

# **IS LEGALISING SURROGACY- AN OUTSOURCING MOTHERHOOD?**

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## **INTRODUCTION:**

The roots of surrogacy can be traced long back in Indian history. The world's second and India's first IVF (In Vitro Fertilization) is a baby - Kanupriya alias Durga in 1978. Since then the field of Assisted Reproductive Technology (ART) has developed rapidly. But legally the laws related to surrogacy are still in the nascent stage. At present the agreement between the parties based on the ART Guidelines are the guiding force of such treatment and the codified law is yet to be adopted and implemented. With the recent growth in the Intended parents opting for surrogacy, India has become the much sought after surrogacy destination. In my opinion, the acceptance of same sex marriages/union and the recognition of the basic human right to have family and children had given rise to surrogacy manifold. However, at the same time nations all across the globe are condemning commercial surrogacy as it results in commercialization of human reproductive system and co modification of children. For it has various socio-ethical reasons, surrogacy has also become a topic of deep interest amongst the government of different nations, medico-legal luminaries as well as public at large. There are two types of surrogacy which are in detail discussed in this paper. The article would emphasis on the only impediments that the system faces now (relate to the legal tangles) that manifest in various phases of the process involved.

## **SURROGACY- NATURE:**

The word surrogate originates from Latin word surrogatus (substitution) which means "to act in the place of".<sup>i</sup> Surrogacy is dubbed as "rent-a-womb". It is a procedure by which a woman carries another's fertilized egg to term, usually in cases where the biological mother's uterus is damaged, i.e., when a woman carries a pregnancy and gives birth to a baby for another woman. Surrogacy is a method of assisted reproduction.<sup>ii</sup>

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Surrogacy is gaining popularity all over the world as it is the only method for a couple to have their own child. There are two types of surrogacy<sup>iii</sup> as mentioned above, namely:

**IVF / Gestational surrogacy**<sup>iv</sup> - This is a more common form of surrogacy. In this procedure, a woman carries a pregnancy created by the egg and sperm of the genetic couple. The egg of the wife is fertilized in vitro by the husband's sperms by IVF/ICSI procedure, and the embryo is transferred into the surrogate's uterus, and the surrogate carries the pregnancy for nine months. The child is not genetically linked to the surrogate.

**Traditional / Natural surrogacy**<sup>v</sup> - This is where the surrogate is inseminated or IVF/ICSI procedure is performed with sperms from the male partner of an infertile couple. The child that results is genetically related to the surrogate and to the male partner but not to the female partner.

### **IVF procedure in India:**<sup>vi vii</sup>

The first step is that of, matching cycles of the genetic mother and the surrogate by adjusting menstruation dates by oral contraceptive pills. When the cycle starts, the surrogate is put onto estrogen tablets to prime the uterus. The protocol used for the genetic mother is day 2 protocols (antagon protocol) is done by giving the oral contraceptive pills in the previous month or the other way is, day 21 protocol, depending on the age of the genetic mother and the other test results. On the 2nd day of the periods, gonadotropin injections are started.

In both the cases, the patients are monitored daily. When the follicle reaches 18 mm size HCG trigger is given. The surrogate is started onto progesterone tablets on the day of HCG injection that is given to the genetic mother. Oocyte (egg) retrieval is done 36 hours later, which is generally day 12 or 13 of the cycle. On the same day the genetic father gives his semen sample. The eggs of the genetic mother are fertilized with sperms of the genetic father in the laboratory by IVF procedure. The resulting embryo is then transferred into the womb of the surrogate under ultrasound guidance. The surrogate is then put on luteal support using progesterone tablets / injections, and pregnancy is confirmed 15 days later.

**There are five major steps in the IVF and embryo transfer sequence:**<sup>viii</sup>

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1. Monitor the development of ripening egg(s) in the ovaries.
2. Collection of eggs.
3. Obtaining the sperm.
4. Putting the eggs and sperm together in the laboratory, and providing correct conditions for fertilization and early embryo growth.
5. Transferring the embryos into the uterus.

### **Surrogacy- critique**

Commercial surrogacy in India was legalized in 2002.<sup>ix</sup> Since then it has been one of the fastest growing industries in the country. Women, generally of the lower-middle and labour classes, take up surrogacy to have additional income for their families and a better quality of life. Some Indian women are also pressured by their families to sell their body as a surrogate to provide a helping hand financially.<sup>x</sup> Surrogacy has grown dramatically in recent years with physicians here overseeing an estimated 1,500 surrogacy births for domestic and overseas couples in 2010, a 50% jump in two years.<sup>xi</sup> The very flexibility, relative affordability and minimal regulation that have made India attractive to many for surrogacy, also leave ample room for abuse, critics, as the medical boards rarely grant sanction to their own members and such lawsuits dragging on for years, or even decades. Concerned about abuses, legal loopholes and the nation's reputation, the Health Ministry in late January, 2011 drafted India's first surrogacy law, setting out age limits, how often surrogates can give birth and also provided the guidelines aimed at preventing "stateless" babies.

Dr. Aniruddha Malpani, a fertility specialist in Mumbai, says that, "Today, unfortunately, even the smallest clinics are doing surrogacy because it's a simple procedure and four times as profitable" as other fertility treatments.<sup>xii</sup> Some of the biggest problems in opting surrogacy involve citizenship. In 2008, "baby Manji" was left stateless after a Japanese couple divorced in the middle of the surrogate pregnancy, and Tokyo refused to recognize the infant after the mother gave her up. And last year, a Canadian couple were shocked when a required DNA test found surrogate twins weren't biologically theirs.

The surrogacy has now become a business and these surrogacy industries have also been accused of taking advantage of impoverished Indian women. As commented by Kama- yani

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Bali Mahabal, a Mumbai-based women's advocate and attorney "Are babies commodities to be planted and harvested?"<sup>xiii</sup> and says that the poverty and illiteracy engender exploitation. Surrogacy can be contended, as it treats children as a "commodity" and exploits some women.<sup>xiv</sup> It is to an extent evident that, these industries are growing wider by using the vulnerability of the poor. Making (a woman) a child-producing machine is not very much acceptable to the Indian community and culture. There should be controls over such an act so that it will not be an open market as it is at the moment.

India being a developing country with strong values and ethics still is not comfortable with the surrogacy culture in its society. It is still considered to be a matter of shame and grief for a contemporary Indian couple to be unable to have a child of their own and at the same hand women who make their womb available for surrogacy are looked down upon. Yet, for their economic survival, women of the lower classes take up surrogacy, without being open about it in society.<sup>xv</sup>

### **Purpose of legalising Surrogacy/ surrogacy law in India:**

India's surrogacy detonation began in January 2004 with a grandmother delivering her daughter's twins. Today, India boasts of being the first to legalise commercial surrogacy soon to legitimise both intra-and inter-country surrogacy.<sup>xvi</sup> Moreover, renting wombs has become an easy and cheap option in India. Relatively low cost of medical services, easy availability of surrogate wombs, abundant choices of donors with similar racial attributes and the lack of any law to regulate these practices is attracting both foreigners and NRIs to sperm banks and surrogate mothers.<sup>xvii</sup> Surreptitiously, India has become a booming centre of a fertility market (ART clinics).

The Supreme Court observed that "commercial surrogacy reaching industry proportions is sometimes referred to by the emotionally charged and potentially offensive terms wombs for rent, outsourced pregnancies or baby farms".<sup>xviii</sup> Surrogacy is presumably considered legitimate because no Indian law prohibits it. But then, as a retort, no law permits surrogacy either. Surely, the proposed law will usher in a new rent-a-womb law as India is set to be the only one to legalise commercial surrogacy.

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In the absence of any law to govern surrogacy, the Indian Council of Medical Research guidelines (2005)<sup>xix</sup> for accreditation, supervision and regulation of ART clinics in India are often violated. The Exploitation, extortion and ethical abuses in surrogacy trafficking are rampant and surrogate mothers are misused with impunity.

The Draft Assisted Reproductive Technology (Regulation) Bill,<sup>xx</sup> 2010, is a step in the right direction. It will help regulate the functioning of the in-vitro fertilisation (IVF) centres and make the entire process of surrogacy legal. The setting up of ART banks will ensure quality check and accountability. Everything would be in black and white and legal redressal for any failures will be possible as there was no accountability of the IVF centres as they can deny everything as legally they don't even exist.

### **Negative effect on society/ Repugnant to human dignity**

The giving birth to a baby or any matter that is in relation with the women body is a matter of dignity. Surrogacy, though being advantageous to the couple who have no kids, but is, inconsistent with human dignity as it is, in a way, woman using her uterus for financial profit and treating her womb as an incubator for someone else's child. These words of the Warnock Committee<sup>xxi</sup> reporting to the British Government in 1984 remain unanswerable even today. The proposed Bill, however, legalises not only surrogacy but even commercial surrogacy or surrogacy "for monetary compensation" or "on mutually agreed financial terms".

### **Rent a womb: The proposed legislation<sup>xxixxiii</sup>**

1. Renting of womb is legal in India but there is no law at present to regulate surrogacy. If Parliament passes the Assisted Reproductive Technology (ART) Bill, renting a womb by Indian and foreign couples looking for surrogate mothers is expected to become hassle-free.
2. The Draft Bill gives gays, singles the legal right to have surrogate babies. It defines a 'couple' as two persons living together and having a sexual relationship. After the Delhi High Court verdict on homosexuality, even two gay men can claim to be a couple.

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3. A woman in the age-group of 21-35 can become a surrogate mother. She will be allowed five live births, including her own children. She will not be allowed to donate Oocyte more than six times in her life.
4. In case of a single man or woman, the baby will be his/her legitimate child.
5. A child born to an unmarried couple using a surrogate mother and with the consent of both parties shall be the legitimate child of both of them.
6. During the gestation period, the couple will bear the surrogate's expenses and give monetary help to her. The couple may enter into an agreement with the surrogate.
7. Foreign couples must submit two certificates — one on their country's surrogacy policy and the other stating that the child born to the surrogate mother will get their country's citizenship.
8. Foreign couples have to nominate a local guardian who will take care of the surrogate during gestation.
9. ART banks, accredited by the government, will maintain a database of prospective surrogates as well as storing semen and eggs and details of the donor.
10. State boards will give accreditation to ART banks — private and government. The board will have a registration authority which, in turn, will maintain a list of all In-vitro Fertilisation (IVF) centres and monitor their functioning.
11. The Law Commission of India (2009) described ART industry as a “Rs 25,000-crore pot of gold”. It recommended only altruistic surrogacy arrangements and not commercial ones. But the Draft Bill legalises commercial surrogacy as well.

The Bill is currently with the Law Ministry, awaiting approval. The legislation also covers IVF, pre-natal determination and surrogacy.<sup>xxiv</sup>

### **CONCLUSION:**

The desire to procreate is a fundamental attribute of the human race. Sadly though, many are denied the joy of parenthood due to several reasons, being it to be biological or otherwise, with the developments in reproductive sciences and technologies the barriers to parenthood are no longer as formidable as they once were. Over the years, surrogacy has evolved as a much preferred mode of bringing a child into this world. India, in particular has seen a rise in the recourse to surrogacy as an ideal technique for childless couples to enjoy the pleasures of

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parenthood. To understand this concept, in simple terminology, it is an arrangement between a woman and a couple or individual to carry and deliver a baby. Women or couples who choose surrogacy often do so because they are unable to conceive due to a missing or abnormal uterus. Most of them also have experienced multiple pregnancy losses, or have had multiple in-vitro fertilization attempts that have failed. It is most of the times, couples go for gestational surrogacy as there is an advantage to the parents, and that is, the embryo is created from the woman's egg and the man's sperm, so it is biologically theirs.

The present Draft has also increased the number of permitted successful live births for a surrogate from three (in the previous Draft) to five; this is inclusive of the surrogate's own children. This provision inadequately addresses an aspect critical to the surrogate's health

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One of the most obvious advantages of using a surrogate is the chance for a couple to have a biological child. Many couples are also able to form a close relationship with their surrogate and can take an active role in the pregnancy. Unfortunately, though, there are many potential downsides to surrogacy, some of which may end in heartbreak for the intended parents.

Contrary to many Westerns countries, commercial surrogacy is legal in India and many Indian women have chosen to become surrogate mothers for Western couples. The typical reason for couples choosing Indian surrogate mothers over Western surrogate mothers is that they are cheaper. While surrogacy in general raises a host of social and ethical problems, I believe that commercial surrogacy in particular can crystallize the difficulties that many people have with surrogacy, and help us get to the core of how surrogacy affects our understanding of motherhood. Commercialization, and its use of market rhetoric, treats surrogacy as a service arrangement between a number of individuals, leading to the creation of a product and the transfer of rights to that product. Hence, we would like to conclude that commercialization of surrogacy would create a negative impact on the young minds and harm the Indian culture and ethical values.

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