

SURROGACY: A BENEFACTION OR A SCOURGE

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India has been a favourite destination for commercial surrogacy. With most of the countries prohibiting commercial surrogacy, India was the ray of hope for the infertile couples. But there were a lot of ethical and social issues that surfaced in countries permitting the same. Be it the 'Baby Manjhi' case or the 'Jan Balaz' case, a need was felt for strong regulatory framework. The government drafted the 'Surrogacy Regulation Bill, 2016' which puts an imperforate ban on surrogacy for single parent, homosexuals, live ins and foreign couples. Some call it a draconian law as it violates the right to reproductive autonomy. Some call it 'Sanskari Bill' as it permits altruistic surrogacy by close relative where money does not change hands. Earlier, surrogacy was a philanthropic deed. But with the passage of time, the financial component came in, thereby, making it commercial. India became one of the most bankable destinations in surrogacy related fertility tourism on account of low cost, potential surrogates and absence of a strong legal framework. The research paper discusses the types of surrogacy and lays emphasis on the pros and cons of commercial surrogacy.

Keywords: Altruistic Surrogacy, Commercial Surrogacy, Surrogacy, Surrogacy Regulation Bill, 2016

INTRODUCTION

"Surrogate motherhood has been the subject of much philosophical and political dispute over the years."

-Thomas Frank

'It's what the rich and famous do', 'Noted actor becomes father to baby boy using surrogacy'- such headlines have been making surrogacy open to discussion. With single Bollywood ace director announcing his parenthood on social networking site, surrogacy is contended. The director has not only managed to catch the headlines of the leading newspapers but also promised to remember the surrogate mother in his prayers. Surrogacy seems to be a reasonable option for people yearning of becoming parents through Assisted Reproductive Techniques. Stereotyped families are no longer the singular norm as surrogate mothers can help in creating a family.

The word 'surrogate' is derived from the Latin word 'surrogatus' means 'substitute or replacement'. Surrogacy is a method of assisted reproduction that helps intended parents (IPs) start families when they otherwise could not.¹ Merriam-Webster Dictionary defines surrogacy as "the practice by which a woman (called a surrogate mother) becomes pregnant and gives birth to a baby in order to give it to someone who cannot have children."²

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 a 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 parent(s)."³ Surrogates have made parenthood an option for people who might not be able to adopt a child, perhaps because of their age or marital status or family pressure. Surrogacy means 'outsourcing the womb'.

BACKGROUND

Infertility is not a problem faced by women only in modern times. Starting a family was always a problem for such women. There have been cases which prove that the practice of surrogacy was even present in ancient times. Using a surrogate mother to bear children for a childless couple is as old as the story of Abraham and Sarah in Genesis chapter 16 of the Bible. Sarah could not bear children, so she gave her servant, Hagar, to Abraham so she could have his children. This was a common practice at the time, since a childless woman was shamed by her friends and family. This was what we call 'traditional surrogacy' today.

Surrogacy was considered to be a philanthropic deed. Later on, the pecuniary component came in, making it commercial. India became the most banking destinations in fertility tourism on account of low costs medical facilities, slipshod governmental regulations, absence of a strong legal framework to regulate surrogacy, pitiable conditions of women and children forcing them to become surrogates to financially support their families. As demand increased, so did concerns. This industry is estimated to be worth whopping 2.3 billion dollars annually. In 2005, ICMR issued a protocol on ART procedures. In order to amalgamate the procedures for surrogacy further, the Law Commission of India submitted

¹ <http://www.circlesurrogacy.com/pages/what-is-surrogacy>

² <https://surrogate.com/about-surrogacy/surrogacy-101/surrogacy-definition/>

³ "Indian Council for Medical Research (ICMR) documents on surrogacy",

[The Assisted Reproductive Technology \(Regulation\) Bill,](#)

2014. http://www.indiansurrogacylaw.com/images/Downloads/ART_Bill_2014.pdf Page 6/69)

its 228th Report⁴ on “*Need For Legislation To Regulate Assisted Reproductive Technology Clinics As Well As Rights And Obligations Of Parties To A Surrogacy.*”

There are various types of surrogacy arrangements:

Gestational Surrogacy

Gestational surrogacy is an arrangement in which a woman carries and delivers a baby for another person or couple. The woman who carries the baby is the gestational surrogate, or gestational carrier. The parents-to-be are known as the intended parents, and they are involved in the pregnancy, can be present at the birth, and become the child's parents after the baby is born.⁵ In gestational surrogacy, the surrogate has no genetic connection with the child. The embryos are created in a laboratory and these embryos are then transferred in the uterus of the surrogate.

Traditional Surrogacy

In a traditional surrogacy arrangement, a surrogate mother becomes pregnant with the use of her own eggs.⁶ A traditional surrogate becomes pregnant using her own eggs combined with the intended father's sperm using either intrauterine insemination (IUI) or in vitro fertilization (IVF). A child conceived using a traditional surrogate therefore has the genetic material of the intended father and surrogate.⁷

Altruistic Surrogacy

Altruistic surrogacy is a type of surrogacy where money does not change hands. The child is carried by a surrogate mother selflessly. She doesn't ‘rent out her womb’. The mother is not paid for her ‘services’.⁸ Only realistic out of pocket expenses are covered by the intended parents like the medical costs, travel, time off work etc. Altruistic surrogacy can use either a traditional or gestational surrogate.⁹

Commercial Surrogacy

⁴ Government of India, “*Law Commission of India -Need for Legislation to Regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of Parties to a Surrogacy*”, 228th Report, 5th August, 2009 available at

<http://www.lawcommissionofindia.nic.in/reports/report228.pdf> (last visited on March 17, 2017)

⁵ <https://www.babycenter.com/surrogacy#articlesection>

⁶ <https://www.babycenter.com/surrogacy#articlesection1>

⁷ www.havingbabies.com/infertility-treatment/surrogacy/traditional-surrogacy/

⁸ <https://www.positive-parenting-ally.com/ethics-of-surrogacy.html>

⁹ <http://www.fertilityconnections.com.au/surrogacy/>

Commercial surrogacy is the process in which an individual or couple pays a fee to a woman surrogate in exchange for her carrying and delivering a baby. At birth, the child is turned over to the individual or couple, either privately or through a legal adoption process.¹⁰

COMMERCIAL SURROGACY- RECONCILING THE PREDICAMENT

“Surrogacy is being a rainbow in someone else’s cloud.”

-Maya Angelou

Surrogacy is an arrangement by which a woman gives birth to a baby on behalf of a woman who is physically unable to have babies herself, and then gives the baby to her.¹¹ This is a relationship in which one woman bears and gives birth to a child for a person or a couple who then adopts or takes legal custody of the child is also called mothering by proxy. In surrogate motherhood, one woman acts as a surrogate, or a replacement mother for another woman, sometimes called the intended mother, who either cannot produce fertile eggs or cannot carry a pregnancy through to birth, or term.¹² The Surrogacy (Regulation) Bill, 2016 sets the precondition of “*only close relatives of couples to be surrogate*”, but in the present socio cultural familial context of India -- where impotency and infertility is associated with stigma, ridicule, name calling of women particularly within the family - such disclosure of medical incapacity of women to bear child before her in laws, family members will put her at greater risk of domestic violence, abuse, name shaming, loss of respect and may even cause eviction of such women from the home, annulment of marriage, etc. This is also breach of privacy, confidentiality of women. The Supreme Court in the case of *R. Rajgopal v. State of Tamil Nadu*¹³ held that right to life includes the ‘*right to privacy*’. A citizen has a right to safeguard not only his own privacy but also of his family, marriage, procreation, motherhood, child bearing and education among other matters. Constitutionally, the state cannot interfere in the prerogative of a person(s) to have children, naturally or through surrogacy. It is for the person and not the state to decide the mode of parenthood. Reproductive autonomy is a basic right and no one can be denied of their fundamental rights. In *B.K.Parthasarathi v. Government of Andhra Pradesh*¹⁴, the Andhra Pradesh High Court upheld ‘*the right of reproductive autonomy*’ of an individual as a facet of his ‘*right to privacy*’. The decision of the US Supreme Court in *Jack T. Skinner v. State of Oklahoma*¹⁵ which characterized the right to reproduce as ‘*one of the basic civil rights of man*’. The right to privacy is a facet of Art. 21 of the Constitution. The Supreme Court in

¹⁰ www.wisegeekhealth.com/what-is-commercial-surrogacy.htm

¹¹ <https://www.collinsdictionary.com/dictionary/english/surrogacy>

¹² <https://legal-dictionary.thefreedictionary.com/Surrogate+Motherhood>

¹³ *R. Rajgopal v. State of Tamil Nadu*, (1994) 6 S.C.C.. 632

¹⁴ AIR 2000 AP 156 (DB)

¹⁵ *Skinner v. State of Oklahoma, ex. rel. Williamson*, 316 U.S. 535 (1942)

Govind v. State of Madhya Pradesh has identified the right to privacy as a constitutionally protected right of the Constitution. The personal decision of a person about the birth of a baby through surrogacy called the '*right of productive autonomy*' of a woman. If reproductive right of a person are to be given constitutional protection, surrogacy allows an infertile couple to exercise their right of reproductive autonomy and even this must be protected like other fundamental rights. Under the existing patriarchal family set up with male domination and subordinated position of women, coupled with extensive domestic violence and assault, there remains the large possibility of emotional, familial pressure or coercion on the woman to act as surrogate to carry out '*altruistic surrogacy*'. Her consent to be a surrogate may not be fair or voluntary. This is testified in the case of death of an Indian surrogate mother *R. Lal (29)* who was forcefully made the altruistic surrogate carrier of her sister-in-law's baby by her husband and in-laws in order to compensate for insufficiency of dowry brought by her despite her unwillingness and cardiac problems. She died of a massive heart attack while giving birth to a surrogate baby boy at a hospital in *Ranchi, Jharkhand, on July 26, 2014*. There may be many such cases which go unreported considering the personal family nature of arrangement, hence clearly altruistic surrogacy is not free from all exploitation, issues of lack of consent.¹⁶

Now, domestic altruistic surrogacy will provide a platform for corruption and exploitation, pushing surrogacy into unethical hands. It could stimulate an underground trading and abusive trade in surrogacy. Relatives will be generated and surrogates will be impregnated in India and shifted to permissible jurisdictions.¹⁷

A concern raised by many objectors is that altruistic surrogacy in itself is an immoral bargain as it fails to serve the best interests of the child since the baby is separated from the birth mother, and it amounts to '*baby-selling*'.

COMMERCIAL SURROGACY- THE CALLOUS BEHAVIOUR IN THE DEVELOPING INDUSTRY CAUSING AN AGONIZED DILEMMA FOR SURROGATES

Commercial Surrogacy commodifies the woman and makes the child the object of a legal transaction. It is basically an agreement drafted by the capitalist patriarchal society where the 'haves' comprising of the fertility clinics, the doctors, the contracting parents and the agents lay down terms and conditions for the 'have nots' i.e. the surrogate mother. Pregnancy has degraded into a service contract wherein the contracting parent is the choosy customer who 'cherry picks' the healthiest baby from the babies of other surrogates and the baby is made the saleable product. The surrogate is selected from a wide database if and

¹⁶ *Altruistic Surrogacy: Not A Panacea For All Evils* by SONALI KUSUM September 20, 2016

¹⁷ "*Surrogacy in India-A law in the making revisited*" by Anil Malhotra August 27th, 2016

only if there are chances of her delivering a ‘*customized*’ baby with a warranty. Her torment does not end here. She is worried about the unforeseen snag as well as the social stigma. She has to detach herself from her baby mentally as well as physically. She keeps all her responsiveness and vibes at bay. She can be told to terminate the pregnancy if desired by the contracting parents and she has no potential to be able to terminate it at her own will.

The intending surrogate mother has to fill up a questionnaire giving details about her height, weight, complexion, colour of eyes, texture of hair, age, qualifications, likes, dislikes, religion and so on so as to facilitate the intending parents to have a customized baby. Surrogacy is like prostitution. In 2015, a PIL was filed by *Lawyer Jayashree Wad*¹⁸, challenging commercial, overseas, same sex, single surrogacy. She had approached the Supreme Court in 2015 to bring to light the pitfalls of the unregulated surrogacy industry. *“It amounts to sale of motherhood..., I read about how women were exploited by a handful of medical experts who controlled it (surrogacy business), which I thought should be stopped. Surrogate moms are not told about the risks,”* says Jayshree Wad²⁰

COMMERCIAL SURROGACY CASES THAT SHOOK THE SURROGACY CORPORATION

There have been various cases that have shuddered the surrogacy industry.

Baby Manji Case

Baby Manji was commissioned by Japanese parents (through an unknown egg donor and the husband’s sperm) and was born to a surrogate mother in Gujarat. The parents divorced before the baby was born.²¹ The father wanted the child’s custody but the Indian law disallowed single men to have custody of a surrogate child and the Japanese law did not recognize surrogacy. Later the baby was granted the visa.

Baby Gammy Case

There have been cases where the commissioning parent refuses to take the child born with abnormalities. One such case is of *Baby Gammy* and his twin sister Pipah. Gammy was born with Down syndrome which is caused by a problem with chromosomes. Normally, a person has 46 chromosomes. But most people with Down syndrome have 47 chromosomes. In rare cases, other chromosome problems cause Down syndrome. Having

¹⁸ Jayashree Wad is an advocate practising in the SC.

¹⁹ *Jayashree Wad v. Union of India*, Writ Petition(C)No. 95, SC 2015

²⁰ <http://www.hindustantimes.com/india-news/magazine-article-led-78-year-old-surrogacy-warrior-to-move-supreme-court/story-Yj6VytKEooOChZTVV3KDmK.html>

²¹ <http://indianexpress.com/article/explained/the-issues-around-surrogacy/>

extra or abnormal chromosomes changes the way the brain and body develop.²² Gammy was left behind while his twin sister Pipah went home with Australian parents.

Baby Dev Case

It so happens that the commissioning parents opt for surrogacy for one child but they are blessed with twins. But the parents cannot afford to raise two children so leave one in India in a stateless situation. This was the situation of *Baby Dev*, a boy born with twin sister who was left behind in India by the commissioning parents from Australia. Because of Indian Surrogacy law, Dev could be left stateless, meaning without citizenship.

Jan Balaz Case

German couple *Jan Balaz* and Susan Anna Lohlad faced problems to take their surrogate sons-Nikolas and Leonard to their home. The twins were born to an Indian surrogate mother in January 2008. These children were stateless. In the case of *Jan Balaz v Anand Municipal Corporation*, Jan Balaz moved the Gujarat High Court. Recognising that there is no law on the subject, the court reasoned that merely by providing the ova, 'a woman will not become a natural mother.' It is the surrogate mother, who carries the child in her womb, who deserves to be the natural and legal mother. With the surrogate as the mother, the twins who resulted from the surrogacy, born as they were to an Indian citizen, were thus Indian citizens. This gave them the right to get passports.²³

COMMERCIAL SURROGACY CASES WHICH WENT UNREPORTED

Premila Vaghela Case

In August 2011, *Premila Vaghela*, the wife of a daily-wage labourer from a poor Ahmedabad suburb, had acceded to become a surrogate mother for an American couple. She wanted to cater to the need of better education of her children. But eight months into her pregnancy, she crumpled to the floor of her doctors' clinic, clutching her stomach in agony. She died four days later. But the baby survived. The doctors and the foreign couple were not held liable due to the commercial surrogacy agreement. The contract stated that in such a circumstance Premila would be sustained with life support equipment to protect the foetus' viability and insure a healthy birth on the genetic parents' behalf".

Sushma Pandey Case

²² <https://www.webmd.com/children/tc/down-syndrome-topic-overview#1>

²³ <https://timesofindia.indiatimes.com/india/German-surrogate-twins-to-go-home/articleshow/5978925.cms>

Sushma Pandey reportedly died due to highly invasive procedures related to egg harvesting, not once but three times in a short span. A division bench of justices Naresh Patil and AM Badar, while dismissing the petitions filed by Dr Gautam Allahbadiya, Dr Gauri Sultane and Dr Kausal Kadam, said: *“Certainly, for any professional to stand for the trial against such serious charges would be uncomfortable situation to face. But considering the nature of allegations made and the evidence collected by the investigating agency, in the facts and surrounding circumstances of the case, we are not inclined to exercise our writ jurisdiction at the threshold for setting aside the entire proceedings.”*

Interpol Investigation Report

Interpol has launched an investigation into an alleged *'baby factory'* after it emerged that a Japanese businessman had fathered 16 surrogate children and expressed a desire for many more.²⁴ In most of the cases, once the contracting parent get what they could not manage on their own, they hardly care about the surrogate's well being. The barren gets the baby, the broker gets the bonus and the surrogate gets the proverbial experience *'No pain, No gain'*. Commercial surrogacy is ripe with opportunities of exploiting women. Taking into consideration all these factors, many nations have prohibited commercial surrogacy. India, too, has taken the plunge. Commercial Surrogacy is a form of alienated labour. It is a physical reproductive labour wherein the worker is not emotionally attached to the *'product'*. Women's reproductive capacities should not be used as physical labour and the status of a child, should not be relegated to that of a commodity. The Surrogacy (Regulation) Act, 2016 has been passed which puts a blanket ban on commercial surrogacy for singles, homosexuals, live ins, foreigners and persons of Indian origin living outside India. The so called *'Sanskari'* bill, linked to Indian ethos allows altruistic surrogacy. Too many pregnancies would cost in oodles to the woman's health including loss of life. Studies have found that multiple pregnancies could lead to cardio-vascular problems in women. Documentaries showed that doctors often transfer more than one embryo to a surrogate. If she gets pregnant with multiples, sometimes the commissioning couple is not told. Nine months later, they fly in and get the one baby they paid for and the extra babies are peddled on the black market.²⁵ Surrogacy is only for the wealthy. It is the rich exploiting the poor. The haves exploiting the haves not, the oligarchs exploiting the rank and file members.

THINK FOSTER CARE

Let's now understand that Surrogacy is never the only option of making a family. No doubt, there is a global urge to have a child out of *'one's own blood and flesh'* and propagate the

²⁴ <https://www.theguardian.com/lifeandstyle/2014/aug/23/interpol-japanese-baby-factory-man-fathered-16-children>

²⁵ Gianna Toboni ,an Investigative reporter from HBO 's documentary show *'VICE'*

patriarchal bloodline. People who crave for babies should opt for the least utilised option in India i.e. foster care. This programme is in its infancy stage in India but not in the West, especially the United States. Many celebrities like John Lennon, Steve Jobs, Marilyn Monroe, Eddie Murphy grew up in foster care. Our country has more than 30 million orphans but few thousands are adopted every year. The rest are languishing in orphanages, being trafficked, forced into begging, construction trades, with many now missing. It is unfortunate that people have to wait for more than three years to adopt and children above five years of age are considered '*unadoptable*' because nobody wants them. Foster Care is a family based non-institutional child care programme that provides temporary care for children in difficult circumstances. E.g. Children who are at an economic disadvantage as either or both of their parents are in jail or are terminally ill, victims of natural calamities, children affected by family breakdown, victims of physical abuse etc. Foster care is a symbiotic relationship where the parent gives the child a home and the child will give them happiness. It means providing the child all the facilities of family life, sustaining their emotional needs and enabling them to enhance their personal growth. Foster parents should have the financial capacity to provide good child care. They should neither have medical conditions like HIV or Tuberculosis nor criminal indictment. They are responsible for providing education and nutrition to the child and look after the overall well-being of the child. Foster care can be short term, medium term or long term but for the foster parents it's always '*unknown term*' with no definite expiry date. It is different from adoption. In adoption the biological parents surrender all their rights over the child. The child becomes a permanent member of the adoptive family and is even made the legal heir. But in fostering the parent has temporary guardianship that must be periodically renewed. The child does not legally become '*yours*'. The foster care was introduced in India for the first time in the Juvenile Justice (Care and Protection) Act, 2014. The Ministry of Women and Child Development drafted its Model guidelines for Foster Care, 2016. As per the guidelines, the child should always have access to information on the situation of his biological family, if they are known. The foster care will end when the child turns 18 years of age if, till then, he has not been adopted. The foster family will also have the first right to adopt the child. There is little awareness about foster care in India. There is a big difference between how Western and Indian families work in foster care. In the west, foster parents are licensed but this is not the case in India. Some NGOs shortlist and register foster families after thorough assessment. The Children Welfare Committees (CWCs) set up in several states of India play an important role but it needs to be strengthened and supported. Foster care also has challenges. Most of the children placed in foster care are reunited with their parents or caregivers. This may be difficult for foster parent because of the emotional bonding. The joys of parenthood, whether biological, adoptive or foster, are far greater than the risks and challenges. The rewards of upbringing a child are apparent in every parenting victory, every smile, every laugh, every mischief and every precious moment.