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## Surrogacy : Legal, Ethical and Human Rights Perspective

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**Abstract:** To help a human who is infertile due to various reasons, God plays a role through technology to create another human being with the aid and assistance of technology. Though this method appears to be beneficial to the parties, it may involve medical, emotional, financial and legal issues which need to be addressed through properly framed laws for an efficient practice of surrogacy in India. In this respect the Surrogacy Regulation Bill 2020 and ART Regulation Bill, 2020 was passed which makes provision for safe and ethical practice of surrogacy, to protect the interest of vulnerable women, to prohibit commercial surrogacy by indicating the rights of surrogate mother and the child. This paper is based on analytical study and contains the important meaning, religious views, position in other countries, rights, socio-legal issues involved in 2020 regulatory bill and finally the judicial responses.

**Introduction:** In Indian society the children are considered as wealth of the family which is given by God. But in some of the family it is the huge misery that they don't have child. That is the main reason for emergence of concept of "surrogacy". Surrogacy is an arrangement, often supported by a legal agreement, whereby a woman (surrogate mother) agrees to become pregnant and give birth to a child for another person who is or will become the parent of the child. In IVF now makes it possible to gather eggs from the mother, fertilize them with sperm from the father and place the embryo into the uterus of a gestational surrogate. The surrogate mother then carries the baby until birth.

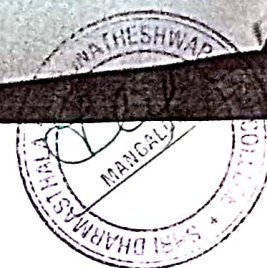
**Meaning:** The word "surrogate" derived from the Latin word "subrogare" (to substitute), means "appointed to act in the place of". The intended parent(s) is an individual or couple who intends to bear the child after its birth. For bearing child for someone else by surrogate women without sexual intercourse. Surrogacy is a well known method of Assisted Reproduction whereby woman agrees to become pregnant for the purpose of gestating and giving birth to a child. She will not raise but hand over a contracted party. She may be the child's genetic mother (the more traditional form for surrogacy) or she may, as a gestational carrier, carry the pregnancy to deliver after having been implanted with embryo. Sometimes surrogacy is only available option for parents who wish to have a child that is biologically related to them<sup>1</sup>

### Surrogacy and Personal Laws in India :

**Hindu Law:** As India and other countries with large Hindu populations have become epicenters for fertility tourism, numerous questions have been raised regarding whether or not surrogacy conflicts with Hindu religion. Under Hindu Succession Act, legitimacy is conferred upon the child by valid marriage only<sup>2</sup>. The child born on legitimate relationship is recognized to inherit the property of a male Hindu as per the Act<sup>3</sup>. Under Indian Succession Act, the child born through donated gametes of strangers to a married couple may not be considered as their legitimate child not being genetically related to them. A child born to a surrogate may be considered as the legitimate child of the surrogate and her husband, if married, even though the gametes of the intending couple are used for procreation<sup>4</sup>.

**Mohammedan law:** The Islamic community has largely outlawed the practice of surrogacy, however there remains a small population of Muslims which contended that the practice of surrogacy does not conflict with Islamic Law because it is akin to zina (adultery) which is strictly prohibited in the Muslim religion. This is based on the fact that in gestational surrogacy, the surrogate carries the fertilized egg of someone who is not her legal husband, thus transgressing the bounds of Allah as stated in the Quran.<sup>5</sup>

Muslim law prohibits inheritance of property of the deceased by illegitimate children as per *Jane Antony .v. M Siyath (2008 DGLs(AHC) 13529)*. It adheres to the concept of Nullius Filius or child of no one. Hence, only the child born during valid wedlock, to the wife, who is artificially inseminated with the sperms of her husband or embryo created with her own eggs and sperms of her husband, shall be their legitimate child. In case, where the child is born to a wife with the use of donated sperms or eggs, or to a



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surrogate, the child will be considered as the child of the gestational mother only under Hanafi Law. The child is born to an unmarried surrogate will be Nullius Filius.

Thus the personal laws are inadequate to address the problems of legal status and parenthood of the children born through ART or Surrogacy.<sup>8</sup>

**Socio- Legal Issues:** The issues of surrogacy can cause great moral, ethical, social and legal arguments within the community. Surrogacy arrangements are complex and involve medical, emotional, financial and legal issues. In India presently there is no law governing ART and Surrogacy. Various Bills are laid before the Parliament in the year 2008, 2010, 2014, 2016, 2019 and recently, the surrogacy (Regulation) Bill, 2020 and Assisted Reproductive Technology (ART) Regulation Bill, 2020 was introduced. The uncertain legal status of the child created via IVF and surrogacy raises other legal, ethical, human rights concerns like

- The problems of trans- border surrogacy are generally in citizenship, nationality, motherhood, parentage and rights of such children
- Breach of contract by intending couple
- Failure of the intended parents to pay for all the expenses and fees
- Miscarriage, twin / triplets, desired baby etc
- Breach of contract by surrogate mother
- Voluntary abortion without the consent of intended parents
- Failing to follow certain behavioral restrictions (drug abuse / alcohol consumption) during the gestation period
- The surrogate refusal to go for an abortion following the attending physician's recommendation<sup>8</sup>

**Purpose and Important Definitions Under Assisted Reproductive Technology (Art) Regulation Bill, 2020 :**

- The bill makes provisions for safe and ethical practice o assisted reproductive technology services in the country
- It regulates surrogacy procedure in such a way as to stop exploitation of poor vulnerable women.
- Ensure protection of rights of the child born out of surrogacy
- Facilitate only needy infertile couple and widow and divorced women to have child to complete their family.
- To achieve the objective, the Bill provides to prohibit commercial surrogacy and allow only altruistic surrogacy.

The central and state government shall appoint one or more appropriate authorities within 90 days of the bill becoming the Act . The functions of appropriate authority include

- granting, suspending or cancelling registration of surrogacy clinics
- enforcing standards for surrogacy clinics
- investigating ad taking action against breach of the provisions of the bill recommending modifications to the rules and regulations<sup>8</sup>

The Bill allow altruistic ethical surrogacy to the needy infertile married Indian couples including Non Resident Indians (NRI's) . Altruistic surrogacy includes contracting a close relative as a surrogate by a heterosexual married couple who have been childless for five years of their marriage. \* intending couple"<sup>10</sup> should have a certificate of essentiality and a certificate of eligibility issued by the appropriate authority. Only Indian couples who have been legally married for atleast 5 years would be allowed to opt for surrogacy<sup>11</sup>. It seeks to allow ethical altruistic surrogacy to the intending infertile Indian married couple between the age of 23- 50 years for female and 26-55 years for male<sup>12</sup>. They do not have any surviving child (biological, adopted or surrogate): this would not include a child who is mentally or physically challenged or suffers from life threatening disorder or fatal illness; and other conditions that may be specified by regulations.

**Rights of Surrogate Mother :**

- The surrogate must be a close relative of the intending couple and be a married women having a child of her own.
- She should between the age of 25 -35 years, not have been surrogate earlier and must be certifiably mentally and physically fit.
- Must be aware of all known side effects and after effects of such procedure
- The written informed consent of the surrogate mother to undergo such procedures in the language she understands



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- The surrogate mother shall have an option to withdraw her consent for surrogacy before the implantation of embryo in her womb
- An insurance coverage is for a period of thirty six months covering post partum delivery complications from an insurance company
- A child born out of surrogacy procedure shall be deemed to be a biological child of the intending couple or intending woman and the said child shall be entitled to all the rights and privileges available to a natural child under any law for time being in force<sup>13</sup>.

**Rights of the Child :** A surrogate mother shall relinquish all parental rights over the child. The birth certificate in respect of a baby born through surrogacy shall bear the name(s) of genetic parents/parent of the baby. A child born to a married couple or a single person through the use of ART shall be presumed to be the legitimate child of the couple or the single person, as the case may be. If the commissioning couple separates or gets divorced after going for surrogacy but before the child is born, then also the child shall be considered to be the legitimate child of the couple<sup>14</sup>.

**Penalties :** The Bill specifies a range of offences and penalties for other contraventions of the provisions of the Bill. The penalties for the offences as per the Assisted Reproductive Technology (ART) Regulation Bill, 2020 is imprisonment up to five lakh rupees for the first offence and for any subsequent offences with imprisonment which may extend to 10 years and a fine up to 10 lakh rupees. Whoever contravenes any of the provisions of this Act, rules or regulations made there under for which no penalty has been provided in this Act, shall be punishable with imprisonment for a term which may extend to three years and with fine which may extend to five lakh rupees and in the case of continuing contravention with an additional fine which may extend to ten thousand rupees for every day during which such contravention continues after conviction for the first such contravention.

If the surrogate mother was compelled by her husband, the intending couple or any other relative, as the case may be, to render surrogacy services, procedures or to donate gametes such person shall be liable for abetment of such offences and shall be punishable for the offences specified under that section<sup>15</sup>.

#### Position in Other Countries

**Israel** – in this country, a child is said to be Jewish when the mother is Jewish. They have legislated that the genetic mother is the legal mother of the child and adoption is not needed. Others view differently, they argue that the surrogate mother is the legal mother because she accepts the embryo, nurtures it and ultimately delivers the baby. She is therefore, the female parent. They argue further that fatherhood is solely genetical but motherhood is not. There is an element of mental attachment which is no less than genetical link. A surrogate mother carries the baby for nine months in her womb and is no way different from normal mothers<sup>16</sup>.

**United State of America** - In the USA, the laws are different, even contrasting, in different States. For example, in Virginia, the surrogate mother is the legal mother, where the law provides that a baby born to a surrogate mother, provided her husband consents, is the legal child of the surrogate mother and her husband. It does not matter whether she is implanted with ovum or sperm<sup>17</sup>. New Jersey has no law as such. But the famous case in *Re Baby M*<sup>18</sup>, supports the law of Virginia. It was held that the surrogate mother should be the custodian of the baby unless she is proved to be unfit and dangerous to the child. But in California; the Law is just the opposite that of Virginia and the law states: when a woman provides ovum and another woman gives birth to a baby, the former's initiative and intension credit her to be the natural mother. It was held in *Jhonson .v. Calvert*<sup>19</sup>, the Supreme Court of California ruled that without the genetic mother the child could not be born. The court also held that the interest of the child is served better by the intending parents. In the case of *Soos .v. Superior Court of Maricopa*<sup>20</sup>, the Court held that the Arizona statute is unconstitutional when it authorizes the surrogate mother as the legal mother including the custody of the child. The court held that the statute is violative of the equal protection rule of both the U S and the Arizona Constitutions. Because, in case where the intending parents provides the gametes they are the biological parents. But though the biological father can be declared as the legal father, the biological mother could not be declared mother because the statutory provision makes surrogate mother as the legal mother. The court declared this as unfair because it violates equal protection laws. The court also upheld the contention that the biological mother is best suited for protecting the interest of the child. when the custody of the child is conferred on the surrogate mother, it is unsure whether she is willing to raise the child and safeguard his interests.



**Judicial Decisions:** In *Jan Balaz v. Union of India*<sup>21</sup>, the court observed : " We are primarily concerned with the rights of two new born, innocent babies, much more than the rights of the biological parents, surrogate mother, or the donor of the ova. Emotional and legal relationship of the babies with the surrogate mother and the donor of the ova is also of vital importance." The court considered the surrogacy laws of countries like Ukraine, Japan and the United States<sup>22</sup>.

In *Baby Manaji Yamanda v. Union of India*<sup>23</sup>, the court defined "commercial surrogacy as a form of surrogacy in which a gestational carrier is paid to carry a child to maturity in her womb" and the related aspects as surrogacy agreement, the stake holders or parties who may enter, and directed for enactment of a statutory law on the same<sup>24</sup>.

**Conclusion :** There is a great concern about changing india into a hub of surrogacy by the foreign countries that could change the system of surrogacy . The Surrogacy (Regulation) Bill, 2020 is making all the effort to protect the ethical legal and human rights of mother and the child under surrogacy. The bill clearly states that altruistic surrogacy should be allowed and there by the health, privacy and life of the surrogate mother is protected. It clearly demarcates the position of competent authority to grant permission to practice surrogacy in India and to satisfy the desire of infertile couples to complete their family life.

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2. Section 3 (1) (j), Hindu Succession Act, 1956 :
3. (1) In this Act, unless the context otherwise requires,— related" means related by legitimate kinship: Provided that illegitimate children shall be deemed to be related to their mothers and to one another, and their legitimate descendants shall be deemed to be related to them and to one another; and any word expressing relationship or denoting a relative shall be construed accordingly. 3 Section 18 , Hindu Succession Act, 1956
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10. intending couple' means a couple who have a medical indication necessitating gestational surrogacy and who intent to become parents through surrogacy.
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21. AIR 2010 Guj 21.
22. *ibid*
23. (2008) 13 SCC 518.
24. *Ibid*

