

# A COMPREHENSIVE STUDY ON THE SURROGACY (REGULATION) ACT, 2021 VIS-A-VIS THE ASSISTED REPRODUCTIVE TECHNOLOGY (REGULATION) ACT, 2021

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## ABSTRACT

*Surrogacy is a process or procedure where a woman consents to be pregnant for other intended/desired parents who are unable to conceive due to medical/natural reasons. Overall, to say that, this is an agreement that implies a consensus ad idem between both the parties i.e., the surrogate mother, and the expected parents. From ethical and moral perspectives, it's helpful, but some instances prove it to be a wringing of all three; surrogate, locum tenens baby and in-fecund couple. The union government keeping in view the advantages and disadvantages, has taken numerous drives to control and to bridle the ART centers. The Surrogacy (Regulation) Bill was passed by the Lok Sabha on 19<sup>th</sup> December, 2018 and the same has received President's assent on 25<sup>th</sup> Dec, 2021 in order to practice and process of surrogacy. Similarly, the Assisted Reproductive Technology (Regulation) Act, 2021 has also received the assent of the president for the regulation and supervision of the Assisted Reproductive Technology herein after called as ART. This is a significant pace taken to end commercial surrogacy in India. This article, attempts to put forth the effort to contemplate the notion of surrogacy and surrogacy law in India. To a greater extent, the paper also focuses on the idea of the malleability of surrogacy in mythology. It is appropriate to note here that in India commercial surrogacy is legal. Many infertility couples, even outsiders approach India for their carving to set off parents. Albeit both the parties acquire good sake out of this procedure, however, there are some indubitable legal proceedings which are exceptionally mind-boggling and entail, inscribed and set on by umbrella legislation. Surrogacy entails a squabble of profuse interests and has memorable effects on the foremost section of the community. Finally, the paper is concluded by giving suggestions.*

**Key words:** -Surrogacy, Commercial Surrogacy, Surrogacy Act, Assisted Reproductive Technology, surrogacy and mythology etc.

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## INTRODUCTION

Every couple is not blessed with a child either due to some medical or due to some natural reasons. Therefore, the urge to have a child in a family makes a partner so compelling that either they advance towards adoption or surrogacy. Surrogacy is such a step that another woman gives her womb on rent to carry the baby for that particular couple who have a desire for a child and ultimately pays for it. The expression ‘Surrogacy’ has been gleaned from the Latin word “surrogates”, which means “to substitute”. The word surrogacy, simply means a womb on rent, where a couple goes and contracts with the surrogate mother. The Black’s Law Dictionary, defines surrogacy as “*the process of carrying and delivering a child for another person*”<sup>3</sup>. In India, surrogacy is not a contemporary conception; it has been practiced in India since the ancient period. Similarly, the New Encyclopedia Britannica elucidates “*surrogacy as a practice in which a woman bears a child for a couple impotent to give birth to children in the customary way*”<sup>4</sup>. Each and every woman has the inclination to embellish the mother of a child, whom she can sustain and stir on the authority of her aspiration and format. But woefully, every woman is not confounded with a child, because of certain scientific reasons; as per the report, many are impotent to accord nativity to a child<sup>5</sup>. Adoption is consistently pondered to be the ultimate pace in this affair of owning a child; for that reason, the supplementary course of action is surrogacy which assist a couple to have a child who would at least have smatter correspondence with the father because the procedure needs the sperm of the father carving the baby.

The surrogacy procedure is ordinarily sought after while pregnancy is considered impossible, either medically or extremely dangerous for the well-being of the mother. The process of surrogacy is not a new concept and the same has been used since ancient times because it is known as antiquity during Babylonian civilization<sup>6</sup>. Generally, it is seen that a barren woman concedes her husband to procreate a child with another woman in order to fend off divorce due to childlessness and that child would be reared by that childless woman. Modern headway in medical science, social norms and legal frameworks has opened on to the expansion of contemporary commercial surrogacy. It would have not been possible to develop an embryo outside the womb or to inseminate the woman artificially without the help of modern science; so, moral issues are less in Assisted Reproductive Technology.

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<sup>3</sup>C. Devprakash, *Position and Need of surrogacy laws in India: An analysis*, IJLRA 4 , 4-33 (2021). Retrieved on 20<sup>th</sup> Sept, 2021 from <https://ijlra.com/wp-content/uploads/2021/05/chavi-devprakash-2.pdf>

<sup>4</sup>R.S. Sharma, *Social, ethical, medical & legal aspects of surrogacy: an Indian scenario*, 140 Indian J Med Res 13, 13-16 (2014) Retrieved on 20<sup>th</sup> Sept, 2021 from <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4345743/>

<sup>5</sup> H.N. Misra, *Surrogate Motherhood: A Ray of Hope*, 5 Indian J. Appl. Res 310, 310-311 (2015). Retrieved on 20<sup>th</sup> Sept, 2021 from [https://www.researchgate.net/publication/282000189\\_SURROGATE\\_MOTHERHOOD\\_A\\_RAY\\_OF\\_HOPE/link/5600e11d08aec948c4fa948d/download](https://www.researchgate.net/publication/282000189_SURROGATE_MOTHERHOOD_A_RAY_OF_HOPE/link/5600e11d08aec948c4fa948d/download)

<sup>6</sup>Garg D., Ritu Sharma, *Surrogacy in India: Current Scenario and Ethical Perspective*, 3 J Clin Obstet Gynecol Infertil. 1, 1-3 (2019). Retrieved on 20<sup>th</sup> Sept, 2020 from <https://www.remedypublications.com/open-access/surrogacy-in-india-current-scenario-and-ethical-perspective-5155.pdf>

## SURROGACY AND HINDU MYTHOLOGY

While there is truancy in compatible legislation relating to surrogacy, it becomes sensitive and controversial in nature. But when we look into ancient India, it will be a surprise to everyone that surrogacy did exist in ancient times as well. Let's take a few instances in-order to adopt surrogacy and make it socially accepted.

Looking to the days of Queen Satyavati who got her illegitimate son Rishi Vyasa to execute "Niyogi"<sup>7</sup> on her two distressed daughter-in law that is Ambika and Ambalika to procreate to a blind child named Dhritarashtra and a subtle child as Pandu, respectively. Similar is the case of Maharani Kunti, who also took the help of Devraj Indra, Dharmaraj and Vayu to give birth to Arjun, Yudhistir and Bheema respectively. The instance of surrogacy is also apparent in Mahabharat, where the birth of Draupadi and her brother Dhristadumnya out of the Yagyakunda. In case of Gandhari, she had conceived from Dhritarastra still undergo a long pregnancy for about two years, for which rishi Vyasa suggested her to put the cells in a nutrient medium and were grown outside the womb till full term.

History is a witness to surrogacy with the birth of Lord Balarama where Rohini gave birth to a child for Vasudev and Devaki in-order to prevent the baby from being killed by the demon Kansa<sup>8</sup>.

Similarly, Lord Kartikeya was born out of surrogacy through Shiva, and not Parvati's womb; rather, it's from the womb of Ganga.

From this it is evident from Indian history that surrogacy was pertinent, since years can conclude that there is no conflict between society and the religion; rather, surrogacy has been trusted as a manifestation of care and never an infringement of personal liberty. But to enter into this we need to understand both the process and methods involved in it.

## EVOLUTION OF SURROGACY REGULATIONS IN INDIA

In the year 2005, for the first time, the Indian Council for Medical Research (ICMR) has adopted a comprehensive guideline for Surrogate Motherhood. Thereafter, in *Manji's case*<sup>9</sup>, the government seemed helpless as there was no legislation. So after observing the entire legal facet, the hon'ble Supreme Court has given a direction to the Legislature to pass an appropriate Law governing Surrogacy in India.

In 2009, the Law Commission of India, under the chairmanship of Justice **A R Lakshmanan**<sup>10</sup> has put forward for proscribing commercial surrogacy and recognizing ethical

<sup>7</sup> A Situation where a woman appoints another person for helping her to conceive incase her husband is dead or impotent.

<sup>8</sup>Vaidehi G. Balvally. *Wombs For Rent- An Addition to The Ban-Wagon*, Retrieved on 20<sup>th</sup> Sept, 2021 from [http://docs.manupatra.in/newslines/articles/Upload/5B2E6FB0-EBBD-440B-A292-23917B60BFF5.2-E\\_CIVIL.pdf](http://docs.manupatra.in/newslines/articles/Upload/5B2E6FB0-EBBD-440B-A292-23917B60BFF5.2-E_CIVIL.pdf)

<sup>9</sup>Popularly known as Japanese Baby case, Baby Manji Yamada v Union of India, AIR 2008 SC 518

<sup>10</sup> The Law Commission of India, Need for Legislation to Regulate Assisted Reproductive Technology clinics as well as Rights and Obligations of Parties to a surrogacy, Report No. 228, August 2009

altruistic surrogacy by sanctioning a worthy legislation. The Commission said<sup>11</sup>, “*It seems that wombs in India are on rent, which translates into babies for foreigners and dollars for Indian surrogate mothers*”. To a greater extent, the commission has recommended that, the rights and obligations of the parties as well as the rights of the surrogate child should be safeguarded under proposed legislation. At the same time, the commission has also focuses on prohibition on vague moral grounds for obtaining surrogacy so that, that purpose can be served properly.

Similarly, in 2010 the Assisted Reproductive Technology (Regulation) bill, 2010 was drafted to check harassment of the surrogate mother. However, due to some technical problems, the bill was not put forward for discussion and the same goes on. Finally, the Assisted Reproductive Technology (Regulation) bill, 2020 was introduced in the Lok Sabha on 14<sup>th</sup> Sept, 2020 and the same has been approved by the President on 18<sup>th</sup> Dec, 2021. Especially the act regulates all the techniques that are important to obtain a pregnancy and helps for the supervision of the assisted reproductive technology clinics as well as ART banks<sup>12</sup>. Moreover, the act also makes provisions for prevention of misuse and safeguarding the ethical practices related to ART services<sup>13</sup>. The Act has been divided into 6 chapters having 46 sections. Under Chapter-II, the act makes special provisions for the establishments of regulating authorities for modulating ART such as National Assisted Reproductive Technology and Surrogacy Board<sup>14</sup> at national level, State Assisted Reproductive Technology and Surrogacy Board<sup>15</sup> at state level and the National Assisted Reproductive Technology and Surrogacy Registry and the Appropriate Assisted Reproductive Technology and Surrogacy Authority<sup>16</sup>. Apart from this, the act also provides for various regulations, such as it states that the clinics shall apply ART services to a woman above the age 21 years and below the age of 50 years,<sup>17</sup> and in case of man it is between 21 to 55 years<sup>18</sup>.

In 2016, the Surrogacy bill was proposed in parliament but the same could not be passed. So, the bill was again re-introduced & was passed by the Lok Sabha on 19<sup>th</sup> December, 2018 and, and same has received President’s assent on 25<sup>th</sup> Dec, 2021. The Surrogacy (Regulation) Act, 2021 clearly entails in this preamble that, an act to establish

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<sup>11</sup> The Law Commission of India, Need for Legislation to Regulate Assisted Reproductive Technology clinics as well as Rights and Obligations of Parties to a surrogacy, Report No. 228, August 2009

<sup>12</sup> The Assisted Reproductive Technology (Regulation) Act, 2021, Preamble, No. 42, Acts of Parliament, 2021 (India)

<sup>13</sup> Ibid

<sup>14</sup> The Assisted Reproductive Technology (Regulation) Act, 2021, §3-§5, No. 42, Acts of Parliament, 2021 (India)

<sup>15</sup>The Assisted Reproductive Technology (Regulation) Act, 2021, §6-§8, No. 42, Acts of Parliament, 2021 (India)

<sup>16</sup> The Assisted Reproductive Technology (Regulation) Act, 2021, §9-§14, No. 42, Acts of Parliament, 2021 (India)

<sup>17</sup>The Assisted Reproductive Technology (Regulation) Act, 2021, §21 cl. (g)(i), No. 42, Acts of Parliament, 2021 (India)

<sup>18</sup> The Assisted Reproductive Technology (Regulation) Act, 2021, §21 cl. (g)(ii), No. 42, Acts of Parliament, 2021 (India)

National Assisted Reproductive Technology and Surrogacy Board (NARTSB)<sup>19</sup> at the national level, the State Assisted Reproductive Technology and Surrogacy Board (SARTSB)<sup>20</sup> at the state level and the appointment of appropriate authorities for regulation of the practice and process of surrogacy. That means this legislation forms three statutory bodies, i.e., national level, state level, and the National Assisted Reproductive Technology and Surrogacy Registry<sup>21</sup> & Appropriate authorities to regulate the practice and process of surrogacy. The act has been divided into 8 chapters having 54 sections. Chapter-II & III deals with surrogacy clinics and surrogacy procedure respectively. The act makes its compulsory for the registration of surrogacy clinics<sup>22</sup>, for that an application is to be filed before the appropriate authority accompanied with prescribed fees<sup>23</sup> and after satisfying all the requirements, the appropriate authority shall issue a certificate of registration<sup>24</sup>. However, on receipt of a complaint or suo motu, the appropriate authority may issue a notice for the cancellation or suspension of the clinics<sup>25</sup>. Under Chapter-VII, offences and penalties has been provided where it states that, in case of contravention of any provisions by the registered medical practitioner or any other persons having a clinics or employed in a clinic shall be liable for punishment with imprisonment for a term of 5 years or with fine of rupees 10 lakhs<sup>26</sup>. It is important to mention here that, all the offences that are mentioned under this act are cognizable, non-bailable and non-compoundable<sup>27</sup>, hence the provision of plea bargaining<sup>28</sup> shall not be apply<sup>29</sup>.

## JUDICIAL APPROACHES

In *B. K. Parthasarathi Vs Union of India*<sup>30</sup>, the hon'ble Court has decided an important question of law and upheld "*the right of reproductive autonomy*" of an individual as a facet of his "*right to privacy*" and acceded with the disposition of the American Supreme Court in *T. Skinner Vs State of Oklahoma*<sup>31</sup>, which characterized the right to reproduce as "*one of the basic civil rights of man*"<sup>32</sup>.

<sup>19</sup> The Surrogacy (Regulation) Act, 2021, §17-25, No. 47, Acts of Parliament, 2021 (India)

<sup>20</sup> The Surrogacy (Regulation) Act, 2021, §26-34, No. 47, Acts of Parliament, 2021 (India)

<sup>21</sup> The Surrogacy (Regulation) Act, 2021, §35-37, No. 47, Acts of Parliament, 2021 (India)

<sup>22</sup> The Surrogacy (Regulation) Act, 2021, §11, cl. 1, No. 47, Acts of Parliament, 2021 (India)

<sup>23</sup> The Surrogacy (Regulation) Act, 2021, §11, cl. 2, No. 47, Acts of Parliament, 2021 (India)

<sup>24</sup> The Surrogacy (Regulation) Act, 2021, §12, No. 47, Acts of Parliament, 2021 (India)

<sup>25</sup> The Surrogacy (Regulation) Act, 2021, §13, cl. 1, No. 47, Acts of Parliament, 2021 (India)

<sup>26</sup> The Surrogacy (Regulation) Act, 2021, §39, No. 47, Acts of Parliament, 2021 (India)

<sup>27</sup> The Surrogacy (Regulation) Act, 2021, §43, No. 47, Acts of Parliament, 2021 (India)

<sup>28</sup> Contained in chapter XXI A of Code of Criminal Procedure, 1973

<sup>29</sup> The Surrogacy (Regulation) Act, 2021, §45, No. 47, Acts of Parliament, 2021 (India)

<sup>30</sup> AIR 2000 A. P. 156

<sup>31</sup> 316 US 535

<sup>32</sup> The Law Commission of India, Need for Legislation to Regulate Assisted Reproductive Technology clinics as well as Rights and Obligations of Parties to a surrogacy, Report No. 228, August 2009

Similarly, in *Baby Manjhi Yaamada Vs Union Of India*<sup>33</sup>, popularly known as Japanese baby case, the honorable Supreme Court has defined the term surrogacy and the court observed the importance of developing surrogacy regulation laws in India.

Lord Patrick Devlin observed: “No act of immorality should be made a criminal offence unless it is accompanied by some other feature such as indecency, corruption or exploitation; It is not the duty of law to concern itself with immorality as such; it should confine itself to those activities which offend against public order and decency or expose the ordinary citizen to what is offensive and injurious<sup>34</sup>.” In this context, legalizing commercial surrogacy should be welcomed because this decision finally catches up without time and in no way, it is offensive and injurious. Public morality must not be accepted as a shield against any act of human development and social change.

## CONCLUSION AND SUGGESTIONS

From the above discussions and deliberations, it can be concluded that, the new legislation is very comprehensive and clearly prohibits surrogacy, that is, commercial surrogacy, as because the act enumerates exhaustive provisions regarding the regulation of clinic, procedure, donor and surrogate. Similarly, National Registry is the need of the hour. It is pertinent to mention here that, linking of the Assisted Reproductive Technologies (Regulation) Act, 2021 and the Surrogacy (Regulation) Act, 2021 is welcome. However, like any other concept, it has also its pros and cons, which differ from case to case. There are negative impacts such as; the act is silent about the freedom and rights of the surrogate mother during her pregnancy, especially when she is carrying the surrogate child, as well as the overall procedure, including medical and legal, is very complicated and time-consuming.

It's evident from the previous report and survey that surrogacy is a contemporary stride in medical science which can fulfill the dreams of many couples desiring to own a child. Further, the researchers are of the opinion that everyone has the right to be a parent keeping in view both moral and ethical principles. Surrogacy can be the best solution for many childless couples. But the major problem being that if done for a commercial purpose affecting even the health of a surrogate mother is unacceptable and needs to be penalized. It appears from the above study that, the legislation is not in touch with reality. Therefore, it is recommended that the parliament should adopt some legislative measures to ensure that there won't be any misuse of law or abuse and cheating on the surrogate mother. Similarly, it is also suggested that more agencies must be created with specialized knowledge for helping childless couples of all kinds to create their family using this technique and abide law. Lastly, it can be said that surrogacy should be allowed with proper rules and regulations, and steps must be taken to educate the women about their rights.

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<sup>33</sup> AIR 2009 SC 84

<sup>34</sup> Said by Lord Patrick Devlin

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