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# Commercial Surrogacy: An Analysis

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## ABSTRACT

*Surrogacy and its commercialization have been in talks for a very long time now, and in fact is debatable topic for discussion. Evidently glimpse of surrogacy can be traced back in ancient times; India saw commercial surrogacy in modern world in the year 2002. The Legalization of commercial surrogacy is still in its initial process. So what is surrogacy, it means to carry the child for other women willing to be a mother who is basically incapable of one due to medical complexity. The major types of surrogacy are natural, gestational, commercial & altruistic. In the year 2008, the Hon'ble Supreme court India saw landmark case which left a light on surrogacy in India in the case of Baby Manji Yamada v. Union of India. The motive of researcher is to critically analyze the importance of legalization of commercial surrogacy. For the bliss of the society and to understand greater extent of new technology for the women wanting to be a mother it is of utmost importance that we comprehend the positive as well as negative aspect of commercial surrogacy. Within first two part of the research is study of term and types of surrogacy, the later part explains issues of legal validity & enforceability of surrogacy agreement, later some light on the ART bill and countries with commercial surrogacy. The next part explains issues: Ethical & Legal issues, along with risk involved in surrogacy. The last part is the conclusion with a few suggestions on commercial surrogacy. In this paper the researcher arrived at the conclusion feeling of motherhood is a pure bliss and commercial surrogacy on the one hand enables a woman to get that feeling and in fact is good alternative for the woman carrying the child which on the other hand is bliss to the society.*

## I. INTRODUCTION

India is the country with the history of worshipping women. But in the 21st century women need more laws for their protection. We have seen landmark cases which worked as a threshold for more and more effective legal provisions for protection of women. One such landmark case was of Baby Manaji Yamanda v. Union of India<sup>2</sup>. In this case Supreme Court elaborated the term “commercial surrogacy” and defined it as “as a form of surrogacy in which a gestational carrier is paid to carry a child to maturity in her womb”

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<sup>1</sup> Author is a student in India.

<sup>2</sup> (2008) 13 SCC 518.

However soon the Apex court during the adjudication cases of commercial surrogacy opined that there was absence of proper regulatory statutory body commercial surrogacy. Later the court directed to enact an act for the same purpose. Following the Court's direction, the Indian Council of Medical Research (ICMR), under the aegis of Ministry of Health & Family Welfare, Government of India, formulated the Assisted Reproductive Technologies (Regulations), ART Bill, 2008.<sup>3</sup>

The bill somehow proved as a necessity. Now we are going to understand in depth about surrogacy, its types, and important provision of this bill.

### **Meaning**

Surrogacy is an arrangement, often supported by a legal agreement, whereby a female (the mother) agrees to bear a child for another person or persons, who will become the child's parent(s) after birth. The married couple in the desire of having a child may seek surrogacy, in the case where the pregnancy women becomes or is impossible.

### **History**

The first mention of surrogacy can be found in "The book of Genesis" which comprises a story of Sarah and Abraham. Sarah and Abraham were married but could not conceive a child of their own, so Sarah turned to her servant Hagar to be the mother of Abraham's child. This is the case of traditional surrogacy, where the surrogate uses her own egg in her womb for the married couple. Until 30 years ago traditional form of surrogacy remained a taboo topic, naming it illegitimate birth of children. The first successful artificial insemination of woman was completed in an ethically questionable way. From here commenced a beginning of surrogacy.

In the year 1975 ethically completed IVF embryo transfer was successful. In 1976 the first legal surrogacy agreement in the history of surrogacy was brokered by lawyer Noel Keane. In the year 1978 the first baby conceived through IVF transfer was born. In 1980 the first compensated surrogacy agreement was arranged.

### **Methods of Surrogacy**

- Traditional Surrogacy
- Gestational Surrogacy
- Altruistic Surrogacy

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<sup>3</sup> Indian Council of Medical Research, The Assisted Reproductive Technology (Regulation) Bill –2008 (Draft) Ministry of Health and Family Welfare, Government of India, available at: -<[http://icmr.nic.in/art/Draft%20ART%20\(Regulation\)%20Bill%20&%20Rules%20-%202008-1.PDF](http://icmr.nic.in/art/Draft%20ART%20(Regulation)%20Bill%20&%20Rules%20-%202008-1.PDF)>.

- Compensated Surrogacy
- International Surrogacy
- Domestic Surrogacy
- Gamete Donation

## **II. DEFINITION & MEANING OF SURROGACY AGREEMENT:**

Surrogacy agreement is a legal agreement for arranging surrogacy or surrogate mother, whereby a woman agrees to bear the child for another person. It may or may not involve monetary compensation. The agreement which involves the monetary compensation, this kind of arrangement makes it **COMMERCIAL SURROGACY**.

The legality of commercial surrogacy varies from jurisdictions to jurisdiction, which might involve international or interstate surrogacy arrangement. Persons seeking surrogacy sometimes may travel to jurisdiction where it permits commercial surrogacy. In some countries, surrogacy is legal only if it does not involve monetary value.

Where commercial surrogacy is legal, couples may use the help of third-party agencies to assist in the process of surrogacy by allocating a surrogate and a commercial contract.

### **SIGNIFICANCE & PURPOSE OF SURROGACY AGREEMENT:**

The surrogacy agreement is one of the most important things in this process of surrogacy. It gives the entire surrogacy journey a clear outlining which involves each party's rights, roles and responsibilities before the pregnancy, during the pregnancy and of course after the pregnancy.

This contract has to be precise with words and very comprehending so it can help limit disputes and miscommunication. The surrogacy agreement should be collaborative effort, as like every other agreement, their respective attorney contributing to the terms that are included.

The process involves the intended parents to work with their attorney to draft initial contract, then this contract has to be sent to the surrogate mother and her attorney. The attorney of the surrogate mother will ensure her interests and requests are represented or not. The two attorneys will continue to negotiate the contract until each party is satisfied with the terms included. The contract can then be signed, and the intended parents and surrogate will move forward with medical procedures.

The contract needs to be completed and signed before the medical procedure. It is necessary to protect each party during the medical process and most fertility clinics will not perform the surrogate's medical procedures until the contract is place.

### III. ISSUES OF LEGAL VALIDITY & ENFORCEABILITY OF SURROGACY AGREEMENT:

Surrogacy is not new to India but the major change was made with the case *Baby Manji Yamada v. Union of India* AIR [2009], Indian courts had not faced a case relating to surrogacy until this. While prevalent, the various facets of surrogacy had not yet been so vigorously debated and examined against the Indian legal and social realities. Baby Manji was left in limbo after the divorce of the contracting Japanese couple. Baby Manji was only acting under commercial arrangement and was not keen to keep the baby, the contracting mother who was no longer interested in the baby, and the contracting father, who wanted the baby but certain provisions of the Indian law posed a hindrance, was widely reported by the media. From a legal viewpoint, there were two landmark outcomes of this case:

1. For the first time the Supreme Court of India was required to examine issues relating to a surrogacy agreement
2. In this case, the Indian Council of Medical Research (ICMR) proposed the draft Assisted Reproductive Technology (ART) Regulation Bill 2008.

In this case the Supreme Court did not rule surrogacy contracts as valid under Indian law, but it did not rule against their validity either. In fact, it elaborated on the concept of surrogacy, methods of surrogacy and recognized all forms of surrogacy, including altruistic and commercial. While not really ruling on the validity or enforceability of any aspect of surrogacy contracts, the Supreme Court recognized that surrogacy arrangements existed in India for various reasons.

#### **ART BILL<sup>4</sup>**

ART is used to treat infertility. It includes fertility treatments that handle both a woman's egg and a man's sperm. It works by removing eggs from a woman's body and mixing them with sperm to make embryos. The embryos are later on put back in the woman's body.

In Vitro fertilization (IVF) is the most common and effective type of ART.

ART procedures sometimes use donor eggs, donor sperm, or previously frozen embryos. It may also involve a surrogate carrier.

Aim of the Bill: To regulate ART banks and clinics, allow the safe and ethical practice of ARTs and protect women and children from exploitation. It was introduced to supplement the Surrogacy (regulation) bill, (SRB) 2019, which aims to prohibit commercial surrogacy in India.

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<sup>4</sup> PRS Legislative Research. 2021. *The Assisted Reproductive Technology (Regulation) Bill, 2020*. [online] Available at: <<https://prsindia.org/billtrack/the-assisted-reproductive-technology-regulation-bill-2020>> [Accessed 8 August 2021].

The bill designates surrogacy boards under the SRB to function as advisory bodies for ART.

- The Bill allows for a married heterosexual couples and a woman above the age of marriage to use ARTs and excludes single men, cohabiting heterosexual couples and LGBTQ+ individuals and couples from accessing ARTs.
- LGBTQ+ stands for lesbian, gay, bisexual, transgender, queer (or sometimes questioning) and (others). The “plus” represents other sexual identities including pansexual, intersex, and sexual.
- Unlike the SRB, there is no prohibition on foreign citizens accessing the ARTs but not all of the Indian citizens which is an illogical result which fails to reflect the true spirit of the constitution.
- The Bill restricts egg donation to a married woman with a child (at least three years old). Even here, egg donation as an altruistic act is possible only once a woman has fulfilled her duties to the patriarchal institution of marriage.

#### **IV. COUNTRIES WITH COMMERCIALISED SURROGACY**

##### **USA**

In most of the states in US, there is no surrogacy law: the child’s parent age is recognised by a judge during the surrogate mother’s pregnancy (usually during the sixth month). The USA is one of the pioneer countries in surrogacy. In fact, it was the first country in the world to recognize surrogacy.

##### **UKRAINE**

Ukraine is one of the countries where surrogacy is regulated in detailed in national law. In Ukraine, married heterosexual couples with fertility problems can carry out the process, provided that they contribute genetic material.

##### **GEORGIA**

This is another country where surrogacy is legal, with the exact same legal status in Ukraine. However, there have been few cases of surrogate pregnancy in Georgia.

##### **RUSSIA**

In Russia, surrogacy is regulated by law in a clear both in commercial as well as in altruistic manner. The quality of clinics is very high and patients receive an exclusive and personalized treatment. In addition to Russian citizens, foreigners have access to gestational surrogacy as well.

**KAZAKHSTAN**

The legal and de facto situation in Kazakhstan involves prices similar to United States, which makes it a somewhat unattractive country where there are hardly any cases of surrogacy.

**GREECE**

Greece is actually one of the few countries where the parentage is decided by judicial decision, and therefore it is possible to recognize parentage of either both intended parents or just the single commissioning mother.

Surrogacy apparently has been legal in India for some years now. In the present time the process is also open to foreigner. Greek law only grants women the right to surrogacy.

**MEXICO**

Mexico is federal state and each state has its own civil, criminal and prosecution code. Not in all states surrogacy is regulated but in Tabasco and Sinaloa where it is allowed only to Mexican citizens. Simply they have regulatory gaps.

In Mexico Distrito Federal, on the basis of what is established by the local civil code and the Mexican Constitution, a judgment (authorization) is obtained by granting to the interested parties the right to initiate a surrogacy program and predetermine the child's filiations.

**INDIA**

Presently only heterosexual married couples whose home country grants the right to surrogacy can follow this process in India. Lesser option makes it a hard for intended parents to have a child.

**V. ISSUES**

With every boon comes a curse, with every right comes a wrong and so is the scenario in the case of surrogacy. There have been cases where the parents refused to accept the surrogate child, or where the surrogate mother with her motherly affection refuses to give away the child. There many issues in the process of surrogacy. Let us study them in detail.

**1. ETHICAL ISSUES** – Till date the ethical implications of surrogacy arrangements remain highly controversial. It is the matter of human rights where a woman's reproductive part is commercialized. Just for the sake of child-bearing women's womb is priced. The commercial bearing of surrogacy is basically renting women's womb. Our system in regulation of commercial surrogate often fails which result in exploitation of surrogate mothers. Surrogacy is a process where the wombs of 'non-valuable' women are used as "breeders" for the embryos

of “valuable women”.

Jan Balaz V. Union of India, The Hon’ble High Court of Gujarat said commercial surrogacy was held to be legal in India as there was no law prohibiting womb-lending or surrogacy agreements.

But in 2009, the Law Commission of India in its 228th report recommended that surrogacy be regulated through a suitable legislation. The Law Commission recommended the only altruistic surrogacy be legalised and commercial surrogacy be totally banned. Following this, The Surrogacy (Regulation) Bill, 2019, was passed by the Lok Sabha on August 5. The Rajya Sabha, in its meeting held on November 21, 2019, adopted a motion to refer the bill to a Select Committee. The committee studied the best practices in surrogacy globally keeping in mind Indian needs. In the United States and Argentina, surrogacy requests are decided by independent surrogacy committees. In the United Kingdom, Netherlands, Ireland, Denmark, Belgium, South Africa, Australia, Canada and Greece, only altruistic surrogacy is allowed. Commercial surrogacy is legally allowed in countries like Russia, Ukraine, and Thailand. In France, Germany, Spain, Sweden, Italy and Iceland, surrogacy is banned in all forms.

**2. LEGAL ISSUES** – The lack of proper legislation for regulation of commercial surrogacy is the biggest failure which often leads to breach of contract between both the parties (Surrogate mother & Intended Parents). But as of March 2021, The standing committee for The Assisted Reproductive Technology (Regulation) Bill, 2020 presented its report. The Bill defines ART to include all techniques that seek to obtain a pregnancy by handling the sperm or the oocyte (immature egg cell) outside the human body and transferring the gamete or the embryo into the reproductive system of a woman. Examples of ART services include gamete (sperm or oocyte) donation, in-vitro-fertilisation (fertilising an egg in the lab), and gestational surrogacy (the child is not biologically related to surrogate mother). ART services will be provided through: (i) ART clinics, which offer ART related treatments and procedures, and (ii) ART banks, which store and supply gametes.

## **VI. RISKS**

Deciding to be a surrogate and being one brings plenty of risks from bearing medical risks to legal contract risks. Like any other pregnancy, surrogate pregnancies involve the same medical risks of carrying a child and giving birth. These can include nausea from morning sickness, weight gain, swelling, back pain, heartburn and other uncomfortable side effects. Some more serious side effects are conditions that can develop during the pregnancy like gestational diabetes, hypertension or potential damage to your reproductive organs. As with any



pregnancy, there is also the risk of a surrogacy miscarriage or preterm labor, with which comes emotional attachment and failure of it can lead to serious depression to some women.

## **VII. SUGGESTIONS & CONCLUSION**

Being a mother and bearing a child inside you is more than just that of pecuniary value. It is an emotional journey. But also there are instances where the pecuniary value turns out as a live or die necessity<sup>5</sup>. In this scenario it is actually a great way for women to make living for them and their families. The instances and cases proved why there was a need for a regulatory body for commercial surrogacy.

In India, commercial surrogacy, following legal agreements, following the commercial agreement are still a need for more efficacies. The provisions in the ART bill as mentioned above can prove as a threshold more and efficient commercial surrogacy. The delay in the bill seems to be a problem here. It has been a long time since the bill was introduced in the parliament. I hope believe when the bill is passed, the act proves why it needed so much time for consideration.

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<sup>5</sup> The Hindu. 2021. *They need the baby, she needs the money*. [online] Available at: <<https://www.thehindu.com/sunday-anchor/they-need-the-baby-she-needs-the-money/article6453307.ece>> [Accessed 8 August 2021].