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# **A SOCIO-LEGAL PERSPECTIVE ON SURROGACY LAWS IN INDIA**

AUTHORED BY - AKHIL SAJEEV & M. ASHWIN

## **Abstract**

This article talks about the Concept of surrogacy, reproductive rights and surrogacy's origin and development; The impact of surrogacy laws on reproductive autonomy and the socio-legal impact of surrogacy in India, health concerns regarding surrogacy and Commercial surrogacy and the Surrogacy motherhood their criteria & types. The Legislative Framework of Surrogacy laws in India from 2008 bill to 2020 bill and the 2021 The Surrogacy Regulation Act 2021.

## **Introduction**

The concept of family plays an important role in the formation of this society since time immemorial. The privilege to marry and establish a family has been considered a fundamental human right. Human rights law upholds the positive right of all peoples to marry and form a family.<sup>1</sup> Every society across the world have given prime importance to the institution of family as the most basic and fundamental unit of social relationship. When two individuals get together and bind themselves in a matrimonial bond, then a new family comes into existence and such family gets complete with the birth of children. Unfortunately, the gift of being able to bear a child is not evenly distributed by nature. Infertility is a term that refers to the status of being unable to have a child in medical terms. The paradox of child completing a family; however, the reality is that it creates difficulty for existing married couple efforts to have their own offspring.<sup>2</sup> This social pressure on the couple to have a child often causing matrimonial disputes and even in some cases those couples are treated as objects of fun in the society. India is one among the countries where surrogacy is legally acceptable since 2002. Even then, there is no law that can dictate on surrogacy agreements in India and there is a need for a proper legislation Surrogacy Bill or Assisted Reproductive Technology Bill in an attempt to legalize the surrogacy in India.<sup>3</sup> Surrogacy may be allowed only if a woman cannot conceive or trying

<sup>1</sup> Article 16 (1) of Universal Declaration of Human Rights, 1948.

<sup>2</sup> Imrana Qadeer, "Social and Ethical Basis of Legislation on Surrogacy: Need for Debate" Available at: <http://www.issuesinmedicalethics.org/171co28> (visited on 19.09.2023).

<sup>3</sup> <https://blog.ipleaders.in/is-surrogacy-legal-in-india/>

to conceive may be fatal or complication to the women's or the baby's health. to give birth. Surrogacy is that kind of arrangement whereby a woman other than the wife of the male partner gets pregnant and gives birth to a baby for them. Here, there are many people do not want to have a child.

## **SURROGACY**

Surrogacy is derived from the Latin word "Surrogatus" which means "substitute" or someone appointed to act in the place of another.<sup>4</sup> According to Black's Law Dictionary, is the procedure of bearing and delivering a child for someone else.<sup>5</sup>

Surrogacy is a legal method of agreement in which a woman (surrogate) agrees to carry a child for another individual or a couple (intended parent/s). They do not have any kind of relationship of affinity with the child at all. Surrogacy is not just a legal phenomenon, but medical and psychological as well as financial in its aspects. Surrogacy makes it possible for one to have a baby since there are some individuals such as those who cannot rear, lesbians and women who cannot conceive. Surrogacy is a practice where a woman who agrees to become a surrogate mother becomes pregnant through IVF and gives birth to a child for another individual or couple – the intended parents. The surrogate is commonly artificially inseminated through In-vitro fertilization Acronym IVF.<sup>6</sup> In this process, physicians put together an embryo through the fertilization of eggs from the intended mother or a surrogate or through using an egg donor as well as sperm from the intended father or sperm donor. The surrogate then replaces the embryo in her womb and will give birth to the baby. Contrary to the traditional case where the surrogate also supplies the egg, the surrogate has no genetic link with the kid at all.

### **CONCEPT OF REPRODUCTIVE RIGHTS:**

The idea of reproductive right is looked at international level. CEDAW (Convention on Elimination of all form of discrimination against Women) Articles 16 and 10 states that women should have equal rights to; Number, timing, and spacing of their children and to gain information or advice about family planning.<sup>7</sup> Article 25 of UDHR (Universal Declaration of

<sup>4</sup> R.S. Sharma, Social, ethical, medical & legal aspects of surrogacy: an Indian scenario, 140 IJMR 13, (2014), Social, ethical, medical & legal aspects of surrogacy: an Indian scenario - PMC (nih.gov).

<sup>5</sup> Surrogacy, Black's Law Dictionary, (9th edition, 2009).

<sup>6</sup> <https://www.creativefamilyconnections.com/blog/history-of-surrogacy/>

<sup>7</sup> United Nations, Sexual and reproductive health and rights, Available at <https://www.ohchr.org/en/women/sexual-and-reproductive-health-and-rights>

Human Rights says that everyone has the right to an adequate standard of living including necessary care and assistance, further it lays emphasis that motherhood and childhood should be protected and they should be provided special care.<sup>8</sup> In the further General Comment 22 a right to sexual and reproductive health is discussed. This is how the recognition is given to the concept of reproductive rights at global level. In general terms the reproductive rights mean the right to have choice to give birth. This right is considered as one of the fundamental rights. But when it is the matter of implementation part whether the choice of reproductive right is available for both is the question. But a stage of life when one has independent parentage of a child is one of the most important but if that is being restrained because of some reason, then it is infringement of right. On this side the laws are concerning the fundamental rights, and on the other side if the laws are preventing individual from exercising his own fundamental right, then it looks paradoxical.

## ORIGIN & DEVELOPMENT OF SURROGACY

In Black Law's Dictionary, the use of the word 'surrogate' has its root in Latin word 'Surrogatus' which is a 'substitute' or 'representative', that is a person delegated to act for another. Surrogacy is one of the oldest practices and is familiar to almost all the countries and societies of the world. There are different forms of surrogacies which include Traditional Surrogacy, Gestational Surrogacy, Commercial Surrogacy and Altruistic Surrogacy.<sup>9</sup> Surrogacy can be traced back as far as the early civilizations such as Mesopotamia, the Greeks and Romans. Laws of these societies allowed childless couples particularly infertile couples to have children and an heir through surrogacy. For instance, in ancient Babylon child bearing surrogate was common where women barren could hire women to bear children on their behave but for their bosses. Besides, the Babylonians had permitted the practice of surrogacy in order to avoid the protracted and cumbersome process of divorce. Surrogacy in its technicality can be traced back to biblical stage in the traditional surrogacy agreement between Abraham, Sarah and her Egyptian maid/surrogate; Hagar as provided by the book of Genesis. Stories down the ages are many where women gave birth to king's and rulers' children when the queens could not conceive. At present, the laws on surrogacy have been changing in some of the states in the U. S. to allow ethical means to the involved stakeholders. Surrogacy was first used in the

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<sup>8</sup> United Nations, Universal Declaration of Human Rights, Available at, <https://www.un.org/en/aboutus/universal-declaration-of-human-rights>

<sup>9</sup> Surrogacy (Regulation) Bill, 2020: The Way Forward, ipleaders, available at <https://blog.ipleaders.in/surrogacy-regulation-bill-2020-way-forward/>



biblical story of Sarah and Abraham as written in 'The Book of Genesis'. Abraham was married to Sarah but the couple did not have any child, therefore, Sarah gave her servant Hagar to him as a wife. This is an example of the traditional method of surrogate since the surrogate transfers to the intended parents' baby from her own egg. As much as Sarah could not be considered biological mother to the child, both she and Abraham took up the responsibility of raising the child as their own.<sup>10</sup> The earlier forms of commercial surrogacy were legalised in India during the Year 2000. This concept was also known as 'Rent a WOMB'. The only reason behind the legalisation of commercial surrogacy was medical tourism. It was utilised for commercial gain rather than to promote medical tourism. Surrogacy became popular in India. Through Indian clinics, a large number of foreign intended parents began contacting surrogate mothers. The intended couple was able to receive a surrogate kid, and the surrogate mother's financial needs were met. Subsequently, India outlawed commercial surrogacy altogether.<sup>11</sup> "Surrogacy" refers to the process by which a single woman conceives and gives birth to a child on behalf of another couple, with the goal of giving the child back to the intended couple after the birth.

## **IMPACT OF SURROGACY LAWS ON REPRODUCTIVE AUTONOMY**

The reproductive autonomy is subject to the considerable influence of surrogacy laws because they can also enhance or limit the extent to which individuals control their birth decisions. Their Positive effects can be in Control over fertility can be given to those who are childless or for the women who are in same sex relationships there can be surrogacy laws framing alternatives. Laws can protect the interests of the surrogates, including ensuring that they are fully informed, fairly compensated, and protected from abuse. Laws can provide a framework for best practices with the surrogacy service providers.

The Negative aspects may include the Laws that should be used to encourage or protect reproduction control access to surrogacy, by making stringent eligibility requirements, or outright prohibiting commercial surrogacy. Choose a surrogate mother may put the surrogate women at risk, because the law does not introduce mechanisms protecting their rights. Laws allow the continuation of prejudice against surrogacy which hinders people from seeking this option of childbearing.

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<sup>10</sup> History of Surrogacy, SURROGATE.COM, available at <https://surrogate.com/aboutsurrogacy/surrogacy-101/history-of-surrogacy/>

<sup>11</sup> [https://www.deslaw.edu.in/pdf/Socio-legal\\_impact\\_of\\_surrogacy\\_in\\_India.pdf](https://www.deslaw.edu.in/pdf/Socio-legal_impact_of_surrogacy_in_India.pdf)

## **SOCIO-LEGAL IMPACT OF SURROGACY IN INDIA**

Surrogacy can be linked to the various rights of an individual. On one hand we speak of equality on the basis of it being a fundamental right and on the other hand this right is being violated by certain other laws. Such laws are themselves in violation, in this case, on the violation of individual rights law. In surrogacy basically two parties are required i.e. surrogate mother and intended parents. Other than the intended couple and the surrogate mothers, however, such opportunities are restricted. It is a reproductive autonomy or the right to become a mother, which is a human right on the international arena, which is also embedded in some of the international law principles. However, surrogacy in the present Indian legal context appears to have certain conditions to be fulfilled in order to qualify as the intended parents or a surrogate mother. Unfortunately, one is not allowed to take a decision to skip motherhood by way of surrogacy not on his or her free will. The following are some of the rights which talks about the impact of surrogacy in India and all or atleast some of such rights, are also recognised at international level and by other Indian laws.

### **(i) RIGHT TO COMPENSATION AND HEALTH**

According to a recently passed Act, surrogacy and surrogacy operations cannot be conducted, undertaken, performed, or used for any other reason than selfless surrogacy and when they are not used for profit or to commercialise surrogacy or surrogacy procedures.<sup>12</sup> The surrogate mother receives no financial remuneration for agreeing to be a surrogate in an altruistic surrogacy. The current legislation states that a surrogate mother is only compensated for her medical costs and insurance during and after the pregnancy. Altruistic surrogacy does not pay the surrogate mother anything, and only a small percentage of women who are close relatives of the intended parents will be willing to serve as surrogate mothers. The aforementioned circumstance has an impact on the parent's ability to get pregnancy. Another problem with this is that the law does not consider a situation whereby the surrogate mother is an employee and has working hours doing which how she is paid for this time devoted to surrogacy. At the same time, there are health problems which arise or develop before, during or after the pregnancy which could affect the health of the surrogate mothers adversely for a long tag. Compensation has not been addressed in the regulation in connection with this problem in the law.

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<sup>12</sup> S. 4(b), The Surrogacy (Regulation) Act, 2021.

**(ii) REPRODUCTIVE RIGHTS & MOTHERHOOD RIGHTS**

Current law stipulates that: Provided that an Indian couple or an intending woman who wishes to use surrogacy obtain a certificate of recommendation from the Board on an application made by the said persons in such a form and manner as may be prescribed.<sup>13</sup> and that in the event that an intending couple has a medical indication that requires gestational surrogacy.

India's surrogacy laws refer to "Certificate of Eligibility" provided by relevant body upon meeting specific requirements, such as intended parents being a married pair or intending lady (i.e., widow or divorcee) within a particular age range. It makes it very clear that using a surrogate to become a parent is not permitted for single people, LGBTQ people, couples, etc. It has an impact on the reproductive rights of mothers in some way.

**(iii) ABSENCE OF PROVISIONS FOR ENFORCING INSPECTIONS**

Apparently, there is no such provision which describes the application of these laws. The most important issue of this discussion is the one which deals with the question of whether the surrogacy process is done properly or not. In addition to that, certain punishments are also provided, however, they do not explain what the pragmatic consequences of the post-surrogacy effect will be. Another aspect on the same related issues is a child's protection and welfare in the course of and post their upbringing. Children who are supposed to grow up with an intended couple cannot be properly ordered since there is no legal body that specifically deals with such cases. The child may not be raised as expected by the prospective parents.

**(iv) SURROGACY PROTOCOL AND MORAL DILEMMAS**

The topic of surrogacy agreements is covered in the Indian Law Commission Report. All agreements are considered contracts under Section 10 of the Contract Act if they are made with the free consent of parties who are legally able to enter into contracts, for a lawful consideration and with a lawful intent, and if they are not expressly declared void. Consequently, any surrogacy agreement that meets these requirements is legally binding. After that, it may be the focus of a civil lawsuit under section 9 of the CPC before a civil court in order to resolve any disagreements regarding the surrogacy agreement and to obtain a declaration or injunction.<sup>14</sup> It has to be of some consideration

<sup>13</sup> S. 4(a), The Surrogacy (Regulation) Act, 2021.

<sup>14</sup> 228th Law Commission of India Report, Need For Legislation To Regulate Assisted Reproductive Technology Clinics As Well As Rights And Obligations Of Parties To A Surrogacy, 22 (2009), Available at <https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022>

which has a specific pecuniary value under the Indian Contract Law. Next, we look at consideration and it's considered as being one of the most pivotal aspects of the contract. In a commercial surrogacy transaction it is unethical to provide money for the renting out of a womb. Because there is no regard for the surrogacy agreement idea in altruistic surrogacy, the entire concept of the surrogacy agreement will not be considerate. Altruistic surrogacy merits surmount the fact that the surrogate mother is not paid for her services since she volunteers to do the surrogacy. Therefore we can infer that an agreement cannot be applied without one of the necessary part. Even in this case the statute creates room for exceptions to be made. In addition to that, some perceptions consider surrogacy agreements as ethically wrong in the first instance.

**(v) RIGHT TO PRIVACY**

One of our important rights, protected through Article 21 of the Indian Constitution, is the right to privateness. The proper to privacy has also been acknowledged through the Supreme Court in a number of case statutes. In the event of surrogacy, this privateness have to be preserved. Concerning the surrogacy technique' secrecy, there may be a opportunity of data theft. This may want to have an effect on stakeholders' privacy. The right to records is a in addition critical aspect. The child is entitled to information concerning his surrogacy, dad and mom, and region of start.

**(vi) EXPLOITATION OF SURROGATES AND THE CHILD**

The prohibition of business surrogacy eliminates ladies' liberty to choose their personal reproductive route and parental rights by using moving the focus from rights-primarily based to desires-primarily based methods. One ought to contend that that allows you to guard the kid's right to delivery, the state have to cease exploiting impoverished girls thru surrogacy. The existing Act, but, does not thoroughly balance those pastimes.<sup>15</sup>

**(vii) COMPENSATION AND BENEFITS**

Aside from the costs for prenatal care and an insurance cover, no payment can be made to a surrogate mother. Payment for commercial surrogacy is not allowed unless it is in kind, cash or any form of remuneration. Couples looking for a surrogate have to first acquire two different documents from an authorized person: one that states the necessity of choosing surrogacy and the other that validates their qualifications. Essentiality certificate can only be obtained after meeting some conditions.<sup>16</sup>

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081094-1.pdf ,

<sup>15</sup> <https://www.drishtias.com/daily-updates/daily-news-analysis/surrogacy-law#>:

<sup>16</sup> <https://www.khuranaandkhurana.com/2023/06/16/legality-of-surrogacy-in-india-everything-you-need-to-know>.

**(viii) CONSTITUTIONAL RIGHTS AND SURROGACY**

As per Article 21 of the Indian Constitution, every human being has the right to live and enjoy personal freedom. With a broader understanding, the courts have interpreted this individual liberty so widely that it also includes various rights and freedoms. In the context of surrogacy, the right to life includes the independence to make choices concerning one's family life and reproductive health. It means people are free to choose whether they want to use surrogacy as a means for becoming parents or not.<sup>17</sup>

Even if it is not specifically mentioned as a fundamental right in the Indian constitution, earning a living can be seen as an extension of right to life and personal liberty. Surrogacy especially from a perspective of economic work can be viewed as a woman's right to a living wage. Being surrogate mothers provide many families with chances and financial support.<sup>18</sup>

**SURROGACY (REGULATION) ACT, 2021****Provision:**

A married couple with a husband and wife as defined by law or a widow/widower who has remarried should be between 35-45 years of age before engaging in surrogacy because it is necessary for them due to medical condition. This is an empirical provision contained in the Surrogacy (Regulation) Act, 2021.

Furthermore, it prohibits all forms of commercial surrogacy that comes with a penalty of 10 years imprisonment and fine up to Rs. 10-lakh.

The law recognizes only altruistic surrogacy in cases where no payment is done and where surrogate mother has genetic connection with intended parents.<sup>19</sup>

**Challenges:****1. Exploitation of the Surrogate Child:**

Some say that the government has to save poor ladies from being used in surrogacy and protect a child's right to live. Nevertheless, this section of legislation is unable to create an equilibrium between these two motives.

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<sup>17</sup> <https://www.defactolaw.in/post/surrogacy-in-india-law-and-issues>.

<sup>18</sup> Ibid, 17

<sup>19</sup> <https://www.drishtias.com/printpdf/surrogacy-4>



2. Strengthens patriarchal norms:

The Act endures the already existing patriarchy norms in our society that do not accord much value to women's labour, which have a direct bearing on women's right to reproduction as per article 21 of the Constitution.

3. Invalidates legitimate income source for surrogates:

Banning commercial surrogacy also denies surrogates their legal source of income thereby reducing the number of women willing to act as surrogates. In general this act deprives the involuntary childless couples from being parents.

4. Emotional Difficulties:

When altruistic surrogacy involves a friend or relative, there are high chances of relationship risks during the pregnancy and post-birth periods leading to emotional difficulties for both the intended parents as well as the surrogate baby. Moreover, due to lack of willingness among relatives to go through this process, altruistic surrogacy limits options available to the intended couple when choosing a surrogate mother.

5. No third parties are involved in an altruistic surrogacy:

This ensures that all medical and other miscellaneous expenses related to surrogacy are paid up front by the intended pair if any third party is present. Typically, during this complex undertaking, third parties facilitate communication between prospective parents and surrogate mothers—something that may not occur in selfless surrogacy situations at all.<sup>20</sup>

## **SOCIAL IMPACT OF SURROGACY**

The welfare state approach to surrogacy regulations in India raises concerns about the implications for both the surrogacy industry and the general public. In the Indian Experts in a range of fields, including bioethics<sup>19</sup>, social work<sup>17</sup>, feminist ethnography<sup>18</sup>, and health policy<sup>16</sup>, have begun to pay more attention to surrogacy. A kid is intimately linked to a woman's unique identity than other forms of labour. Pregnancy is a long-term complex process that leads the mother and foetus emotional and physical attachments.<sup>21</sup> Both the surrogacy industry and the public at large are concerned about the implications of surrogacy regulations based on India's approach to a welfare state. Surrogacy in India has started to attract more attention from professionals in diverse fields such as health policy<sup>16</sup>, social work<sup>17</sup>, feminist

<sup>20</sup> Ibid, 19

<sup>21</sup> <https://www.ijfmr.com/papers/2022/6/1139.pdf>

ethnography<sup>18</sup> and bioethics<sup>19</sup>. The distinctiveness of motherhood is more of a defining trait for women than for those who engage in other forms of labor and hence pregnancy is an attitudinal process that establishes powerful affective and sensory connections between mothers and fetuses over time.<sup>22</sup>

Surrogacy commercialization is one of the modern legal issues emerging from recent developments in assisted reproductive technology (ART). Therefore, there is a need for appropriate laws to address this very sensitive subject that has a lot of social, legal, ethical and political implications. In this context, the 2015 Bill was meant to protect the legal, social and medical rights of genetic parents as well as surrogate mothers. The proposed bill also contains various guiding principles concerning various guidelines which ART facilities are supposed to follow. In addition to that, ART clinics have certain rights and obligations that they must observe together with genetic parents, donors and surrogate mothers depending on compliance with the stipulations in this draft legislation regarding punishment for offences and their consequence.<sup>23</sup>

The ethical and legal ambiguities connected with surrogacy, as well as the rights of mothers and children, are largely absent from both the 2008 Reproductive Technology (Regulation) Bill and its 2014 revision. Sometimes, it provides for provision that allows surrogate mothers to be given payments in a legally enforceable manner. By 20-12-21, commercial surrogacy—which has been dubbed the “surrogacy capital of the world”—is expected to grow to be a massive US\$ 2.3 billion sector in our nation. 32.7% of our people live below the international poverty line; hence, they live poorer than many other countries across the globe. Therefore, Indians are easy prey to exploitation by those who are coming from other parts of this planet rich enough to provide bastards with all kinds of luxuries at their disposal.<sup>24</sup>

Hypertension, gestational diabetes and reproductive organ injury are some of the illnesses that can develop as a result of certain medicines. Surrogacy pregnancies are no exception to this; premature labour or miscarriage may occur in such cases as well.<sup>25</sup>

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<sup>22</sup> <https://www.pagepressjournals.org/hls/article/view/hls.2015.5465/5394> - :~:text=Surrogacy%20can%20lead%20to%20the,children's%20psychological%20adjustment%20is%20undeter mined.

<sup>23</sup> Ibid, 21

<sup>24</sup> Ibid, 23

<sup>25</sup> [surrogate.com/surrogates/pregnancy-and-health/emotional-and-medical-risks-of-surrogacy/#](https://surrogate.com/surrogates/pregnancy-and-health/emotional-and-medical-risks-of-surrogacy/#):

## LEGAL IMPACT OF SURROGACY

The arrangement is equipped in various ways and by different people. Different states have different roles to play and functions to perform since some surrogacy practices are condemned as felonies in some states, while they are allowed for philanthropic reasons in others. Currently, India is the only country that does not prohibit or regulate surrogacy. Within this context, there is no legal framework on surrogacy in India. National Academy of Medical Science and ART practitioners contend that it is neither fully legal nor actionable since it was not explicitly discussed as such within the ambit of law. In 2005, Ministry of Health and Family Welfare released guidelines that were not binding on ART clinics' accreditation, regulation or monitoring after years of debate mostly in ICMR. The aim of The Assisted Reproductive Technology Bill 2008 was to give some forms of reproductive technology a face-lift including commercial surrogacy under Indian Council for Medical Research.<sup>26</sup>

In accordance with the surrogacy law of 2021, India allows only altruistic surrogacy, where a surrogate mother carries a child for somebody else without being paid except for health insurance. Thus, this provision safeguards all individuals involved, ensuring that surrogacy contracts in India remain ethically sound and transparent. Moreover, there are some requirements that have to be met by couples or individuals wishing to pursue surrogacy in India; highlighting the importance of regulated and ethical surrogacy process in the country.<sup>27</sup> The rationale behind the need for surrogacy legislation was provided by the Indian Law Commission in its 228th Report. The Draft Assisted Reproductive Technology Bill and Rules (2010) is the latest draft following the amendments and additions made to the 2018 draft. Under the Assisted Reproductive Technology Bill of 2013, a surrogate mother must be at least 21 years old but under 35 years old. At present times, there exists no law on surrogacy in India because it is not explicitly declared illegal. It seems like it is fully legitimate to do so. Through the above-discussed rules and regulations, one can understand what really is the legal position of surrogates in India.<sup>28</sup>

### (i) LEGAL STATUS OF SURROGACY IN INDIA

The Commission cites Article 16.1 of the 1948 Universal Declaration of Human Rights, which states that "men and women of full age without any limitation due to

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<sup>26</sup> *supra*, 21

<sup>27</sup> <https://www.ivfconceptions.com/latest-surrogacy-law-in-india/#:~:text=The%20surrogacy%20law%20in%20India,medical%20expenses%20and%20insurance%20cover,age.>

<sup>28</sup> <https://www.ijfmr.com/papers/2022/6/1139.pdf>

race, nationality, or religion has the right to surrogacy," to demonstrate that surrogacy is lawful and protected by both international and domestic law to get married and have a family. The Law Commission emphasizes that surrogacy protection is a part of this right. Nevertheless, the committee believes that in spite of this, other nations do not recognize this right is a component of the right to reproduce. The commission urges cautious regulation of surrogacy. Believe the time has come to take a practical approach and legalize arrangements for altruistic surrogacy and outlaw using commercial surrogates.

**(ii) ETHICS OF SURROGACY**

Surrogacy should be one of the critical moral concerns particularly among the developing nations. Usually, surrogacy is viewed merely as a monetary transaction between commissioning parents and surrogate mothers; however many other factors need consideration besides this e.g. motherhood desires and unborn child's rights among other things. The first evidence about this can be traced back to Genesis. It is extremely difficult to relate women's reproductive system variations with different religious and cultural backgrounds. In addition, it has been discovered that everything possible has been done by Jewish laws to support those who face these kinds of problems provided they do not cause harm to anyone in the process.<sup>29</sup> Many individuals see surrogacy as an option for infertility "treatment" or a substitute for adoption and thus, it should be embraced as it enables people to realize their dream of getting children. But surrogacy brings with it numerous complicated ethical problems related to gender, work, pay, exploitation and disparities.<sup>30</sup> All types of infertility therapies for women are supported by the Catholic Church but not assisted reproductive technology. These are some faiths that hold progressive opinions regarding the management of infertility: Baptists Methodists Lutherans Mormons Presbyterians Episcopalians United Church of Christ Christian Scientists Jehovah's Witnesses Mennonites. There is complete freedom to treat barrenness according to Islamic law. The use of artificial sperm is also included but only restricted to the husband and wife. The issue has been raised less vehemently within Hinduism than others concerning assisted reproduction technologies. Their belief was always that one's karma starts at birth so they did not have any

<sup>29</sup> Supra, 28

<sup>30</sup> <https://www.birmingham.ac.uk/news-archive/2018/the-ethics-of-surrogacy-1#:~:text=Surrogacy%20is%20often%20thought%20to,%2C%20payment%2C%20exploitation%20and%20inequality.>

discussions about using ARTs among themselves. They never opposed assisted reproduction; they instead viewed it as medical help rather than violation of religious norms<sup>31</sup>

## HEALTH CONCERNS REGARDING SURROGACY

Surrogate pregnancies are almost as risky as regular ones during childbirth and delivery. These include weight gain, swelling, backaches, heartburn, morning-sickness-related nausea among other unpleasant effects. Some of the most serious negative effects include gestational diabetes, hypertension and even damage to reproductive organs due to pregnancy-related diseases. Like any other forms of gestation surrogacy pregnancies have associated risks such as preterm labor or miscarriage. It is important therefore to keep in constant touch with your doctor about prescribed medication, adequate sleep and adherence to their directives so as to lower these risks. On the other hand IVF treatments using gestational surrogacy has certain minor medical concerns. This means that if you are taking fertility drugs such as those you can inject at home yourself through a needle like device then expect anything from mild needle bruises up to transient allergic reactions that go away quickly.<sup>32</sup>

If you are on medications to control your menstrual cycle and boost your chances of conception, there is a high possibility that you may experience more symptoms of pre-menstrual syndrome like headaches or mood changes. There is very little risk to transferring embryos. After the surgery, you may experience light bleeding or cramps. As always, it is essential to stay in touch with your doctor; sometimes an infection may develop that can be treated by antibiotics but in rare cases only. It is important for you to understand the risks associated with twin or triple pregnancy because having multiple infants is common in surrogacy. This includes risks such as premature delivery, low twin birth weight, detachment of the placenta and caesarean section. The doctor will most likely give you detailed advice on how to do your daily activities safely if you are expecting more than one child.<sup>33</sup>

## COMMERCIAL SURROGACY IN INDIA

India became a destination for surrogacy because in 2002 it legalized commercial surrogacy. Many infertile couples unable to conceive naturally resorted to seeking surrogate mothers who

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<sup>31</sup> Supra, 28

<sup>32</sup> <https://surrogate.com/surrogates/pregnancy-and-health/emotional-and-medical-risks-of-surrogacy/#>:

<sup>33</sup> Supra, 32



were paid; consequently, India became internationally known as a hub for surrogacy. However, as time went by, government of India noted some abuses and loopholes regarding commercial surrogacy and therefore introduced by the ICMR rules that would prevent it. According to a United Nations (UN) report in 2012, India was named “the world capital of surrogacy”.

The practice of commercial surrogacy was made illegal by the Indian government in 2015 and it barred the participation of foreigners, or NRIs. In November 21, 2016, a surrogacy regulation bill that was introduced in Lok Sabha was rejected by the standing committee on January 12, 2017. Later on August 10, 2017 the committee submitted its report to Lok Sabha which passed the bill on December 19, 2018. It expects selfless surrogacy but discourages commercial ones. Moreover, the bill protects against exploitation of children and surrogate mothers. After intense talks, the Surrogacy Regulation Act was eventually passed on December 25, 2021.<sup>34</sup>

### **SURROGATE MOTHERHOOD: MEANING**

In surrogate motherhood practice, one woman serves as a surrogate or replacement mother for another known as intended mother who is unable to carry a pregnancy to term or to fertilisation. There are various ways through which surrogate mothering can be done. The most common method of implanting the husband's sperm in the surrogate is through artificial insemination. In this case, gestational mother is also biological mother of the child born through her womb. This kind of surrogacy is known as traditional surrogacy.<sup>35</sup>

According to the Black Law Dictionary, a surrogate mother may or may not be a child's genetic mother. There are two classifications schemed like traditional surrogacy and gestational surrogacy. It can also be classified into altruistic or commercial depending on whether she receives payment during pregnancy or when giving up the child. Since these situations entail social, ethical, and legal concerns there might be plenty of disagreements.<sup>36</sup>

Regarding this more analytical mindset, actually acceptably, in a way of "renting a uterus" could be justified with something like "at least our gametes have fused together to make this foetus, although it's growing in a borrowed womb." A case was similar when sisters, sisters-

<sup>34</sup> <https://www.ijfmr.com/papers/2022/6/1139.pdf>

<sup>35</sup> <http://www.legal-dictionary.thefreedictionary.com/surrogate+motherhood>

<sup>36</sup> Black's Law Dictionary, Eighth Edition, 1036 (2004).

in-law and even mothers were doing it for their sibling's wife-turned-on surrogates were also allowed, since if there arise any problems later on they can be resolved promptly and blood will always tell after child birth.<sup>37</sup>

It is a procedure whereby a woman (the surrogate mother) carries a child for a couple who can't conceive, mostly due to infertility on the part of the wife or inability to carry the pregnancy to term. The surrogate becomes pregnant through artificial insemination (usually with sperm from the husband) or by placing an embryo made through in vitro fertilization into her womb. Traditionally, surrogate mothers surrender all parental rights; although this has come under legal contestation.<sup>38</sup>

### **CRITERIA FOR BECOMING SURROGATE MOTHER**

Knowing who is eligible to serve as a surrogate is crucial, and the following standards must be met in order to judge a woman's suitability for the role:

Surrogates

- a) must be in perfect health;
- b) should have no physical complications that are likely to cause pregnancy;
- c) must not be overweight, smoke much, get involved in alcoholism or drug abuse because such traits would make her and the unborn baby at risk when she is acting as a surrogate mother;
- d) should have had at least one previous child preferably with one of her relatives;
- e) need to do so on an independent basis;
- f) ought to be below 35 years;
- g) surrogacy is both physically and emotionally demanding hence a support system including husband, friends or relatives must be provided.
- h) All practical, emotional and legal matters should be considered in detail. Also looked into is how it would affect any children already present as well as the surrogate mother's partner, family or friends.<sup>39</sup>

### **TYPES OF SURROGACIES**

Although there are various types of surrogacies but the following types are essential for the

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<sup>37</sup> Nandita Adhikari, "Surrogate Motherhood" Law and Medicine 167 (2012).

<sup>38</sup> <http://www.britannica.com/EBchecked/topic/575390/surrogate-motherhood>

<sup>39</sup> Supra, 37

purpose of study:

(i) **Altruistic Surrogacy**

This phrase refers to the situation where there is no formal contract or payment to the birth mother. Most of the time, it's an agreement made among family or close friends. Altruistic surrogacy has three main components including surrogate mother carrying the baby, relinquishing her parental rights after delivery of the child and paying surrogate mother by genetic parents. The surrogate is remunerated partly or wholly so as to compensate her suffering and thus may include her medical bills among other expenses.<sup>40</sup>

(ii) **Commercial Surrogacy**

On the other hand, commercial surrogacy consists of paying a huge sum of money to the surrogate for services rendered and any additional costs incurred during pregnancy; therefore, it can be perceived as business. In exchange for relinquishing the baby at birth by the birth mother a fee for incubation services is charged like in any other business transaction. Besides, there are usually financial agreements such as those stated above besides additional costs among which includes wage loss etc. Often times this stipulates some actions that biological mother will have to perform (like undergoing tests, getting an abortion in case fetus is abnormal or refraining from drinking and smoking). Most of the time, the intended parents who want to have their own baby and the birth mother do not know each other. Some people argue that if only costs and earnings are paid, then the arrangement would be non-commercial and not for services rendered or giving up custody rights to a child.<sup>41</sup> This medical procedure has been made legal in many countries, including India. It has a vastly developed sector because of its excellent medical facilities, great international demands as well as accessibility to inferior surrogates. Commercial surrogacy is sometimes referred to as “wombs for rent”, “outsourced pregnancies” or “baby farms” which have sensitive connotations that can be quite derogatory.<sup>42</sup>

## INDIAN LEGISLATURE

Numerous bills on surrogacy have been presented time and again before the houses of the parliament, these bills are discussed in detail below:

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<sup>40</sup> Kush Kalra, “Surrogacy Arrangements; Legal and Social Issues” Journal of Law Teachers India 125 (2010).

<sup>41</sup> Ibid, 40

<sup>42</sup> J.P.S. Sirohi, Criminology and Penology 679 (2011)

**(i) Assisted Reproductive Technology (Regulation) Bill 2008**

Views from various states indicates that national regulations were not being uniformly implemented all over the country. Therefore, in 2008, the ART (Regulation) Bill was drafted by ICMR. Other amendments to this law are: the Statute on Assisted Reproductive Technology (Regulation) of 2013, 2014, 2017 and the Bill of 2020.<sup>43</sup>

**(ii) The Surrogacy (Regulation) Bill, 2016**

J. P. Nadda, Minister for Health and Family Welfare, introduced the Surrogacy (Regulations) Bill, 2016 in Lok Sabha on November 21, 2016.

Some of the key features of the bill are:

1. Substitution, as per the law means that she gets pregnant with someone else's child and has it in place of that couple.
2. The bill requires altruistic replacements while outlawing paid replacements. There is no need for the altruistic replacement to give the substitute mother any extra money above the medical and insurance costs during pregnancy. In contrast to necessary medical and insurance expenses, marketable replacement requires substitute and cash or kind compensation methods.
3. The intending couples must obtain an "entitlement certificate" or a relevant authority issued "essentiality certificate".
4. A statement by a District Medical Board that one or both persons in the relationship are barren.<sup>44</sup>

**(iii) The Surrogacy (Regulation) Bill, 2019**

In the eve of urging for non-profit surrogacy in India, the Union Cabinet brought forth before the Lok Sabha the Surrogacy (Regulation) Bill, 2019 on July 15, 2019. The reasons for surrogacy according to Section 4(ii) of the Surrogacy Bill, 2019 are as follows:

1. It should not be commercialized.
2. It should only be done out of selflessness
3. It cannot be meant to abuse, sell or traffic children in any way.
4. They are for couples diagnosed with infertility

<sup>43</sup> *Surrogate Motherhood -Ethical or Commercial*, Dr. Ranjana Kumari, Director Centre for Social Research Available at <https://wcd.nic.in/sites/default/files/final%20report.pdf>. (Visited on 26.09.23).

<sup>44</sup> <https://www.hindustantimes.com/editorials/the-new-surrogacy-bill-will-stop-exploitation-of-women-and-make-way-for-ethical-practices/story-zefLgh17lJpfjg8T8zv1QM.html>

5. Other eligibility criteria set forth by regulations.<sup>45</sup>

**(iv) Assisted Reproductive Technology (Regulation) Bill 2020**

The Bill defines “assisted reproductive technology” as a means of conception achieved through handling sperm or oocytes outside the human body and placing gametes or embryos within a woman’s reproductive system; it was first presented in Lok Sabha on September 14, 2020.<sup>46</sup>

**(v) Surrogacy (Regulation) Act, 2021, and the Assistive Reproduction Technology (Regulation) Act, 2021**

Approved were by the Rajya Sabha The Assisted Reproduction Technology (Regulation) Bill, 2021 and Surrogacy (Regulation) Bill, 2021. Two bills simultaneously trying to prohibit commercial surrogacy in India while regulating in vitro fertilization (IVF) clinics.<sup>47</sup> Notably, in June 2022 were notified by the Ministry of Health and Family Welfare the Assisted Reproductive Technology (Regulation) Rules, 2022, using powers that have been given them under Section 42 of the Act.

**Assisted Reproductive Technology (Regulation) Act, 2021**

1. The Assisted Reproductive Technology (Regulation) Act, 2021 was made to control and oversee assisted reproductive technology clinics and banks as well as to protect against abuse.
2. The Act mandates that all banks and ART clinics be registered in the National Registry of Banks and Clinics of India. This Bill requires the establishment of a National Registry which will provide a national database with information about all ART clinics and banks across the country.
3. The Act also lays down guidelines concerning the supply and donation of gametes.
4. It is even clearer in this Act that the parent of a child born through ART shall not have any parental rights over the donor whatsoever.

<sup>45</sup> Surrogacy (Regulation) Bill, 2019, Section 36

<sup>46</sup> Assisted Reproductive Technology Regulation Bill proposes national registry of clinics

<sup>47</sup> Esha Roy, “Surrogacy regulation Bill and ART Bill passed by Rajya Sabha”, Indian Express, 9 December, 2020 ,Available at :<https://indianexpress.com/article/india/surrogacy-regulation-bill-art-bill-passed-by-rajya-sabha-7663054/>



**Surrogacy (Regulation) Act, 2021**

1. Commercial surrogacy is forbidden by the Surrogacy (Regulation) Act, 2021 and only allows altruistic surrogacy.
2. Additionally, the intended couple must obtain an eligibility certificate and a certificate of essentiality from the appropriate authorities.
3. This Act restricts itself to gestational surrogacy which breaks any biological link between the surrogate mother and her child.

**CONCLUSION**

One key component of marriage is conceiving a child. Females possess the right to feel privileged because they are able to carry out the act of child-birth. In our country, giving birth has been esteemed highly. Moreover, a female can only be considered as a wife when she has her own children in this society. However, not all women have such advantage; indeed some cannot organize any occasion due to the lack of fertility by either spouse. For the purposes of child birth several techniques are in existence such as IVF or even surrogacy. Surrogacy has over time become a popular technique used by many couples who want to complete their families. However some issues related to it are endless since many questions remain unanswered concerning it. There is currently an Act on Surrogacy though it suffers from 3 major gaps: First off, LGBTQ+ couples do not benefit from surrogacy under the law resulting into the violation of their rights under Article 14 and 21 of our constitution; Second, Section 2(s) of Surrogacy (Regulation) Act 2021 fails to consider single women seeking surrogacy; and finally while altruistic surrogacy is allowed, yet finding a surrogate mother becomes itself a problem.

The necessity of today is to defend reproductive independence. Surrogacy is one of the methods through which people can experience fatherhood or motherhood. At the same time, it is important to protect the rights of surrogate mothers, surrogate children, and desired parents while safeguarding such independence. Existing laws do not address some issues that are denying intended couples the right to be eligible for surrogate parents. Thus, not every individual can go for this option at all. Amendments may be necessary under legislation because of equality rights. Moreover, referring to surrogate mothers every woman cannot become a surrogate mother. The surrogate mother can only be a close relative of intended parents. Here, however, surrogate mother cannot be coerced into acting so by members of her family and it must be done voluntarily. Furthermore, if she faces money problems, it cannot be

resolved through this process and no remuneration shall ever be paid either way. Therefore, the laws should be reformed as per different human rights protection required by individuals.

