

Commercial Surrogacy: Is Prohibition an Answer to the “Market of Life” in India



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Abstract

The paper examines the commercial gestational surrogacy market which exists in India. Commercial surrogacy is a result of technological development which facilitated sale and purchase of gametes and renting of wombs. It discusses how absence of law and existence of mere guidelines resulted in widespread of this industry. Since there were only ICMR guidelines to regulate this business which lacked legal sanctity the IVF clinics and hospitals resorted to unethical practices. There were many steps taken by state to regulate and control the surrogacy business at different points in history. In 2019 it has resulted in steps for formulation of law which completely bans this industry. In this paper argues that making a law which completely prohibits commercial gestational surrogacy and permits altruistic surrogacy is not a solution to uproot a deeply penetrated market in India. As making commercial surrogacy illegal will only make this industry go underground and will result in exploitation of both the surrogate mothers and the intended parents because none of the parties won't be able to ask for justice as it would be done secretly as it will be illegal if this bill is passed. In an interview conducted with the person running a surrogate home in Delhi it was clearly stated by him that making commercial surrogacy illegal will only make this industry more dangerous as people have alternatives.

Keywords: Gestational Surrogacy, IVF, Reproductive Labor, Intended Parents, Surrogate Homes, Surrogate Agents, Surrogate Mothers.

Introduction

Indian gestational surrogacy market is widespread across the country and deeply penetrated with proper networking among its stakeholders. The first case of gestational surrogacy happened in India in 1978 which was second test tube baby of the world, after few days when the world witnessed the first test tube baby with the efforts of Patrick Steptoe in England in 1978.

It was through the efforts of Dr. Subhash Mukherjee that after 67 days the second test tube baby was born in the world and the first in India. ICMR did not recognize his efforts and Dr. Mukherjee had to face lot of humiliation and he committed suicide and it was in 2002 the second test tube baby was born which was scientifically documented by ICMR and since then gestational surrogacy prevailed in India and attained a commercial character to it.

Here it has been briefly illustrated how commercial surrogacy materializes. When a couple is unable to procreate and a woman is unable to conceive a child due to various reasons the reproduction is assisted with the help of assisted reproductive technologies and *in-vitro fertilization* (IVF). Gestational surrogacy is offered as a last option for the couples who want a biological child. There are instances where eggs of intended mother can be utilized and the sperm of the intended father can't be used, then the eggs or sperms from the egg donors or sperm donors are utilized and the embryo is formed in a dish called a petri dish and the embryo is implanted in the uterus of the surrogate mother. The surrogate mother carries the child for nine months in her womb and relinquishes the infant on birth and receives compensation in lieu of her reproductive services for the stipulated period. This industry is completely facilitated by technology and medicine. Commercial surrogacy spread all across India and some cities like Gujarat, Mumbai, Bangalore, and Delhi became major hubs of surrogacy due to the accessibility and services provided to the customers. The liberal ICMR guidelines, docile labor and world class facilities at a relatively cheap rate compared to their home countries lured foreign couples to India. The

marketing of this industry was only possible through media and with the help of internet through which a person sitting in one corner of the world could communicate and describe the kind of surrogate mother she will wish to have for her child. This resulted in India becoming an international destination of commercial surrogacy. Transnational surrogacy was banned in India in 2015 on the grounds of being exploitative and it was alleged this trade at international level was similar to trafficking of human beings and in the background there was also turmoil in this trade at international level due to Baby Manji case where the baby was stranded in India. In such a context a need for banning transnational surrogacy emerged in India. Eventually commercial surrogacy for international couple was banned in India. The next section examines the efforts of the state to frame a law for commercial surrogacy which went through different phases.

Is Prohibition an answer to the Commercial Surrogacy Market in India?

In the absence of stringent law the gestational surrogacy market became uncontrollable as there were mere "National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India, 2005" which were issued by Indian Council for Medical Research (ICMR). These guidelines were openly flouted by the IVF clinics in the country as it did not have any legal sanctions behind. There were many steps taken by the different governments from leaving the market free to regulating the market and placing a complete ban on commercial surrogacy and shifting towards altruistic surrogacy.

The framework used by Kotiswaran (2018) to describe the legal steps taken by the Indian state in a formulation of law for commercial surrogacy has been borrowed. He describes by categorizing them into three phases- "medico-liberal phase from the late 1990s up to 2008; a highly contested phase between 2008 and 2012 and a contracting and normative phase between 2012 and 2017"¹ and here an addition of fourth phase which is the contemporary phase which is a prohibitionist phase from 2017 till now by the researcher.

In the Medico-liberal phase (1990-2008) commercial surrogacy business flourished in India in a liberal and a free manner. A liberal legal environment, world class medical facilities at a relatively cheap cost for the entire surrogacy arrangement compared to the contractual surrogacy abroad this industry attracted transnational clients. Transnational surrogacy flourished in India as "reproductive tourism" and such tourism was encouraged by Indian state as well during this phase. In 2003 finance minister Jaswant Sinha called for making India a "global health destination" and the medical visas were valid for year and issued to companions as well.² This step was taken to encourage people from abroad to come to our country for medical purposes which would as result generate tourism as well. The primary motive behind such a step was to generate revenue which could be utilized for public health care facilities. Assisted reproductive Technologies (ART's) were

added in the list of medical tourism. It was in 1999 an expert committee was formed by ICMR to regulate commercial surrogacy in India. The efforts of this committee resulted in formulation 'National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India, 2005' were issued by Indian Council for Medical Research (ICMR). These guidelines were for different stakeholders involved in the surrogacy transaction which were IVF clinics, intended parents, surrogate mother and the gamete donors. It included not only guidelines for different stakeholders but also called for setting up for advisory boards and also enlisted consent and agreement forms which were supposed to be signed by the contracting parties.

These guidelines were first step towards regulating the newly perpetuating business in India and established standards for the IVF clinics. Since the 'National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India, 2005' lacked legal sanctity the clinics openly flouted these guidelines which were meant regulate and supervise ART clinics. A situations of turmoil had arisen in India in 2008 which was also known as Baby Manji case where the intended couple divorced and the intended mother was not ready to come along with the intended father to take the possession of the baby.

The second phase is the contested phase (2008-2012) as there were various developments which were witnessed during this phase. ICMR guidelines of 2005 were critically scrutinized and an urgent need was felt for formulation of a law to regulate surrogacy in India particularly the transnational surrogacy in India. In this context there was occurrence of an instance where a baby born to Japanese couple was stranded in India due to liberal nature of the ICMR guidelines which shook the Indian reproduction market.

Baby Manji Yamada Vs. Union of India & ANR. [2008] case, Dr. Yuki Yamada and Dr. Ikufumi Yamada who were a Japanese couple and had opted for gestational surrogacy in India at Dr Nayna Patel's clinic at Anand, Gujarat. The couple had opted for a donor egg and with help of intended father's gamete the embryo was implanted in the womb of an Indian woman. But before the baby was born they divorced in June 2008 and after a month the child was born on 25th July 2008. Dr. Ikufumi Yamada, the father of the child wanted the infant but Yuki Yamada did not wanted the child. When the contract was being made the couple had included the clause that the husband would take care of the child if the couple separated.³ Dr. Yuki Yamada didn't come to India along with her ex-husband so the father had to come alone to take baby Manji home. But before baby Manji could have gone a "day after her birth 17 explosions rocked Ahmedabad, killing 29 people and injuring 200"⁴. The baby was moved to a hospital in Jaipur for her safety.

Yamada after reaching India initiated the process to get a Japanese passport for baby Manji but was denied by the Japanese Embassy in India as the Japanese government or Civil Code does not recognize surrogacy. It only considers the birth mother as the mother of the child but baby Manji's

birth mother was of Indian origin which barred him from getting a Japanese passport.

As there were no laws relating to surrogacy the genetic parents had to adopt the children born through surrogacy but Yamada was stuck again as an Indian law, Guardians and Wards Act 1890 does not permit a single man to adopt a female girls from a different religion. Ifukumi Yamada along with her infant daughter baby Manji was stranded between the legal systems⁵ of two countries.

As a result baby Manji could only go to Japan on 27th October 2008 after a legal battle which was fought by her father to attain the possession of the child who was rendered stateless and even parentless for a while. This particular case highlighted the problems associated with transnational or cross border surrogacy arrangements and the how a little infant's identity and citizenship was in crisis due to difference in the legal system of the two countries.

This case created uneasiness in the surrogacy market and brought the attention of policy makers to formulate a law for commercial surrogacy in India to regulate this industry. As the ICMR guidelines due to its liberal nature were incompetent in doing so. Government took an immediate action "India's health minister, Abhumani Ramadoss, called for surrogacy legislation. A week later, the ICMR presented a draft bill of binding national regulations and invited public comments."⁶ This bill was titled as, 'The Assisted Reproductive Technology (Regulation) Bill 2008'.

The 2008 bill was the first attempt towards having a law in the country to regulate the surrogacy industry which was infiltrated by rampant exploitation and unethical practices. This bill was quite similar to the ICMR guidelines and a visible bent or tilt in favor of the IVF clinics and intended parents was quite visible and concerns of surrogate mothers were not addressed.

There many clauses in the bill that contradicts each other and the language used in the bill are vague and ambiguous. There is contradictory aspect in payment of monetary compensation as clause 26(6)⁷ of ART bill 2008 states the semen bank could advertise for surrogate mothers and gamete donors who would be given monetary compensation by the bank whereas clause 34(2) of the bill states the surrogate mothers can be financially compensated by the couple or the individual seeking her reproductive labour or services.

Baby Manji's case even resulted in submission of report no.228 by the Law Commission 2009⁸ which was titled as 'Need for Legislation to Regulate Assisted Reproductive Technology Clinics as Well As Rights and Obligations of Parties to A Surrogacy'. This report made commendations surrogacy arrangements should not be commercial in nature and should be on altruistic grounds. Surrogacy should not be prohibited irrationally. It also recommended that the birth certificate should have the names of the commissioning parents and there should be genetic link at least of one commissioning parent for the protection of the rights of the child and the surrogate mother.

The bill reiterated most of the guidelines of 2005 and with important additions like it introduced offences and consent form which were supposed to be signed by different stakeholders. The ART bill 2008 failed to become a law and was followed by the ART bill 2010. While the first the attempt for formulating a law in the country was not successful. It resulted in proposing of second bill, The Assisted Reproductive Technology (Regulation) Bill, 2010. The suggestions and feedbacks given on the first bill were accommodated (if not all, few of them) were accommodated while framing the ART (Regulation) Bill 2010. This bill addressed the mediating agents of this market which were not mentioned in 2008 bill and made "Use of individual brokers or paid intermediaries to obtain gamete donors or surrogates shall be an offence under this Act, punishable by imprisonment for a term which may extend to three years and fine which may be specified."⁹ To avoid occurrence of cases of stateless children (like baby Manji) it was proposed in the bill that foreigners and NRI's seeking surrogacy should ensure their home country recognized the children born through surrogacy arrangements. If the commissioning parents failed to take the baby then the local guardian was responsible to keep the child or put it for adoption within a period of one month.

The ART bill 2010 was followed by a regulation issued by Ministry of foreign Affairs which directed foreign nationals seeking surrogacy services in India.

The phase from 2012-2017 was a normative and contracting phase as described Kotiswaran and by 2012 surrogacy was deeply penetrated in India as the transactions were happening in a liberal manner as the bill of 2010 couldn't become a law. The new regulation of 2012, '*Foreign Nationals Intending to Visit India for Commissioning Surrogacy*' was a step taken by the government which closed the doors for individuals who wanted to be single parents and for the gay couples as well. The different clauses explicated in 2012 draft bill were followed by 2014 draft bill which reiterated almost everything which was mentioned in 2012 bill. LGBT were excluded from commissioning surrogacy arrangements and foreign couples were also kept out from commissioning surrogacy in India. It was only Overseas Citizen of India (OCIs), Non Residential Indians (NRI's), People of Indian Origin (PIOs) and foreigners married to Indian citizen could commission as surrogacy in India. There were several provisions added for protecting the rights of surrogate mothers which included an insurance policy for surrogate mothers for the pregnancy period and the expenses of the policy would be borne by the commissioning parents. Apart from married and within the age group of twenty three to maximum of thirty five years of age the woman who intend to become a surrogate mother should have a at least one live child (at least three years of age). This bill elucidates if at the time of delivery if surrogates mothers life is in danger, priority would be given to save the life of the surrogate mother and the surrogate mother should be paid the agreed amount

of monetary compensation whatever is the birth outcome.

The fourth phase is an addition to the phases which Kotiswaran had mapped out to analyze the developments in formulation of law in India for commercial surrogacy. This is a contemporary and a prohibitionist phase as steps in this phase are being taken to completely prohibit commercial surrogacy in India.

The Surrogacy Regulation Bill 2016 passed in Lok Sabha on 19th December 2018 but failed to become a law as the Loksabha was dissolved. After so many years surrogacy bill was passed in Jan 2019 and resulted in a law for surrogacy which completely bans commercial surrogacy in India.

The bill was again introduced again and passed by the cabinet in July 2019 and has also been introduced in the Loksabha on 15th July 2019 by Harsh Vardhan, Minister of Health and Family Welfare. This bill was passed in Lok Sabha on August 5, 2019. The Surrogacy Regulation Bill 2019 completely prohibits commercial surrogacy in India. It only allows altruistic surrogacy where a couple in need of surrogate mother can only opt for a woman as a surrogate mother from their families who would be a "close relative". The bill doesn't define close relative and hence leaving scope for unwarranted interpretation. The bill also debar widowed, divorced, unmarried couples and singles from commercial surrogacy and become parents. The bill entails that a man and woman who are married for minimum five years and proven to be infertile can opt for surrogacy.

The discussion of four phases in formulation of law for surrogacy enunciates how the Indian state moved from a free liberal approach to a totally prohibitionist approach towards commercial surrogacy. This prohibitionist approach is clearly visible in the present form (The Surrogacy Regulation Bill 2019) of the bill which has been passed by Loksabha. The central concern of this paper is a complete prohibition of commercial surrogacy in India is a remedy for the unethical and exploitative practices followed in this business. Since this industry has been functioning in an unregulated manner since its inception and have deeply penetrated in India it will be difficult to uproot it.

If this bill is passed it might result this industry going underground which will be quite dangerous as the chances of exploitation and unethical practices would be more. If this bill is passed and becomes a law none of the party to the contract will be able to approach the courts if they are exploited because this bill criminalizes commercial surrogacy.

In an interview conducted at a surrogate home (SDS surrogate home)¹⁰ in Delhi¹¹ the owner of the surrogate house told that even if the bill is passed and becomes law this trade will exist. He confidently refers to the Kidney racket and says it has been illegal since so long but still exists in India. During the discussion with him it was evident that the players of this industry are sure that this industry will go underground and but exist even it is criminalized. There were 13 interviews conducted at this surrogate

house and all the surrogate mothers were unhappy with the bill and argued that nobody will do it for free referring to altruistic surrogacy which is permissible within the family. Within the family it would be difficult as these days no one has time for others and even if it is done in familial sphere there would be no anonymity and since it would be done in close relation the surrogate mother might ask for the child back which would be a chaotic situation.

Conclusion

Commercial surrogacy has been contested on grounds of ethicality and the labor of surrogate mothers is stigmatized. The discussion of different steps taken by Indian state to formulate a surrogacy law highlights that how at different points of time the Indian state followed different approaches to frame a surrogacy law from being liberal to completely prohibitionist. The present surrogacy regulation bill 2019 prohibits commercial surrogacy. Criminalizing commercial surrogacy will only make the situation more chaotic, a two step approach should be followed. In the first phase a stringent law should be formulated which regulates surrogacy industry which should be followed by a prohibitionist model in the second phase which completely prohibits surrogacy.

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Endnotes

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3. Kari Points. "Commercial Surrogacy and Fertility Tourism in India: The Case of Baby Manji." *Case Studies in Ethics* (Kenan Institute for Ethics, Duke University), 2009, p.4
4. Kari Points. "Commercial Surrogacy and Fertility Tourism in India: The Case of Baby Manji." *Case Studies in Ethics* (Kenan Institute for Ethics, Duke University), 2009, p.5
5. Yamada even tried for issuance of Indian passport for baby Manji but was not successful in his efforts as the Municipal Council of Anand was not sure about the name of mother which is supposed to be there in the birth certificate. The Municipal Council refused to issue a birth certificate to baby Manji. Though later the birth certificate was issued to baby Manji with her father's name.
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10. The name of the surrogate house is a fictitious name.
11. This interview was conducted when the bill was passed in Loksabha in January 2019.