

# **Commercial surrogacy in India: need for an effective legislation**

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## **Abstract**

Surrogacy is the practice of gestating a child for another couple/man/woman. India currently has no law regulating assisted reproductive technologies. It is an undisputed fact that the Indian legislation in respect to surrogacy is limited and Indian laws are expected to change in response to the growing demand for surrogacy arrangements. The legislators are struggling hard to get things on an ideal track. The guidelines that govern the surrogacy arrangement in India has unaddressed lacunas.

There are several ethical challenges that have come up and have never been addressed. The mere idea of selling a baby casts several moral obligations on everyone involved. There is a chance that people start using this as a tool to exploit women. Further there exists legal issues such as who qualifies to be a surrogate mother, what are the rights and duties of a surrogate mother, what are the provisions for the maintenance & protection of the surrogate mother so on and so forth.

This paper seeks to highlight the status quo of the legislation in this regard. It also provides an in depth doctrinal analysis of the existing literature in this regard. Further, the next part deals with the ethical challenges involved. The paper also provides a detailed analysis of how vulnerable the weaker sex is when it comes to the present surrogacy set up in India. It concludes with a set of recommendation that can be incorporated in order to evolve a better set up in India.

*Keywords:* Assisted Reproductive Technologies, Ethical challenges, Status quo, Exploitation of Women, Recommendations.

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## **Introduction**

Motherhood has been termed as one of the best experiences of the world. A mother is said to be the protagonist of every man's life-cycle for it is she who not only gives him birth but also makes him what he has been able to become. Indeed, it is a bane for those couples, who are not able to conceive due to infertility related issues. This paper is thus a study on what is surrogacy in the Indian context as an increased execution of this methodology is taking place that too not under proper hygienic conditions and India has become a hub for this practice, primarily due to its cheap availability.

The paper is divided into four parts. The first part is an introduction to the topic and its classification. Through this we get to know what Surrogacy stands for, from where has it been derived and how the Indian Council of Medical Research gages it. The second part which deals with the "status quo" of surrogacy in India starting with what Indian mythology has put surrogacy as, laying emphasis on the new scientific reproductive technologies which means any of the Assisted Reproductive Technologies (ARTs) like IVF (in-vitro fertilisation)<sup>3</sup> and IUI (Intra-Uterine Insemination) The paper also provides an in depth doctrinal analysis of the existing literature in this regard. The Third part then addresses the issues or the problems which the surrogated mothers face especially in regards with ethical point of view. The concluding part brings out the solution to address these ethical issues which can be used to not only protect the rights of the surrogate mothers but also to stop the unethical commercialisation of surrogacy.

## **Hypothesis**

Whether surrogacy laws will lead to the protection of the rights of surrogated mothers in India, as India growing to become the world's largest market in this domain.

## **Research question**

1. Why surrogacy laws are the need of the hour?
2. Without these laws what steps can be taken to establish an ethical commercial surrogacy till there is no implementation of statutes in this arena?

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<sup>3</sup>Grayson Mathis, *A couple's guide: trying to conceive In vitro fertilization*, WEBMD(June 11, 2011),<http://www.webmd.com/infertility-and-reproduction/guide/in-vitro-fertilization>.

### **Definition of surrogacy**

Black's Law Dictionary, defines surrogacy as the process of carrying and delivering a child for another person. The Britannica defines 'surrogate motherhood' as the practice in which a woman bears a child for a couple unable to produce children in the usual way. The Report of the Committee of Inquiry into Human Fertilization and Embryology or the Warnock Report (1984) termed surrogacy as the practice whereby one woman carries a child for another with the intention that the child should be handed over after birth.

A standard definition of 'surrogacy' is offered by the American Law Reports<sup>1</sup> in the following manner:

"...a contractual undertaking whereby the natural or surrogate mother, for a fee, agrees to conceive a child through artificial insemination with the sperm of the natural father, to bear and deliver the child to the natural father, and to terminate all of her parental rights subsequent to the child's birth."<sup>4</sup>

In the Indian context, Section 3.10 of the guidelines of Indian Council of Medical Research (ICMR) defines surrogacy as under:

"Surrogacy is an arrangement in which a woman agrees to carry a pregnancy that is genetically unrelated to her and her husband with the intention to carry it to term and hand over the child to genetic parents for whom she is acting as a surrogate."

In the case of Baby Manji<sup>5</sup>, the Supreme Court of India defined surrogacy 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 be, as a gestational carrier, carry the pregnancy to delivery after having been implanted with an embryo. In some cases, surrogacy is the only available option for parents who wish to have a child that is biologically related to them."

### **Classification of surrogacy**

The essential elements of surrogacy are:

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<sup>4</sup>American Law Reports, *Validity and Construction of Surrogate Parenting Agreement*, 77 ALR. 4 70. (1989).

<sup>5</sup>*Statistics regarding infertility problems in India*,  
<http://www.indiastat.com/india/Showdata.asp?secid=17795&ptid=291&level=3-102k>.

- Gestational surrogacy, on the other hand, involves the creation of an embryo in a Petri dish and its implantation into the womb of the surrogate who carries it to the term termination of her parental rights after his birth and
- Payment of money by the genetic parents.

### **Non- commercial and commercial surrogacy**

If the money paid is merely to recompense the surrogate for the pain undertaken by her and includes reimbursement of medical and other expenses, then it is 'non-commercial' surrogacy. In contrast, 'commercial' surrogacy involves payment of hefty sum of money as income to the surrogate for the service offered by her and surrogacy is thereby looked upon as a business opportunity.

### **Traditional, gestational and donor surrogacy**

Traditional surrogacy: involves the artificial insemination of the surrogate mother using the sperm of the intended father.

Gestational surrogacy: on the other hand, involves the creation of an embryo in a Petri dish and its implantation into the womb of the surrogate who carries it to the term.

In donor surrogacy there is no genetic relationship between the child and the intended parents as the surrogate is inseminated with the sperm, not of the intended father, but of an outside donor.

### **Status quo in India**

In India, surrogacy has been portrayed right from the mythological roots. In the BhagvataPurana, Vishnu heard Vasudev's prayers beseeching Kansa not to kill all sons being born. Vishnu heard these prayers and had an embryo from Devaki's womb transferred to the womb of Rohini, another wife of Vasudev. Rohini gave birth to the baby, Balaram, brother of Krishna, and secretly raised the child while Vasudev and Devaki told Kansa the child was born dead.<sup>6</sup>

India currently has no law regulating assisted reproductive technologies. But there are guidelines of non-binding nature regulating the practice in the country known as the

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<sup>6</sup>VERONICA IONS, INDIAN MYTHOLOGY 58-59 (1883).

National Guidelines for Accreditation, Supervision & Regulation of ART Clinics in India in 2005. The preamble to the Guidelines cites the mushrooming of infertility clinics in India providing services in the private sector and the provision of “highly questionable” services provided by some clinics along with the lack of adequately trained manpower and infrastructure facilities to deliver highly sophisticated technologies. In addition to establishing a procedure for state governmental bodies to oversee all matters relating to the accreditation, supervision, and regulation of ART clinics, the Guidelines include provisions with respect to gamete transfer and surrogacy. The main drawback of the Guidelines is its non-binding nature.

Presence of a regulative framework of law will eliminate this visualized uncertainty in cases of custody of child and forestall exploitation. As a positive right to procure surrogacy contracts exists for infertile couples, it is clear that state paternalism has no legitimate role in such moral choices of individuals concerning their fundamental rights but to enforce them.

The country has now become a booming industry of fertility market as with its reproductive tourism industry reported at estimated Rs. 25000 crores in total<sup>7</sup>. India has become the favoured destination for infertile couples from across the globe because of lower cost, less restrictive laws, lack in regulation of ART clinics and availability of surrogate mothers. Under guidelines issued by the Indian Council of Medical Research, surrogate mothers sign away their rights to any children. A surrogate’s name is not even on the birth certificate which eases the process of taking the baby out of the country. Also the surrogate mothers in India cost about \$25,000, roughly a third of the typical price in the United States<sup>8</sup>. That includes the medical procedures; payment to the surrogate mother, which is often, but not always, done through the clinic; plus, air tickets and hotels for two trips to India (one for the fertilization and a second to collect the baby).

### **Review of literature**

There is no other area of medicine which offers more rancorous and penetrating debates than the implications of new modern technology on maternal- foetus relationship.

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<sup>7</sup>Anil Malhotra, *Business of Babies*, THE TRIBUNE, (Dec.14, 2011), <http://www.Tribuneindia.com/2008/20081214/spectrum/main2.htm>.

<sup>8</sup> The New York Times, *India nurtures business of surrogate motherhood*, NYTIMES, <http://www.nytimes.com/2008/03/10/world/asia/10surrogate.html>.

While Robert .H. Blank (2002)<sup>9</sup> has given a comprehensive coverage of the legal and social issues raised as a result of both emerging technologies for foetal intervention and increasing knowledge of foetal development. In chapter five of the book, the author has analysed various legal issues relating to surrogacy like the rights of the surrogate mother and the commissioning parents, informed consent and further questioned the legality of surrogate contracts. He says, “Although surrogacy arrangements are typically governed by a legal contract, the concept of informed consent is still applicable. As an ethical and legal concept pertaining to medical therapy and research, informed consent requires that the person understand the likely consequences. It is unrealistic to maintain that the only way to gain such understanding is to have had the actual experience, along with the accompanying feelings. “Adam Plant (2003)<sup>10</sup> in his article has given an analysis of legal models developed via case laws through the 1990s to the present and the legislative models governing surrogacy in the U.S.A. he makes use of the Culliton Case<sup>11</sup>, as he states, “Culliton serves as a focal point for analysis due to the court’s pragmatic approach to solving the riddle of gestational carrier surrogacy in the absence of legislative guidance.” The Victorian Law Reform Commission’s (2005)<sup>12</sup> position paper on Surrogacy discusses issues relevant to the regulation of surrogacy in Australia especially in Victoria and has made certain interim recommendations on the assumption that altruistic surrogacy is to be permitted in Victoria while Kelly Weisberg(2005)<sup>13</sup> in her book focused on the birth of surrogacy in Israel and opined that the resulting legislation in Israel goes further than any other nation or American state in embracing surrogacy and in providing comprehensive legislation overseeing and regulating the practice.

### **Ethical issues:**

### **Payment**

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<sup>9</sup>ROBERT H. BLANK, MOTHER AND FOETUS CHANGING NOTIONS OF MATERNAL RESPONSIBILITY, 150-156 (Greenwood Publishing Group, 2d Ed. 2009).

<sup>10</sup> Adam P Plant, *With a Little Help from My Friends: The Intersection of the Gestational Carrier Surrogacy Agreement, Legislative Inaction, and Medical Advancement* 54 ALLR 639 (2003).

<sup>11</sup>Culliton v. Beth Israel Deaconess Medieval Centre, 756 N.E.2d 113 (Mass. 2001).

<sup>12</sup> The Victorian Law Commission (2006), 14, <http://www.lawreform.gov.au>.

<sup>13</sup>Kelly D. Weisberg, *The Birth of Surrogacy in Israel*4 (University Press of Florida, 2005).

Perhaps no topic related to surrogate motherhood is more contentious than compensation of the surrogate mother by the intended parents.<sup>14</sup> Payment often is substantial because of the duration and complexity of involvement.

### **Baby selling**

One of the major objection lies in the suggestion that surrogacy is in ‘baby- selling’.<sup>15</sup> People who express a strong distaste for surrogate motherhood are quick to label it “baby-selling”. That term has such negative connotation, and the practice is so universally disapproved, that once surrogacy is categorized as a new variety of baby-selling, its rejection is sure to follow quickly. But fairness demands an objective examination of the issue. Monetary payment is for the women’s in convenience and possible discomfort, including the risk of any complication of pregnancy<sup>16</sup>.

### **Exploitation of women**

This makes it appear that surrogacy is unethical because of the type of practice it is, namely a form of exploitation<sup>17</sup>. According to one writer, “When a woman provides womb service, the feminist issue surfaces. Women object to being baby factories or sex objects because it offends their human dignity.”<sup>18</sup>

### **Conclusion**

The study forwards the following pragmatic suggestions for the considerations of policy makers, in the direction of regulating surrogacy in India:

#### **Enactment of legislation**

Legislation should be enacted with provisions expressly authorising and regulating assisted reproductive technology and commercial surrogacy arrangements with certain limitations.

#### **Guiding principles for the act**

The Act should set out the following principles to guide the administration and the activities regulated under the Act: The welfare and interests of children to be born as a

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<sup>14</sup> *Id.*

<sup>15</sup> JK MASON ET AL., LAW AND MEDICAL ETHICS 106 (Butterworths Lexis Nexis, 2002)

<sup>16</sup> Mishra Suman “*Regulating Surrogacy*” LL.M Dissertation, SLS. 2009.

<sup>17</sup> Mishra Suman “*Regulating Surrogacy*” LL.M Dissertation, SLS. 2009

<sup>18</sup> GOSTIN, *supra* note.

result of the use of ART are paramount. At no time should the use of reproduction technologies be for the purposes of exploiting (in trade or otherwise) either the reproductive capabilities of men and women or the children born as a result of the use of such technologies. All children born as a result of the use of donated gametes have a right to information about their genetic parents.

### **Surrogate mother**

A woman intending to be the surrogate mother must:

- must be assessed by an obstetrician specializing in ART and counsellor or psychologist as physically and mentally capable of acting as a surrogate;
- consent to all aspects of the arrangement, including the use of ART;
- have already experienced pregnancy and childbirth

### **Legal parentage**

- a. The person or couple who commission a surrogacy arrangement should be deemed to be the child's legal parent from birth, and that the surrogate is not a parent of the child. Such a presumption would recognize the intention of the parties before of the child.
- b. The commissioning couple would be recorded as the parents of the child's birth certificate.