



## Legality of Commercialisation of Surrogacy in India and Social Implications

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### ABSTRACT

*Surrogacy refers to the act of bearing a biological child of another woman with any financial or sentimental object. Commercial surrogacy refers to act of surrogacy when done for monetary gain. Such acts though fulfilling for issueless parents may cause adversities to the life of gestational mother. Some decided cases of US courts suggest that such trends of commercial surrogacy might lead to legal battles and uncertainty of child's future. The lawmakers of India should keenly observe the global scenario before passing any regulation regarding commercial surrogacy.*

**KEYWORDS :** Commercial surrogacy, Surrogate mother, Assisted Reproductive Technology, Biological child

**Introduction:** The connotations like “substitute” or “deputy” symbolize the meaning of the word “surrogate”. Some women are unable to conceive and carry a child for various reasons such as, the failure of the embryo to implant, repeated miscarriages or any other disability of such kind. In such cases, the alternative is either to go for adoption or Assisted Reproductive Technology (ART). In surrogacy a woman bears through her womb the biological child of another woman, who is unable to conceive successfully or bear for the full term and deliver the child. The surrogate voluntarily rents out her womb to carry the child for other woman with an intention of the helping the childless couple with a specific understanding to hand over the child after the delivery. There are various motivating factors and reasons for surrogacy like self-fulfillment, a desire to help others, a liking to become pregnant and also for commercial purposes. On the other hand, an analysis of the varied forms of resistance towards surrogacy and their repercussions reveals the true nature of stratified motherhood in India.

**Cases of Global relevance:** William Stern and his wife, Elizabeth Stern, entered into a surrogacy agreement with Mary Beth Whitehead, whom they found through a newspaper advertisement. In re Baby M was a custody case that became the first American court ruling on the validity of surrogacy. According to the agreement, Mary Beth Whitehead would be inseminated with William Stern's sperm, bring the pregnancy to term, and relinquish her parental rights in favor of William's wife, Elizabeth. After the birth, however, Mary Beth decided to keep the child. The New Jersey court ruled that the surrogacy contract was invalid according to public policy, recognized Mary Beth Whitehead as the child's legal mother, and ordered the Family Court to determine whether Whitehead, as mother, or Stern, as father, should have legal custody of the infant, using the conventional 'best interests of the child' analysis. Stern was awarded custody, with Whitehead having visitation rights. The case of Johnson vs. Calvert was the first contested gestational surrogacy case and, as a consequence, received worldwide public attention. Anna Johnson was hired by Mark and Crispina Calvert to be a gestational surrogate for their child. The embryo implanted in Anna was created via In Vitro Fertilization (IVF) using the egg and sperm of the Calverts. The surrogacy contract provided that Anna would be paid \$10,000 plus associated medical expenses for giving birth and relinquishing “all parental rights” to the baby in favor of the Calverts. The California Supreme Court faced the difficult task of identifying the legal mother of a child who has both a birth mother and a genetic mother. The court concluded that because the Uniform Parentage Act recognized both giving birth and genetic consanguinity as means of establishing the mother and child relationship, and when one woman is not both the birth mother and the genetic mother, the mother who “intended to bring about the birth of a child that she intended to raise as her own” is the natural mother.

**Ancient practices in India:** Surrogate Motherhood is not a new concept. In ancient time it was practiced in somewhat a rudimentary

form. In Primitive society certain kinds of sons, like (1) Kshetraja or the son begotten on the wife by another, (ii) Gudaja or the son born to the wife by secret intercourse with another, (iii) Nishada or the son by a Sudra Woman, (iv) Parasava or the son by a Sudra Woman and (v) Parasava or the son by a concubine, who were recognized as lawfully belonging to a Hindu, actually conveyed the idea of surrogacy; and the other kinds of sons like (i) Kritrima or the sons made and (ii) Krita or the son bought, who were also recognized as lawfully belonging to a Hindu, conveyed the then existing concept of surrogate motherhood.

**Vision in Modern India:** India's first gestational surrogacy took place in 1994 in Chennai. In 1997, a woman from Chandigarh, India agreed to carry a child for 50,000 rupees in order to obtain medical treatment for her paralyzed husband. In 1999, an Indian newspaper carried the story of a villager in Gujarat who served as a surrogate for a German couple. In India, it is estimated that the number of births through surrogacy doubled between 2003 and 2006 and estimates range from 100 to 290 each year to as many as 3,000 in the last decade. The Indian Council of Medical Research (ICMR) working under the auspices of the Ministry of Health and Family Welfare finalised the National Guidelines for accreditation, supervision and regulation of ART Clinics in India. Under these 2005 guidelines, there was no legal bar to the use of ART by a single or an unmarried woman and the child born would have legal rights on the woman or the man concerned. Thereafter, the draft ART (Regulation) Bill, 2008, the draft ART (Regulation) Bill, 2010 & the draft ART Bill, 2013, stated to be revised based on the recommendations of the Ministry of Law and Justice. However, the public opinion has been always in favour of ART in India would be available to all persons including single persons and foreign couples. The exercise of drafting the 2008, 2010 and 2013 Bills was entrusted to a 12 Member Specialist Drafting Committee besides constituting a National Advisory Committee on ART under the Chairmanship of the Director General, ICMR. The draft Bills and Rules of 2008 and 2010 were extensively circulated for public opinion besides being sent to State Government, institutions, statutory bodies, NGOs and other stakeholders besides medical professionals. The 2013 Draft Bill was however not circulated or put in the public domain for discussion, comment or opinion.

**Reported Cases:** The only reported judgment of the Supreme Court in surrogacy matters in Baby Manji Yamada (2008) took due notice that in cases of “commercial surrogacy”, an intended parent may be a single male, when it had the occasion to consider the petition of a Japanese grandmother wanting issuance of a travel document for her Japanese divorced son's daughter. In another matter decided by the Gujarat High Court in Jan Balaz (2009) the matter in appeal is still pending in the Supreme Court and the decision of the High Court holding, that babies born in India to gestational surrogates are Indian citizens entitled to Indian passports, has been stayed by the Supreme Court. However, twin German children born to the German couple were permitted to leave India upon directions of the Apex Court to

Central Adoption Resource Agency (CARA) to permit adoption of the children as a special case for them to leave India. The main issue of nationality and citizenship arising thereto, being of grave importance, is still undecided.

#### **Objectification and possible exploitation of Gestational Mothers:**

Most empirical studies observe that surrogate mothers tend to be of a lower socio-economic class than the intended parents. Gestational mothers in India are vulnerable to exploitation and coercion due to their disadvantaged socio-economic status. However, studies of households showed increased trust between the gestational mother and her husband as in most cases only the couple in the family knew about the surrogacy. Moreover after one surrogacy, women become identified with their magic wombs that are capable of reducing the poverty of the family.

**Guidelines Restricting Surrogacy:** The Ministry of Home Affairs by Guidelines of 9th July, 2012 restricted surrogacy to foreign nationals i.e. a man and a woman duly married for at least two years who would be required to take a medical visa for surrogacy in India. As of now, even though surrogacy as a subject is in the administrative concern and domain of the Ministry of Health and Family Welfare, regardless, it has been decided that till the enactment of a law on the ART Bill, 2013, the Guidelines issued by the Ministry of Home Affairs will prevail. Hence, foreign single parent surrogacy is as of now barred.

#### **Proposed Measures**

- There is an urgent need of national and international debate on inter-country surrogacy issues with an integrated and inter-disciplinary outlook.
- All kind of surrogacy clinics should be under strict supervision and control of the special machinery appointed by the State Accreditation Authority.
- Such machinery should be given all powers to regulate surrogacy agreements on par with Central Adoptive Resource Agency (CARA).
- Every application for surrogacy must be routed through the respective Governments, to which the Commissioned Parents belong.
- Single parent surrogacy requires strict monitoring, keeping in view the best interests of the child.

**Conclusion:** In India, surrogacy is purely a contractual bond between the parties and proper care has to be taken while drafting any such agreement so that it won't violate laws or ethics. India is probably the only nation in the world which exclusively enshrines female deities in artistically built temples. However, the history of reproduction politics in India shows a proliferation of rhetoric and policies that discourage poor women from reproducing. Ironically, such contradictory mindset of the state is manifested in everyday negotiations by the surrogates themselves. On the one hand, by using their bodies to earn income, the surrogates seem to subvert notions of wasteful fertility, as historically portrayed by the state. The fertility, bodies, and reproductive decisions of lower-class women get revalued only insofar as these women serve as human incubators for their richer sisters. Laws of India should not be thoughtlessly imposed on women of weaker social and educational attribute just for the sake of validating a developmental and welfare measure.

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