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# **“Rights And Laws for Surrogate Mother-in India”**

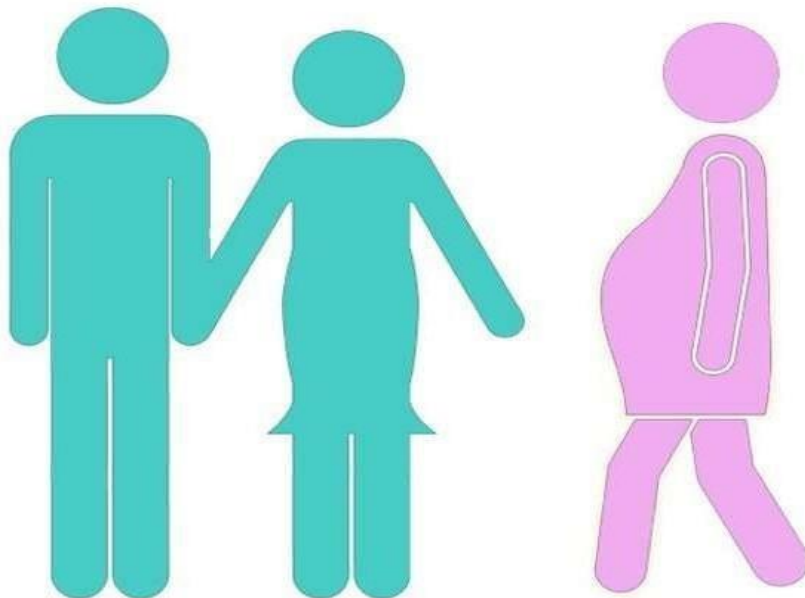
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*"There is nothing more beautiful than someone who goes out of their way to make life beautiful for others."*

## **Abstract:**

Surrogacy is an important process for the couples, who are not able to have the vouchsafed wonderful capacity of being parents, but due to increasing number of the surrogacy cases in the country leads to development of the commercialization of surrogacy which primarily affects the surrogate mother as it leads to the exploitation of the surrogate mother.

The positive aspect of the surrogacy process brings happiness to the couples who are infertile but contrary to this the negative aspects is the cause of many legal, social ethical and moral issues in society of the country like India. Further the article describes more about the development in the field of the surrogacy process and how the governments totally ban the commercialization of the surrogacy and tries a lot to perform only altruistic form of surrogacy.



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## • **Introduction:**

Nature has bestowed the beautiful capacity to procreate a life within woman and every woman cherishes the experience of motherhood. But, unfortunately some women due to certain physiological conditions could not give birth to their own off-spring. The urge of motherhood leads them to seek alternative solutions like Artificial Reproductive Technology (ART), In-Vitro Fertilization (IVF), Intra-Uterine Injections (IUI), etc. infusing hope into many infertile couples, who long to have a child of their own. With advances in medical sciences and technology, particularly in assisted reproductive techniques which have come in with techniques like donor insemination, embryo transfer methods, etc. revolutionizing the reproductive environment such methods such as „surrogacy“ are also gaining popularity for varied reasons. As commonly understood, a surrogate mother is one who is hired to bear a child that she turns over at birth to her employer.

Right to reproduce their young one is untaught right of an every individual. Parenthood is a life altering and most permanently rewarding experience.

### **Concept of Surrogacy:**

The word “surrogate” has been derived from the Latin word “*surrogatus*” which means “appointed to act in the place of”. The method of Surrogacy requires a woman who consents to carry the baby and go through gestation for it. After the child is born, it is then handed over to the couple who sought it. The role of the woman carrying it is merely that of a gestational carrier. “Surrogacy is a well-known method of reproduction whereby a woman agrees to become pregnant for the purpose of gestating and giving birth to a child. However, she will not raise the child but hand it over to the contracted party.

Surrogacy in a country like India has strengthen a new level of advancement in the field of scientific development in which a mother of another womb help another mother to help her in being a mother who by any reason not able to have child.



## **Definition of Surrogacy:**

According to **Black’s Law Dictionary**, Surrogacy is an agreement where a woman agrees to be artificially inseminated to carry with the semen of another woman’s husband.

According to **The new Encyclopaedia Britannica** surrogacy define as – Surrogate motherhood as the practise in which a woman bears a child for the other couple to produce children in the usual way.

**In Medical parlance** – the term surrogacy means using of a substitute in a place of the natural mother.

According to Assisted Reproductive Technology Bill surrogacy is defined as an agreement in which a woman agrees to a pregnancy, achieved through assisted reproductive technology, in which neither of the gametes belong to her or to her husband, with the intention to carry it to the term and hand over the child to the person or persons for whom she is acting as a surrogate.

## **History of Surrogacy in India:**

According to the Hindu mythology it also offers instances of surrogacy shows the secrecy due to which practise of surrogacy still surround us. In Bhagavata Purana, Vishnu ji heard Vasudev’s prayers begging Kansa not to kill all sons being born. Vishnu heard these prayers and had an embryo from Devika’s womb transferred to the womb of Rohini, the other wife of the vasudev. Rohini the give birth to the baby Balaram, brother of Krishna and secretly raised the child while Vasudev and Devki told Kansa that the child was born dead.

The History of surrogacy also belonged to the Mahabharata, as in Mahabharata Gandhari delivered a semi solid material on the place of delivering a child, Mahairishi Vyas further divided that semi solid material into 100 pieces and planted them in different pans. Thus the 100 Kauravas were born.

India’s First IVF baby and world second baby Kanupriya was born 67 days later on 3rd of October 1978. The baby Kanupriya is the result of the efforts made by Dr. Subhas Mukherjee and his two mates in Kolkata. The Birth of this first IVF Indian baby was a part of tremendous controversy.

## **Commercialisation of surrogacy arrangement in India:**

The commerce of a child is a thing that can be hard to imagine as the child is symbol of the love not of the money and having a child is a perception away from the concept of marketing activities. But surrogacy has become a part of the commercial business in a country like India. This commercialisation of surrogacy has now become a political debate for the Indian society. The market of surrogacy is now becoming very large and growing very rapidly. There are “N” numbers potential parents in a country like India desire to hire other women to bear their child.

The concept of surrogacy has revolved around an ordinary biotic function of the body of a woman into a commercial contract and hence the surrogate services are now even publicized.

Surrogates are being enlisted and the operating agencies make huge profits from them. The commercialization of surrogacy is nothing but the giving rise to the new problem of selling child and setting up breeding farms which may turn women into baby producers.

After a critical observation in India the data given by the National ART (artificial reproductive technique) Registry of India, there is jump of 300 percent cases in the year 2005 with reference to the cases from the year 2004 i.e. 50 cases in 2004 to nearly 160 cases in year 2005.

According to the Human Organs Act 1994, it bans the trade of the human organ as a part of commercial business.

## **Indian law associated with surrogacy**

In the year 2002 commercial surrogacy was legalised by the India seeing this immense growth of surrogacy in India leads to the growth of the many commercial surrogacy firm who claims to have the forte in the surrogacy law and assisting the foreigners who came India in search of mother womb as a rent. The 228th report of the Law Commission of India has recommended to prohibit the process of commercial surrogacy and enacted the suitable legislation which allows performing altruistic surgery which is ethical.

Since there was a lack of appropriate regulatory measures, the surrogacy business, or the baby-making business- as it is commonly referred to, was thriving in India prior to the introduction of the Act. Hospitals had made it into a booming business, worth \$2.3 Billion/annum.

In the world of the diverse jurisdiction the legal approach to the process of surrogacy differs from one jurisdiction to another jurisdiction. The international motion to the surrogacy has been differentiated in three major approaches they are:

1. Free Market
2. Regulated
3. Prohibited (forbid)

Many jurisdiction of the world completely interdict the process of surrogacy as they proclaim commercial surrogacy to be a criminal offence in their respective jurisdiction on the contrary some jurisdiction permits process of surrogacy but only to the some extent or we can say that only on the grounds of altruism (selflessness). In the world only country India neither completely interdicts the surrogacy nor synchronizes the process of surrogacy, the reason behind this is that In India the surrogacy is not directly proclaimed unenforceable by the law so it is considered to be valid and enforceable.

The assisted reproductive technology bill 2008 was drafted by the Indian council of medical research to sanction and regularize different form of reproductive technologies including the process of commercial surrogacy. The law commission of India in its 228th report rationalize that why there is a need of the surrogacy in India.

According to the provision ART (Assisted Reproductive Technology) bill 2013 no women of the age less than 21 years and more than 35 years can act as the surrogate mother. This bill leads to put condition on the foreign couples who are taking womb at rent which was first time by this ART bill 2013. The compensation for the surrogacy as per the guidelines by the ART bill 2013 draft will be the private negotiation between the surrogate mother and the commissioning couples. The ART bill 2013 leads to disqualify homosexual couples, foreign single individuals and the couple in live in relationship from having the child through the surrogate mother in India.



## Case laws related to surrogacy in India

1. **In Baby Manji Yamada's case**, in this particular case the Japanese couple entered into a contract with an Indian woman to be the surrogate mother for their child. After this Baby Manji Yamada's was born to the Indian surrogate mother. Further the commissioning father Mr. Yamada tries to take his child to Japan for which he applies for visa to Japan to which the embassy of Japan in India denied as the Japan civil code did not grant the surrogate child. After which Mr. Yamada tried to file for Indian visa which requires a birth certificate and on birth certificate there is need of the name of the Father and Mother of the child, but in this case Mr. Yamada was the genetic father of the baby Manji but ambiguity arises in the case of the mother name as there are three mothers for that child- The commissioning mother, the egg donor and the surrogate mother ; seeing this authorities refuses to give visa to child Manji as the legal mother was not certain. In the end the Apex court of India had to be interceding and the child Manji was allowed to leave the country with her grandmother.
2. After the case of Manji the Supreme Court of India in 2008 held that surrogacy is permissible in India due to which it subsequently increase the international confidence ingoing in for the surrogacy in India.
  - **The German Couple Case** in this case a childless German couple has twins through the surrogate mother with the help of Anand Infertility Clinic Gujarat. Since the German laws did not recognise the surrogacy as a means of parenthood, due to this twins are not treated to be the German citizen so the German commissioning parents to avoid the foreseeable hurdle of the Immigration laws they approach to the High court of the Gujarat for authorizing their surrogate twin with the Indian Passport, on which Gujarat High Court held that the child who born through the surrogate mother will carry the name of the surrogate mother but not of the Biological mother and the child should be authorize with the Indian Passport and certifies him as the Indian citizen and the surrogate mother in turn had to give the child to the German couples in adoption.
  - In a another case the Israel gay couple Yonatan and Omer Gher became parents in India in year 2008 through help of a surrogate mother who belonged from Mumbai in a infertility clinic of the Bandra. After which

both the gay couples have vouchsafed with a baby as the Israel laws does not allow the same sex marriage and the surrogate child so they came India for their child. After the child was born the gay couple left to the Israel in the year 2008.

## **The Important provisions of the Surrogacy Bill**

On the other hand, The [surrogacy bill](#) will only permit "ethical" and "altruistic" surrogacy which will be free of any monetary transaction or payment to surrogates. In altruistic surrogacy, other than medical bills and insurance during the pregnancy, the surrogate mother receives no monetary compensation. Women's rights campaigners claim that this clause will deprive poor women of a way to monetize their services as surrogates if they are unable to find other work.

The Surrogacy (Regulation) Act was enacted on 25 December 2021 after it got the assent of President Shri Ramnath Kovind. In the Act, commercial surrogacy is termed as the buying and selling of human embryos i.e., commercial surrogacy is banned in the whole country. The Act created new regulations for surrogacy and a single man/woman can't opt for surrogacy. The Act mandates everyone to not print or air advertisements of commercial surrogacy.

The Act allows Altruistic surrogacy as an act of generosity between close relatives with a contract between them for the same. The intended couple must be 25 to 35 years old. The act made mandatory for the eligibility certificate and the proof on infertility of either of the husband or the wife. The couple must get the order regarding the parentage from the Magistrate of first- class or above.

A married woman having a child of her own can act as the intending woman. The Act provided that the surrogate mother can withdraw her consent anytime before the embryo is implanted. And she should be informed about the risks and consequences wholly before she chooses to accept.


The Act also mandates the couple to provide insurance for the mother and child. It also mentioned that the couple should not abandon the baby born out of the surrogacy procedure. If anyone including the intended couple forces the woman to terminate, she can report to the appropriate authority.


Chapter 4 of the Act provides for the Registration of Surrogacy Clinics. The clinic must have the Certificate of Registration to function. For the purpose of registration of surrogacy clinics, a registry was established called the National Assisted Reproductive Technology and Surrogacy Registry.

A board called National Assisted Reproductive Technology and Surrogacy Board was constituted and the board consists of 23 members who are experts. Every decision and order of the Board must be signed and authenticated by the Chairperson. Every offence committed shall be cognizable, non-bailable, and non-compoundable.


Under section 46 of the Act, the clinic should maintain all the records, forms, consent reports, letters, and all other documents regarding surrogacy for a period of twenty-five years. If any clinic has pending criminal proceedings against it, it shall maintain the same till the final proceeding.


### **The Eligibility Criteria:**

 **FOR THE SURROGATE MOTHER-** The woman must be married ever and between the ages of 25 to 35. There must be only one time surrogate mother in her life time and also the surrogate mother must have to qualify the medical fitness test to act as a surrogate mother.

 **FOR THE COMMISSIONING COUPLES-** The man must be of the age 26 to 55 and women must be of the age between 23 to 50. Both the couples must have been married for last five years and both the commissioning couples must be the citizen of India and they have no child before this by any means.

### **National Surrogacy Board**

 **Board consists of-** Chairperson- The minister who is in the charge of Ministry of health and family welfare, Vice Chairperson- The person who is secretary in charge of department dealing with the circumstances related to surrogacy.

 **Members-** Three members from the ministry of central government from the women and child development, Three women members from the parliament, and The Director- general of the health Service of Central Government.

## - Offences:

### Punishments

#### Under the Act, any person who:

1. Abandons a child born out of surrogacy,
2. Conducts sex selection,
3. Undertake or run an unauthorized racket or group to perform activities related to surrogacy
4. Exploits surrogate mother or the child
5. Imports or helps to import human embryos
6. Publish, distribute or advertise any information about commercial surrogacy,

#### Shall be punishable with:

1. Imprisonment of a term which may extend to 10 years and
2. A fine which may extend to ten lakh rupees.

### ▪ Impact of the Bill on Surrogacy Contracts

- Since the Bill has introduced stringent regulatory mechanisms, it is pertinent to analyse the issue of validity of surrogacy contracts. Surrogacy contracts play a vital role in the process of surrogacy.
- In the absence of a surrogacy contract, it becomes very difficult to regulate the process since it could lead to a lot of legal hassles. The major purpose of surrogacy contracts is to protect the surrogate mothers, the intending parent(s) and the child equally.

The most conflicting issue raised on surrogacy contracts is that whether such contracts amount to baby selling. The 2020 Bill has put an end to all such speculations by seeking to put a blanket ban on commercial surrogacy.

Another question which arises is whether surrogacy contracts are forbidden by any law or opposed to public policy. In certain situations, courts can refuse to enforce a contract on considerations of public policy.

Further, it cannot be claimed that the object of surrogacy contracts is unlawful in lieu of section 24 of Indian Contracts Act<sup>[12]</sup> since section 35 of the 2020 Bill strictly prohibits commercial surrogacy, exploitation of surrogate mothers and

children born through surrogacy. It also penalises the same. Therefore, the 2020 Bill has ensured that the validity of surrogacy contracts remains intact. Moreover, regulatory bodies have been assigned to implement the safeguards.

## **Conclusion:**

Surrogacy in the world is not a new concept of having a child but the process of the surrogacy had been practised from ancient times. The method of the surrogacy is not only limited to the couples who are infertile or not able to have a child without any medical deformity but the surrogacy is also practised by anyone who wishes to have a child. Due to the rising number of surrogacy process it influences the country or the world in raising the debates on the legal, ethical, religious and the moral issues all over the world. The increment in the process of commercial surrogacy leads to the violation of the human rights but commercial surrogacy safeguards the reproductive prerogative of the infertile women.

As India is becoming a booming industry for the process of the surrogacy due to which it brought certain complexities and many social, ethical, and legal issues related to surrogacy due to which the requirement for a particular legislation being needed.

The process of surrogacy in a country like India has both positive as well as the negative impact. If it is used shrewdly then it bring satisfaction to many infertile couples who are not able to have a child, but if the process of surrogacy used in a careless manner or used for the purpose of commercialization then it has adverse effect on the society at large.

