



# Surrogacy: Ethical And Legal Issues In Indian Perspective And Comparative Analysis

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## ARTICLE INFO

## ABSTRACT

*Surrogacy in India presents a multifaceted landscape of moral and legal challenges. This research paper explores these issues through a comparative lens, examining both Indian perspectives and international practices. Ethical considerations in Indian surrogacy encompass concerns over autonomy and consent, particularly given the socioeconomic disparities that often influence decisions to become a surrogate. Cultural attitudes towards fertility, parenthood, and the commercialization of reproduction further complicate ethical debates. Comparative analysis with other republics such as the USA, UK, Australia, Canada and various European nations reveals contrasting approaches to surrogacy regulation, highlighting diverse cultural, legal, and ethical landscapes. This abstract underscore the complexity of surrogacy as a global phenomenon, emphasizing the need for nuanced legal and ethical frameworks that protect all stakeholders involved while respecting human dignity and reproductive rights. The Surrogacy (Regulation) Act, 2021, for instance, seeks to restrict commercial surrogacy and ensure altruistic motives. This paper contributes to a deeper understanding of the ethical and legal complexities of surrogacy in India, advocating for sensitive and comprehensive approaches to regulation that uphold the rights and dignity of all stakeholders. Surrogacy is burning issue in modern era, we should focuss on such topic. My goal in writing this paper is to educate readers about surrogacy. Here, I would talk about a variety of topics, including meaning, approach, kinds, socio-legal concerns, ethical dilemmas, and different reproductive procedures. This article is entirely dependent on secondary sources of information, including legal journals, books, periodicals, publications, internet pages, and other sources.*

**Key words:** Surrogacy, categories, human civilizations, Article 21 of Indian Constitution and Compensation

## INTRODUCTION

Children are “the most precious gift to the spouses in this world. There is no bigger responsibility but the relationship with a child can bear the greatest rewards. Undoubtedly a child is one of the most valuable boons of God to every living creature on this earth”.<sup>1</sup> procreation is a biological process in which a legally wed wife and husband give birth to children.<sup>2</sup> The genetic makeup of the child combines elements from both the dad and the woman. These individuals, known as parents and children, are genetically related. Marriage life is taken into account when children are conceived within the mother's womb. Own kid procreation is essential for fostering happy relationships between partners. In Morden age , number of causes are infertility. A problem of global dimensions, infertility, or the inability to conceive, affects more than ten percent of couples

<sup>1</sup> The Social Construction of Childhood - ReviseSociology visited on 24/11/2003 at 6:00 PM

<sup>2</sup> Family of Procreation | Definition, Example & Importance - Lesson | Study.com Visited on 26/12/23 at 8:00PM

worldwide.<sup>3</sup> Today science has developed different types of technologies for reproduction of child.<sup>4</sup> Surrogacy is one of them. We can say that Surrogacy has proven to be a crucial method for individuals seeking their own child. Due to infertility, the person trying to conceive a child is unable to do so on his own. It also ensures that the child born through surrogacy who shares genetic ties to the commissioning parents will have a better future, where future of such kid is frequently uncertain and once the adoptive parents develop a strong attachment to the child. Today, every kind of sterility is encouraged to use IVF and other ART methods. Surrogacy is one of the most practical methods of treating infertility, along with other types of ART. A man and woman shared a home and engaged in sexual activity, which was commonly followed by pregnancy and childbirth.

### OBJECTIVE OF RESEARCH PAPER

The present research paper originates from debatable issues of 'Surrogacy' in contemporary development of modern versions of scientific Technologies. The aims and objectives of this study is to investigate the serious threats to the concept of surrogacy. Hence to make an extensive and comprehensive study of the subject. And suggest the solutions to short out the number of issues partening to surrogacy.

### SIGNIFICANCE OF THE STUDY

Today, India has become a Tourism place of Surrogacy due to cheaper surrogacy procedure and other causes. It is clear that women in the developing states are more at risk of exploitation as surrogates. The scope of study includes the detailed analysis of the ICMR guidelines in 2005, "Assisted Reproductive Technology (Regulation) Bill, 2010," law commission 228<sup>th</sup> report in august 2009 and "surrogacy (regulation) Bill, 2016." In addition to it the core international provisions and law related to the Surrogacy shall be studied. Further, the Judgments of the Supreme courts of India, High Court of Various states shall be studied and discusses.

### RESEARCH METHODOLOGY

The design of the present research study has been analytical and **the methodology of research** has been doctrinal and as well as empirical. Method of Data Collection: Primary data was collected through survey form . Structured interview schedule was used to collect data. Secondly data was collected from Government reports, Books, Articles, Journals, Websites and other sources.

### STUDY PLAN OF RESEARCH PAPER

Effective legislation Recommendations: Based on the findings, propose of recommendations that strike a balance between protecting the rights of surrogate child and preventing exploitation of surrogate mother. Socio-Cultural Perspectives: Uncover the socio-cultural nuances surrounding Surrogacy process, shedding light on its role in challenging various issues and society dynamics.

### HISTORICAL DEVELOPMENT OF SURROGACY

The early human civilizations of Egypt, Rome, Mesopotamia, and the Mediterranean all acknowledged surrogacy as a common cultural practice to ensure the continuation of heritage and offspring. The origins and history of surrogacy can be learned from ancient inscriptions, legends, myths, epics, religious text and other sources, even though they are not precisely documented in structured historical records.<sup>5</sup> The ancient Babylonian included comprehensive instructions and outlined the circumstances under which it was legally acceptable. In conclusion, the evolution of surrogacy in India has been traced from unofficial arrangements to a major international hub for commercial surrogacy, with subsequent regulatory adjustments meant to allay ethical worries and safeguard the rights of those concerned. India's changing strategy for striking a balance between reproductive rights and ethical issues surrounding assisted reproduction is highlighted by the current situation.

The various epics, mythologies, and other historical texts from ancient India depict various surrogacy practices, including. Natural conception and the use of external mediums like artificial insemination and test tube pregnancy. A handful of the instances are mentioned briefly here. According to common Indian religious belief, perhaps the 4th or 5th century BC. According to pthe Epic Ramayana, gametes were donated in order for Lord Hanuman to be born through surrogacy. "The sperm of Lord Shiva was carried and stimulated by Vayu, the God of Wind, who implanted the sperm into the womb of Anjani, who carried the foetus as a gestational carrier

<sup>3</sup> Surging trends of infertility and its behavioural determinants in India - PMC (nih.gov) Visited on 29/7/2023 at 10:00PM

<sup>4</sup> Fertility and infertility: Definition and epidemiology - PubMed (nih.gov) Visited on 4/2/2023 at 9:00PM

<sup>5</sup> Available.at.<https://www.bing.com/search?q=uttaranchal+university+dehradun&cvid=555600bd9a6c4>, visited on 17/01/22 at 8:00PM

or surrogate mother and gave birth to a son named Hanuman." Here, Lord Shiva was the biological father, Anjani was the gestational carrier (i.e., both the genetic mother and the egg donor), and she gave birth to the surrogate son, Lord Hanuman. According to the Epic Mahabharata, Lord Balrama was born between the eighth and ninth centuries BCE as a surrogate child. In the uterus of the goddess Yogamayain Rohini, who was Vasudeva's spouse and acted as a surrogate mother, were implanted gametes eggs and sperms from the Devaki and Vasudeva, which resulted in the conception of Lord Balrama, the brother of Lord Krishna. Hindu mythology provides examples of surrogacy and illustrates the concealment that contributes to the prevalence of surrogacy today. In Bhagavata Purana and The Ramayana there are various instances relating to this practice. The History of surrogacy also belonged to the Mahabharata as discussed earlier.

Kanupriya was born on October 3, 1978, 67 days after the birth of the second IVF baby in history and the first in India. The baby Kanupriya is the result of the effort that Dr. Mukherjee and his two friends did in Kolkata. In India, the first recorded example of commercial surrogacy occurred in 1997. A Chandigarh woman agreed to get pregnant in exchange for 50,000 rupees so that her crippled husband might receive medical care. In the same year, "a Gujarati village woman was featured in an Indian newspaper as a surrogate for a German couple."

**MEANING AND KINDS OF SURROGACY** According to statistics ranging from 100 to 290 a year, the number of surrogate births in India is thought to have doubled between 2003 and 2006. Thus, it is evident from the above noted fact that how rapidly the matter of surrogacy increased in India. And in last decade what a surprisingly boom came in India regarding the matters of surrogacy.

Surrogate motherhood is a biological practice in which a woman (the surrogate) bears and births a baby for another individual or spouse (the intending parents).<sup>6</sup> It involves a complex set of legal, ethical, and emotional considerations. There are several kinds of surrogacy, broadly categorized based on the genetic relationship between the surrogate and the resulting child:

1. **Conventional Surrogacy:**

- When a surrogate mother utilizes her own egg in a typical surrogacy, she becomes genetically connected to the kid she bears.
- Because of the psychological and legal difficulties brought on by the surrogate's genetic relationship to the kid, this procedure is less popular now.<sup>7</sup>

2. **Gestational Surrogacy:**

- This surrogacy, also called as full surrogacy, is the most prevalent type.
- Usually, the prospective parent' or donor' egg and sperm are used in in vitro fertilization (IVF) to develop the embryo, which is then placed inside the surrogate's womb.

Based on the arrangement and compensation involved, surrogacy can also be categorized as:

**1. Altruistic Surrogacy:**

- Altruistic surrogacy includes no financial provision or only repayment of medicinal and other reasonable expenditures incurred by the surrogate.
- The surrogate volunteers to carry the child out of goodwill or familial bond, often for a close family member or friend.<sup>8</sup>

**2. Commercial Surrogacy:**

- This surrogacy comprises financial compensation beyond medical and other expenses paid to the surrogate.<sup>9</sup>
- This form of surrogacy has been controversial due to concerns about exploitation of surrogate mothers, commodification of reproductive services, and ethical considerations related to treating pregnancy as a commercial transaction.

**RESPONSIBLE FACTOR OF SURROGACY**

Several responsible factors contribute to the practice of surrogacy, influencing its ethical, legal, and practical considerations. These factors vary depending on cultural, social, and legal contexts:

1. **Reproductive Assistance:** Surrogacy is often requested by people or couples who are unable to conceive or have a baby owing to health problems such as being infertile, repeated miscarriages, or medical disorders which render pregnancy unsafe.
2. **Family Building:** Intended parents may turn to surrogacy to fulfil their desire to have a biological child when other assisted reproductive technologies (ART) like IVF are unsuccessful or not viable.

<sup>6</sup> Available at [www.ijres.org](http://www.ijres.org) visited on 28/01/22 at 5:30PM

<sup>7</sup> Anish V. Pillai, "Surrogate Motherhood and the Law International and National Perspective", edition 2015, Regal Publications, New Delhi page 43

<sup>8</sup> *Ibid.*

<sup>9</sup> The Surrogacy (Regulation) Act 2021(Act 47 of 2021), s. 2(1)(g).

3. **Medical Advancements:** Technological advancements in assisted reproduction, such as IVF and embryo transfer techniques, have made gestational surrogacy a feasible option for those struggling with infertility.<sup>10</sup>
4. **Legal Frameworks:** The legal framework in some countries allows and regulates surrogacy, creating a structured environment where surrogate mothers, intended parents, and children's rights are protected and defined.
5. **Ethical Considerations:** Moral issues are prioritized in responsible surrogacy procedures, including obtaining informed permission from all parties, safeguarding the physical and mental health of pregnant women, and dealing with concerns related to abuse and commercialization.
6. **Support Systems:** Responsible surrogacy involves the presence of support systems for surrogate mothers, including medical care, psychological support, legal counsel, and financial compensation that is fair and transparent.
7. **Regulation and Oversight:** Effective regulation and oversight by governmental and non-governmental bodies help ensure that surrogacy arrangements adhere to ethical standards, protect the rights of all involved, and prevent abuses or exploitation.
8. **Age Related Issues** - Age-related considerations are significant when deciding whether to use surrogacy. Marriages today are formally celebrated much later. The females are consequently unable to bear children and this cannot be happened or become possible without risk. Therefore, in order to avoid these risks the individuals mostly prefer it.
9. **Better Services** – The great commitment has been made in handling soon after being born baby to its planned parents. There are very few matters where any dispute arises regarding the reluctance of the surrogate to give the child up.
10. **Better Life style of Surrogate Woman** – Even in this modern age in India, the morality and the manners have occupied the highly significant place in Indian society. The Indian women lead a virtuous and methodical life style and most of the women do not indulge in smoking and drinking.
11. **Lack of Specific Laws** – Before coming into effect, The SURROGACY (REGULATION) ACT, 2021, there was lack of law to regulate and control the surrogacy in India. The ICMR regulations 2005, through its guidelines controlled the surrogacy but they have no binding effect and legal sanctity on major issues. This is another factor to give unexpected rise and growth in sphere of surrogacy in India.

Surrogacy presents various advantages and disadvantages, impacting both intended parents and surrogate mothers. Here's a balanced view of the pros and cons:

#### Advantages of Surrogacy:

1. **Biological Parenthood:** Surrogacy enables couples or individuals who are unable to get pregnant or sustain an embryo to have children of their own. This fulfils their desire for genetic parenthood.<sup>11</sup>
2. **Medical Option:** For individuals or couples with medical conditions such as infertility or recurrent miscarriages, surrogacy offers a viable path to parenthood when other treatments or procedures have been unsuccessful.<sup>12</sup>
3. **Genetic Link:** In gestational surrogacy, when the surrogate is not genetically linked to the kid, the prospective parents may still have a genetic relationship to the baby by using their own gametes (eggs or sperm).
4. **Control and Involvement:** Intended parents can be involved in the pregnancy process from conception to birth, including attending medical appointments and being present during childbirth.
5. **Emotional Fulfilment:** Surrogacy can provide emotional fulfilment and the opportunity to experience parenthood for individuals or couples who have longed to have children.

#### Disadvantages of Surrogacy:

1. **Legal Complexities:** Surrogacy can involve complex legal issues, especially in countries with unclear or restrictive laws regarding surrogacy. Ensuring legal parentage and rights can be challenging.
2. **Financial Cost:** Surrogacy can be financially burdensome due to medical expenses, legal fees, compensation for the surrogate, and other related costs. Commercial surrogacy, in particular, can be expensive.
3. **Emotional Challenges:** The emotional journey of surrogacy can be intense and fraught with complexities for all parties involved, including potential emotional attachments and conflicts.

<sup>10</sup> <https://www.webmd.com/infertility-and-reproduction/guide/using-surrogate-mother>, visited on 28/01/22 at 6:00PM

<sup>11</sup> <https://surrogacy.institute/Advantages and disadvantages of surrogacy: pros and cons> visited on 26/5/2023 at 5:00PM

<sup>12</sup> [https://www.T.ncbi.nim.gov/ advantages and disadvantages of altruistic and commercial surrogacy in India - PMC \(nih.gov\)](https://www.T.ncbi.nim.gov/ advantages and disadvantages of altruistic and commercial surrogacy in India - PMC (nih.gov)) visited on 28/6/2023 at 9:00PM



4. **Health Risks:** Pregnancy and childbirth carry inherent risks to the surrogate mother's health, regardless of whether it's a traditional or gestational surrogacy. These risks need careful consideration and medical monitoring.
5. **Ethical Concerns:** Surrogacy raises moral concerns about exploitation, trade of reproductive services, and the possible for coercion, particularly in commercial surrogacy arrangements.
6. **Social Stigma:** In some cultures, or societies, surrogacy may still carry social stigma or be viewed negatively, leading to potential challenges in acceptance or support from family, friends, or the community.

## LEGISLATIVE ACTION

ICMR released the very first set of rules regarding surrogacy in India. The Indian Council of Medical Research (ICMR) established guidelines for surrogacy in India in 2005. These guidelines were among the early efforts in India to provide a regulatory outline for surrogacy practices.<sup>13</sup> Here's an overview of the key points from the ICMR's 2005 guidelines:

### 1. Types of Surrogacy:

- **Altruistic Surrogacy:** The guidelines focused on Altruistic surrogacy occurs when the female surrogate obtains no monetary benefit other than payment for medical disbursements.
- **Commercial Surrogacy:** The ICMR guidelines did not permit commercial surrogacy (where surrogates are paid beyond their medical expenses), reflecting a preference for non-commercial arrangements.

### 2. Eligibility Criteria:

- **Surrogates:** The guidelines set specific criteria for surrogates, including age limits (typically between 21 and 35 years), psychological and medical evaluations, and prior childbirth experience to ensure they are physically and mentally prepared for the process.
- **Intended Parents:** Guidelines included requirements for intended parents to demonstrate their ability to provide for the child, which involved financial and emotional readiness.

### 3. Surrogacy Agreements:

- **Contracts:** The guidelines recommended the establishment of detailed surrogacy agreements between the parties.
- **Legal Procedures:** They suggested that the legal process should include formal

### 4. Medical and Ethical Considerations:

- **Medical Screening:** Surrogates were required to undergo comprehensive medical and psychological evaluations to ensure they are suitable candidates for surrogacy.<sup>14</sup>
- **Ethical Issues:** The rules meant to address moral concerns by promoting transparency and preventing exploitation.

### 5. Legal Parentage:

- **Parental Rights:** The guidelines outlined the importance of lawful measures to found the parental rights of the intended parents and ensure the surrogate's rights are clearly defined.

### 6. Role of Clinics and Agencies:

- **Regulation:** The guidelines included recommendations for the regulation of clinics and agencies involved in surrogacy to ensure ethical practices and compliance with the guidelines.

The ICMR and the Ministry of Health prepared the ART (Regulation) Bill 2008. It established the governance and administration of ART across India. The Bill has 50 provisions organized into nine (9) chapters. Surrogacy agreements are legally acceptable under the Bill of 2008. Here are some key points from those guidelines:

1. **Eligibility of the Surrogate:** The surrogate mother ought to be between the ages of 21 and 35 years. She should have at least one child of her own and must be mentally and physically healthy.
2. **Surrogacy Agreement:** A formal agreement between the surrogate and the intending parents should be made, detailing the rights and responsibilities of each party. This agreement should cover aspects like compensation, medical care, and the surrogate's role.
3. **Medical and Psychological Evaluation:** Both the surrogate and the intending parents should undergo medical and psychological assessments to ensure they are fit for the procedure and understand the implications.

<sup>13</sup> Available at <https://www.latestlaws.com/articles/surrogacy-regulation-bill-of-2020-balancing-interest/> visited on 10/12/22 at 6:00PM

<sup>14</sup> Available at [https://prsindia.org/files/bills\\_acts/billsparliament/2020/SCR%2020The%20Assisted%20Reproductive](https://prsindia.org/files/bills_acts/billsparliament/2020/SCR%2020The%20Assisted%20Reproductive) visited on 12/12/22 at 4:00 PM

4. **Compensation:** The surrogate mother should be compensated fairly for her services, but this compensation should not be considered as a form of exploitation.
5. **Ethical Considerations:** The guidelines stress the importance of ethical practices in surrogacy arrangements, including respect for the surrogate's rights and avoiding any form of coercion or exploitation.<sup>15</sup>
6. **Confidentiality:** The identities of the surrogate mother and the intending parents should be kept confidential to protect their privacy.
7. **Health and Safety:** The well-being and care of the surrogate and the baby must be a priority, with appropriate medical care and monitoring throughout the pregnancy.<sup>16</sup>

The Lok Sabha cleared the **Surrogacy (Regulation) Bill in 2016**. It proposed to outlaw commercial surrogacy. "The 2016 bill lapsed owing to the adjournment of the parliament session. The bill was reintroduced and passed by the Lok Sabha in 2019. Here number of key features proposed in The Surrogacy (Regulation) Bill, 2019:

1. Childless couples are those who have not had a child naturally for 5 years after marriage and have been diagnosed with infertility and are between the ages of 23 and 55 for women and 26 and 55 for males.
2. There is a requirement that the surrogate mother be a member of the family. Furthermore, the Bill must properly define relative in order to understand the situation.
3. There is a clause that no monies will be transferred as an enticement, except for medical or insurance needs.
4. The age of surrogate mother should be between 25 and 35 years old in order to act as a surrogate mother. She can only be a surrogate mother once in her life.

Finally, the Indian Legislature after a long period enacted the **Surrogacy (Regulation) Act, 2021**. Further the Indian Legislature in order to improve the facilities provided in surrogacy clinic the Ministry of Health and Family Welfare came up with **Surrogacy (Regulation) Rules, 2022 on 21<sup>ST</sup> June 2022**, which elaborates the requirement of number of persons employed and the qualifications that they must possess. The **Surrogacy (Regulation) Act, 2021** is a landmark piece of legislation in India designed to regulate and oversee surrogacy practices. The Act aims to ensure ethical, legal, and medical standards are maintained while protecting the rights and welfare of all parties involved. The President of India gave his assent on 25th December finally the Act no 47 notified in official gazette by the union government on 25th January 2021. Here are the key features of the Act:

1. The Act's primary goal is to control the use of ART, the surrogacy process, and other mothers involved in India, with a focus on bonus commercial surrogacy. It only recognizes altruistic surrogacy and the compensation given to the surrogate mother, with the exception of medical costs and insurance coverage. The Act is divided into eight chapters and contains fifty-four sections.
2. The first chapter is divided into two distinct sections. Section 1 establishes the title and introduction of the program, while Section 2 defines terms related to the surrogacy process, such as "abandoned child," "artistic surrogacy board," "commercial surrogacy egg embryo," and "foetus," among other terms.
3. Chapter second explain regulation of surrogacy Clinic and medical practices and any help relating to surrogacy procedure it Bank advertisement of any kind.
4. Chapter 3 regulates surrogacy and its laboratory procedures. The act forbids the use of any facility, including surrogacy centres, for surrogacy procedures without a certificate of recommendation from the board that is established under the main goal of preventing the exploitation of surrogate mothers and their children. No eligibility certificate is issued to a surrogate mother by the appropriate authority unless the following requirements are:

- (a) only married women having her own child between the age 25 to 35 years shall be a surrogate mother by donating her outside or otherwise.<sup>17</sup>
- (b) A willing women cell also permitted to act as a surrogate mother by undergoing surrogacy procedure as correct.
- (c) No women select as a surrogate by giving her own when it is and not allow more than once in her lifetime.
- (d) A fitness certificate of surrogate mother must be obtained for.
- (e) Retain concerned must be taken in by the prescribed form of the surrogate mother.
- (f) The act strictly Express that due to any disability genetic default and sex the surrogate child said not be abandon by the intended parents the child will be considered as a biological child of them.
5. Chapter four addresses the registration of surrogacy clinics under Sections 11 to 16. According to this section, a surrogacy clinic cannot be registered unless it has the necessary facilities, equipment, and personnel, including enough mother power, qualified staff, physical infrastructure, and diagnostics. The appropriate

<sup>15</sup> Available at [https://prsindia.org/files/bills\\_acts/billsparliament/2020/SCR%20The%20Assisted%20Reproductive](https://prsindia.org/files/bills_acts/billsparliament/2020/SCR%20The%20Assisted%20Reproductive) visited on 12/12/22 PDF at 7:00PM

<sup>16</sup> Available at <https://www.dlmssv.inflibnet.ac.in> visited on 16/12/22 at 8:00PM

<sup>17</sup> The Surrogacy Regulation Act, 2021, ss. 17 & 18

authority cell must then issue the registration certificate after conducting an investigation to issue a notice<sup>18</sup> and providing a reasonable opportunity of hearing to the clinics the authority may conceal Suspension and take Criminal action against such surrogacy clinic according section 14 of the Act any evasively agriwal aggravate party of the order of appropriate authority main prefer and appeal to state government all these 30 days again such order.

6. Chapter 5 defines National assisted reproductive technology and surrogacy board section 17 to 24 is related with national board and 26 to 34 is related as national and state level ,central government with qualified member under this act the board Shall meet at least one in 6 months.And due to unable the chairperson the vice chairman at the meetings of the board all order and division of such bored shall be authenticated by the signature of the chairperson and other instruments of board salary authenticated by the signature of the member Secretary of the board the board cell make the advice to the central government on metal relating to surrogacy and set the minimum laboratory Diagnostic equipment physical infrastructure and expert national board cell supervise .The functioning of state board as the National board,the state board self-Institute in which state union territory by the concerned State Government for performing the functions and monitor the implementation of the provisions of the egg the state board shall meet at least once in 4 months all matters of the board shall be delivered by a majority of the word of the members present and voting.

7. Chapter six outlines the appropriate authority, stating that the Central Government must designate one or more suitable for Union territories within ninety days of the project's inception. The state government is also responsible for carrying out the functions of the Propriety Authority Cell, which include suspending and cancelling surrogacy clinic registration, setting up standards for surrogacy clinics, and having the authority to take action against donors who do not comply with Act provisions.

8. In accordance with Chapter 7Th of the Act, any laboratory or clinic that engages in commercial surrogacy or the exploitation of exchange mothers and children faces up to ten years in prison and a fine of up to 10 lakh rupees. If no one takes advantage of the appealing surrogacy, there will be five years in prison and a fine of up to ten lakhs. No code in fairness to a metropolitan magistrate or a Judicial Magistrate of first class tell me any often under this act. All offenses under this act shall be governed by Bhartiya Nagarik Suraksha Sanhita,2023. The Player Bargaining provisions of the B.N.S.S.2023 shall not apply to the offenses of these laws.

9. The eight chapter offers various provisions. The central government may make regulations to carry out the provisions of this act. The board may make regulations with the prior approval of the central government rules and regulations to be late before parliament. Each registered surrogacy clinic cell has all the records related surrogacy procedure as document for 25 years.

### **Key Features of The Surrogacy (Regulation) Rules, 2022 – The following are**

some key features of The Surrogacy (Regulation) Rules, 2022:

Surrogacy clinics shall have at least one gynaecologist, one anesthetist, one embryologist and one counselor. The clinic may employ additional staff by the Assisted Reproductive Technology Level 2 clinics in order to dispose work.

- ❖ Form 1 details the process for requesting the certificate of approval from the Board.”
- ❖ “The intended mother or the individuals must buy a general health insurance policy for surrogate mother from a company or agent recognized by the Insurance Regulatory and Development Authority for a duration of 36 months that is sufficient to cover all costs for pregnancy-related issues and care after delivery.<sup>19</sup>
- ❖ Number of attempts of any surrogacy procedure on the surrogate mother should not exceed a triplet.”<sup>20</sup>
- ❖ Surrogate women must provide her permission in the manner outlined in Form 2.
- ❖ “Gynaecologist must transfer one embryo in the uterus of a surrogate mother during a treatment cycle: Provided that only in special circumstances up to three embryos may be transferred.
- ❖ Surrogate mother may be allowed for abortion during the process of surrogacy in accordance with the Medical Termination of Pregnancy Act, 1971.

After conducting such an investigation and determining that the applicant has satisfied every prerequisite, the relevant authority will provide the appellant with a certificate of registration in Form 4.

### **Implications and Criticisms:**

1. Limiting the scope of surrogacy to altruistic purposes and close relatives may restrict access to surrogacy for individuals or couples who do not meet the eligibility criteria, including single parents and same-sex couples.
2. The Act may lead to a decrease in the availability of surrogate mothers, as the pool is limited to close relatives. This could potentially increase the demand for surrogacy services in other countries, where commercial surrogacy is allowed.
3. The Act emphasises on regulation and prohibition of commercial surrogacy may

<sup>18</sup> The Surrogacy Regulation Act, 2021,ss.17 &18

<sup>19</sup> The Surrogacy Regulation Act, 2021, s.4

<sup>20</sup> The Surrogacy Regulation Act, 2021, ss.17 &18

discourage the development of a regulated and ethical surrogacy industry within India, leading to the potential migration of surrogacy-related business to other countries.

4. Implementation challenges, such as monitoring and enforcing the Act provisions, may arise due to the need for coordination between various authorities and boards at the national and state levels.

## JUDICIAL RESPONSE

### Domestic surrogacy and Indian Judiciary:

In 2002, India made commercial surrogacy legal, and since then, the industry had expanded tremendously.

#### *Baby Manji Yamada v. Union of India & Anr.*<sup>21</sup>

It is very first case which was filed through a writ petition, The Supreme Court opined in this case that surrogacy arrangements are legal in India and so it ordered to hand over the child Manji born through surrogacy arrangement, to her guardians. The court also held that the medical procedure even in commercial surrogacy is legal in India as it is in many countries of the world.

#### *Jan Balaz v. Anand Municipality and others*<sup>22</sup>

In this case, The court held that babies born in India to gestational surrogates are citizens of this nation and hence entitled to a passport, and to direct the passport officials to deliver the passports immediately." the Court said, upholding the boys' citizenship rights.

#### *P. Geetha v. The Kerala Livestock Development Board Ltd.*<sup>23</sup>

The Kerala HC ruled that it would be unfair to deny or fail to recognize a woman's right to become a mother through advanced reproductive technologies (ART) and that she should be accorded the same treatment as a biological mother, along with the identical set of rights and responsibilities.

#### *Dr. Pooja Jignesh Doshi v. State of Maharashtra*<sup>24</sup>

The Court decided that the petitioner was entitled to maternity leave for the child delivered through surrogacy as a result of the abovementioned judgments. The petitioner's numerous leaves were ordered to be changed to maternity leave, as requested by the petitioner.

#### *Dr. A. SINDHU v. THE UNION OF INDIA*,<sup>25</sup>

As per Section 26, each State has to constitute the 'Assisted Reproductive Technology' and 'Surrogacy Boards'. Insofar as the regulatory mechanism envisaged by the Act is in place, this Court cannot grant permission for surrogacy, bypassing the prescribed procedure.

## Surrogacy around the World

### United States of America:

Nearly all American states allow financially compensated surrogacy. You can buy a woman's womb to have the child of your dreams. The surrogate mother and the kid are both protected by US law. The laws are quite beneficial and advantageous for both. **The issue about surrogacy agreements was first raised in the United States** of America in the well-known Baby M case of 1980. At present though there is no federal law on the surrogacy in the Country but it is considered most favorable country for surrogacy arrangements. United States law on Surrogacy is very complicated as different states have different laws. Only Arizona, District of Columbia, Michigan and North Dakota are the States which forbids Surrogacy.<sup>26</sup>

**The United Kingdom:** - In UK, particular laws such as the Surrogacy Arrangements Act of 1985, the Human Fertilization and Embryology Act of 2008, the Human Fertilization and Embryology (Parental Order) Regulations of 2010, and Part 13 of the Family Procedure Rules of 2010 regulate surrogacy procedures. Only Altruistic surrogacy is available. Advertising for surrogacy is not legal and **foreigners can not access surrogacy in the UK.**

**Israel** -Thanks to the Israeli surrogacy legislation of 1996, Israel is the first and only country in the world where all surrogacy contracts are publicly regulated by a government-appointed commission. The Surrogacy

<sup>21</sup> AIR2008 SC18

<sup>22</sup> AIR 2010 GUJ 21

<sup>23</sup> 2015 SCC OnLine Ker 71

<sup>24</sup> 2019 SCC OnLine Bom 1433

<sup>25</sup> WP(C) NO. 18346 OF 2022

<sup>26</sup> <https://www.Comprehensive Guide to U.S. Surrogacy Laws | Conceive Abilities> visited on 24/7/2023 at 6:00PM



Agreements Law stipulates that surrogacy agreements must be authorized by a committee that the Minister of Health appoints, along with further requirements.<sup>27</sup>

**Thailand** - Thailand used to be the preferred location for international couples seeking commercial surrogacy before July 2015. Thailand has been a center for reproductive tourism due to a number of variables. Thailand has also grown in popularity, notably among homosexual couples and single males, after India banned same-sex relationships, singles, and unmarried couples from accessing surrogacy contracts in 2013.

**Canada** - The Royal Commission on New Reproductive Technologies was appointed by the Canadian government to take into account the most recent advances in the treatment of infertility in 1989. As a consequence, in March 2004 the Assisted Human Reproduction Act (AHR Act) was passed. First and foremost, the Act prohibits Commercial Surrogacy. Only Altruistic surrogacy is available. Foreigners can access surrogacy but it has to be altruistic.

### CONCLUDING REMARKS

Surrogacy is now viewed as a boon for mankind. It gives spouses who can't conceive biologically an option if they want to try. It presents an opportunity for all hopeful parents who are without children. Today's medical science helps infertile couples, couples of the same sex, and couples who are fertile have a child who is genetically related to them through ART in various forms. As stated in the recently passed law, in altruistic surrogacy agreements, surrogate mothers are not compensated for their services and are performed purely on the basis of love and compassion as a charitable act. Comparative analysis with global practices reveals contrasting regulatory frameworks and ethical standards, highlighting India's unique position within the global surrogacy market. The interplay of these factors underscores the necessity for balanced legislation that protects the interests of all parties involved while respecting ethical boundaries and human dignity. The strict ban has led to illegal clinics and surrogacy rackets. Therefore law of surrogacy needs amendments for regulation with safeguards.

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<sup>27</sup> <https://www.ifjglobal.org/blog> (Redefining Exploitation: Surrogacy Arrangements in Israel and the United States — International Feminist Journal of Politics (ifjglobal.org))