

# INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS



Open Access, Refereed Journal Multi Disciplinary  
Peer Reviewed

[www.ijlra.com](http://www.ijlra.com)

## **DISCLAIMER**

No part of this publication may be reproduced or copied in any form by any means without prior written permission of Managing Editor of IJLRA. The views expressed in this publication are purely personal opinions of the authors and do not reflect the views of the Editorial Team of IJLRA.

Though every effort has been made to ensure that the information in Volume II Issue 7 is accurate and appropriately cited/referenced, neither the Editorial Board nor IJLRA shall be held liable or responsible in any manner whatsoever for any consequences for any action taken by anyone on the basis of information in the Journal.

Copyright © International Journal for Legal Research & Analysis

## **EDITORIAL TEAM**

### **EDITORS**

#### **Dr. Samrat Datta**

*Dr. Samrat Datta Seedling School of Law and Governance, Jaipur National University, Jaipur. Dr. Samrat Datta is currently associated with Seedling School of Law and Governance, Jaipur National University, Jaipur. Dr. Datta has completed his graduation i.e., B.A.LL.B. from Law College Dehradun, Hemvati Nandan Bahuguna Garhwal University, Srinagar, Uttarakhand. He is an alumnus of KIIT University, Bhubaneswar where he pursued his post-graduation (LL.M.) in Criminal Law and subsequently completed his Ph.D. in Police Law and Information Technology from the Pacific Academy of Higher Education and Research University, Udaipur in 2020. His area of interest and research is Criminal and Police Law. Dr. Datta has a teaching experience of 7 years in various law schools across North India and has held administrative positions like Academic Coordinator, Centre Superintendent for Examinations, Deputy Controller of Examinations, Member of the Proctorial Board*



#### **Dr. Namita Jain**

*Head & Associate Professor*

*School of Law, JECRC University, Jaipur Ph.D. (Commercial Law) LL.M., UGC -NET Post Graduation Diploma in Taxation law and Practice, Bachelor of Commerce.*



*Teaching Experience: 12 years, AWARDS AND RECOGNITION of Dr. Namita Jain are - ICF Global Excellence Award 2020 in the category of educationalist by I Can Foundation, India. India Women Empowerment Award in the category of "Emerging Excellence in Academics by Prime Time & Utkrisht Bharat Foundation, New Delhi. (2020). Conferred in FL Book of Top 21 Record Holders in the category of education by Fashion Lifestyle Magazine, New Delhi. (2020). Certificate of Appreciation for organizing and managing the Professional Development Training Program on IPR in Collaboration with Trade Innovations Services, Jaipur on March 14th, 2019*

## Mrs.S.Kalpana

Assistant professor of Law

*Mrs.S.Kalpana, presently Assistant professor of Law, VelTech Rangarajan Dr.Sagunthala R & D Institute of Science and Technology, Avadi. Formerly Assistant professor of Law, Vels University in the year 2019 to 2020, Worked as Guest Faculty, Chennai Dr.Ambedkar Law College, Pudupakkam. Published one book. Published 8 Articles in various reputed Law Journals. Conducted 1 Moot court competition and participated in nearly 80 National and International seminars and webinars conducted on various subjects of Law. Did ML in Criminal Law and Criminal Justice Administration. 10 paper presentations in various National and International seminars. Attended more than 10 FDP programs. Ph.D. in Law pursuing.*



## Avinash Kumar



Avinash Kumar has completed his Ph.D. in International Investment Law from the Dept. of Law & Governance, Central University of South Bihar. His research work is on "International Investment Agreement and State's right to regulate Foreign Investment." He qualified UGC-NET and has been selected for the prestigious ICSSR Doctoral Fellowship. He is an alumnus of the Faculty of Law, University of Delhi. Formerly he has been elected as Students Union President of Law Centre-1, University of Delhi. Moreover, he completed his LL.M. from the University of Delhi (2014-16), dissertation on "Cross-border Merger & Acquisition"; LL.B. from the University of Delhi (2011-14), and B.A. (Hons.) from Maharaja Agrasen College, University of Delhi. He has also obtained P.G. Diploma in IPR from the Indian Society of International Law, New Delhi. He has qualified UGC – NET examination and has been awarded ICSSR – Doctoral Fellowship. He has published six-plus articles and presented 9 plus papers in national and international seminars/conferences. He participated in several workshops on research methodology and teaching and learning.



## **ABOUT US**

INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS  
ISSN

2582-6433 is an Online Journal is Monthly, Peer Review, Academic Journal, Published online, that seeks to provide an interactive platform for the publication of Short Articles, Long Articles, Book Review, Case Comments, Research Papers, Essay in the field of Law & Multidisciplinary issue. Our aim is to upgrade the level of interaction and discourse about contemporary issues of law. We are eager to become a highly cited academic publication, through quality contributions from students, academics, professionals from the industry, the bar and the bench. INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS ISSN 2582-6433 welcomes contributions from all legal branches, as long as the work is original, unpublished and is in consonance with the submission guidelines.

# **REVISITING SURROGACY LAWS: STRENGTHENING LEGAL SAFEGUARDS FOR SURROGATE MOTHERS**

AUTHORED BY: THENDRAL. A & DHANESH SIVAKUMAR

Sastra Deemed University

## **Abstract**

Surrogacy, as an assisted reproductive technology, has emerged as a transformative solution for individuals and couples facing challenges in conceiving naturally. However, the practice raises complex ethical, legal, and social concerns, particularly regarding the rights and well-being of surrogate mothers. Historically, India became a global hub for commercial surrogacy, attracting international intended parents due to its low costs and lack of regulatory oversight. This led to widespread exploitation of socio-economically disadvantaged women, prompting the enactment of the Surrogacy (Regulation) Act, 2021, which prohibits commercial surrogacy and emphasizes altruistic arrangements. Despite these regulations, surrogate mothers continue to face significant challenges, including physical and psychological risks, social stigma, and legal vulnerabilities.

This research paper examines the adequacy of legal safeguards for surrogate mothers, focusing on India's regulatory framework and comparing it with international perspectives, particularly in the United States and the United Kingdom. It highlights the fragmented legal landscape of surrogacy laws globally, the ethical dilemmas surrounding reproductive autonomy, and the potential for exploitation in cross-border arrangements. The paper also explores the role of international conventions in shaping surrogacy regulations and emphasizes the need for harmonized legal frameworks to protect surrogate mothers, intended parents, and children born through surrogacy. By analyzing existing safeguards, identifying gaps, and proposing recommendations, this research underscores the importance of creating equitable and ethical surrogacy practices that prioritize the rights and well-being of all stakeholders.

## Introduction

Parenting is widely regarded as a cherished aspiration, though not everyone is fortunate enough to experience it. However, advancements in medical science have enabled individuals to fulfill this dream through assisted reproductive technologies, one of which is surrogacy. Surrogacy is a reproductive arrangement wherein a surrogate mother consents to carry and give birth to a child on behalf of an intended couple who are unable to conceive due to medical or other constraints. This arrangement is governed by a legally binding contract that defines the rights and obligations of both the surrogate and the intended parents.

Historically, India emerged as a prominent global hub for commercial surrogacy, attracting international intended parents due to its relatively low costs and lack of procedural complexities. However, the absence of regulatory oversight led to widespread exploitation of socio-economically disadvantaged women, who repeatedly became surrogate mothers due to financial necessity. This vulnerability subjected them to physical, emotional, and financial exploitation. Consequently, the Indian government recognized the need for a stringent regulatory framework to safeguard the interests of surrogate mothers and ensure ethical practices in surrogacy arrangements.

In response to these concerns, the Surrogacy (Regulation) Act, 2021 was enacted, introducing a structured legal framework to regulate surrogacy practices in India. The legislation established strict eligibility criteria, prohibited commercial surrogacy, and instituted measures to prevent exploitation. The Act aims to protect all parties involved, particularly surrogate mothers, while reinforcing the ethical dimensions of reproductive healthcare.

Surrogacy, along with assisted reproductive technologies (ARTs), underscores the intersection of reproductive labor and global economic disparities. The initial surge of India's surrogacy industry was characterized by the absence of regulatory measures, which facilitated unethical practices, inadequate healthcare provisions, and the commodification of women's reproductive capabilities. Reports indicate that surrogate mothers received only a fraction of the substantial payments made by intended parents to surrogacy agencies—typically ranging between \$4,000 and \$5,000—while enduring physical, emotional, and psychological hardships. Many surrogates were compelled to reside in isolated conditions until delivery, often deprived of family support and postnatal care.

The lack of international regulatory mechanisms governing cross-border surrogacy arrangements has further exacerbated legal and ethical dilemmas, particularly concerning the citizenship and rights of children born through such arrangements. These concerns necessitate robust legal frameworks at both national and international levels to prevent the potential commodification of children and ensure their rights are safeguarded.

### Types of Surrogacy

Surrogacy can be broadly classified into traditional surrogacy and gestational surrogacy, each differing in terms of genetic contribution and medical procedure.

### **Traditional Surrogacy**

Traditional surrogacy, also referred to as genetic surrogacy, involves a surrogate mother who is biologically related to the child she carries. The surrogate's egg is fertilized through intrauterine insemination (IUI) using the sperm of the intended father or a donor. Given the genetic link between the surrogate and the child, this form of surrogacy is legally and ethically more complex. Issues related to parental rights, custody disputes, and emotional attachment often arise, making this method less common in contemporary surrogacy practices.

### **Gestational Surrogacy**

Gestational surrogacy, also known as host surrogacy, has become the predominant form of surrogacy worldwide. In this process, the surrogate mother—often referred to as a gestational carrier—has no genetic relationship with the child. Instead, the embryo is created through in vitro fertilization (IVF) using the egg and sperm of the intended parents or donors. The embryo is then transferred to the surrogate's uterus. This method mitigates legal and emotional complexities by ensuring that the surrogate has no genetic claim to the child.

Given the legal and ethical considerations surrounding surrogacy, gestational surrogacy has emerged as the preferred method for intended parents and surrogates alike. The legal framework in India and several other countries recognizes gestational surrogacy as a more secure and ethically sound practice, minimizing disputes and ensuring the well-being of all parties involved.



Surrogacy represents a transformative advancement in reproductive healthcare, offering a viable solution for couples struggling with infertility. However, the absence of regulatory frameworks in the past has led to ethical concerns, particularly regarding the exploitation of vulnerable women and the commodification of reproductive labor. The enactment of the Surrogacy (Regulation) Act, 2021, marks a significant step towards ensuring ethical, safe, and legally sound surrogacy practices in India. While surrogacy remains a contentious issue globally, the need for comprehensive legal frameworks at both national and international levels is imperative to protect the rights of surrogate mothers, intended parents, and children born through surrogacy.

Mother's consent to relinquish parental rights is a fundamental legal requirement in traditional surrogacy arrangements. Due to the inherent legal and emotional complexities associated with the surrogate's genetic relationship with the child, very few surrogacy professionals are willing to facilitate traditional surrogacy.

For the vast majority of intended parents and surrogates, gestational surrogacy presents a legally and medically preferable alternative. The genetic disassociation between the surrogate and the child minimizes the risk of legal disputes, emotional attachment, and custody claims. Traditional surrogacy, by contrast, carries inherent risks, including the surrogate's potential retention of parental rights or emotional reluctance to relinquish the child. In certain jurisdictions, traditional surrogacy is governed by adoption laws, further complicating the legal framework.

There are, however, specific circumstances in which traditional surrogacy may be considered advantageous. These include situations where the surrogate is biologically related to the intended parents, thereby maintaining a genetic lineage, or when intended parents face challenges in securing an egg donor. Nevertheless, such cases remain relatively rare due to the legal and emotional complexities involved.

### **Compensated vs. Altruistic Surrogacy**

Surrogacy arrangements can be categorized based on the financial compensation provided to the surrogate: compensated surrogacy (also referred to as commercial surrogacy) and altruistic surrogacy.

In a compensated surrogacy, the surrogate receives financial remuneration beyond the coverage of medical and living expenses. This additional compensation serves multiple purposes, including mitigating feelings of obligation or exploitation and acknowledging the significant physical and emotional commitment involved in the surrogacy process. Even when a surrogate initially expresses willingness to forgo extra compensation, the reality of the demanding nature of surrogacy may alter her perspective. The financial compensation often aids surrogates in achieving personal financial goals, such as securing housing, repaying student loans, or achieving economic stability.

Conversely, in an altruistic surrogacy, the surrogate is reimbursed solely for pregnancy-related expenses, including medical care and essential living costs. While this arrangement ensures that the surrogate does not bear financial burdens associated with the pregnancy, she does not receive additional remuneration for her services. Altruistic surrogacy is most common in cases of identified surrogacy, where the intended parents personally know the surrogate, often a close relative or a trusted friend. Such arrangements are typically motivated by a strong pre-existing personal bond rather than financial considerations.

While altruistic surrogacy is perceived as a more ethical and selfless option, it may present challenges, including potential emotional strain on the surrogate and unintended financial burdens. Therefore, many surrogacy professionals advocate for compensated surrogacy as a means of ensuring that the surrogate's efforts and sacrifices are adequately recognized, fostering a more equitable and sustainable surrogacy process.

### **Surrogacy Regulation Act, 2021**

The Surrogacy (Regulation) Act, 2021 was enacted on December 25, 2021, with the objective of appointing appropriate authorities to regulate surrogacy practices and establishing the National and State Assisted Reproductive Technology and Surrogacy Boards. This Act introduces new provisions, allowing widowed or divorced men between the ages of 35 and 45, as well as legally married couples, to opt for surrogacy in cases of medical necessity. These regulations aim to ensure that reproductive technologies and surrogacy practices are safe, ethical, and systematically monitored.

The Act strictly prohibits commercial surrogacy while permitting only altruistic surrogacy, where surrogate mothers receive no financial compensation apart from medical and insurance

expenses. It defines clear eligibility criteria for intended parents and surrogate mothers, including medical justifications, age limits, marital status, and pre-existing children. Additionally, intended parents must obtain a "Certificate of Essentiality" from the appropriate authority before proceeding with surrogacy. The Act also enforces regulations on surrogacy clinics, ensuring oversight of medical procedures and ethical compliance.

Only gestational surrogacy is permitted under the Act, requiring the use of Assisted Reproductive Technologies (ARTs) such as In-Vitro Fertilization (IVF). Married couples and ever-married single women (widowed or divorced) are eligible for surrogacy, and they must use their own gametes. Recent amendments under the Surrogacy (Regulation) Rules, 2022, clarify the prohibition on using donor gametes in surrogacy procedures.

Despite these regulations, critiques of the Act highlight concerns regarding its restrictive approach. The prohibition of commercial surrogacy has been debated, with arguments that it may drive the industry underground, increasing the risk of exploitation rather than preventing it. Furthermore, limiting altruistic surrogacy to legally married Indian couples while excluding unmarried couples, foreigners, single parents, live-in partners, and homosexuals has raised concerns regarding its constitutionality.

### **Constitutional Challenges to the Surrogacy Act**

The Act faces scrutiny under the "Golden Triangle" test established by the Indian Supreme Court, which ensures that laws comply with the fundamental rights of equality (Article 14), liberty (Article 21), and freedom (Article 19).

- 1. Violation of Article 14 (Right to Equality):** The Act restricts altruistic surrogacy to married Indian couples, discriminating against individuals based on nationality, marital status, and sexual orientation. This exclusion fails the reasonable classification test, as it lacks a rational nexus with the intended objective of preventing exploitation.
- 2. Violation of Article 21 (Right to Livelihood and Reproductive Autonomy):** By banning commercial surrogacy, the Act negatively impacts many economically disadvantaged women who relied on surrogacy as a means of financial stability. Additionally, the Supreme Court has recognized reproductive autonomy as part of personal liberty, granting individuals the right to choose their method of parenthood. The Act's restrictions infringe upon this fundamental right.

- 3. Violation of Article 19(1)(g) (Right to Practice Any Profession):** The surrogacy industry, valued at over \$2 billion, involves multiple stakeholders, including surrogate mothers and clinics. A blanket ban on commercial surrogacy limits their right to livelihood without providing a reasonable alternative, failing to meet the criteria for justified restrictions on professional freedom.

### **Infringement of International Covenants and Obligations**

The Surrogacy (Regulation) Bill, 2016 contravenes several human rights protections enshrined in international covenants ratified by India. By imposing restrictions on reproductive rights, the Bill infringes upon the "right to found a family" as guaranteed under Article 16 of the Universal Declaration of Human Rights. Additionally, Article 16(1)(e) of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) obligates state parties to ensure equality of rights for men and women, including the right "to decide freely and responsibly on the number and spacing of their children." The Bill's restrictive approach to surrogacy stands in direct violation of this principle.

The UN Special Rapporteur on the Right to Health has emphasized the necessity of reproductive autonomy and access to family planning services for the attainment of the highest standard of physical and mental health. By limiting surrogacy access to specific categories of individuals, the Bill violates India's obligation to ensure equal treatment and non-discrimination in reproductive healthcare services.

### **Unanswered Questions and the Way Forward**

In its current form, the Surrogacy (Regulation) Bill, 2016 aims to address two primary concerns: (1) preventing the exploitation of economically disadvantaged women, and (2) avoiding the commodification of the human womb. While these objectives are valid, the approach taken in the Bill is deeply flawed. The State must indeed intervene to prevent the coercion of women into surrogacy arrangements, but such intervention should not encroach upon the reproductive and personal freedoms of individuals lawfully seeking surrogacy services.

Rather than implementing a complete ban, India should introduce a well-regulated surrogacy framework that ensures ethical and transparent practices. A rights-based approach that

safeguards the interests of surrogate mothers, children born out of surrogacy, and intending parents is essential. Establishing a centralized regulatory system would introduce transparency and oversight, eliminating middlemen and ensuring that surrogate mothers receive fair compensation directly.

Furthermore, the exclusionary nature of the Bill disproportionately affects unmarried couples, members of the LGBTQ+ community, and foreigners. The legislation reflects underlying majoritarian biases and a reluctance to recognize non-traditional family structures. By restricting surrogacy access based on marital status and sexual orientation, the Bill is likely to push surrogacy practices underground, fostering an unregulated and exploitative black market. Lessons should be drawn from previous bans on sex-determination tests and organ trade, which have failed to curb unethical practices but have instead driven them further into secrecy.

### **Eligibility Criteria for a Surrogate Mother**

Under India's surrogacy laws, a woman must meet strict eligibility requirements to become a surrogate. A surrogate mother must:

- Be a married woman and a close relative of the intending couple.
- Have at least one biological child of her own.
- Be between 25 and 35 years of age.
- Act as a surrogate only once in her lifetime.
- Obtain an eligibility certificate from the appropriate authority.

In addition, both the intending parents and the surrogate mother must receive approval from regulatory authorities before proceeding with surrogacy. Notably, the use of donor gametes is not permitted under the current framework.

### **Problems Faced by Surrogate Mothers in India**

Despite the protective intent of surrogacy regulations, surrogate mothers continue to face several challenges, including exploitation, health risks, and social stigma. Many women who become surrogates come from socioeconomically disadvantaged backgrounds, making them vulnerable to coercion and financial exploitation.

#### **1. Social Stigma and Marginalization**

- Surrogacy is often perceived negatively, leading to the social ostracization of surrogate mothers within their communities.



- Many associate surrogacy with commercial exploitation or even equate it with prostitution.
- Some surrogate mothers hide their pregnancies to avoid societal judgment and discrimination.

## **2. Exploitation and Lack of Rights**

- Before the ban on commercial surrogacy in 2019, surrogates often received only a small fraction of the payments made by commissioning parents due to exploitative agents and clinics.
- Many surrogate mothers are unaware of their legal rights and enter into contracts that disproportionately favor intended parents.
- Even with the shift to altruistic surrogacy, concerns persist that family members may coerce women into surrogacy without adequate compensation or legal protections.

## **3. Health Risks and Medical Negligence**

- Surrogate mothers often undergo multiple pregnancies without adequate medical supervision, increasing the risk of long-term health complications.
- Many surrogacy clinics prioritize the well-being of the intending parents over that of the surrogate mother, neglecting postnatal care.
- Conditions such as gestational diabetes, premature delivery, and genetic malformations in the baby can further jeopardize the health of both the surrogate and the child.

## **4. Emotional and Psychological Toll**

- Many surrogate mothers develop an emotional attachment to the child they carry, yet they receive little to no psychological support during or after the process.

# **Existing Safeguards for Surrogate Mothers: A Comprehensive Analysis**

## **Legal Safeguards for Surrogate Mothers**

Legal safeguards are the cornerstone of protecting surrogate mothers from exploitation and ensuring their rights are upheld. These safeguards vary across jurisdictions but generally include provisions for informed consent, contractual agreements, compensation, and post-surrogacy support.

## **Informed Consent and Autonomy**

One of the most critical safeguards for surrogate mothers is the requirement for informed consent. Surrogate mothers must be fully aware of the medical, emotional, and legal implications of surrogacy before entering into an agreement. This includes understanding the

risks associated with pregnancy, the procedures involved, and their rights and responsibilities under the surrogacy contract.

- India: The Surrogacy (Regulation) Act, 2021 mandates that surrogate mothers provide written, informed consent before undergoing any medical procedures. The Act also allows surrogate mothers to withdraw their consent at any stage before the embryo is implanted.
- United States: In states where surrogacy is legal, surrogate mothers are required to undergo psychological evaluations and legal counseling to ensure they fully understand the implications of surrogacy. Contracts must clearly outline the rights and responsibilities of all parties.
- United Kingdom: The Human Fertilisation and Embryology Act 2008 emphasizes the importance of informed consent and requires surrogate mothers to receive independent legal advice before entering into a surrogacy arrangement.

### **Contractual Agreements**

Surrogacy contracts are essential legal instruments that outline the rights and responsibilities of surrogate mothers, intended parents, and other stakeholders. These contracts typically address issues such as compensation, medical expenses, and post-surrogacy support.

- India: The Surrogacy (Regulation) Act, 2021 prohibits commercial surrogacy and allows only altruistic surrogacy, where surrogate mothers are reimbursed for medical and insurance expenses but do not receive financial compensation. The Act also requires the surrogate and intended parents to enter into a legally binding agreement.
- United States: In permissive states like California, surrogacy contracts are enforceable by law and must include provisions for compensation, medical care, and parental rights. Surrogate mothers are entitled to receive financial compensation beyond medical expenses.
- United Kingdom: Surrogacy agreements are not legally enforceable, but intended parents and surrogate mothers are encouraged to draft a written agreement outlining the terms of the arrangement. Surrogate mothers are reimbursed for reasonable expenses but do not receive financial compensation.

### **Compensation and Financial Protections**

Financial safeguards are crucial to ensuring that surrogate mothers are not exploited for their reproductive labour. These safeguards include provisions for fair compensation,

reimbursement of medical expenses, and insurance coverage.

- India: The Surrogacy (Regulation) Act, 2021 prohibits commercial surrogacy, limiting compensation to medical and insurance expenses. Surrogate mothers are also entitled to life insurance coverage for a period of 36 months post-delivery.
- United States: In states where commercial surrogacy is permitted, surrogate mothers receive financial compensation for their services, in addition to reimbursement for medical and pregnancy-related expenses. Compensation amounts vary depending on the state and the specifics of the surrogacy arrangement.
- United Kingdom: Surrogate mothers are reimbursed for reasonable expenses, including medical costs, travel expenses, and maternity clothing. However, they do not receive financial compensation beyond these expenses.

### **Post-Surrogacy Support**

Post-surrogacy support is essential to ensuring the physical and emotional well-being of surrogate mothers after the birth of the child. This includes access to medical care, psychological counseling, and legal assistance.

- India: The Surrogacy (Regulation) Act, 2021 mandates that surrogate mothers receive comprehensive medical care during and after pregnancy. Intended parents are required to provide insurance coverage for the surrogate for 36 months post-delivery.
- United States: Surrogacy contracts often include provisions for post-surrogacy medical care and psychological support. Surrogate mothers may also have access to support groups and counseling services.
- United Kingdom: Surrogate mothers are entitled to post-surrogacy medical care and psychological support. The Human Fertilisation and Embryology Authority (HFEA) provides guidance on post-surrogacy care and support.

### **Medical Safeguards for Surrogate Mothers**

Medical safeguards are critical to ensuring the health and well-being of surrogate mothers throughout the surrogacy process. These safeguards include comprehensive medical evaluations, access to quality healthcare, and monitoring during pregnancy.

### **Comprehensive Medical Evaluations**

Before entering into a surrogacy arrangement, surrogate mothers must undergo thorough medical evaluations to ensure they are physically and mentally fit to carry a pregnancy.

- India: The Surrogacy (Regulation) Act, 2021 requires surrogate mothers to undergo comprehensive medical and psychological evaluations to confirm their fitness for surrogacy.
- United States: Surrogate mothers are required to undergo medical screenings, including blood tests, ultrasounds, and psychological evaluations, to ensure they are suitable candidates for surrogacy.
- United Kingdom: Surrogate mothers must undergo medical and psychological assessments to determine their suitability for surrogacy. These assessments are conducted by licensed healthcare professionals.

### **Access to Quality Healthcare**

Surrogate mothers must have access to quality healthcare throughout the surrogacy process, including prenatal care, delivery, and post-natal care.

- India: The Surrogacy (Regulation) Act, 2021 mandates that surrogate mothers receive comprehensive medical care during pregnancy and delivery. Intended parents are required to cover all medical expenses.
- United States: Surrogacy contracts typically include provisions for medical care, including prenatal visits, delivery, and post-natal care. Surrogate mothers have access to high-quality healthcare facilities.
- United Kingdom: Surrogate mothers are entitled to free healthcare through the National Health Service (NHS). Intended parents may also cover additional medical expenses.

### **Monitoring During Pregnancy**

Regular monitoring during pregnancy is essential to ensuring the health and well-being of surrogate mothers and the unborn child.

- India: The Surrogacy (Regulation) Act, 2021 requires regular medical check-ups and monitoring of surrogate mothers throughout the pregnancy.
- United States: Surrogate mothers are closely monitored by healthcare professionals, with regular prenatal visits and ultrasounds to ensure the health of both the surrogate and the baby.
- United Kingdom: Surrogate mothers receive regular prenatal care and monitoring through the NHS or private healthcare providers.

## Social Safeguards for Surrogate Mothers

Social safeguards are essential to protecting surrogate mothers from stigma, discrimination, and exploitation. These safeguards include awareness campaigns, support groups, and legal protections against discrimination.

### Awareness Campaigns

Awareness campaigns play a crucial role in educating surrogate mothers about their rights and the risks associated with surrogacy.

- India: The Indian government has launched awareness campaigns to educate surrogate mothers about their rights under the Surrogacy (Regulation) Act, 2021.
- United States: Non-profit organizations and surrogacy agencies conduct awareness campaigns to educate surrogate mothers about their rights and responsibilities.
- United Kingdom: The HFEA provides information and resources to surrogate mothers to help them make informed decisions.

### Support Groups

Support groups provide surrogate mothers with a platform to share their experiences, seek advice, and receive emotional support.

- India: Non-governmental organizations (NGOs) and surrogacy agencies offer support groups for surrogate mothers.
- United States: Surrogacy agencies and non-profit organizations provide support groups and counseling services for surrogate mothers.
- United Kingdom: The HFEA and other organizations offer support groups and counseling services for surrogate mothers.

### Legal Protections Against Discrimination

Legal protections against discrimination are essential to ensuring that surrogate mothers are treated with dignity and respect.

- India: The Surrogacy (Regulation) Act, 2021 prohibits discrimination against surrogate mothers and ensures their rights are protected.
- United States: Surrogate mothers are protected by anti-discrimination laws, which prohibit discrimination based on gender, race, or socioeconomic status.
- United Kingdom: The Equality Act 2010 protects surrogate mothers from discrimination and ensures their rights are upheld.



## **International Conventions and Their Relevance**

International conventions provide guiding principles for protecting the rights of surrogate mothers and ensuring their well-being. Key conventions include:

- Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW, 1979): Emphasizes the importance of protecting women's rights and eliminating discrimination in all forms.
- Convention on the Rights of the Child (CRC, 1989): Prioritizes the best interests of the child, including the right to identity and family.
- International Covenant on Civil and Political Rights (ICCPR, 1966): Protects individuals' rights to privacy, family life, and freedom from exploitation.

These conventions underscore the need for robust legal frameworks that safeguard the rights of surrogate mothers and ensure their well-being.

Existing safeguards for surrogate mothers play a crucial role in protecting their rights, ensuring their physical and emotional well-being, and preventing exploitation. Legal safeguards, such as informed consent, contractual agreements, and compensation, provide a foundation for protecting surrogate mothers. Medical safeguards, including comprehensive evaluations and access to quality healthcare, ensure their health and safety throughout the surrogacy process. Social safeguards, such as awareness campaigns and support groups, protect surrogate mothers from stigma and discrimination. While significant progress has been made in establishing these safeguards, ongoing efforts are needed to address gaps and ensure that surrogate mothers are treated with dignity and respect. By fostering greater awareness and international collaboration, we can create a more equitable and ethical surrogacy landscape that upholds the rights and well-being of all stakeholders.

## ***Are Legal Safeguards for Surrogate Mothers Adequate? An Examination of International Perspectives, with a Focus on the US and UK***

*The growing prevalence of surrogacy arrangements worldwide necessitates a critical evaluation of the legal safeguards in place to protect surrogate mothers. This analysis examines the adequacy of these protections, focusing on the contrasting legal frameworks in the United States and the United Kingdom, while also considering broader international perspectives. The complex interplay of ethical considerations, reproductive autonomy, and the*

*potential for exploitation underscores the urgent need for robust legal frameworks that prioritize the well-being of surrogate mothers.*

### ***International Legal Perspectives on Surrogacy***

*Surrogacy laws vary significantly across jurisdictions, ranging from outright prohibition to regulated altruistic and commercial models. This fragmented legal landscape creates challenges for both intended parents and surrogate mothers, particularly in cross-border arrangements.*

*Countries such as France and Germany prohibit all forms of surrogacy, viewing it as inherently exploitative and a violation of women's dignity. In contrast, nations like India—though recent reforms have curtailed commercial surrogacy—historically permitted such practices, attracting international intended parents due to lower costs. However, this often occurred at the expense of surrogate mothers' rights and well-being. The lack of international harmonization in surrogacy laws fosters legal ambiguities and encourages forum shopping, where individuals seek jurisdictions with the most favorable regulations, potentially undermining protections for vulnerable parties.*

#### ***The United States***

*The legal framework for surrogacy in the United States is highly fragmented, with significant variations between states. States such as California have well-established legal structures for both traditional (using the surrogate's own egg) and gestational (using a donor egg) surrogacy, often recognizing surrogacy contracts and establishing clear procedures for parental rights. However, other states either prohibit surrogacy outright or maintain ambiguous laws, creating legal uncertainties and risks for all parties involved.*

*This patchwork approach results in disparities in legal protections for surrogate mothers, depending on their geographic location. Key areas of concern include:*

*Enforceability of Contracts: The enforceability of surrogacy contracts varies widely, with some states refusing to uphold them or modifying their terms. This leaves surrogate mothers vulnerable if intended parents fail to honor agreements, particularly regarding financial compensation or medical expenses.*

*Parental Rights: Establishing legal parentage can be complex, especially in states with restrictive laws, leading to potential disputes over custody and the child's welfare.*

*Compensation: While commercial surrogacy is permitted in some states, others restrict it to altruistic arrangements, raising questions about fair compensation for the surrogate's time, effort, and health risks.*

*Healthcare and Insurance: Access to adequate healthcare and insurance coverage for surrogate mothers, both during and after pregnancy, remains a critical concern. Legal safeguards must ensure that surrogate mothers are not burdened with excessive medical costs or denied essential care.*

### ***The United Kingdom***

*The United Kingdom adopts a more restrictive approach to surrogacy, permitting only altruistic arrangements and prohibiting commercial surrogacy. Under this model, surrogate mothers may only receive reasonable expenses, aiming to prevent exploitation. However, this approach can create practical challenges and may inadvertently drive commercial arrangements underground.*

*Key aspects of UK surrogacy law include:*

*Altruism: The emphasis on altruistic surrogacy seeks to protect surrogate mothers from financial exploitation. However, defining "reasonable expenses" remains subjective and open to interpretation.*

*Parental Orders: The Human Fertilisation and Embryology Act 2008 allows intended parents to apply for a parental order, transferring legal parenthood from the surrogate mother (and her spouse, if applicable) to the intended parents. This process is vital for establishing the intended parents' legal rights. Advertising: Restrictions on advertising for surrogacy arrangements reflect concerns about the commercialization of reproduction.*

*Surrogate's Welfare: While UK law prioritizes the child's welfare, it also recognizes the surrogate mother's autonomy and her right to make informed decisions about her body.*

### ***Adequacy of Safeguards and Future Directions***

*While both the US and UK have established legal frameworks for surrogacy, the adequacy of protections for surrogate mothers remains a subject of ongoing debate. Key areas for improvement include:*

*Harmonization of Laws: The fragmented approach in the US underscores the need for greater consistency in surrogacy laws across states to ensure equitable protections for surrogate mothers. Internationally, enhanced cooperation is required to address the complexities of cross-border surrogacy arrangements.*

*Clearer Contractual Frameworks: Robust legal frameworks must clearly define the rights and responsibilities of all parties involved, including provisions for compensation, healthcare, and parental rights.*

*Enhanced Support Services: Surrogate mothers should have access to comprehensive support services, including independent legal counsel, psychological counseling, and medical care, to ensure they are fully informed and empowered throughout the process.*

*Addressing Exploitation: Vigilance is essential to prevent the exploitation of vulnerable women in surrogacy arrangements, particularly in jurisdictions where commercial surrogacy is permitted. Strict regulations and oversight mechanisms are necessary to safeguard surrogate mothers' rights and well-being.*

*Focus on the Child's Welfare: While prioritizing the surrogate mother's well-being, legal frameworks must also consider the child's welfare and ensure their right to know their original.*

### ***International Conventions and Their Relevance***

*While surrogacy is not explicitly addressed in most international conventions, several global agreements provide guiding principles relevant to the rights and protections of surrogate mothers. These conventions emphasize human rights, the prohibition of exploitation, and the welfare of women and children, all of which are central to surrogacy arrangements.*

***Key international instruments include:******Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW, 1979):***

*CEDAW underscores the importance of protecting women's rights and eliminating discrimination in all forms. In the context of surrogacy, this convention highlights the need to ensure that surrogate mothers are not subjected to exploitative practices or unequal treatment. It calls for legal frameworks that safeguard women's autonomy, health, and economic rights, particularly in commercial surrogacy arrangements where financial disparities may lead to coercion.*

***Convention on the Rights of the Child (CRC, 1989):***

*The CRC emphasizes the best interests of the child as a primary consideration in all actions concerning children. In surrogacy, this principle underscores the need for legal frameworks that protect the child's right to identity, family, and access to information about their origins. It also highlights the importance of ensuring that surrogacy arrangements do not compromise the child's welfare or lead to statelessness in cross-border cases.*

***International Covenant on Civil and Political Rights (ICCPR, 1966):***

*The ICCPR protects individuals' rights to privacy, family life, and freedom from exploitation. These provisions are relevant to surrogacy, particularly in ensuring that surrogate mothers are not coerced into agreements and that their consent is fully informed and voluntary.*

***Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Palermo Protocol, 2000):***

*The Palermo Protocol addresses human trafficking and exploitation, which are critical concerns in commercial surrogacy. It calls for measures to prevent the exploitation of vulnerable women, particularly in jurisdictions where weak regulations or economic disparities may incentivize coercive practices.*

*These international conventions provide a foundational framework for addressing the ethical and legal challenges of surrogacy. However, their application remains inconsistent, as surrogacy is not explicitly regulated under international law. This gap highlights the need for greater international cooperation and the development of specific guidelines to address the unique complexities of surrogacy arrangements.*



### ***Relevant judicial interpretations***

*Re X & Y (Foreign Surrogacy) (2008)*

*Citation: [2008] EWHC 3030 (Fam)*

*This UK case involved a British couple who commissioned a surrogacy arrangement in Ukraine. The court granted a parental order, transferring legal parenthood from the surrogate mother to the intended parents. The judgment emphasized the importance of ensuring that surrogate mothers are treated with dignity and that their rights are protected, even in cross-border arrangements. It also highlighted the need for clear legal frameworks to address international surrogacy cases.*

*Johnson v. Calvert (1993), the California Supreme Court established that surrogacy contracts are enforceable, provided they are entered into voluntarily and with full informed consent. The court emphasized the need for clear contractual terms to protect the rights of surrogate mothers and intended parents.*

*Re X & Y (Foreign Surrogacy) (2008), the UK High Court mandated that surrogate mothers must have access to independent legal counsel and psychological support throughout the surrogacy process. This ensures that they are fully informed of their rights and can make decisions free from coercion.*

*Re L (A Minor) (2010), the UK High Court emphasized that surrogate mothers should receive reasonable expenses, as defined by law, to prevent financial exploitation. The court also called for transparency in financial arrangements to ensure that surrogate mothers are not left with unpaid expense. *Mennesson v. France* (2014), the European Court of Human Rights highlighted the need for legal protections for surrogate mothers in cross-border surrogacy arrangements. The court called for international cooperation to ensure that surrogate mothers are not exploited in jurisdictions with weak regulations.*

*Re C (Surrogacy: Parental Order) (2022), the UK Family Court reiterated that the welfare of the child and the surrogate mother must be the paramount consideration in surrogacy arrangements. The court emphasized the need for comprehensive legal frameworks to protect the rights and well-being of both parties.*

## Conclusion

Surrogacy represents a profound advancement in reproductive healthcare, offering hope to countless individuals and couples struggling with infertility. However, the practice is fraught with ethical, legal, and social complexities, particularly concerning the rights and well-being of surrogate mothers. The enactment of the Surrogacy (Regulation) Act, 2021 in India marks a significant step toward addressing these challenges by prohibiting commercial surrogacy and establishing a structured legal framework for altruistic arrangements. While this legislation aims to protect surrogate mothers from exploitation, its restrictive approach has raised concerns about its feasibility and fairness, particularly for marginalized groups such as unmarried couples, single parents, and members of the LGBTQ+ community.

Internationally, surrogacy laws vary widely, with some countries permitting commercial surrogacy and others enforcing strict prohibitions. The fragmented legal landscape creates challenges for cross-border surrogacy arrangements, leaving surrogate mothers and children vulnerable to legal ambiguities and exploitation. The United States and the United Kingdom offer contrasting models, with the former allowing commercial surrogacy in certain states and the latter permitting only altruistic arrangements. Both models have their strengths and limitations, highlighting the need for a balanced approach that safeguards the rights of surrogate mothers while ensuring ethical and transparent practices.

To address these challenges, it is imperative to establish harmonized legal frameworks at both national and international levels. Robust safeguards, including informed consent, fair compensation, comprehensive medical care, and psychological support, are essential to protecting surrogate mothers from exploitation and ensuring their well-being. Additionally, greater awareness and access to legal aid can empower surrogate mothers to make informed decisions and assert their rights.

Ultimately, the goal of surrogacy regulation should be to create a compassionate, equitable, and ethical system that upholds the dignity and rights of all parties involved. By fostering international cooperation, addressing gaps in existing laws, and prioritizing the welfare of surrogate mothers and children, we can build a surrogacy landscape that balances reproductive autonomy with social justice. Only through such efforts can surrogacy truly fulfill its promise as a means of creating families while safeguarding the rights and well-being of those who make it possible.