

SURROGACY AS A MEANS OF VIOLATION OF HUMAN RIGHTS - A NEW FORM OF HUMAN TRAFFICKING

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Abstract

The commodification of the human body has been drawn into sharp focus over the last several years as issues such as human trafficking for organs and sexual servitude have gained international attention. Unfortunately, another form of trafficking has evaded the same level of attention and outrage of the international community: surrogacy motherhood. Surrogacy motherhood is a violation of the rights of the mother as well as the child. Surrogacy, which helps a childless woman to get a child through someone else. In traditional surrogacy, the surrogate contributes her own egg, which is artificially inseminated with the donor's sperm", but "In gestational surrogacy, a fertilized egg is implanted in the surrogate as because the majority of surrogates no longer use their own eggs, in this Article. Surrogacy may be altruistic, in which the surrogate is not paid for her labor, or commercial, in which she is." Today Surrogacy is widely practiced in India. Even though there have been no legal provisions to guide this surrogacy or to take care of the rights of a surrogate mother but then also this practice is widely prevalent in India specifically. Surrogacy has emerged as a business and might be a good option for any childless couple and people who are ready for bring a surrogate mother is also doing a great job but then where is the security of these surrogate mothers. What are the rights of this surrogate mother and the child born out of this surrogacy? To stop the exploitation India should come forward with strict laws governing surrogacy such that women of our country are not exploited.

Keywords: Human trafficking, human rights, new form of labor, human exploitation, women as a commodity.

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INTRODUCTION

“Surrogacy refers to the process through which a woman intentionally becomes pregnant with a baby that she does not intend to keep. Rather, she is carrying the baby for its intended parent or parents, usually because the parent is unable to do so without her. Surrogacy, which helps a childless woman to get a child through someone else. In traditional surrogacy, the surrogate contributes her own egg, which is artificially inseminated with the donor’s sperm.”¹, but “ In gestational surrogacy, a fertilized egg is implanted in the surrogate as because the majority of surrogates no longer use their own eggs, in this Article. Surrogacy may be altruistic, in which the surrogate is not paid for her labor, or commercial, in which she is.”² Today Surrogacy is widely practiced in India. Even though there have been no legal provisions to guide this surrogacy or to take care of the rights of a surrogate mother but then also this practice is widely prevalent in India specifically. People from foreign also come here for surrogacy. India has become the growing hub to the practice or rather the business of surrogacy which is being widely practiced in India.

In the past surrogacy would limit to only between the family members and the relatives, ‘confined to kith and kin of close relatives’³ which would be basically an altruistic deed, but then with the improvement of the society and the financial arrangements, this practice of surrogacy actually extended to outside the families and friends but rather today it has been extended to strangers also within the country as well as beyond the country as well.⁴ This if we see is also a good way to give child to a childless woman but then even this leads to much exploitation and other things⁵ “the commercialization of surrogacy has raised fears of a black market and of baby selling and breeding farms; turning impoverished women into baby producers and the possibility of selective breeding at a price. Surrogacy degrades a pregnancy to a service and a baby to a product.”⁶ “Slowly but steadily India is emerging as a popular destination for surrogacy arrangements for many rich foreigners’. Cheap medical facilities, advanced reproductive technological know-how, coupled with poor socio-economic conditions, and a lack of regulatory laws in India, in this regard combined to make India an attractive option.”⁷ This is the situation in India today as because India is a country where we can see that the large number of people lives below the poverty line and hence they are being in need of the money where they get exploited as such they never know how much the actual cost of being a surrogate mother, but then these poor people actually become ready to become a surrogate mother at a very low cost and hence they are being exploited here and hence can lead to human trafficking.

SURROGACY AS EXPLOITATION

¹ Barbara Stark , TRANSNATIONAL SURROGACY AND INTERNATIONAL HUMAN RIGHTS LAW, available at, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2118077, last seen 7/9/2015.

² Ibid.

³ Centre for social research, Surrogate motherhood- ethical or commercial, available at, <http://www.womenleadership.in/Csr/SurrogacyReport.pdf>, last seen 8/9/2015.

⁴ Ibid.

⁵ Ibid.

⁶ Ibid.

⁷ Ibid.

Surrogacy is a new form exploitation which is emerging in this era of globalization. It compromises the dignity of the child by making it a commodity for a contract and also it compromises the dignity of the surrogate mother also even though her participation is voluntary but then treating her as a gestational oven.⁸ “Religious fundamentalists, the Roman Catholic Church, and feminists alike have condemned the practice of contractual surrogacy as ‘baby selling’- one that demeans and threatens women.”⁹ The emerging business of surrogacy has opened new ways as to how women are exploited. They are not only exploited physically but also mentally.¹⁰ Today this surrogacy though has become very popular in our country but then today this the major ground for exploitation today. Today we do not have any legislation for surrogacy and hence there are no rights which are determined for the women as well as the surrogate child. Where there are chances of exploitation. The surrogate mother can be exploited in many ways. There are many instances where they are not paid the exact amount what they should be paid and hence they get ready for this for any amount and hence they are exploited health wise where may be perfect care cannot be taken and hence may be sometimes their womb bleed also and hence the surrogate mother is affected highly and may also can lead to death of the surrogate mother. In India we are very much concern about this surrogacy as because this process helps a childless couple to get a child but did we notice that why this surrogate mother are only the people from the weaker sections of the society as because they are much more in need of money and hence they are not at all concerned with the health conditions of their own but what they want is only money to raise their family and hence they become ready at whatever amount they get without knowing about their rights.

COMMERCIAL SURROGACY IN INDIA

“In 1978, October 3, India become the world 2nd nation to use IVF(in vitro fertilization) procedure to give birth to a baby girl named Kanupriya alias Durga at Calcutta, that also after the birth of the first baby boy through IVF named Louise Joy Brown born in Great Britain in the year 1978, July 25.”¹¹ Commercial surrogacy, where a women is paid for renting the womb of her for another person, It came to India where after the use of the technology of IVF procedure by the fertility centre, Associated Reproductive Technologies become popular among couples who are medically unfit for giving birth to child.¹² “In India the first child born through gestation was at Dr. Nayna Patel’s Akanshka Fertility Clinic in Anand, Gujarat in 2004, where Rhadha Patel aged 47 years, became surrogates mother for her UK based daughter. After that case, the Dr. Nayna Patel’s Akanshka Fertility Clinic was highlight in media there by attracting numbers of foreign Couples.”¹³ Previously surrogacy was not legal

⁸ European centre for law and justice, SURROGATE MOTHERHOOD: A VIOLATION OF HUMAN RIGHTS, available at, <http://www.culturavietii.ro/wp-content/uploads/2015/01/Surrogacy-Motherhood-ECLJ-Report.pdf>, last seen 7/9/2015.

⁹ Ibid.

¹⁰ Ibid.

¹¹ Piyali chatterjee, HUMAN TRAFFICKING AND COMMERCIALIZATION OF SURROGACY IN INDIA, available at, http://www.researchgate.net/publication/268518044_Human_Trafficking_and_Commercialization_of_Surrogacy_in_India, Last seen 8/9/2015.

¹² Ibid.

¹³ Ibid.

in India but it was after the case of baby manji¹⁴ where the Supreme court of India held that commercial surrogacy is legal in India and even asked the legislature to make laws regarding surrogacy and the surrogacy should be governed by the laws and hence According to that, Legislature has prepared a bill called Assisted Reproductive Technologies (Art) Regulation Draft Bill 2010, which is still pending for its approval.¹⁵ But then why India has become the emerging hub of surrogacy, where in other advanced cases we cannot find surrogacy this much prevalent as in India where even people from the foreign actually come to India for having a surrogate child. This is because in India Surrogacy can be done in such a low cost with all the modern facilities available and with no such strict laws available to guide the surrogacy and hence people can easily practice surrogacy and can earn much and hence since in India still we do not have any such strict laws to guide this hence the surrogate mothers are exploited in every other way and hence India has become the surrogacy hub and people from foreign also come for the surrogacy. Surrogacy has emerged as a business and might be a good option for any childless couple and people who are ready for bring a surrogate mother is also doing a great job but then where is the security of these surrogate mothers. What are the rights of this surrogate mother and the child born out of this surrogacy? To stop the exploitation India should come forward with strict laws governing surrogacy such that women of our country are not exploited.¹⁶

COMMERCIAL SURROGACY AND HUMAN TRAFFICKING

“In a recent study done by the National Rapporteur on Trafficking In Human Beings of Dutch¹⁷, and also the report submitted by the same, raised a question about the Commercial Surrogacy, that whether the women for commercial surrogacy were coming voluntarily or forcefully to become a Surrogates mother?”¹⁸ In India exploitation is at a different level than other countries as because in India we don't have any codified strict laws to regulate the surrogacy and due to this we see that is both the women and children are exploited.¹⁹ “Unfortunately, given the ethical dilemmas and newness of surrogacy issues, many human rights groups are either ignorant or remain neutral to the dangers of surrogacy.”²⁰ Human trafficking which is an emerging issue in this globalization and there are many forms of globalization and this surrogacy somewhat is emerging as a type of surrogacy. With

¹⁴ Baby Manji Yamada versus Union of India & Anr. [2008] INSC 1656

¹⁵ Piyali chatterjee, HUMAN TRAFFICKING AND COMMERCIALIZATION OF SURROGACY IN INDIA, available at, http://www.researchgate.net/publication/268518044_Human_Trafficking_and_Commercialization_of_Surrogacy_in_India, Last seen 8/9/2015

¹⁶ Ibid.

¹⁷ National Rapporteur on Trafficking in Human Beings, *Human trafficking for the purpose of the removal of organs and forced commercial surrogacy*, THE HAGUE: BNRM, 2012, at. 18 <http://www.dutchrapporteur.nl/reports/organ-removal-forced-commercial-surrogacy/>

¹⁸ Piyali chatterjee, HUMAN TRAFFICKING AND COMMERCIALIZATION OF SURROGACY IN INDIA, available at, http://www.researchgate.net/publication/268518044_Human_Trafficking_and_Commercialization_of_Surrogacy_in_India, Last seen 8/9/2015.

¹⁹ European centre for law and justice, SURROGATE MOTHERHOOD: A VIOLATION OF HUMAN RIGHTS, available at, <http://www.culturavietti.ro/wp-content/uploads/2015/01/Surrogacy-Motherhood-ECLJ-Report.pdf>, last seen 7/9/2015

²⁰ Ibid.

surrogacy comes this concept of baby selling conspiracy. In Asia, it is the trick of the rich people to use women from poor families to use as surrogate mothers. "Another incident of human trafficking in 2011 was report, where 14-15 Vietnamese women were rescue from Thailand and they were trafficked and forced to become Surrogate mother for Commercial Surrogacy by a company named BABY 101."²¹ There have been several rings which operated in various countries such as Vietnam, Thailand, Cambodia and other countries where illegal surrogacy business was going on. "Thai police broke up the illegal surrogacy service rescuing fourteen Vietnamese women. The victims, aged nineteen to twenty-six, were transported to the outskirts of Bangkok and confined to two houses after first being promised . . . a job 'suitable for their health' and only figured out the real situation after several months being kept in the houses without a job."²² Hence even in these illegal situations women are transferred from one country to another for this business of surrogacy where these women are exploited in the name of surrogacy. There has been cases where once the women is transferred from one country to another then their passport are taken and they are not allowed to come back to their own places.²³ All these happen due to no laws in this country. "In absence of surrogacy law, women in India are subject to many sufferings both mentally and physically. And there was a case in India, where a girl from the orphanage of Haryana, sold out for two times within 3 yrs."²⁴

The second issue which arises is that Forced surrogacy which is also the result of commercial surrogacy. This type of surrogacy has actually raise concerns on forced surrogacy and also on the manipulation on how the women are manipulated to enter into this business of surrogacy and this has drawn a thin line between the human trafficking and this which is probably being overlooked. In India this is very common and here we can find that the surrogate mothers who mostly come from villages, which are illiterate and are very poor.²⁵

Some human rights activists have researched upon how the recruiting process is notably similar to the recruitment process used by human traffickers to 'coerce rural women into sex work in cities.'²⁶ Then there could have been seen other similar situations where women are made to sign documents as it is done in the situations of human trafficking where they do not even read the documents and these are performed until the obligations are fulfilled and then again it is found in the reports that after this there has been reports where it could be seen that there are large number of women who are dying due to this but then the hospitals or the agencies does not take any liability on the death of the surrogate mother. such as "'renting' of Indian women's bodies by westerners, the lack of counseling services available to surrogates

²¹ Piyali chatterjee, HUMAN TRAFFICKING AND COMMERCIALIZATION OF SURROGACY IN INDIA, available at, http://www.researchgate.net/publication/268518044_Human_Trafficking_and_Commercialization_of_Surrogacy_in_India, Last seen 8/9/2015

²² European centre for law and justice, SURROGATE MOTHERHOOD: A VIOLATION OF HUMAN RIGHTS, available at, <http://www.culturavietii.ro/wp-content/uploads/2015/01/Surrogacy-Motherhood-ECLJ-Report.pdf>, last seen 7/9/2015

²³ Ibid.

²⁴ Supra at 21

²⁵ Supra at 22

²⁶ Ibid.

after the relinquishment of their gestational babies”²⁷ women who become the surrogate mothers are exploited in various ways.

So, if a woman is forced to become Surrogates mother or forced to donate her eggs in that case it will be a crime and will fall under human trafficking as per the definitions of United Nations. The report which was submitted by National reporter said that, which says that the instances where if a woman is forced to become a Surrogates mother then in that case it will come under trafficking and it will be a crime.²⁸

In this Indian scenario it complicates the scenario of Surrogacy world -wide. Surrogacy has changed the situation of many families in India, but then the question comes whether they are doing this voluntarily or not, even though they might say that they are doing this voluntarily but then these Indian women are forced into this by their husbands and in-laws and even they have said that they do not want to do these works, for them these works are not ethical but they do it because this is a majboori for them to work.

Even though surrogacy is voluntary but then also this surrogacy has pictured “Women’s bodies as commodities through which others can purchase what they wish to have, and most or all care, concern, and medical attention is directed at the child while the surrogate mother is left to fend for herself.”²⁹

Then the question which arises is that what the situations of the woman are after surrogacy. “What about the possible long-term, harmful effects fertility drugs, obstetric complications, or surgical procedures might have on surrogacy workers? Are these risks less morally acceptable in developing-world contexts? Are clinics or contracting parties responsible for surrogacy workers’ medical care if the gestational labor they did under contract causes cancer, sterility, or long-term pregnancy-related disabilities? Can these harms be written off as occupational job hazards?”³⁰

“Because of nonattendance of law identifying with Commercial Surrogacy in India, if there should arise an occurrence of death of surrogate mother or premature delivery because of any complexity, the healing facility power and the hereditary guardian are not at risk. In India, nobody is obligated for the Surrogate's hopelessness Mother.

The UNODC Model Law against Trafficking in Persons is create by the United Nations Office on Drugs and Crime (UNODC) to help States in executing the procurements contained in the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing that Convention. Furthermore, here they had proposed to incorporate "the utilization of ladies as surrogate mother " under abuse. In addition, we realize that abuse of people go under infringement of Human Rights. Indeed, even it was

²⁷ Ibid.

²⁸ Supra at 21

²⁹ European centre for law and justice, SURROGATE MOTHERHOOD: A VIOLATION OF HUMAN RIGHTS, available at, <http://www.culturavietii.ro/wp-content/uploads/2015/01/Surrogacy-Motherhood-ECLJ-Report.pdf>, Last seen 7/9/2015

³⁰ Supra at 21

found that, if there should arise an occurrence of any inconveniences amid conveyance, the Doctors attempted to spare the life of the unborn infant first and after that the mother's life. Since, the altered cash was for the unborn infant and not for the mother. Simply because of this reasons the life of the unborn tyke have first need over mother's life."³¹

There has been so many cases of surrogacy and human trafficking such as in a case In India, a 26 years woman named Yuma Sherpa from Delhi, died during the egg removal procedures and a 17 years Girl named Sushma Pandey from Mumbai, died after two days of egg removal procedures. Because of the absence of law and guidelines regarding how many eggs can be removed from the body at a time and the dosage of injection Gonadotropin that is used for producing multiple of eggs has increased a great concern for the doctors, lawyers and Human rights activist in respect of the health and life of the women. Recently, the Thailand Military Government, after the case of BABY GAMMY, has given approval for a drafted bill by which Commercial Surrogacy in Thailand will amount to be a criminal offence and thereby making it banned.³² Women in surrogacy are exploited physically, emotionally and as well as economically. After the baby is born the contractual parents they take away the baby and then after that no one thinks about the surrogate mother. They become emotionally connected to the baby but then they have to give up the baby and then may be as entered into contract they cannot even contact the baby. As we do not have any codified laws in India, hence the surrogate mothers face this problem. Here there should be law to determine the rights of a surrogate mother. That they should at least could meet the child. They should have been given the rights. Even this surrogacy does not only lead to the human trafficking of the surrogate mothers but also of the child who are born out of surrogate mothers. There are situations where the child born out of this are not accepted by the contractual parents then the legal status of the child become questionable which was decided in the famous case of baby Manji where both the parents from Japan refused to take the custody of the child and hence the status of children was questionable as because the government of that country refused to give the citizenship status to the child and even he could not be given the citizenship of India and hence then supreme court gave the custody of the child to his grandmother. But then there are many instances where the status of the child remains undecided and then they become the victims of child trafficking.³³

VIOLATION OF ARTICLE 19, 21 AND 23 OF INDIAN COSTITUTON

In India the basic right of reproduction is also given under article 21 of the constitution of India. "The Andhra Pradesh High Court in *B. K. Parthasarathi v. Government of Andhra Pradesh*³⁴, ruled that reproductive right is a human right and its comes under right to privacy and also they agreed with the decision of the US Supreme Court in *Jack T. Skinner v. State of*

³¹ Piyali chatterjee, HUMAN TRAFFICKING AND COMMERCIALIZATION OF SURROGACY IN INDIA, Available at, http://www.researchgate.net/publication/268518044_Human_Trafficking_and_Commercialization_of_Surrogacy_in_India, Last seen 8/9/2015

³² Ibid.

³³ The kenan institute for ethics, COMMERCIAL SURROGACY AND FERTILITY TOURISM IN INDIA, available at <https://web.duke.edu/kenanethics/CaseStudies/BabyManji.pdf>, last seen 10/9/2015.

³⁴ AIR 2000 A.P. 156

*Oklahoma*³⁵, which characterized the right to reproduce as one of the basic civil rights of man.”³⁶ Now the question arises that does these rights violates the basic human rights of other people. Though, we know that surrogacy through modern medical technology which gives an infertile couple the happiness of getting a child. But then in this only the poor women are exploited and how the surrogate mother are treated in the society and it still has a very negative impact on the society. There is a great violation of women rights under Article 21, which grants No person shall be deprived of his life or personal liberty except according to procedure established by law.³⁷ Then again under article 23 of the constitution “Prohibition of traffic in human beings and forced labour”³⁸. In addition, they are not getting the proper money for their work also and hence they are exploited in a very bad manner. Then in this male dominating society the women are exploited very badly as because they are forced into this business of surrogacy for money and paying off debts and hence their rights are violated under article 21 of the constitution and then under article 19 (1) of the constitution as because they are not allowed to stay with their families when they become pregnant and hence they could not even express their feelings and they even cannot meet their own children.

CONCLUSION

From the above discussion, we have found that Commercial Surrogacy is a gift of Medical Science and Technology to the infertile or medically unfit couples to have their own baby. But then still it has a very bad impact on the society as well on the health of the woman and also she is being exploited physically, emotionally, economically, various rights of the woman are violated as well as of the child. In the absence of Uniform International Law to regulate the Reproductive Industries, “the Industries are flourishing day by day with the increase of trafficking of women and minor girl in Indian market as well as in the International market. To deal with the present scenario, uniform International Law is to be passed to control the trafficking in the places like India.”³⁹

³⁵ 316 US 535

³⁶ Piyali chatterjee, HUMAN TRAFFICKING AND COMMERCIALIZATION OF SURROGACY IN INDIA, available at, http://www.researchgate.net/publication/268518044_Human_Trafficking_and_Commercialization_of_Surrogacy_in_India, Last seen 8/9/2015

³⁷ Ibid.

³⁸ Ibid , Rita Biswas, HUMAN TRAFFICKING - A BURNING PROBLEM IN INDIA,2 BCC-ISSN-2278-8794,(March,2014)

³⁹ Piyali chatterjee, HUMAN TRAFFICKING AND COMMERCIALIZATION OF SURROGACY IN INDIA, available at, http://www.researchgate.net/publication/268518044_Human_Trafficking_and_Commercialization_of_Surrogacy_in_India, Last seen 8/9/2015