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## From Contracts to Justice - Surrogacy and the Role of Judicial Interpretations

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*The procreation of offspring is one of the primary objectives of marriage. Every person's fundamental aspiration is to perpetuate their lineage by having descendants. Happiness within a marriage relies not only on fulfilling the biological need for sexual fulfillment but also on the ability to have children. Experiencing childlessness often leads to feelings of depression and insecurity among parents, impacting them both psychologically and socially while also interrupting their lineage. Surrogacy has emerged as a preferable option to adoption for these couples, as the child born through surrogacy maintains a genetic link to the parents. According to their assessment, India was deemed the 'CAPITAL OF SURROGACY' by the UN in 2012<sup>1</sup>. The origins of surrogacy in India date back to October 3, 1978, when Kanupriya, also known as Durga, was born in Kolkata using the In Vitro Fertilization (IVF) method, shortly after the birth of the world's first IVF baby, Louise Joy Brown, in Great Britain on July 25, 1978. Following the verdict of the Supreme Court in the case of **Baby Manji Yamada v Union of India** 2008<sup>2</sup>. India has taken the lead in international surrogacy due to the legalization of commercial surrogacy. Currently, India is the most popular destination for surrogate motherhood. The reasons that draw foreign couples to choose India for surrogacy include simpler procedures, lower associated costs, poverty, illiteracy, the absence of regulations governing ART clinics, the potential for any law*

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<sup>1</sup> Sakshi Sinha, 'An Understanding of Surrogacy: A Legal Analysis in Indian Context' (2021) SSRN <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3726683](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3726683)> accessed 12 December 2024

<sup>2</sup> *Baby Manji Yamada v Union of India* (2008) 13 SSC 518

*regarding the subject to be adjusted, and judicial endorsement that regularizes commercial surrogacy. This paper seeks to explore the advancements in reproductive technologies within the framework of family law and to analyze the proposed Surrogacy (Regulation) Bill, 2016,<sup>3</sup> against the backdrop of various constitutional and contractual stipulations, along with recommending legal reforms to better govern surrogacy arrangements in India.*

**Keywords:** *procreation, surrogacy, reproductive technologies, lineage, emotional complexity.*

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## INTRODUCTION

The notion of family has been integral to the development of society throughout history. The right to marry and create a family is widely regarded as a fundamental human right. Human Rights Legislation supports the inherent right of all individuals to marry and establish a family unit<sup>4</sup>. Across cultures, the family is recognized as the essential building block of social relationships. When two people unite in marriage, they form a new family, which is often completed with the arrival of children. Birth is essential for the continuation of life, as no living being is immortal. Early human civilization established relationships to facilitate the process of procreation. The legally and culturally recognized union between a man and a woman, which grants them the titles of husband and wife and confers legal status upon their children, is commonly known as marriage. The primary biological purpose of marriage is reproduction, which is vital for the survival of the species. Regrettably, the ability to conceive is not universally available, and the medical term for the inability to have children is infertility. This contradiction, where a child is seen as the completion of a family, yet some couples face challenges in having children, places significant strain on married couples. Societal pressure to produce offspring can lead to marital discord and expose couples to social stigma.

All living organisms must possess the ability to reproduce to ensure their survival. Reproduction is the biological process through which a woman brings forth a child. Offspring produced through this natural mechanism are cared for by their biological parents.

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<sup>3</sup> Olinda Timms, 'Ending commercial surrogacy in India: significance of the surrogacy (Regulation) Bill, 2016' (2018) 3(2) Indian Journal of Medical Ethics <<https://doi.org/10.20529/IJME.2018.019>> accessed 12 December 2024

<sup>4</sup> Universal Declaration of Human Rights 1948, art 16(1)

Consequently, reproduction has become a vital mechanism for the continuation of species. The institution of marriage developed within cultures to promote this continuity. Unfortunately, many couples face challenges in conceiving, indicating that numerous individuals are unable to achieve pregnancy due to various social or health-related factors.

The term 'Social infertility' describes the inability to conceive stemming from a range of circumstances. Similar to individuals in same-sex relationships, widowed, single, or divorced individuals may have the potential to parent but encounter obstacles for different reasons. Infertility presents a significant challenge in societies, impacting both men and women equally.

In the Abrahamic traditions, infertility is viewed as a divine gift that couples are encouraged to accept with faith, often attributed to past actions. The Quran emphasizes God's Sovereignty, stating that he creates as he wills and grants children to whom he chooses, including the ability to remain childless. In Buddhism and Hinduism, the concept of the 'Karmic cycle' is considered a fundamental factor influencing major life events, including infertility, which is believed to stem from previous misdeeds. Medical Infertility, on the other hand, refers to the inability to conceive after years of marriage and regular unprotected intercourse, often linked to biological issues such as diabetes mellitus.

## **STATEMENT OF PROBLEM**

Insufficient research on surrogacy poses significant challenges to the formulation of laws and the implementation of measures against individuals found to be in violation. Numerous critical questions surrounding surrogacy remain unresolved, including whether Surrogacy serves as a viable option for individuals or couples facing difficulties in conceiving or carrying a pregnancy, yet it brings forth considerable challenges across medical, ethical, legal, and social spheres. The absence of a unified global regulatory framework often leads to inconsistencies and potential exploitation. A key issue in this context is how to safeguard the rights and well-being of surrogate mothers, especially concerning age limitations. While setting an age cap is intended to promote healthier outcomes for both the surrogate and the child, it also ignites discussions about autonomy, equity, and potential discrimination. These intricate issues highlight the necessity for clear, fair, and enforceable regulations that protect all stakeholders while adapting

to the changing societal and technological landscape. These inquiries necessitate a thorough examination.

## REVIEW OF LITERATURE

Peter Singer and Deane Wells, in their book *Making Babies: The New Science and Ethics of Conception*<sup>5</sup>, present a comprehensive examination of the perspectives on surrogacy in the United States, Great Britain, and Australia. The authors investigate potential legal frameworks that could effectively govern the surrogacy process. They suggest a model inspired by the adoption system in Australia, advocating for the creation of a State Surrogacy Council to oversee these arrangements.

Martha A. Field, in her work, *Surrogate Motherhood: The Legal and Human Issues*<sup>6</sup>, explores the legal framework and enforceability of surrogacy agreements. She outlines various perspectives on how to approach surrogacy and the factors that may justify these positions. Additionally, the book addresses custody disputes that arise independently of surrogacy contracts. Field argues that a mother who opts out of a surrogacy agreement should have the right to maintain custody of her child without the obligation to demonstrate to the court that she would be a superior parent compared to the biological father.

Dr. Nandita Adhikari's work, *Law and Medicine*,<sup>7</sup> explores the topic of surrogate motherhood, including its historical context and the legal status of surrogacy contracts across different nations. She also examines various issues associated with surrogacy arrangements.

Nikita Kaushik's article, '*Law in Surrogacy*',<sup>8</sup> focuses on the principle of substitution and analyzes the legal frameworks that govern surrogacy in India. Additionally, it reviews the findings of the 228th Law Commission and the Surrogacy (Regulations) Bill of 2019<sup>9</sup>, as well as the Supported

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<sup>5</sup> Peter Albert David Singer, *Making babies: The new science and ethics of conception* (Charles Scribner's Sons 1985)

<sup>6</sup> Martha Field, *Surrogate Motherhood: The Legal and Human Issues, Expanded Edition* (Harvard University Press 1990)

<sup>7</sup> Nandita Adhikari, *Law and Medicine* (Central Law Publications 2012)

<sup>8</sup> Nikita Kaushik, 'Law in Surrogacy' (2019) 2(1) Indian Journal of Health and Medical Law

<<https://lawjournals.celnet.in/index.php/ijhml/article/view/296>> accessed 12 December 2024

<sup>9</sup> 'Surrogacy Bill Aimed At Regulation, Constituting National Board Passed' NDTV (17 December 2021)

<<https://www.ndtv.com/india-news/surrogacy-regulation-bill-2019-parliament-news-parliament-winter->

Technologies (Regulation) Bill of 2010.<sup>10</sup> Kaushik also discusses the rights and responsibilities of surrogate mothers.

## RESEARCH OBJECTIVES

The practice of surrogacy, where a woman agrees to carry and give birth to a child on behalf of another individual or couple, is a deeply complex and highly regulated process. Among the numerous medical, ethical, and legal considerations that govern surrogacy, the age of the surrogate mother often emerges as a critical factor. It is commonly mandated or recommended that surrogate mothers be under 35 years of age, with one of the primary reasons being that a female's uterus must be healthy to bear a child. This essay delves into the multifaceted rationale behind this age limit, examining its basis in medical science, societal norms, legal frameworks, and ethical principles while addressing counterarguments and alternative perspectives.

The primary aim of surrogacy is to enable individuals or couples who are unable to conceive or carry a pregnancy to have a biological child. This includes individuals with medical conditions that prevent pregnancy, same-sex couples, and single parents. Surrogacy serves as a pathway to parenthood, offering hope and fulfillment to those who might otherwise be unable to experience the joy of raising a child with a genetic connection. Additionally, surrogacy allows intended parents to be involved in the pregnancy process, from conception to birth, fostering a sense of connection and bonding with their child.

## HYPOTHESIS

Surrogacy is a multifaceted social and ethical issue that connects medical progress with human reproductive needs. It provides hope for those who cannot conceive, but it also brings up important concerns regarding exploitation, consent, and the commodification of the human body. The legal and cultural acceptance of surrogacy differs significantly from one country to

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[session-surrogacy-bill-aimed-at-regulation-constituting-national-board-passed-in-parl-2657251](#)> accessed 12 December 2024

<sup>10</sup> Anitha K N and Dr. B. S. Reddy, 'The Assisted Reproductive Technologies Regulation Bill, 2010 : A Hope Ray To Regularise Surrogacy In India- A Human Right Perspective' (2013) 3(2) Indian Journal Of Applied Research <[https://www.worldwidejournals.com/indian-journal-of-applied-research-\(IJAR\)/recent\\_issues\\_pdf/2013/December/December\\_2013\\_1385986790\\_cc62d\\_75.pdf](https://www.worldwidejournals.com/indian-journal-of-applied-research-(IJAR)/recent_issues_pdf/2013/December/December_2013_1385986790_cc62d_75.pdf)> accessed 12 December 2024

another, reflecting a variety of moral and societal values. Ethical surrogacy frameworks can empower women while safeguarding the rights and well-being of everyone involved. By examining surrogacy from a balanced perspective, we can work towards creating fair regulations that honor individual freedoms and prevent potential abuses.

## RESEARCH METHODOLOGY

The research methodology used for this research is Doctrinal. Primary and Secondary sources have been used to gather the information for doctrinal research. Doctrinal research is commonly known as the conventional or theoretical method of legal inquiry. This approach entails examining established legal principles, doctrines, statutes, and case law to gain an in-depth understanding of a particular legal issue.

The phrase 'Doctrinal Research' derives from the term 'doctrine,' which signifies established legal principles or theories. In the context of legal studies, doctrinal research involves the analysis of legal texts, court decisions, and academic publications to systematically organize, interpret, and evaluate the legal framework surrounding a specific subject.

## SURROGACY - A CONCEPTUAL FRAMEWORK

In India, parenthood is often viewed as a blessing, while infertility is perceived as a misfortune. The societal framework in India is characterized by a strong family structure, with a particular emphasis on having sons to continue the family lineage. For women facing infertility, this condition is frequently regarded as a significant burden. Those experiencing difficulties in conceiving are often labeled as '*Banjh*.'

The term 'Surrogacy' originates from the Latin word 'subrogate,' which translates to 'to substitute.'<sup>11</sup> Infertility significantly impacts many couples who desire to experience parenthood and have children. The causes of infertility are diverse and can differ from individual to individual, often linked to factors such as lifestyle, health issues, age, and dietary habits. Both

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<sup>11</sup> Kaushik (n 8)

men and women can experience infertility. Given the prevalence of fertility challenges in society, surrogacy has become an important option for many individuals seeking to build their families.

The concept of 'rent a uterus' in fact may be readily acceptable in the more analytical frame of the mind with the argument 'at least the baby is made with our gametes, even though nourished in a rented body.' With sisters, sisters-in-law and even mothers lending a hand or rather a uterus, it received greater acceptability (even if future consequences arose, it could be solved very easily, and the helping hand of near and close relatives may not be taken out after delivering the child).

According to the Artificial Reproductive Technique (ART) Guidelines, surrogacy is an arrangement in which a woman agrees to a pregnancy, achieved through assisted reproductive technology, in which neither of the gametes belongs to her or her husband, to carry it to term and hand over the child to the person or persons for whom she is acting as surrogate; and a 'surrogate mother' is a woman who agrees to have an embryo generated from the sperm of a man who is not her husband, and the oocyte for another woman implanted in her to carry the pregnancy to full term and deliver the child to its biological parents(s).

However, advancements in science and reproductive technologies have emerged as a significant advantage for couples struggling with infertility, enabling them to have children of their own. Various clinics across India offer Assisted Reproductive Technologies.

**Assisted Reproductive Technologies include:**

- In Vitro Fertilization (IVF)
- Preimplantation Genetic Diagnosis (PGD)
- Intrauterine Insemination (IUI)
- Intracytoplasmic Sperm Injection (ICSI)
- Genetic Donation
- Surrogacy

## **IN-VITRO FERTILIZATION**

In vitro fertilization (IVF) is a sophisticated set of procedures designed to assist individuals in achieving pregnancy. It serves as a solution for infertility, which is defined as the inability to conceive after a year of trying for most couples. Additionally, IVF can be utilized to mitigate the risk of transmitting genetic disorders to offspring. The IVF process involves the retrieval of mature eggs from the ovaries, which are then fertilized by sperm in a laboratory setting. Following fertilization, one or more of the resulting embryos are transferred into the uterus, the organ where fetal development occurs. A complete IVF cycle typically spans approximately 2 to 3 weeks, although the process may be divided into distinct phases, potentially extending the overall duration.

IVF is recognized as the most effective form of fertility treatment that encompasses the manipulation of eggs, embryos, and sperm. Collectively, these procedures fall under the umbrella of assisted reproductive technology. The IVF process can utilize a couple's own eggs and sperm, or it may involve donor eggs, sperm, or embryos, whether from known or anonymous sources. In certain situations, a gestational carrier may be employed, wherein an embryo is implanted into another individual's uterus.<sup>12</sup>

## **PREIMPLANTATION GENETIC DIAGNOSIS (PGD)**

Preimplantation genetic diagnosis (PGD) is an advanced procedure designed to assist couples at a higher risk of conceiving a child with a genetic disorder. Many women and their partners opt for PGD in conjunction with in vitro fertilization (IVF) instead of pursuing a natural conception, which would involve genetic testing during the course of a pregnancy. Hormones are given to the woman to stimulate her ovaries and allow the collection of a number of her eggs (called oocytes).

After the eggs are removed, they are fertilised in the laboratory with sperm. Those eggs that are successfully fertilised divide and multiply to form a developing embryo. When the embryo is at the blastocyst stage, a few cells are removed to test for the specific genetic condition in question.

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<sup>12</sup> Jennifer Choe and Anthony L. Shanks, *In Vitro Fertilization* (StatPearls 2023)



In general, the removal of these cells does not appear to harm the developing embryo. Only those embryos that do not have the genetic condition tested for will be transferred into the woman's uterus.<sup>13</sup>

## **INTRAUTERINE INSEMINATION**

After ejaculation, sperm ascends through the vagina and enters the cervix, which serves as the gateway to the uterus. Once the sperm successfully navigates the cervix, it proceeds into the uterine cavity and subsequently into the fallopian tubes. These tubes are responsible for capturing the egg once it is released from the ovary. If sperm are present in the fallopian tube at the time the egg arrives, fertilization can occur, resulting in the formation of an embryo. The embryo then makes its way back through the fallopian tube to the uterus, where it implants and establishes a pregnancy. The cervix acts as a natural barrier to sperm movement, meaning that only a small fraction of sperm can pass through it and enter the uterus following ejaculation. Intrauterine insemination (IUI) is a procedure that bypasses this barrier by directly placing sperm into the uterus.

Intrauterine insemination (IUI) is a procedure that bypasses this barrier by directly placing sperm into the uterus. This reduces the distance the sperm must travel to reach the fallopian tubes, thereby enhancing the chances of one sperm successfully fertilizing the egg.<sup>14</sup>

## **INTRACYTOPLASMIC SPERM INJECTION (ICSI)**

Before a man's sperm can successfully fertilize a woman's egg, it must first attach to the egg's surface. Once this attachment occurs, the sperm penetrates the egg's outer layer to reach the cytoplasm, where fertilization happens. However, there are instances when the sperm struggles to penetrate the egg's outer layer, which may be either too thick or too difficult to navigate. Additionally, the sperm may not exhibit normal motility. In such situations, a technique known as intracytoplasmic sperm injection (ICSI) can be employed alongside in vitro fertilization (IVF)

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<sup>13</sup> *Ibid*

<sup>14</sup> *Ibid*

to facilitate fertilization. During ICSI, a single sperm is directly injected into the cytoplasm of the egg.

There are two primary methods for fertilizing an egg through IVF: traditional fertilization and ICSI. In traditional IVF, a sample containing 50,000 or more motile sperm is placed adjacent to the egg in a laboratory setting. Fertilization occurs when one sperm successfully enters the egg's cytoplasm. Conversely, in the ICSI method, a specialized tool called a micropipette is utilized to inject a single sperm directly into the egg's center.<sup>15</sup>

## GENETIC DONATION

Egg donation involves a woman providing her eggs (oocytes) to assist another woman in achieving pregnancy. This process is a component of Assisted Reproductive Techniques (ART) and serves as an effective family-building option for couples facing challenges such as premature ovarian failure, inadequate response to conventional ovarian stimulation, or significant male infertility issues. Additionally, egg donation is a viable choice for couples who are carriers of genetic disorders and wish to prevent the transmission of these conditions to their offspring.

The Indian Council of Medical Research (ICMR) emphasizes that egg donation should be conducted anonymously, and it is essential for donors to undergo thorough screening prior to the use of their eggs.

Following mentioned below are the ways through which the donors can be obtained -

***Anonymous Donors*** - Donors who prefer to remain anonymous to the recipients can be identified through egg donation programs, agencies, or records from fertility clinics. In India, the legal guidelines stipulate that donors should maintain their anonymity and should not be individuals familiar to the recipient.

***Known Donors*** - Women who are familiar to the couple or the recipient can serve as potential donors. Typically, these donors may be close relatives or friends. In certain cases, couples may

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<sup>15</sup> *Ibid*

actively seek donors by placing advertisements in newspapers or online. In such situations, the recipient and the donor may already have a prior relationship and can meet without the involvement of an intermediary program or agency. Recipients need to exercise caution when directly recruiting donors without the support of an intermediary program or agency for donor screening or without obtaining legal advice.

## IN-VITRO FERTILIZATION PROGRAMS

Women who undergo IVF mainly donate their excess eggs to infertile patients. This way of donation is limited because it can be seen as coercive, particularly if the donors are offered a financial discount on their IVF Cycle.<sup>16</sup>

## DEFINITION OF SURROGACY

Surrogacy, according to the *Merriam-Webster Dictionary*, is defined as ‘*the practice in which a woman designated as a surrogate mother becomes pregnant and carries a child to term with the intention of giving the child to individuals who are unable to conceive.*’<sup>17</sup>

According to *Bernard Dickens, Professor of Law at the University of Toronto*, an initial difficulty in addressing surrogate motherhood arrangements is that they do not conform to predictable patterns of behaviour, and no legal language exists to describe the human and social relationships that they create.

A standard definition of surrogacy is offered by the *American Law Reports* in the following manner: ‘*...a contractual undertaking whereby the natural or surrogate mother, for a fee, agrees to conceive a child through artificial insemination with the sperm of the natural father, to bear and deliver the child to the natural father, and to terminate all of her parental rights subsequent to the child’s birth.*’

The *Assisted Reproductive Technologies (Regulation) Bill*, defines ‘Surrogacy’ as an agreement in which a woman agrees to a pregnancy, achieved through assisted reproductive technology,

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<sup>16</sup> Paridhi Goel, ‘Laws related to donation of eggs and sperm in India’ (*iPleaders*, 05 June 2021) <[https://blog.ipleaders.in/laws-related-donation-eggs-sperm-india/#What\\_is\\_egg\\_donation](https://blog.ipleaders.in/laws-related-donation-eggs-sperm-india/#What_is_egg_donation)> accessed 12 December 2024

<sup>17</sup> ‘Surrogacy Definition’ (*surrogate.com*) <<https://surrogate.com/about-surrogacy/surrogacy-101/surrogacy-definition/>> accessed 12 December 2024

in which neither of the gametes belong to her or her husband, with the intention to carry it and hand over the child to the person or persons for whom she is acting as a surrogate.

It defines 'Surrogate mother' as a woman who is a citizen of India and is resident in India, who agrees to have an embryo generated from the sperm of a man who is not her husband and the oocyte of another woman, implanted in her to carry the pregnancy to viability and deliver the child to the couple/individual that had asked for surrogacy.

### **HISTORICAL INSTANCES OF SURROGATE MOTHERHOOD**

In surrogate motherhood, a woman serves as a surrogate, or substitute, mother for another individual, often referred to as the intended mother. This arrangement typically occurs when the intended mother is unable to produce viable eggs or carry a pregnancy to term. Surrogacy can be achieved through various methods, with the most common being the implantation of the husband's sperm into the surrogate via a process known as artificial insemination. In this scenario, the surrogate is both the genetic and gestational mother of the child, a practice commonly referred to as traditional surrogacy.<sup>18</sup>

Surrogacy serves as a significant opportunity for couples facing infertility challenges. It involves a woman gestating a child for another individual or couple through the transfer of embryos or gametes created from the intended parents. This practice has roots in India, where it was historically referred to as *Niyoya Dharma*.

In ancient Hindu society, there existed a practice known as Niyog Dharma, wherein a woman who was childless because her husband was impotent was allowed to conceive through her brother-in-law. The child belonged to the couple, and the brother-in-law had no claim over it. Niyoga Dharma was surrogate fatherhood. It was much less complicated, legally and emotionally, than surrogate motherhood. The scholars of Islam have pronounced a Fatwa regarding surrogacy; it is considered illegal and immoral for a woman to carry the child of any

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<sup>18</sup> *Ibid*

man other than her husbands. The Bible promotes the idea of surrogate motherhood. However, as far as earlier laws of Christians are concerned, it promotes surrogate fatherhood.<sup>19</sup>

The issue of surrogate motherhood came to national attention during the 1980s with the *Baby Manji Yamada v Union of India*<sup>20</sup> case. In 1984, a New Jersey couple, William Stern and Elizabeth Stern, contracted to pay Mary Beth Whitehead \$10,000 to be artificially inseminated with William Stern's sperm and carry the resulting child to term. Whitehead decided to keep the child after it was born, refused to receive the \$10,000 payment, and fled to Florida. In July 1985, the police arrested Whitehead and returned the child to the Sterns.

The Baby M. decision inspired state legislatures around the United States to pass laws regarding surrogate motherhood. Most of those laws prohibit or strictly limit surrogacy arrangements. Michigan responded first, making it a felony to arrange surrogate mother contracts for money and imposing a \$50,000 fine and five years' imprisonment as punishment for the offense. Florida, Louisiana, Nebraska, and Kentucky enacted similar legislation, and Arkansas and Nevada passed laws permitting surrogacy contracts under judicial regulation.

## ANCIENT INDIA

Sage Gautama produced two children from his own semen, a son Kripa and a daughter Kripa, who were both test-tube babies. Likewise, Sage Bharadwaj produced Drona, who was later to be the teacher of Pandavas and Kauravas. The story relating to the birth of Drishtadyumna and Draupadi is even more interesting and reflects the supernatural powers of the great Rishis. King Draupada had enmity with Dronacharya and desired to have a son strong enough to kill Drona. He was given medicine by Rishi, and after collecting his semen, Rishi processed it and suggested that artificial insemination homologous (AIH) should be done for his wife, who, however, refused. The Rishi then put the semen in a yajna kund from which Dhrishtadyumna and

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<sup>19</sup> V B Mishra, 'The Practice Of Niyoga In Ancient Literature Of India : A Sociological Study' (1978) 59 Annals Of The Bhandarkar Oriental Research Institute <<https://www.jstor.org/stable/41691747>> accessed 12 December 2024

<sup>20</sup> *Baby Manji Yamada v Union of India* (2008) 13 SSC 518

Draupadi were born. While the above are quoted as examples of in vitro fertilisation (IVF) and parthenogenesis, there is another story which refers to embryo transfer.<sup>21</sup>

In the ancient narrative, Balram, the seventh child of Devki and Vasudev, was carried in the womb of Rohini, Vasudev's first wife, as an embryo. This was done to safeguard the child from being harmed by Kansa.

In the Mahabharata, Gandhari experienced an extended pregnancy lasting two years, during which she delivered a mass. Sage Agyasa discovered that this mass contained 101 cells, which were subsequently cultivated in a nutrient medium outside the womb, resulting in the birth of 100 male offspring known as the Kauravas and one female, Dushala.

Additionally, Kartikey, often recognized as the deity of fertility, was born through surrogacy, with Shiva and Ganga serving as the intended parents and surrogate mother, respectively.

These historical examples illustrate that surrogacy has been practiced since ancient times, indicating that there is no inherent conflict between assisted reproductive technologies and socio-religious values.

The idea of 'renting a uterus' can be more easily embraced within a rational framework, particularly when considering the perspective that 'the baby is conceived from our own gametes, despite being carried by another.' The involvement of sisters, sisters-in-law, and even mothers in this process has contributed to its increased acceptance. Although potential future implications may arise, they can often be addressed with relative ease, and the support of close family members is likely to continue even after the child is born.<sup>22</sup>

## ANCIENT MESOPOTAMIAN CIVILIZATION AND EGYPT

The origins of surrogacy can be traced back to the late 1800s, particularly among American Indian communities, who were pioneers in this practice. When an Indian woman was unable to conceive, her husband would approach the tribe's chief for assistance. The chief would direct

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<sup>21</sup> *Ibid*

<sup>22</sup> Kaushik (n 8)

him to the medicine man, who would provide the wife with specific herbal remedies. If these remedies proved ineffective, the husband would return to the chief, who would permit him to take another woman as a surrogate in hopes of fathering a son to continue the lineage of the tribe. The infertile wife would not have any biological connection to the child.

Surrogacy has existed in various cultures long before documented history. Many societies have belief systems that support surrogacy, while those that oppose it may face familial rejection. Numerous religions and civilizations honor surrogate mothers for their altruistic contributions. In the 1980s, the gay community began utilizing surrogate mothers to create families, although this practice faced societal disapproval at the time.

It is crucial to understand the qualifications for becoming a surrogate, and the following criteria should be evaluated to determine a woman's suitability for this role:

The surrogacy process, in which a woman consents to carry and deliver a child for another individual or couple, is an intricate and heavily regulated undertaking. Among the various medical, ethical, and legal factors that influence surrogacy, the age of the surrogate mother is often highlighted as a significant consideration. It is typically required or advised that surrogate mothers be under the age of 35, primarily due to the necessity for a healthy uterus to support a pregnancy. This essay explores the diverse reasons for this age restriction, analyzing its foundations in medical research, societal expectations, legal standards, and ethical considerations while also addressing opposing viewpoints and alternative arguments. Women in their late teens to early 30s experience optimal reproductive health. During this period, the uterus and related reproductive systems are best equipped to sustain a healthy pregnancy. Surrogates under 35 are less likely to face age-related declines in uterine and ovarian functionality, which can adversely affect pregnancy outcomes. This demographic tends to have higher rates of successful embryo implantation and lower miscarriage rates, making it the preferred choice for surrogacy arrangements.

As women grow older, the likelihood of complications during pregnancy significantly increases. After 35, the risks of developing conditions such as gestational diabetes, hypertension, and preeclampsia rise markedly. These health issues not only threaten the surrogate's well-being but

also endanger the fetus. Additionally, the chances of preterm birth, low birth weight, and chromosomal abnormalities, including Down syndrome, increase with maternal age. By restricting surrogacy to women under 35, these potential risks can be mitigated, promoting a safer and healthier pregnancy experience. The uterus experiences physiological transformations over time, including diminished elasticity and blood circulation, which can impact its capacity to support a pregnancy.

Women under the age of 35 typically possess a more favorable uterine environment, adept at accommodating the physical and hormonal shifts essential for fetal growth. This robustness lowers the risk of complications such as placenta previa, placental abruption, and uterine rupture, which are more prevalent in older women. While surrogacy generally involves the transfer of an embryo formed from the gametes of the intended parents or donors, the surrogate's overall fertility can still influence the success of the pregnancy. Younger women usually exhibit better reproductive health, which can enhance their ability to carry a pregnancy to term. Although egg quality is not a direct factor in gestational surrogacy, the health aspects related to the surrogate's age can indirectly impact pregnancy outcomes.

Surrogacy laws and regulations often emphasize the health and safety of the surrogate mother. Establishing an age limit of 35 serves as a precautionary measure to reduce health risks. In numerous jurisdictions, surrogacy contracts necessitate thorough medical assessments, and age restrictions provide a clear criterion for determining eligibility. Intended parents commit substantial emotional, financial, and legal resources to the surrogacy journey. Ensuring that the surrogate is under 35 minimizes the risk of complications, offering greater confidence in achieving a successful outcome. This age requirement helps alleviate potential legal disputes or financial setbacks that may arise from unsuccessful pregnancies or health emergencies during the surrogacy process.

## **TYPES OF SURROGACIES**

Although there are various types of surrogacies, the following types mentioned below are the essential ones for the study -



*Traditional Surrogacy* - The insemination in this scenario is artificial and is done between a surrogate mother and either by the intended father or an anonymous donor.

*Gestational Surrogacy* - This type of surrogacy methodology is performed by creating an embryo by the fusion of an egg and the sperm, which is produced by the intended parents and then is transferred into the womb of the surrogate mother.

*Altruistic Surrogacy* - This term refers to a scenario in which there is no formal agreement or financial compensation provided to the birth mother. Typically, this arrangement occurs between close friends or family members. In altruistic surrogacy, key components include the surrogate mother carrying the child, relinquishing her parental rights following the birth, and the genetic parents providing financial support. The surrogate may receive compensation solely to cover the physical discomfort she experiences, which can include reimbursement for medical and related expenses, or she may choose not to receive any payment at all.<sup>23</sup>

*Commercial Surrogacy* - In contrast, commercial surrogacy entails the payment of a substantial sum to the surrogate as compensation for her services, along with coverage for any expenses related to her pregnancy. This arrangement is often perceived as a business opportunity. It functions as a transactional agreement where a fee is paid for the gestational service in exchange for the birth mother relinquishing her parental rights upon delivery. Typically, financial agreements include not only the primary fee but also additional costs such as lost wages and other related expenses. It is described as 'Baby farms.'

## THE SURROGACY AGREEMENTS

Broadly, there are two types of agreements pertaining to Surrogacy, which are -

**Surrogacy Parenting Agreements:** A surrogacy agreement is a legal arrangement between a woman and, typically, a couple facing infertility, wherein the woman agrees to carry an embryo through pregnancy. This contract outlines that the surrogate mother will (1) gestate a child for

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<sup>23</sup> Rishita Singh, 'Regulating Surrogacy In India' (2024) 5(2) International Journal Of Advanced Legal Research <<https://ijalr.in/wp-content/uploads/2024/11/REGULATING-SURROGACY-IN-INDIA.pdf>> accessed 12 December 2024

the intended parents and (2) forfeit all parental rights to the child. If the surrogate is married, her spouse must also agree to the terms of the surrogacy contract. The agreement typically stipulates that the surrogate will surrender any parental rights she may possess upon the child's birth.

Indian Surrogacy Law Centre recommends that not only the intended parents and the surrogate mother but also the spouse of the surrogate mother sign the agreement so as to show his acknowledgement of the surrogacy agreement. Also, the intended parents may appoint a person who shall be named in the agreement, who shall take the child into his possession, in an event of uncertainty over the actual intended parents' possibility of taking custody of the child.

**Surrogacy Arrangement Agreements:** A Surrogacy Arrangement Agreement is established between the intended parents and the Hospital/ Agency, outlining the terms and conditions that govern the interactions of the parties throughout the surrogacy process. This agreement will include specifics such as the fee structure, scheduled procedure dates, payment methods, required medical tests, embryo implantation dates, and other medical procedures, ensuring comprehensive support for the intended parents until the agreement is signed.

## LEGAL LANDSCAPE OF SURROGACY IN INDIA

Surrogacy involves numerous ethical and legal complexities. The ban on commercial surrogacy has been praised for reducing the exploitation of women from economically disadvantaged backgrounds. However, this prohibition also raises questions about the autonomy of women who may view surrogacy as a viable option for financial independence. Furthermore, the stringent eligibility requirements outlined in the Surrogacy (Regulation) Act, 2021<sup>24</sup>, have faced criticism for being exclusionary, particularly affecting single parents and LGBTQ+ individuals who are denied access to surrogacy services.

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<sup>24</sup> Shivani Luthra Lohiya and Nitin Saluja, 'Exploring the Legal Landscape of Surrogacy in India: Rights, Risks, Regulations and Challenges' (*Bar And Bench*, 14 December 2024) <<https://www.barandbench.com/columns/legal-landscape-of-surrogacy-in-india-rights-risks-regulations-challenges>> accessed 12 December 2024

In light of the significant and widespread misuse of surrogacy in India amid a lack of legislative and regulatory frameworks, approximately ten draft Bills aimed at ethically regulating surrogacy were proposed from 2005 onwards. Various models were examined in the years 2008, 2010, 2013, 2014, 2015, 2016, 2018, 2019, and 2020.

Throughout this period, the practice was primarily governed by a collection of informal and non-binding guidelines established by the Indian Council of Medical Research (ICMR) alongside the policies of individual fertility clinics. Additionally, three Parliamentary Committee Reports and a Law Commission Report highlighted the necessity for legislation to oversee ART clinics and clarify the rights and responsibilities of all parties involved in surrogacy.

By 2015/2016, the government opted to prohibit commercial surrogacy to curb the misuse of ART procedures. This decision led to the systematic exclusion of foreign couples from accessing ART services in India, limiting eligibility to heterosexual married couples, banning the importation of embryos, and ultimately denying visas for surrogacy to all non-residents.

These regulatory efforts culminated in the passage of the Surrogacy (Regulation) Act, 2021 (SR Act)<sup>25</sup> and the Assisted Reproductive Technology (Regulation) Act, 2021 (ART Act).<sup>26</sup>

Another significant concern pertains to the legal parentage of children born via surrogacy. Although the Act allows intending parents to be recognized as legal parents, complications can arise in cases involving foreign nationals, where differing laws across countries may result in disputes regarding citizenship and parental rights.

### **THE SURROGACY (REGULATION) BILL 2020**

The Surrogacy Act<sup>27</sup> has introduced notable modifications in the governance of surrogacy, which include the following:

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<sup>25</sup> Surrogacy (Regulation) Act 2021

<sup>26</sup> Assisted Reproductive Technology (Regulation) Act 2021

<sup>27</sup> Goel (n 16)

- The Bill has removed the previously defined infertility criteria, which required couples to be unable to conceive after five years of unprotected intercourse.
- The drafting committee noted that a five-year waiting period for couples to conceive is excessive and unreasonable, contradicting the objectives of the Act.
- Commercial surrogacy has been completely prohibited, allowing only a close relative of the couple to act as a surrogate mother, provided she gives her consent.
- Altruistic surrogacy is permitted, while a comprehensive ban on commercial surrogacy, including the sale and purchase of human embryos and gametes, has been established to prevent women from engaging in surrogacy due to financial difficulties. The Act guarantees that adequate medical facilities and comprehensive medical insurance for 36 months will be provided to the surrogate.
- Registration of clinics where surrogacy occurs is now mandatory under the Act to ensure timely regulation. Couples aged between 23 and 55 years are eligible for ethical surrogacy under the Act, with the stipulation that they must be Indian nationals.
- The Bill allows married infertile couples and women up to a certain age to commission ART Procedures. It also specifies the age ranges for the gamete donors. It places conditions such as egg donors must be married with a child who is at least 3 years old, which are a little different from the guidelines of the ICMR. Commissioning parties must ensure egg donors are protected from risks. It also states that National and State Boards will be set up to regulate ART Services.
- A National Registry with information on all ART Clinics and Banks will be formed. ART Clinics and Banks will be required to share periodic information about the donors and the commissioning parties with the Registry, which may share this with the National Board. However, the identity would not be shared with anyone else. Under offences and penalties, the bill suggests that the sale or purchase of gametes will attract a fine between Rs. 5 and 10 Lakhs. A subsequent offence will attract imprisonment of 8-12 years with a fine.

## THE ASSISTED REPRODUCTIVE TECHNOLOGY REGULATIONS

- Assisted Reproductive Technology (ART) encompasses all methods employed to achieve pregnancy by manipulating sperm or egg cells outside the human body, followed by the transfer of the embryo into a woman's reproductive system. This includes procedures such as sperm donation, in-vitro fertilization (IVF), where fertilization occurs in a laboratory setting, and gestational surrogacy, where the surrogate is not genetically related to the child.
- Regulations for ART clinics and banks stipulate that all such facilities must be registered with the National Registry of Banks and Clinics of India, which maintains a comprehensive database of these institutions. The registration is valid for five years and can be renewed for an additional five years. However, it may be revoked or suspended if the institution fails to comply with the Act's provisions.
- Regarding sperm donation and ART services, a registered ART bank is authorized to screen, collect, and preserve semen from men aged 21 to 55 years, as well as store eggs from women aged 23 to 35 years. According to the Act, female donors must be married and have at least one child who is a minimum of three years old. Legally, a child conceived through ART is recognized as the biological child of the couple, granting them all associated rights, while the donor retains no parental rights.
- Informed consent is mandatory for ART procedures, requiring written approval from both the couple and the donor. Additionally, the couple must secure insurance coverage for the female donor to address any potential loss, damage, or death.
- The regulation of ART processes falls under the purview of the National and State Boards established by the Surrogacy Act 2021. These boards are tasked with advising the government on policy matters, overseeing the implementation of the law, and developing a code of conduct for ART clinics and banks.

## HARMONIZING CONTRACTS AND JUSTICE - ROLE OF JUDICIARY

**Judicial Response to Surrogacy in India:** India does not have any law dealing with the complicated issues related to surrogate motherhood and surrogacy. India, a country with a rich

cultural heritage, has not been able to keep up with the changing scenario in the context of surrogacy. India, often named as the '*Surrogacy Hub*,' still does not have a structured framework for surrogate mothers and motherhood, which is also one of the biggest businesses that is growing in the country.<sup>28</sup>

In the landmark case of *Baby Manji Yamada v Union of India*<sup>29</sup>, a Japanese couple, Dr. Ikufumi Yamada and his wife, wished to have a baby, and they entered into a contract of surrogacy with an Indian woman in *Anand (Gujarat)*, where this practice was pioneered. The couple in the following case went through a matrimonial discord, with the wife not being ready to accept the child and the surrogate mother having abandoned the child, but the father still insisted on having custody of the abandoned child. In the absence of clear laws on surrogacy, the child's fate hung in balance.<sup>30</sup>

The Honourable Supreme Court, in legitimizing surrogacy and equating it with an industry, has re-opened the debate on the commercialization of surrogate motherhood in India. Linking surrogacy with other forms of outsourcing business and identifying factors like *excellent medical infrastructure, high international demand and ready availability of poor surrogates* have raised the question of exploitation of women, abuse of their reproductive organs, lack of choice-making capacity and undue pressure on women to earn money in a patriarchal society.<sup>31</sup>

It was observed by the Supreme Court that *Commercial Surrogacy reaching industry proportions is sometimes referred to by the emotionally charged and potentially offensive terms 'Wombs for Rent', 'Outsourced Pregnancies' or 'Baby Farms'.*

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<sup>28</sup> Priya Pareek, 'Surrogacy, Concept of Renting a Womb' (*Legal Service India*) <<https://www.legalservicesindia.com/article/921/Surrogacy,-Concept-of-Renting-a-Womb.html>> accessed 12 December 2024

<sup>29</sup> *Baby Manji Yamada v Union of India* (2008) 13 SSC 518

<sup>30</sup> *Ibid*

<sup>31</sup> Shekhar Bhatia, 'Revealed: how more and more Britons are paying Indian women to become surrogate mothers' *The Telegraph* (26 May 2012) <<https://www.telegraph.co.uk/news/health/news/9292343/Revealed-how-more-and-more-Britons-are-paying-Indian-women-to-become-surrogate-mothers.html>> accessed 12 December 2024

In *Jan Balaz v Union of India*<sup>32</sup>, the Gujarat High Court conferred Indian citizenship to twin babies fathered through compensated surrogacy by a German National in the Anand district of Gujarat. The court observed that “*We are primarily concerned with the rights of two newborn, innocent babies; much more than the rights of the biological parents, surrogate mother or the donor of the ova. Emotional and legal relationship of the babies with the surrogate mother and the donor of the ova, is also of white importance*”.

Recently, in the case of *H. Siddaraju v Union of India*,<sup>33</sup> the Karnataka High Court has evolved a triple test theory to permit a couple to undertake the procedure of surrogacy, which otherwise was not permitted to them as the husband being 57 years old has crossed the age of eligibility criteria under *The Surrogacy (Regulations) Act, 2021*.

The triple test evolved as follows -

**Genetic Tests** - The Court had asked the husband to undergo a genetic test to determine the health of the sperm to ensure that the child is not born with any deformity or disorder.

**Physical Tests** - The couple must have the physical capacity to handle the child. Physical capacity has to be given the meaning that the couple is capable of managing the child.

**Economic Tests** - The intending couple must be economically sound and should not lead the child to penury the moment it is born.

## **ADOPTION OF SURROGACY BY THE LGBTQ+ COMMUNITY**

Surrogacy is also resorted to by gay couples in India. In *Devika Biswas v Union of India*<sup>34</sup>, the Apex Court accepted the reproduction right as a necessary component of the provision of the *Right to Life* enshrined in Article 21 of the Constitution of India. Women's reproductive rights comprise the right to bring a foetus to full term, deliver the child and raise the child. The rights of privacy, decency and inviolability are also included. Article 21 is violated by limiting

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<sup>32</sup> *Jan Balaz v Union of India* (2010) 2 ALL MR (Journal) 14

<sup>33</sup> *H.Siddaraju v Union of India* (2023) LiveLaw (Kar) 162

<sup>34</sup> *Devika Biswas v Union of India* (2016) 10 SCC 726

substitution to married couples and widowed or divorced when women of a specific age range refuse reproductive alternatives to LGBTQ persons, individuals and elderly couples.

In the landmark judgement of *Justice K.S Puttaswamy v Union of India*,<sup>35</sup> interference by the State in procreation is direct in the French Mint of one right to procreate and right to privacy, and Article 21 recognises it as a component of one's right to life.

Ever since its introduction, the Surrogacy Regulation Act, 202 has been challenged by writ petitions before the Supreme Court and various High Courts. The *vires* of the Act have been assailed on multiple grounds - being unscientific, arbitrary, exclusionary, discriminatory, enabling unnecessary state interference in private life, etc. Specifically, the following aspects of the Act have come under the scanner:

- a. The arbitrary and discriminatory age limit prescribed for the intending couple and the surrogate.
- b. The artificial distinction is drawn between a single woman, to whom surrogacy is not available on the one hand, and a divorcee or widow, who is permitted to avail of surrogacy services on the other.
- c. The complete ban on commercial surrogacy.
- d. The baseless restriction on availing surrogacy based on the number of existing children.
- e. The rights of individuals who had initiated surrogacy before the Act came into force.

Although the aforesaid issues are pending and still *sub judice* before the Supreme Court, at first blush, the Act appears to be discriminatory. It does not meet the touchstone of Article 14 of the Constitution of India as it does not consider India's new realities. The LGBTQ+ population, live-in-couples and single men and women have been indiscriminately excluded from the purview of the Act.

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<sup>35</sup> *Justice KS Puttaswamy v Union of India* (2017) 10 SCC 1



The Supreme Court has also recently indicated that a ban on commercial surrogacy may not be the answer and that there is a need for a regulation system so that no woman is exploited.

### **POLICY RECOMMENDATIONS PERTAINING TO SURROGACY**

The second IVF baby in the world and the first in India, *Kanupriya*, also known as 'Durga,' was born in Kolkata on October 3, 1978, approximately two months after the birth of the first IVF baby, Louise Joy Brown, in Great Britain on July 25, 1978. Since that time, the field of assisted reproductive technology (ART) has advanced significantly. In 1984, the first successful birth via gestational surrogacy occurred globally, followed by India's first instance of this practice in Chennai a decade later. In 1997, an Indian woman served as a gestational carrier, receiving compensation to fund treatment for her paralyzed husband. The topic gained media attention in India when a Gujarati grandmother gave birth to twins for her daughter in January 2004. According to current Indian law, the grandmother is recognized as the legal mother of her grandchildren, despite DNA tests indicating otherwise. The biological mother must adopt the children to establish legal parentage. Reports suggest that this is not an isolated case of surrogacy in India, with many more instances of surrogate births occurring across the country, often remaining concealed due to the societal stigma surrounding the issue.<sup>36</sup>

### **INDIAN COUNCIL FOR MEDICAL RESEARCH (ICMR) FRAMEWORK**

In 2000, the Indian Council of Medical Research (ICMR) released a set of guiding principles for Assisted Reproductive Technologies (ART) involving surrogacy. These recommendations included several protective measures for surrogates, such as:

- (i) Surrogacy should only be pursued in conjunction with legal adoption whenever feasible;
- (ii) The notion that the woman who carries and delivers the child is its biological mother must be challenged;

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<sup>36</sup> Bhatia (n 31)

- (iii) The intended parents should have the primary right to adopt the child, which includes a mandatory six-week postpartum waiting period for the mother's consent;
- (iv) While appropriate compensation may be provided upon the finalization of the adoption, the surrogacy agreement will remain valid, contingent upon the surrogate's right to retain the child if she chooses;
- (v) The genetic parents' only recourse would be to seek custody based on the best interests of the child;
- (vi) The surrogate's right to terminate the pregnancy for medical reasons, as per abortion laws, is non-negotiable, and in such instances, the adoptive parents are not entitled to any funds previously disbursed.

Additionally, on September 4, 2002, the Secretary of Family Welfare announced proposed regulations for ART clinics. These draft rules were developed by a committee formed by the ICMR in collaboration with the National Academy of Medical Sciences in New Delhi.

## **REPORT OF THE LAW COMMISSION**

Law Commission 228th Report, August 2009, is essential to be looked upon. Some of the key proposals of the Law Commission of India on Surrogacy are:

1. Substitution planning will persist to be controlled by an agreement between the parties, which will include all of the requirements needing the substitution mother's approval to have a kid, as well as the acquiesce of their spouse and other family members. However, such an understanding should not be commercial.
2. A substitution accord should comprise provisions for pecuniary help for the substitute kid for the reason that the commissioning couples or persons die before the kid is delivered or if the proposed parents split and no one desires to get the kid.
3. Life insurance coverage for the substitute mother must be incorporated into each surrogacy bargain.

4. One among the proposed parents should be a contributor since a biological link is the primary source of love and affection between a kid and his or her parents.
5. Abortion matters should be regulated and administered solely by the Medical Termination of Pregnancy Act 1971.

## **INTERNATIONAL FRAMEWORK ON SURROGACY**

There are numerous perspectives on the topic of ‘Surrogate birth’ across different countries. This issue presents a complex legal landscape, as only a limited number of nations recognize it, and there is significant inconsistency in the legal principles applied in those countries regarding surrogate birth. Although the concept of surrogate motherhood has existed for some time, it gained international prominence in the mid-1970s due to a decline in the number of children available for adoption and advancements in human embryology techniques, which offered a viable alternative to the lengthy and uncertain processes of adoption or facing childlessness. The practice of surrogate motherhood has sparked various concerns, including the question of compensation for services rendered, raising ethical considerations about the potential commodification of children and the rights of all parties involved in the event that any complications arise during the process.

**United States of America:** As of March 1990, the majority of jurisdictions in the United States lacked specific regulations regarding surrogacy. The topic of surrogate motherhood gained national prominence in the 1980s, particularly due to the Baby M case. This landmark decision prompted state legislatures across the country to enact laws addressing surrogate motherhood.

Efforts by Congress to create a national framework for surrogacy legislation were unsuccessful, leading to a situation where the U.S. Congress seemed willing to defer the matter to state governments and the judiciary. One significant federal proposal was introduced in the House on May 14, 1987, by Democrat Tom Luken from Ohio. This bill aimed to ban the creation, participation in, or facilitation of surrogacy agreements on a commercial basis, meaning that any individual involved in such arrangements would not be allowed to receive or expect any form

of payment, directly or indirectly. Additionally, the bill sought to prohibit advertising for surrogacy services.

However, during the 1987 legislative session, the Luken bill did not progress beyond the subcommittee stage. A similar bill was reintroduced in the 1989 session. Another notable piece of legislation was proposed by Barbara Boxer (D.-Cal.) and Henry Hyde (R.-Ill.), which sought to impose criminal penalties on surrogacy brokers, including a maximum sentence of five years in prison and a \$50,000 fine, while not applying any penalties to the surrogate or the contracting couple.<sup>37</sup>

Like New York, a handful of other states either prohibit surrogacy contracts, refuse to enforce them, or both. For example, Arizona, the District of Columbia, Indiana, Michigan, and Nebraska prohibit and/or do not enforce surrogacy contracts.<sup>38</sup>

**United Kingdom:** The legal framework of England and the judicial rulings of the Privy Council have consistently served as a reference for Commonwealth nations. This overview examines the emerging medico-legal landscape in the United Kingdom. The Surrogacy Arrangements Act 1985, in conjunction with relevant provisions of the Human Fertilisation and Embryology Act 1990, establishes a functional structure for surrogacy agreements. A significant issue within this framework pertains to the financial compensation that a surrogate may receive. The Surrogacy Arrangements Act 1985 criminalizes the organization of commercial surrogacy, imposing penalties that include fines and/or imprisonment for up to three months. Additionally, it prohibits advertising and other elements associated with commercial surrogacy.<sup>39</sup>

The legal environment in the United Kingdom is notably intricate, encompassing both statutory and case law. Ultimately, British law does not explicitly prohibit compensated surrogacy; however, it renders all surrogacy contracts unenforceable if the birth mother objects. The ongoing discussion in Great Britain centers not on the enforcement of surrogacy contracts against the birth mother's wishes but rather on the permissibility of such arrangements when all

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<sup>37</sup> Martha A. Field, *Surrogate Motherhood: The Legal and Human Issues* (Harvard University Press 1990)

<sup>38</sup> *Ibid*

<sup>39</sup> *Ibid*

parties are in agreement. An early legal case in Britain allowed a surrogate mother to reject the contract on the grounds of public policy.<sup>40</sup>

**South Africa:** The South Africa Children's Act 2005, which became fully effective in 2010, allows for the validation of surrogacy agreements by the High Court prior to fertilization. This provision ensures that commissioning parents are recognized as legal parents from the beginning of the surrogacy process, thereby reducing potential uncertainties. However, if the surrogate mother is also the genetic mother, she retains the right to change her mind within 60 days following the child's birth. The legislation permits single individuals and same-sex couples to act as commissioning parents, but only those residing in South Africa are afforded legal protection under this law. Non-validated agreements are not enforceable, and all agreements must be altruistic rather than commercial in nature. In cases where there is a single commissioning parent, that individual must be genetically related to the child. If there are two commissioning parents, both must be genetically related unless it is impossible due to infertility or the couple's gender. Additionally, the commissioning parent or parents must be unable to conceive and carry a child independently. The surrogate mother is required to have previously experienced at least one successful pregnancy and must have at least one living child. While the surrogate has the right to terminate the pregnancy unilaterally, she is obligated to inform and consult with the commissioning parents. If the termination is for non-medical reasons, she may be required to reimburse any medical expenses she has incurred.<sup>41</sup>

## CONCLUSION

One of the fundamental aspects of marriage is the ability to procreate. Women possess the unique capability of carrying and giving birth to children, a process that is celebrated in our culture. In many societies, a woman is often viewed as a wife primarily when she has children. However, this ability is not universal, as some couples face challenges related to infertility. To address the need for procreation, various options are available, including in vitro fertilization

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<sup>40</sup> *A v C* [1985] 1 F.L.R. 445

<sup>41</sup> Annabel Christie, 'South Africa shows a way to ensure more predictability in surrogacy arrangements' (*PET*, 09 January 2012) <<https://www.progress.org.uk/south-africa-shows-a-way-to-ensure-more-predictability-in-surrogacy-arrangements/>> accessed 12 December 2024

(IVF) and surrogacy. Surrogacy has become increasingly popular, with many couples utilizing it to expand their families. Nevertheless, the complexities surrounding surrogacy are numerous, and many questions remain unanswered. Although there is now legislation governing surrogacy, it has significant shortcomings. For instance, the law does not extend surrogacy rights to LGBTQ+ couples, which infringes upon their rights under Articles 14 and 21 of the Constitution. Additionally, the Surrogacy (Regulation) Act 2021 fails to consider unmarried women who wish to pursue surrogacy. While altruistic surrogacy is allowed, finding a suitable surrogate can be quite challenging. Furthermore, the Act focuses on prohibiting commercial surrogacy rather than establishing a regulatory framework. It also restricts surrogacy to Indian citizens, excluding foreigners and NRIs. Lastly, societal stigmas surrounding surrogacy persist. Therefore, any new legislation must undergo thorough discussions regarding its provisions before being enacted. Given the existing flaws in the current Act, amendments are necessary to recognize surrogacy as a right for LGBTQ+ couples, unmarried women, single men, and couples in live-in relationships.