



THE ETHICAL AND LEGAL IMPLICATIONS OF COMMERCIAL SURROGACY

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ABSTRACT

Surrogacy is the process where a woman carries and delivers a baby to couple or other persons, who are known as intended parent. When a woman who carries a baby is paid for surrogacy, it is called as commercial surrogacy.

There is distinction between when can be made as an object of commerce, what must remain in the domain of gift and what ought not to be transferred at all.

Commercial surrogacy raises many ethical considerations; Ethical implications of commercial surrogacy involve a complex interplay of individual autonomy, reproductive rights, economic disparities and the need to protect the interest and well being of all parties involved. These considerations can vary significantly depending on the legal and cultural context in which surrogacy takes place.

Legal implications of commercial surrogacy depend on country and jurisdiction involved because it differs on each country. It is crucial for anyone considering commercial surrogacy to understand the legal landscape in their specific jurisdiction as well as any international legal consideration if they are pursuing surrogacy across borders.

In this article we can learn the ethical and legal implications of commercial surrogacy, its effect on India, its pros and cons, some incidents that took places, about its future and the conclusion about commercial surrogacy.

1. INTRODUCTION:

Surrogacy is a Latin term *surrogare* which means “to substitute”¹ so when a married couple not able to get pregnant by themselves then they made a arrangement, where a another woman carries and gives birth to a baby for intended couple which means the intended parents substitute other women to carries and gives birth to the baby for them.

The surrogacy is of two types on the basis of nature of fertility:

1 Traditional surrogacy

2 Gestational surrogacy

Traditional surrogacy:

Traditional surrogacy means when a women is being infertile she is not able to carries or use her egg to gives birth to the baby then the women who is related to the intended mother by family use her egg to carries and gives birth to the baby for the intended couple . In this method the surrogate shares DNA with the baby so she has a genetic connection with the baby.

Gestational surrogacy:

Gestational surrogacy is a process where one person not able to carries a fetus through pregnancy then the process where sperm is taken from the intended father and the egg is taken from the intended mother and which was grown outside in the embryo through IVF method and the embryo was transferred to the surrogate mother. The surrogate mother gives birth to the child for the intended couple but does not shares DNA with the baby so there is no any biological connection with the baby.

¹ National Institutes of Health: [<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6262674/>]

The surrogacy is of different types, the difference is based on the monetary compensation if the money or compensation package is paid to the surrogate is called commercial surrogacy. If the surrogate does not receive any monetary compensation other than her medical expenses along with insurance coverage is called altruistic surrogacy².

2. HISTORICAL BACKGROUND:

In the biblical time, the traditional surrogacy arrangement was made between Abraham, Sarah and servant when Abraham and Sarah are not able to give birth to a baby they made an arrangement with her servant to be a surrogate this was evident in the book of Genesis³.

In Hindu mythology Mahabharata 500 years ago Kunti conceived five children without sexual activity it shows that there is some method through which a woman can conceive⁴. Another incident in Mahabharata was when Vichitravijaya dies. His mother invites the sage Vyas to produce a child with his widowed daughter-in-law as a result of which Dhritrashtra and Pandu were born thus the legal father of the baby produced by Vyas is Vichitravijaya even though Vyas is the biological father of that baby. It shows that the donor is not allowed to give his name to the offspring conceived from his donated sperm⁵.

The man who could not produce a child from his wife, he was given benefit and allowed to marry again and again, if despite this he failed to father a child, if he is impotent or confirmed his sterility. The scriptures suggest that another man in the same lineage be invited to cohabit with the wives with the permission of the husband this practice is known as niyoga. It was mentioned in Vedas in simple niyoga pratha means that the married woman or widowed who is childless was sent to have sexual intercourse with the person other

² Surrogate.com: <https://surrogate.com/>

³ Worldwide Surrogacy Specialists: <https://www.worldwidesurrogacy.org/blog/the-history-of-surrogacy>

⁴ Times Of India: <https://timesofindia.indiatimes.com/nri/citizen-journalists/citizen-journalists-reports/nitin-mehta/house-of-surrogates/articleshow/23980241.cms>

⁵ Fertility Plus: <https://www.fertilityplus.org.uk/religious-attitudes-to-fertility-a-hindu-view/>

than her husband to beget a child the above stated example of vichitraviya was a practice of this custom⁶.

Balarama, the elder brother of Srikrishna was one of the ten incarnations of Vishnu as stated by Bhagabat and other Puranas. His father was Vasudeva of Yadu clan but he had two mothers Devaki and Rohini. Maharaja Kamsa, the king of Mathura killed all the six issues of his sister Devaki as one of her sons was to kill him according to some forecast. So Goddess Yogamaya had made some miracle for her seventh issue, while Devaki was pregnant. Yogamaya extracted the foetus from the uterus of Devaki while she was eight months pregnant and placed it inside the uterus of Rohini. Rohini at that time hide herself in Nanda's house at Gopa for the fear of demon Kamsa. It is said in Bhagabat that

'Devakya Jathare Garbham Shesakhyam

Dham Mamakam,

Tata Sanni Krushya Rohinya Udare

Sanniveshaya'

- Bhagavat [10-3-(8-10)]⁷

3. ETHICAL VIEW OF COMMERCIAL SURROGACY:

Though modern world is developing on the other hand new issues like living together, LGBTQ etc arising in recent days which affect the ethical and moral values of the country. Surrogacy is one among the issues. There are various ethical issues evolving around the commercial surrogacy which are as given below.

⁶ Hinduismfacts.org: <https://www.hinduismfacts.org/niyoga/>

⁷ Odisha: <https://magazines.odisha.gov.in/Orissareview/2010/July/engpdf/87-90.pdf>

*According to Hindu mythology and scriptures when mother gets pregnant, the baby in the mother's womb is get connected with the mother. In Mahabharata when Abimanyu was in his mother's womb, Arjuna describes how to enter into a chakravyugha which was learned by Abimanyu while he was in mother's womb. Also Sukdevgoswami heard whole of Srimadh Bhagavat gita in mother's womb and narrate the same to the Parikshit Maharaj. So the time period of nine months of a child in mother's womb is very important. But the process of surrogacy affects this completely⁸.

*India is the country where the system of family is followed and the process of surrogacy completely affects the family system where the child who is born to surrogate mother may not attach to family as the normal child.

*Motherhood is a precious gift from the god to women which is attached naturally to every women and it is important for every women in her natural biological process. Now in the name of rights and freedom this natural process of motherhood is being affected. Surrogacy leads to commercial marketing of women to surrogate child which is highly dangerous to a moral society.

*Surrogacy involves literal labour but many see it as distinct from labour. This leads to an ethical question of whether surrogacy is different from other kinds of paid work. And paying a surrogate mother raises a moral question.

*India has emerged as a surrogacy hub for married couple from different countries due to the cheaper rate of surrogacy. Due to poverty in India, poor women in India are used as cheaper surrogate mother, it turns the female body into a commodity for hire and automatically here rises a moral question⁹.

⁸ Times Of India: <https://timesofindia.indiatimes.com/nri/citizen-journalists/citizen-journalists-reports/nitin-mehta/house-of-surrogates/articleshow/23980241.cms>

⁹ The Economic Times: <https://economictimes.indiatimes.com/news/politics-and-nation/govt-introduces-bill-to-ban-commercial-surrogacy/articleshow/70227304.cms>

*Many couples preferred “chubby” over “skinny” women. Surrogate mothers are made to stand in a line in front of these couples where they choose who they wanted and beautiful, fair skinned woman was preferred which here says that surrogacy has completely turned into a commercial markets where a child is treated as a quality product and mothers as machines. Also if a surrogate mother do this for money she may not look after her body properly which may affect the child in whole lifetime. Many surrogate mothers are even died due to various health issues due to surrogacy¹⁰.

4. LEGAL IMPLICATIONS OF SURROGACY:

One of the legal issues of surrogacy is there is no existence of law that governs or regulate surrogacy related issues. The absence of legislation gives a space to exploitation of women who choose to become a surrogates, often due to abject poverty

In the year 2002 India recognized commercial surrogacy and legalizing it which lead many infertile foreign couple comes to India in search of surrogate women it ultimately results in exploitation of woman health very badly the reason behind the surrogate mother is poverty so in 2005 Indian Council of Medical Research [ICMR] which point out certain guidelines for attribution, direction and regulation of ART clinics in India but it was not followed¹¹.

In 2010 the ART Regulation Bill introduced however it does not enacted as law. The surrogacy (Regulation) Bill was introduced in 2016 which was aimed to prohibit commercial surrogacy. The latest surrogacy bill was passed in Lok Sabha in the year 2019 according to that bill commercial surrogacy is prohibited; the main aim to ban the commercial surrogacy is to prevent the women from exploitation, child trafficking, illegal trade of human embryos.

¹⁰ The India Forum: <https://www.theindiaforum.in/article/surrogacy-biomarkets-india-troubling-stories-2021-act>:

¹¹ MyAdvo.in: <https://www.myadvo.in/blog/surrogacy-laws-in-india-an-evaluation/>

Legal provisions related to surrogacy in India:

1 The Surrogacy Regulation Act, 2022

2 Surrogacy Regulation Rules, 2022

IMPORTANT JUDGEMENTS:

1. **Jan Balaz v. Anand Municipality [2009 SCC OnLine Guj 10446]:** This is a landmark case in Indian surrogacy law. In 2008, the Petitioner, a German national, entered into a surrogacy agreement with an Indian woman to have a child. The child was born in Gujarat, India, and the Petitioner obtained a birth certificate for the child. However, when the Petitioner tried to leave India with the child, he was prevented from doing so by the authorities. The Petitioner filed a petition in the Gujarat High Court seeking permission to leave India with the child. The Court initially denied the petition, citing concerns about the child's welfare and the legality of commercial surrogacy in India. However, the court ultimately granted permission to the Petitioner to leave with the child, subject to certain conditions. The case brought attention to the issue of commercial surrogacy in India and the need for clearer laws and regulations around surrogacy agreements. It also highlighted the need to ensure the protection and welfare of children born through surrogacy arrangements¹².

Baby Manji Yamada v. Union of India [(2008) 13 SCC 518]: The relevance of this case lies in it being not only the first decision relating to surrogacy made by the Supreme Court of India but also in bringing to light the absence of regulation of the existing surrogacy industry in India. In the year 2008, a surrogacy case came forward named as 'The Baby Manji case' in which a baby named Manji was born through surrogacy to a Japanese couple. The couple got separated before the birth of the child. The father was

¹² KHURANA & KHURANA: <https://www.khuranaandkhurana.com/2023/06/16/legality-of-surrogacy-in-india-everything-you-need-to-know/#:~:text=Commercial%20surrogacy%2C%20where%20people%20pay,also%20increased%20because%20of%20surrogacy.>

barred from taking custody of the child as Indian Law bars single men from taking custody of a girl child and the Japanese law did not recognize surrogacy.

Subsequently, a Habeas Corpus Writ Petition was filed before the High Court of Rajasthan challenging the legality of surrogacy and criticising it as feeding an illegal industry in India and stressed the need for the enactment of a law.

The baby got a visa but the case underscored the need for a framework to regulate surrogacy in India. Therefore the above case can be said to be the genesis of the **Assisted Reproductive Techniques (Regulation) Bill, 2014**¹³.

5. CONCLUSION:

As we see in detail in about surrogacy in this article, it is important for us to understand that whether surrogacy is necessary for our country. Usually if we look that term in a legal aspect, it may be look like that it is a right of an individual to decide .A women can decide whether she could give birth to her child or not. It is an individual right and it is fair enough to say that gaining baby by surrogacy process is not illegal. However there is no law relating to surrogacy since it is the recent issue arising in the country and the world due to technological developments and modern developments in a legal point of view it is important to bring out laws relating to surrogacy. But it is important to understand that every issue should not be viewed in legal view alone, it is necessary to view in moral and ethical aspects also. We all know that many rights have some restrictions in our legal system even though it is legal in other countries. Likewise freedom regarding to surrogacy should also be restricted.

Making surrogacy legal may lead to complete destruction of our culture and way of living. India is the only country where the system of family is followed and surrogacy may affect that too. Also it is to be understood that

¹³ Manupatra: <https://docs.manupatra.in/newsline/articles/Upload/B2DC0190-6995-4560-A6E0-6B65B4895120.pdf>

Motherhood is a privilege to have and it should not be turned into a business or industry by the modern development. Also it is to be noted that a child will have special attachment to a woman who gave birth to the child. Also due to poverty in India, if commercial surrogacy is legalized many other country couples may approach here and it will lead to a business market which is not good for a nation. Surrogacy can also affect the health of a woman and child. So it is important to understand that the human natural processes should not be changed.

It is important to bring out strict restrictions and regulations to surrogacy and it should be allowed only when a couple can't give birth to a child due to impotency. Only in rare cases, death sentences are declared, likewise surrogacy is allowed only in the cases where the couples not able to produce a child by themselves.

