prohibit commercial surrogacy and allow ethical surrogacy to the needy infertile couples". It allows all infertile married couples to benefit from ethical surrogacy the govt.

Also relied heavily on 228<sup>th</sup> report of the Law commission of India. So, this recommended prohibition of commercial surrogacy. The Bill allows only infertile Indian couples to opt for surrogacy. It bans foreigners and overseas Indians, unmarried people, single men and women, couples in live-in relationship or couples in same sex relationship and married couples with one or more children either adopted or biological, from using surrogacy.

**External Affairs Minister Sushma Swaraj**, who headed the group of ministers that finalised the bill, told the media that Surrogacy was banned for foreigners and PIOs (people of Indian Origin) As divorces were common in foreign countries. She said too that same sex couples and couples in live-in-relationship could not be allowed to use Surrogacy because it would go against the Indian Ethos.

### **Demerits of the proposed Bill**

- The Proposed legislation deals with issue in a limited manner and is based on assumptions that may not be true.
- It passes an unnecessary value judgement on single parents ,live-in relationships and same sex relationships.
- It conveys political message that is the ruling party is in consonance and biased and only considers married Heterosexual couples eligible to avail surrogacy.

- It is problematic to assert that the new bill restricts the Autonomy of women over their bodies and their reproductive rights- Right to be a Surrogate.
- It is based on the assumption that women who become surrogates do so willingly and voluntarily with everything else in society being equal.
- The Income of the surrogate is seen as empowering as she is able to use it to feed, cloth, and educate her family and this aspect is neglected.

In UNION OF INDIA V. JAN BALAZ & OTHERS.<sup>3</sup>

In 2010 SC while deciding the above said case observed that larger issues of rights of a child biologically belonging to foreign parents and born to a surrogate mother needed consideration.

In BABY MANJI YAMADA v. UNION OF INDIA<sup>4</sup>

In 2008, the Baby Manji case brought to centre stage the issue of the rights of the child.

The Baby, born using a gestational surrogate with the help of a donor egg, faced a peculiar dilemma following the divorce of the commissioning parents. Japan had outlawed surrogacy and Indian law did permit adoption by a single parent. The child's grandmother filed a petition seeking the custody.

#### India - a reproductive tourism destination

In commercial surrogacy agreements, the surrogate mother enters into an agreement with the commissioning couple or a single parent to bear the burden of pregnancy.

In return of her agreeing to carry the term of the

Pregnancy, she is paid by the commissioning agent for that. 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. This has made India a favorable

Destination for foreign couples who look for a cost-effective treatment for infertility and a whole branch of medical tourism has flourished on the surrogate practice.

ART industry is now a 25,000 crore rupee pot of gold.

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<sup>3</sup> LAW (SC) -2015-10-121

<sup>4</sup> Baby Manji Yamada V. Union Of India (2008) 13 SCC 518 (India).

Anand, a small town in Gujarat, has acquired a distinct reputation as a place for outsourcing commercial surrogacy. It seems that wombs in India are on rent which translates into babies for foreigners and dollars for Indian surrogate mothers.

### Legal and moral issues

The moral issues associated with surrogacy are pretty obvious, yet of an eye-opening nature. This includes the criticism that surrogacy leads to commoditization of the child, breaks the bond between the mother and the child, interferes with nature and leads to exploitation of poor women in underdeveloped countries who sell their bodies for money. Sometimes, psychological considerations may come in the way of a successful surrogacy arrangement.

As far as the legality of the concept of surrogacy is concerned it would be worthwhile to mention that Article of the Universal Declaration of Human Rights 1948 says, inter alia, that “men and women of full age without any limitation due to race, nationality or religion have the right to marry and found a family”. The Judiciary in India too has recognized the reproductive right of humans as a basic right. For instance,

#### **Jack T. Skinner v. State of Oklahoma<sup>5</sup>**

Which characterized the right to reproduce as “one of the basic civil rights of man”.

#### **Rihannon Elizabeth Nixon V. Mrs Vimla Devi<sup>6</sup>**

In the above mentioned case the plaintiff( Rihannon Elizabeth Nixon) who has the Dual citizenship of both Australia and UK comes to India for a surrogate baby as she cannot conceive by natural procedure and in a clinic with IVF facilities she contracts with the Defendant to have a gestational surrogacy of the child but because of the inappropriate behavior of the Defendant no.2 (husband of the surrogate women) plaintiff had to file a suit to demand declaration from the defendants stating that the entire thing was contracted and they shall never interfere in the matter of baby and never claim the baby’s custody in future.

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<sup>5</sup> Jack T. Skinner v. State of Oklahoma 316 U.S. 535 (1942).

<sup>6</sup> 6 April 2013 Court Of Small Causes South Delhi.

The court held that: once the baby has been given birth the surrogate mother has no right over the child nor can claim the status of Biological mother.

**K. kalaiselvi vs. Chennai port Trust 2013<sup>7</sup>**

madras high court judgement

In the said case there was an controversy regarding if I a women who is going to have a child through a surrogate mother can claim for maternity leave or not?

The court held that :even if a women has not produced a child and has a baby through Surrogacy she is entitled to leave of 2 months by Rule 3-A of leaves regulation Act.

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<sup>7</sup> K. kalaiselvi vs. Chennai port Trust Mad HC 4,2013 (India).