

# Reproductive Tourism And Commercial Surrogacy In India: Legal And Ethical Aspects

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## Introduction

Infertility has become a rising problem all over the world and the advancement in the field of medical sciences and technology has led to the globalization of reproductive tourism. To deal with the problem of infertility, assisted reproductive techniques like surrogacy, in-vitro fertilization, egg and sperm donation, etc. has become quite prevalent throughout the world. Reproductive tourism refers to travelling by infertile couples from their country of residence to another to receive fertility treatments or avail assisted reproduction technology services to conceive and reproduce.

Surrogacy is defined as “a practice whereby one woman bears and gives birth to a child for an intending couple with an intention of handing over such child to the intending couple after the birth”<sup>1</sup> Surrogacy can either be for commercial<sup>2</sup> or altruistic<sup>3</sup> purposes. When a woman gestates a child and after birth delivers it to the genetic parents without any remuneration paid to her it is altruistic surrogacy. But when a woman goes through this arrangement for financial gain it amounts to commercial surrogacy. Laws in various countries prohibit the practice of commercial surrogacy, egg donation, payment to donors etc. and in some countries assisted reproduction is highly regulated<sup>4</sup>. Due to these reasons infertile couples, same sex couples, chose to travel to different countries to receive medical treatments.

India has become a hub for transnational commercial surrogacy and is also known as the ‘surrogacy capital of the world’ due to factors such as cost effective medical facilities, availability of Indian women as surrogates, well-equipped fertility clinics, lack of laws to regulate commercial surrogacy etc. India is one of the most preferred fertility

tourism destinations of the world and has attracted infertile couples from all corners of the world thus generating huge revenue for the country. The medical tourism industry in India gained momentum after 2003, when the then finance minister Jaswant Singh called for the country to become a ‘global health destination’ and urged measures, such as improvements in airport infrastructure, to smooth the arrival and departure of medical tourists.<sup>5</sup> The External Affairs Ministry of India agreed to streamline medical tourism by fast-tracking the entry of medical patients on arrival to the country. In this regard, a new category of medical visa was introduced and allowed patients and family members to stay in the country for twelve months instead of the normal six months under a tourist visa.<sup>6</sup> A United Nations backed study in July 2012 estimated the surrogacy business at more than \$400 million per year, with over 3,000 fertility clinics across the country.<sup>7</sup>

## Legal, Ethical and Social issues

An infertile couple unable to procreate due to medical or physical reasons can become parents through surrogacy. Similarly, a poor surrogate who is financially vulnerable gets paid well for her services with which she can provide food, education and a better life to her family. Surrogacy can benefit both the intended parents and the surrogates but also raises a horde of ethical and legal issues.

Some women enter into a surrogacy contract out of coercion by her husband<sup>8</sup> and in-laws for money. The brokers and middlemen can easily lure the impoverished, illiterate women to use their bodies or rent their wombs as paid labor, due to their desperate need for money. A woman has a natural ability to procreate but the concept of surrogacy has altered such biological function of a woman’s body into a commercial contract<sup>9</sup>. Ethically it is not considered right to pay women to act as surrogates as it is a form of commodification of the human body or reproductive ability of a woman because women are exploited and are turned into baby producers. Commercial surrogacy also amounts to commodification of the child and in a surrogacy agreement the “baby like any other commodity does not belong to the producer but to the purchaser”<sup>10</sup> as the child is produced for the purpose of being sold and transferred to the commissioning couple.<sup>11</sup> If commercial surrogacy keeps growing, some fear it would change from a medical necessity for infertile women to a convenience for the rich.<sup>12</sup> Surrogacy has also been called ‘reproductive trafficking’ because it creates a national and

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international traffic in women in which women becomes moveable property, objects of reproductive exchange, and brokered by go-betweens mainly serving the buyer.<sup>13</sup>

Article 21 of the *Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine* states that “the human body and its parts shall not, as such, give rise to financial gain” but the practice of commercial surrogacy completely violates this provision. Surrogacy has redefined reproduction and motherhood and it has changed the bond a mother and a child shares. In surrogacy the question arises as to who the real mother is, since the baby technically has three mothers: the intended mother, egg donor and the surrogate. In India the surrogates are housed in hostels for nine months with limited contact with their family and are monitored throughout their pregnancy. Their diet and activities are closely controlled and they relinquish the ability to make decisions related to their pregnancy. The surrogates have to live a disciplined life and have to give up the baby after delivery.<sup>14</sup>

In the absence of any clear law, issues like nationality, citizenship, rights of child, parentage, custody disputes etc., arises in case of transnational commercial surrogacy. In India, the Registry of Births and Deaths issue birth certificates to the children after birth but the question as to whose name should be listed as parents raises serious concern. The IMCR Guidelines provided that birth certificate would be issued in the name of the genetic parents whereas some ART practitioners indicated that the names of the commissioning parents should be placed on the Indian birth certificates.<sup>15</sup> However, the Gujarat High Court in Jan Balaz case directed the twin’s birth certificate be changed to reflect the name of the surrogate as the mother of the child and remove the intended mothers name. Children who are born via surrogacy in foreign countries often face immigration issues<sup>16</sup> or the parents are unable to take the child out of the country where they were born<sup>17</sup> and legal parentage issues after arriving to the country of the commissioned parents. In the Israeli gay couple’s case the parents had to undergo DNA testing to establish parentage.<sup>18</sup> The problem of custody of children arises when the intended parents divorce or die. In situations where the surrogate child has been born with some medical problems or disability the intended parents refuse to take the child<sup>19</sup> and also raises problems for the child if the intended parents do not come to take custody after

the child’s birth in transnational surrogacy. In some cases the child who is not genetically related to the intended parents, are disowned and the child ends up living in an orphanage or abandoned by the parents because of the gender of the child.<sup>20</sup>

Health risks are also involved in surrogacy as a surrogate mother may die during childbirth, have a miscarriage or abortion. Surrogates do not get paid if they fail to get pregnant, if they miscarry they may not receive the entire amount as promised neither will she be paid for the medical expenses incurred. In the absence of legislation the rights of the child and the surrogate mother are not secure if any complications arise.

#### **Legal framework on Surrogacy in India**

Commercial surrogacy is legal in India since 2002 but in the absence of legislation there has been an unprecedented and unregulated growth of ART clinics and hospitals. In India, the Indian Contract Act, 1872, governs the surrogacy agreements between the parties. To regulate ART and surrogacy the Ministry of Health and Family Welfare, after several years of discussion with Indian Council of Medical Research in collaboration with National Academy of Medical Science, ART practitioners, introduced and implemented the *National Guidelines for Accreditation, Supervision and Regulation of Assisted Reproductive Technologies (ART) Clinics in India* in 2005. The guidelines pertaining to surrogacy provides that a child born through surrogacy must be adopted by the genetic or biological parents unless they can establish through genetic (DNA) fingerprinting that the child is theirs. It also stipulates that surrogacy by assisted conception should normally be considered only for patients whom it would be physically or medically impossible/undesirable to carry a baby to term. It further states that, payments to surrogate mothers could cover all genuine expenses associated with the pregnancy. Documentary evidence of the financial arrangement for surrogacy must be available and the ART centre should not be involved in the monetary aspect. Advertisements regarding surrogacy should not be made by the ART clinic and the responsibility of finding a surrogate mother, through advertisement or otherwise should rest with the couple, or a semen bank. The ICMR guidelines specify that a surrogate mother should not be more than 45 years of age and before accepting a woman as a possible surrogate for a particular couple’s child, the ART clinic must ensure and put on record that the woman satisfies all the testable criteria to go through a successful full-term

pregnancy. A relative, a known person, as well as a person unknown to the couple may act as a surrogate mother for the couple. It also states that a prospective surrogate mother should be tested for HIV and shown to be seronegative for this virus just before the embryo transfer. She must also provide a written certificate that the (a) she had not had a drug intravenously administered into her body through a shared syringe (b) she has not undergone blood transfusion; and (c) she and her husband has had no extra marital relationship in the last six months. The prospective mother must also declare that she will not use drugs intravenously, and not undergo blood transfusion excepting of blood obtained through a certified blood bank. Finally, a woman cannot act as a surrogate more than thrice in her lifetime.

The Law Commission in its 228<sup>th</sup> Report on “*Need for Legislation to Regulate Assisted Reproductive Technology Clinics as well as rights and Obligations of Parties to a Surrogacy*” submitted in 2009<sup>21</sup> made certain recommendations concerning surrogacy.

The Ministry of Health and Family Welfare drafted and released the Assisted Reproductive Technology (Regulation) Bill in 2008 to regulate and monitor cases of surrogacy in India. This Bill was replaced by the Assisted Reproductive Technologies (Regulation) Bill, 2010, 2014 and was further revised and introduced as the Surrogacy (Regulation) Bill of 2016. This Bill of 2016 makes an attempt to bring a legal framework to regulate surrogacy in India. The highlights of the Bill are as follows:

- i. The bill prohibits commercial surrogacy. A woman cannot be paid money for surrogacy, although money can be paid for her treatment and insurance policy.
- ii. Altruistic surrogacy is permitted and can be opted only by Indian couples who have been married for atleast five years, provided either the husband or wife suffer from fertility related issues.
- iii. A woman who is a close relative of the intended parents, between the age of 25-35 years can act as a surrogate mother only once in her lifetime.
- iv. The intending parents cannot abandon a child born out of surrogacy procedure if the child suffers from any birth defect, genetic defect or medical condition, sex of the child or conception of more than one child etc.
- v. The Bill provides for the establishment of National, State and Union Territory Surrogacy Boards and sets out the constitution, functions, qualification and disqualification of the member of such Boards.
- vi. The draft Bill states the procedure for registrations and accreditation of surrogacy clinics.

vii. The Bill sets out the punishment for contravening the provisions of the Act. Any person initiating commercial surrogacy shall be punishable with imprisonment for a term which shall not be less than five years and with fine which may extend to five lakh rupees for the first offence and for any subsequent offence with imprisonment which may extend to ten years and with fine which may extend to ten lakh rupees.

viii. The Bill provides that the surrogacy clinic shall maintain and preserve all records, charts, forms, reports, consent letters agreements and all documents for a period of twenty five years.

ix. The child born through surrogacy will have the same rights as are available for the biological child.

The Bill is pending before the Government and is yet to be placed before the Parliament.

#### **Judicial Approach on Commercial Surrogacy in India**

In the absence of a statutory law to regulate commercial surrogacy in India the courts have tried to resolve issues in cases filed before it and has directed time and again to enact legislation for proper regulation of the surrogacy industry in India.<sup>22</sup>

In *Baby Manji Yamada v Union of India & anr*,<sup>23</sup> a Japanese couple Yuki Yamada and Ikufumi Yamada entered into a contract with a surrogate in Anand district of Gujarat using the sperm of Mr. Yamada and egg from an anonymous Indian donor. Baby Manji was born on 25 July, 2008. A month before the birth of the baby the commissioning parents divorced. For the issuance of a birth certificate the question arose as to who should be named the mother since Manji technically had three mothers. Eventually the Municipality of Anand, issued a provisional birth certificate indicating only the father’s name on it. In order to take the baby to Japan the baby had to be adopted and an Indian passport had to be obtained. Several legal and diplomatic complications were raised and Yamada encountered difficulties in obtaining documents from the Indian Government and obtaining a visa from the Japanese government. Due to the bomb blasts in Gujarat, the baby had to be shifted to Jaipur under the care of her paternal grandmother. In Jaipur, ‘Satya’ a non governmental organization filed a petition in Rajasthan alleging that the legitimacy of the baby cannot be claimed by anyone and that clinic engaged in the illegal trade in infants and selling them to foreigners. The Rajasthan High Court issued notices to the Home Ministry and Department of Home of the State Government

to produce the baby within four weeks. Thereafter, the grandmother filed a petition before the Supreme Court under Article 32 of the Constitution of India. The court granted temporary custody to the grandmother. The Court referred the matter to the National Commission for Protection of Child Rights. A certificate of Identity was issued by the Regional Passport Authority of Rajasthan to baby Manji instead of a passport allowing her to leave India, and the Japanese embassy issued a one-year visa on humanitarian grounds and finally she returned to Japan with her grandmother.

In *Jan Balaz v Union of India*<sup>24</sup>, a German couple entered into a contract with a surrogate in India. The intending mother was unable to conceive a child naturally, therefore eggs from an Indian donor was fertilized with the sperms of the genetic father and was implanted in the uterus of the surrogate. Twins Leonard and Nikolas were born but they were stateless as the German Government refused to grant citizenship<sup>25</sup> on the ground that the state law did not recognize surrogacy as a means of parenthood. The Regional Passport Authority in India refused to grant passport and wouldn't allow the parents to take the twins as Indian citizens.<sup>26</sup> Jan Balaz moved the High Court of Gujarat seeking Indian citizenship and the Court held that since the surrogate mother is an Indian national, and the child was born in India, the children is entitled to an Indian passport. The Union Government challenged this verdict of the High Court in the Supreme Court. This ended up in a two year long legal battle and finally the Supreme Court granted exit permit to the children to leave India and the German Government finally agreed to provide the necessary travel documents after Balaz and his wife went through the inter-country adoption process supervised by the Central Adoption Resources Agency.<sup>27</sup> The Supreme Court hoped that Parliament would make appropriate laws to clarify the country's legal position regarding the citizenship rights of a surrogate child born to an Indian surrogate commissioned by foreign parents.<sup>28</sup>

Both the cases discussed above grabbed huge media attention all around the world. Several questions were raised including citizenship and nationality, which has still been left undecided, but the courts echoed concern about the absence of legislation.

### Conclusion

In the Baby Manji and Jan Balaz cases the Court cited the urgent need for legislation to regulate commercial surrogacy in India

and though the Surrogacy (Regulation) Bill has been drafted and revised from time to time it is yet to be passed by the Parliament. With the mushrooming growth of ART clinics in India it has become essential to regulate and supervise the operation of such clinics. In the absence of a legal framework, surrogates can be easily exploited and foreign couples misled by agents and middlemen. As provided under the proposed law, instead of putting a complete ban on surrogacy the government should heavily regulate it as it may not put an end to the baby trade, but will start up a black market and infertility clinics will jump through legal loopholes by moving surrogate mothers across borders exposing them to greater risks leaving them more vulnerable than before.<sup>29</sup> Since altruistic surrogacy is to be allowed where a relative of the intended parents can act as a surrogate, chances are that a woman who may not be willing to act as surrogate may be coerced to do so against her will. Therefore the Government should enact a stringent legislation, which regulates the ART industry, protects procreative rights of the infertile couple, protect legal rights, health and welfare of surrogate mothers and children.

### References

- 1 Section 2(zb). The Surrogacy (Regulation) Bill, 2016.
- 2 Section 2(f) *ibid*. Commercial surrogacy means commercialization of surrogacy services or procedures or its component services or component procedures including selling or buying of human embryo or trading in the sale or purchase of human embryo or gametes or selling or buying or trading the services of surrogate motherhood by way of giving payment, reward, benefit, fees, remuneration or monetary incentive in cash or kind, to the surrogate mother or her dependents or her representative, except the medical expenses incurred on the surrogate mother and the insurance coverage for the surrogate mother.
- 4 Countries such as France, Germany, Spain Norway, New Zealand, Switzerland, Italy, Greece, etc., forbid commercial surrogacy.
- 5 Rupa Chinai & Rahul Goswami, *Medical Visas Mark Growth of Indian Medical Tourism*, 85 BULL. OF WORLD HEALTH ORG.161 (2007), <http://www.who.int/bulletin/volumes/85/3/07-010307/en/index.html>.
- 6 Shree Mulay & Emily Gibson, *Marketing of Assisted Human Reproduction and the Indian State*, 49 DEVELOPMENT, (2006), 84-93.
- 7 Nita Bhalla and Mansi Thapiyal, *India Seeks to Regulate its Booming Surrogacy Industry*, REUTERS, Sept 30, 2013

- 8 Centre for Social Research, *Surrogate Mother: Ethical or Commercial*, 39. An empirical study conducted by Centre for Social Research shows that husbands emotionally pressurize wives to act as surrogates in order to buy a house, pay debts, set up a garage or start a business.
- 9 Gena Corea “*The Mother Machine: Reproductive Technologies from Artificial Insemination to Artificial Wombs*”, New York: HARPER & ROW, 1985
- 10 B.K ROTHAM, *EMBRYO, ETHICS AND WOMEN’S RIGHTS: EXPLORING THE NEW REPRODUCTIVE TECHNOLOGIES*, 99 (E. Hoffman Baruch ed. Lond on: Harrington Park Press 1998)
- 11 Bryns Williams-Jones, *Commercial Surrogacy and the Redefinition of Motherhood*, 2 THE JOURNAL OF PHILOSOPHY, SCIENCE AND LAW (2002).
- 12 *Outsourced Pregnancies Boom in India*, THE ASSOCIATED PRESS, Dec 30, 2007
- 13 Janice J Raymond, *Reproduction, Population, Technology and Rights*, 2 WOMEN IN ACTION (1998) <http://www.isiswomen.org/wia/wia298/rep00001.html>
- 14 Pande, Amrita. (2010) *Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker*, 35 JOURNAL OF WOMEN IN CULTURE AND SOCIETY.
- 15 Usha Rengachary Smerdon, *Crossing Bodies, Crossing Borders: International Surrogacy between The United States and India*, 39 Cumberland Law Review, (2009)
- 16 Sarah Pook, *Twins Born to Their Granny Win Entry to UK*, DAILY TELEGRAPH, JULY 27, 2004. Twins were born using the gametes of the commissioning parents who were residents of UK, and the surrogate mother was their grandmother. British High Commissioner denied passports to the twins as the twins were born in India by an Indian surrogate. This led to a long legal battle after which the couple was able to secure the twins entry into the country on a fixed term entry for one year.
- 17 Times of India, Aug 15, 2008. An Indian couple was detained at the Mumbai Airport when they tried to take a 16-month-old child to Canada. The details in the passport were considered to be false since the commissioning parents names were given instead of the child’s biological mother.
- 18 Indian Express, *Israeli Gay Couple to Take Surrogate Twins Home* “May 28, 2010.
- 19 In 2015, baby Gammy was born to an Australian couple David and Wendy Farrell, using a surrogate from Thailand. Since the baby was

- diagnosed with Down’s syndrome, the parents refused to take the baby, while the healthy twin sister was readily accepted.
- 20 Australian Couple Abandons Surrogate Baby in India, Times of India, Oct 9, 2014. The couple abandoned one of the children born to a surrogate mother because of the baby’s gender since the couple already had one child and only wanted one of the babies.
- 21 [lawcommissionofindia.nic.in](http://lawcommissionofindia.nic.in)
- 22 *The Supreme Court Asks The Centre to Bring Commercial Surrogacy Within The Ambit of Law*, The Indian Express, Oct15, 2015.
- 23 (2008) 13 SCC 518
- 24 (2010)AIR 21, SLP (Civil) No. 31639/2009.
- 25 *Surrogate Children Have No Right to German Passport: Court Rules*, The Local April 28, 2010. The Court in Berlin ruled that the German Embassy in India was within its rights to refuse a passport to the child and that a child born to a surrogate mother in India has no right to a German passport despite having a German biological father.
- 26 Times of India. *Born in India, No Where to Belong*, 18December 2009.
- 27 Dhananjay Mahapatra, *German Surrogate Twins To Go Home*, The Times of India, May 27, 2010.
- 28 *Surrogate German Twins Get Visa*, The Hindustan Times, May 26, 2010.
- 29 Sharmila Rudrappa, *India Outlawed Commercial Surrogacy: Clinics Are Finding Loopholes*, 24 Oct, 2017, The author highlights about the effect of ban on commercial surrogacy citing examples of a few countries. When India banned surrogacy for gay couples in 2012, the infertility clinics continued to sign on gay clients all over the world. Clients shipped their frozen sperms to Delhi, which was used to fertilize eggs from Indian donors. To avoid the ban the clinics moved the surrogate mothers across international borders into Nepal where the babies were delivered and clients arrived to pick up their children. A similar effect of commercial ban was witnessed in Cambodia, where surrogate mothers were transferred either to Laos or Bangkok.

