

## SURROGACY: LEGAL ASPECTS & FLAWS

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### Abstract:

The advancement of science and technology has proved a blessing to mankind however it has brought within its purview certain unavoidable challenges to existing social, political and legal structures operating globally. One such advancement in science has been in the field of assisted human reproductive technology which is surrogacy. This surrogacy which is named differently can simply mean giving a womb on rent either with or without any consideration. Surrogacy has a lot of legal controversies. The most infamous of them is the refusal by the intending parents to accept the child born through a surrogate as during pregnancy the intending couple divorced. Whether liability can be imposed or not? If yes, how? And to what extent, this research paper is going to focus on the legal intricacies involved and how to overcome that? This paper will also focus on the adequacy of legal protection available to both parties in a surrogacy contract.

**Keywords:** Surrogacy, Controversies, surrogacy Contract, Surrogate Mother, Rights, Liabilities.

### Introduction:

The word 'surrogate' has its origin in the Latin word 'Surrogatus' meaning a substitute, that is, a person appointed to act in the place of another. Generally, surrogacy is defined as an arrangement in which one party (surrogate or birth mother) agrees to bear a child and permanently hand over the responsibilities for rearing that child to another person referred to as the intended parents.<sup>1</sup> Encyclopedia Britannica defines surrogate motherhood as the practice in which a woman bears a child for the couple who is unable to produce the child in the usual way. Warnock Commission Report defines surrogacy as 'the practice whereby one woman carries a child for another with the intention that the child should be handed over after birth<sup>2</sup>. The New South Wales also defined surrogacy as, 'an arrangement where a woman agrees to become pregnant and to bear a child for another person or persons to whom she will transfer the custody of the child at or shortly after birth<sup>3</sup>.

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Nature from altruistic to commercial surrogacy has extended its network beyond its limited domain and now cuts across the countries.<sup>3</sup>

The Legal approach of Nations globally has been diverse and depends upon their socio-political-economic and theological perspectives or structures. In some countries, surrogacy is prohibited<sup>3</sup>, in some places; it is allowed with certain restrictions and in a few other places, the restrictions are minimum. Till January 2022 India was considered a favored place/ destination for surrogacy. The concept of procreative tourism has emerged with surrogacy; India has become one of the procreative tourism destinations in this context also. India is rapidly developing as a major destination for surrogacy.

In 2000 Indian Council for Medical Research adopted Ethical Guidelines for Biomedical Research on Human Participants in which they prescribed guidelines to deal with Assisted Reproductive Techniques in general<sup>3</sup>.

ICMR in the year 2002 submitted to the Ministry of Health, Union of India a draft guideline for Accreditation, Supervision and Regulation of Assisted Reproductive Technology Clinics in India which was further updated and adopted by ICMR in the year 2005<sup>3</sup>. These guidelines contained provisions dealing with surrogacy practices in India. Till the enactment of The Surrogacy Regulation Act, 2021 ICMR guidelines were the only regulatory framework available in India to deal with

Thus, one can say that surrogate is a person appointed to act in place of another. The term mother includes a means to give birth. Thus, a surrogate mother is a woman appointed to give birth to a child in place of another<sup>4</sup>. Legally speaking Surrogate mother means a woman who agrees to bear a child<sup>5</sup>(who is genetically related to the intending couple or intending woman) through surrogacy from the implantation of the Embryo in her womb and fulfills the conditions as provided in sub-clause (b) of cl(iii) of section 4<sup>6</sup>. Surrogacy is traditionally defined as the procedure whereby a couple contracts with the woman (the surrogate) to conceive a child for them, carry it to term, and then relinquish to the couple all the parental rights<sup>7</sup>

According to the law, surrogacy means a practice whereby one woman bears and gives birth to a child for an intending couple to hand over such a child to the intending couple after birth.<sup>8</sup> Though not in the present form, surrogacy has been practiced since ancient times, not with the involvement of sophisticated technology as it is done in contemporary times.

Peeping through history good number of instances can be found where a family member or a servant may have stepped in for a woman who could not become pregnant.<sup>9</sup> In the past surrogacy arrangements were confined to the kith and kin of close relatives, family, or friends usually as an altruistic deed. But with the changing exploitation of the child who was yet to see the light of the world<sup>10</sup> got somehow avoided. In the absence of the law what sort of liability the intending parents had to share was more muddled.

And was the acceptance of the child by the father & grandmother a means to avoid continued litigation trauma... or was the acceptance of this child born out of surrogacy because of love & affection..... Was any follow-up observed by the state regarding the child's wellbeing as to how the child is brought up in a family which at the first instance was not willing to accept and because of court intervention the father of the child accepted the responsibility?

However, of late India has come up with a law attempting to regulate the process of surrogacy<sup>11</sup>. There is every possibility that if the law is implemented with its true spirit the misuse of the practice of surrogacy can be minimized to a greater extent.

#### **Nature and types of Surrogacy Agreements:**

The surrogacy contracts can be either formal or informal. in the first case, there is a proper contract between the intending parties whereas in the case of informal contracts they are based on a mere understanding of the parties. Surrogacy as per Surrogacy Act, 2021 is mainly of two types:

1. Altruistic surrogacy<sup>12</sup> means that type of surrogacy where no charges expenses, fees, remuneration, or monetary incentive of whatever nature except the medical expenses and such other prescribed expenses incurred on the surrogate mother and the insurance coverage of the surrogate mother or her dependents or her representative.

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Surrogacy Practices. The vulnerability of the Indian legal system to deal with the issues surrounding surrogacy surfaced in the case of Baby Manji<sup>3</sup>. This case exposed the real picture of the possible threats of surrogacy. In this case, a Japanese couple sought the help of surrogacy of an Indian Surrogate mother to give birth to a child. However, during pregnancy, the couple got divorced and the intended mother refused to take the child. Fortunately, the father and grandmother of the child were willing to take care of that child and possible confusion and stretching of litigation or

2. The other type of surrogacy is Commercial,<sup>13</sup> which is defined as the commercialization of surrogacy services or procedures or its component services including selling or buying of human embryos or trading in the sale or purchase of human embryos 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 dependants or her representative, except the medical expenses and such other prescribed expenses incurred on the surrogate mother.

A surrogacy agreement between an intending parent and surrogate mother requires clear intention and understanding between them regarding their rights & duties towards each other. Such an agreement may or may not be reduced to writing, however, there exists controversy about whether surrogacy agreements are real contracts or not. Let us analyze the true nature of the agreement.

As per section 2(h) Indian Contract Act, 1872, the contract is an agreement enforceable by law. An agreement consists of reciprocal promises between the two parties. In contractual relations, there must be a proposal and acceptance of that proposal to create contractual obligations between the contracting parties. A valid contract creates rights and obligations<sup>14</sup>. A surrogacy contract can be defined as a private contract based on which women<sup>15</sup> act as a surrogate, and agrees to become pregnant through artificial reproductive techniques, carries the fetus to term, give birth to the baby and relinquish her rights over the baby and handover it to his or her intended parents.

With the enactment of **The Surrogacy (Regulation) Act, 2021**, which came into force in January 2022, Commercial surrogacy has been banned but the law permits altruistic surrogacy with certain regulatory measures. The intending couple<sup>16</sup> must possess the certificate of essentiality<sup>17</sup> & certificate of eligibility issued by the appropriate authority. The aim of The Surrogacy Regulation Act, 2021 is described in its preamble stating that;

‘‘The act is enacted for the establishment of a National Assisted Reproductive Technology and surrogacy Boards and appointment of appropriate authorities for regulations of processes and practices and matters connected therewith or incidental thereto<sup>18</sup>.’

But such a board and appropriate authorities are yet to be constituted/appointed and intended couples who were in the surrogacy processes started way back before the present Act came into force are now facing problems because of its non-implementation. One such issue came before the Mumbai High court. On May 18, the Bombay High Court sought Mumbai-based Hinduja Hospital’s reply after a couple moved the court seeking to complete a surrogacy procedure, which commenced before Parliament passed the Assisted Reproductive Technologies (ART) Act and the Surrogacy Act in December 2021. The couple had approached the hospital in October 2021 to undergo surrogacy after the wife had lost both her children and could no longer naturally give birth due to a medical issue. After completing fertilization, the embryos were cryopreserved at Thane. Later, after the above laws came into force in January 2022, the hospital told the couple that they could not transfer the embryos to the surrogate carrier as the new law prohibited it from treating the surrogate carrier. In response, the couple moved to the Bombay High Court seeking the transfer of the embryos to any other ART clinic. The hospital argued that under the new law, such issues were to be solved by a national or state board which had to be set up within 90 days of the implementation of The ART Act. On the other hand, the couple pointed out that no such board has not been constituted as yet. Hence, keeping the lifespan of the embryos in mind, the couple argued that they had to move to the Bombay High Court as a last resort.

**Salient features of The Surrogacy (Regulation) Act, 2021**

An Act to constitute the National Assisted Reproductive Technology and Surrogacy Board, State Assisted Reproductive Technology and Surrogacy Boards and appointment of appropriate authorities for regulation of the practice and process of surrogacy. The whole act is divided into VIII chapters including a miscellaneous chapter. The chapter first deals with and defines certain important terms used in the Act. Chapter II and Chapter III provide for the regulation of surrogacy clinics. Elaborate prerequisites have been provided in this chapter related to the regulation of surrogacy clinics which includes registration, authorization, etc of these clinics. This chapter also provides for the regulation of surrogacy and surrogacy procedures and elaborates on the situations when a woman consents to be a surrogate mother and also imposes restrictions on the commercialization of surrogacy procedures. It also limelights the situation and impose prohibition related to the exploitation of children born through surrogacy and it also prohibits misuse of surrogacy procedures and also provides for the rights of the surrogate children. Chapter IV provides for the registration of surrogacy clinics, necessary conditions to be fulfilled before registration and it also provides for the cancellation of registration of surrogacy clinics that act in contravention of the law. This chapter also provides for the establishment of national assisted reproductive technology and surrogacy registry for the registration of surrogacy clinics. Chapter V of the Act gives wings to accomplish the aims and objectives of this law i.e establishment of the National Assisted Reproductive Technology and Surrogacy Board, State Assisted Reproductive Technology, and Surrogacy Boards. This Chapter also provides for the constitution and conduct of business by these boards. Chapter VI provides for the appointment of appropriate authority and their powers and functions. Chapter VII prohibits commercial surrogacy and the exploitation of surrogate mothers and children. It also talks about the punishment in case of contravening the provisions of this Act. The last Chapter ie Chapter VIII titled 'Miscellaneous' deals with other issues which are not provided in the preceding Chapters of this Act.

Although the law regulating surrogacy has been passed and is in force, is a welcome step, towards protecting the rights of the intending parents, the surrogate mother and the surrogate child. However, there are still a lot of grey areas which need to be addressed fully. For instance everyone is having a right to get benefit from recent technology and advancements. This right is recognized internationally, whether the ban on surrogacy either partial or total denies a person's use of such scientific advancements. The surrogate mothers also put forward the argument that being a surrogate helps them financially. They admit that doing physical domestic work in other families is much more hectic work than acting as a surrogate which yields good financial outcomes. The blanket ban on commercial surrogacy whether practicable to operate or will provide a fertile ground for the exploitation of surrogates. The permission & regulation for altruistic surrogacy will open a floodgate of victimization to all the parties involved.

**Conclusion & Suggestions:**

Over the past decade, surrogacy has raised a plethora of legal, social, and ethical issues which surely need to be addressed on all fronts. Having said that, surrogacy is surely a boon for those couples who cannot naturally have children. Of late Government of India has come up with a surrogacy law, which came into force in 2022 whereby the surrogacy processes have been regulated and the establishment of boards for regulation purposes has been provided. The recent Law has prohibited the commercialization of surrogacy and also punishes in case of contravention. But how far this law is going to address all the concerns related to surrogacy is yet to observe.

The advancements in technology if used properly protect the interests of human beings and the same is the case concerning the advancement made in assisted reproductive techniques. The social realities and the law have to go hand in hand to protect major good. Putting a blanket ban on commercial surrogacy and the consequences of it need to be further researched.

With the following message of Victor Williams and Alison M. Macdonald, I conclude this research paper

“Laws and institutions must go hand in hand with the progress of the human mind. As the human mind becomes more developed, more enlightened and discoveries are made, new truths discovered

and manners and opinions change with the change of circumstances, the laws and institutions must also advance to keep pace with the changing times<sup>19</sup>”.

In this scenario how far The Surrogacy (Regulation) Act, of 2021 is going to protect the interests of the parties involved in the surrogacy process as a whole is yet to be seen...?

With the passage of ‘The Surrogacy (Regulation) Act, 2021 though certain issues surrounding surrogacy would be resolved still it needs proper implementation and the constitution of the Surrogacy Regulation Board need to be constituted at the earliest.

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