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Mapping Surrogacy Laws in the Globalized World: A Case Study of India

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ABSTRACT

Surrogacy has become now a days a more frequent phenomena than ever before in the history of mankind. It can be due to several reasons such as advances in medical technology, especially in assisted reproductive techniques (ARTs) like IVF, which has made the process more accessible and successful. Apart from heterosexual couples, social attitudes toward different family structures have also become more acceptable encouraging single individuals and same-sex couples to pursue parenthood through surrogacy worldwide. The success of surrogacy choices are also due to rising infertility rates, often linked to lifestyle changes, medical conditions of the woman and delayed parenthood or practice of late marriages choices which have increased the demand for alternative reproductive options with genetic links for more emotional and genetic bonds. To support this largely prevalent practice legal frameworks in many countries have also evolved to support and regulate surrogacy, making it a safer and more organized process. Therefore in this article the author will try to analyze the meaning of surrogacy, why it is needed, surrogacy in the ancient period in the different parts of the world, surrogacy in modern world and the analysis of surrogacy laws of India which was recently enacted in 2021 and their rules in 2022 which does not permit surrogate child for single persons and LGBTQs.

Keywords: *Surrogacy, assisted reproductive techniques (ARTs), IVF, same- sex couple, commercial surrogacy, LGBTQs etc.*

I. INTRODUCTION

Surrogacy is not a new phenomenon rather it has been practiced since ages. There are references of its practice in ancient history and in all most all civilization which existed. There are references of it in the Bible, Mahabharata etc. It was practiced in ancient Israel as is mentioned in Hebrew Bible and in the ancient Babylon as found in the code of Hammurabi. In ancient India the Mahabharata talks about the surrogate child and *Kauravas* were one of the examples, lord Krishna's brother Balram was also supposed to be born through embryo transfer from

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Devaki's womb to Rohini's. The logic behind this concept was to have a child especially male child in the family to lead the blood lineage. In ancient India the *Manu Smriti*: the code of conduct for Hindus placed producing offspring as one of the parts of dharma of every couple.

In those days medical science was there but not the present day technology. The new technical advancement in the 21st century gave the pace to the desire of surrogate child. As a consequence some women found it to be a financial solution also in lieu of bearing a surrogate child of others. As a result the intermediaries and stakeholders such as ART clinics, sperm banks, middlemen etc. they also commercialized this surrogate arrangement and earned money. That is why India and especially Gujarat became hub for commercial surrogacy and intending couples from across the world visited here, terming it as surrogacy tourism. In all these scheme of things the new problem arose which was the physical, emotional and financial exploitation of the surrogate mother.

To overcome those problems and to balance the morality and constitutionally guaranteed rights to have child and reproductive autonomy, the Parliament made the AET Regulation Act, 2021, The Surrogacy Regulation Act, 2021 and the Surrogacy (Regulation) Rules, 2022. The current study will delve in to the concept of surrogacy, its historical development in different civilizations, its practice in ancient times and the modern surrogacy laws of different parts of the world. Afterwards taking all those discussions in account the study will critically analyze the provisions of present Indian surrogacy laws and rules on the touch stone of balancing morality and the constitutional guaranteed rights of reproductive autonomy and right to have a child and form family. The study will also discuss pros and cons of the present laws on various stakeholders of surrogacy procedure.

II. UNDERSTANDING THE TERM SURROGACY

The term surrogate is derived from a Latin word *surrogatus* which means appointed to act in the place of. Black's Law Dictionary defines surrogacy as the process of carrying and delivering a child for another person. The New Encyclopedia Britannica defines 'surrogate motherhood' as the practice in which a woman bears a child for a couple unable to produce children in the usual way. The Report of the Committee of Inquiry into Human Fertilization and Embryology or the Warnock Report (1984) defines surrogacy as the practice whereby one woman carries a child for another with the intention that the child should be handed over after birth.³ The American Law Reports defined it as "a contractual undertaking whereby the natural or surrogate

³ See, para 8.1, p.42 of the Warnock Report 1984 available at http://www.hfea.gov.uk/docs/Warnock_Report_of_the_Committee_of_Inquiry_into_Human_Fertilisation_and_Embryology_1984.pdf (last visited on 12th Oct. 2024).

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."⁴ "Surrogacy" in India means "a practice whereby one woman bears and gives birth to a child for an intending couple with the intention of handing over such child to the intending couple after the birth."⁵ Thus Surrogacy is a process in which a woman, known as a surrogate, carries and delivers a child for another individual or couple who will become the child's legal parents after birth.

- **Types of Surrogacy**

Surrogacy can be classified as traditional and gestational surrogacy and altruistic and commercial surrogacy.

- a. Traditional and gestational surrogacy:**

Traditional surrogacy: In traditional surrogacy, the surrogate's mother provides her own egg and is fertilized through artificial insemination, making her the biological mother of the child. This was in practice from ancient times when medical science was not as developed as it is today.

Gestational surrogacy: In gestational surrogacy, the surrogate has no genetic link to the baby; instead, an embryo created from the intended parents' or donors' egg and sperm is implanted into her uterus. Advances in medical technology, particularly in vitro fertilization (IVF), have made gestational surrogacy more common today.

- b. Altruistic surrogacy and commercial surrogacy:**

Altruistic surrogacy: as the name suggests this type of surrogacy does not involve money meaning thereby the surrogate mother is not paid money for the service of surrogacy or carrying the child to give birth for intending couple. However medical expenses and insurance coverage fee is permitted.

Commercial surrogacy: this kind of surrogacy procedure involves sell and purchase of human embryo or gametes, or selling and buying of the service of surrogate to bear the child to earn money⁶. Sometimes middle man may also charge commission who searches a surrogate mother

⁴ See, American Law Reports, Validity and Construction of Surrogate Parenting Agreement (1989) 77 A.L.R. 4th Edn. At 70.

⁵ Sec 2 (zd) of the Surrogacy (Regulation) Act 2021

⁶ Sec. 2(1) (g) of Surrogacy Regulation Act 2021. It reads: (g) "commercial surrogacy" means commercialisation of surrogacy services or procedures or its component services or component procedures including selling or buying of human embryo or trading in the sale or purchase of human embryo or gametes or selling or buying or trading the services of surrogate motherhood by way of giving payment, reward, benefit, fees, remuneration or monetary incentive in cash or kind, to the surrogate mother or her dependents or her representative, except the medical

for intending couple or intending parents. This is banned in India under the present law.

- **The need for surrogacy: Why surrogacy is needed?**

In an online survey conducted by University of Cambridge in April 2021 to study surrogacy related matters, in paragraph 2.2 it discussed the motivations for surrogacy.⁷ Some of the main motivations for surrogacy option were to make a complete family, the best and preferred options to become parents because of fertility issues, biological links with surrogate child for intending parents, legal considerations such as surrogacy offered the best guarantees, difficulties with adoption system and rights of same sex couples and LGBTQs to form a family.⁸ Surrogacy is needed in the modern world for a variety of personal, medical, and social reasons. Here's a list of some of the pertinent reasons why it has become increasingly relevant in today's time:

1. **Infertility and Medical Conditions:** Many individuals and couples are unable to conceive naturally due to infertility, medical conditions (like uterine issues), or previous surgeries (like hysterectomies). Surrogacy offers them a way to have a biological child.
2. **LGBTQ+ Families:** Surrogacy allows same-sex couples, especially male couples, to have children who are biologically related to one or both partners.
3. **Age-related Challenges:** Women who are older or face age-related fertility decline may opt for surrogacy to have a child using their own or donated eggs.
4. **Medical Risk to Mother or Baby:** Some women can get pregnant but doing so would pose serious health risks. Sometimes women are not able to carry full term of pregnancy and deliver a normal child. Here Surrogacy provides a safer alternative.
5. **Reproductive Freedom and Choice:** In modern society, there's a growing emphasis on reproductive autonomy. Surrogacy is part of that—giving people more options to create families in the way that works best for them.
6. **Adoption generally takes more time than surrogacy:** so when intending parents have lost their chance to have their own biological child, surrogacy provides an easier, effective and relatively less lengthy method to have a child which can be genetically related too if any one of the intending couple wants it.

expenses and such other prescribed expenses incurred on the surrogate mother and the insurance coverage for the surrogate mother.

⁷ See, <https://www.family.law.cam.ac.uk/survey-international-surrogacy-arrangements> , for detailed report see, Claire Fenton-Glynn, *International Surrogacy Arrangements: A Survey*, available at chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.family.law.cam.ac.uk/files/images/www.family.law.cam.ac.uk/documents/surrogacy/international_surrogacy_arrangements_-_a_survey_april_2022.pdf, last visited on 24 February 2025

⁸ Ibid

III. SURROGACY IN ANCIENT TIMES

Surrogacy in ancient times wasn't like today's medically-assisted process, but the core idea having another woman bears a child for someone else did exist in several cultures. Here's a glimpse into how it looked back then:

i. **Biblical Times (Ancient Middle East)**

One of the earliest recorded examples of surrogacy comes from the Bible. When Sarah couldn't have children, she asked her servant Hagar to bear a child with her husband Abraham. Hagar's child, Ishmael, was considered Sarah's in a social and legal sense. This was a form of traditional surrogacy where the surrogate was also the biological mother. Surrogacy in the ancient Middle East was not only practiced but also recognized and regulated, especially in societies like Mesopotamia and ancient Israel, where fertility and lineage were central to family and social structure. Here's how surrogacy appeared in that context:

ii. **Surrogacy in the Hebrew Bible (Ancient Israel)**

Story of Sarah and Hagar (Genesis 16): This story is one of the most famous early examples of traditional surrogacy. Sarah, wife of Abraham, was barren. She gave her Egyptian maidservant Hagar to Abraham to bear a child for her. Hagar conceived and gave birth to Ishmael, who was seen as Abraham's son and initially intended to be Sarah's legal child.

iii. **The Code of Hammurabi (Babylon, ~1754 BCE)**

The Babylonian Code allowed a wife who couldn't bear children to give her maidservant to her husband to have children on her behalf. For example:

- **Law 145:** If a wife cannot bear children, she may give her husband a slave to have children. Those children would legally belong to the wife.
- **Law 146:** If the slave bears children but starts acting equal to the wife, the wife could demote her, but not sell her.

These laws protected the legal wife's status and regulated the rights of the surrogate (the slave woman), showing a clear social framework for alternative childbearing arrangements.

iv. **Ancient India**

In Hindu texts and mythology, there are references to surrogate-like arrangements. For example, in the Mahabharata, the birth of the Kauravas involved the division and gestation of embryos in multiple vessels—mythological, but symbolizing the idea of alternative reproduction.

- **Balarama's Birth (Brother of Krishna):** Balarama was said to have been **transferred from Devaki's womb to Rohini's**, through divine intervention, to protect him from King Kamsa. This is often considered a mythological form of **womb surrogacy or embryo transfer**.
- **Niyoga Pratha : birth of Pandawas : Kunti and Madri**, wives of King Pandu, had children through divine intervention, called upon via special mantras. These were symbolic of niyoga, ensuring that the dynasty continued.

IV. SURROGACY IN PRESENT GLOBAL SCENARIO

Surrogacy was not limited to any one society or country as we saw above that it was prevalent in ancient Middle East, Israel, Biblical mythologies, Hammurabi Codes and ancient India to mention some of them. This practice was legally accepted as surrogacy was done through traditional methods where surrogate mother (whether close relative or maid servant or any one) used her own egg with the sperm of the intended father to produce the baby. This carried the genetic material of the father and gave legitimacy to the genetic or blood related male succession of the family or dynasty. This practice with some modifications due to advancement of assisted reproductive technologies in the form of In Vitro Fertilization (IVF) continues even today in the entire world. The level of government regulations may differ from country to country but general consensus is that surrogacy should be legally regulated so that all stakeholders get justice and no one is adversely exploited.

a. United Kingdom:

There are two laws dealing with surrogacy in United Kingdom and they are The Surrogacy Arrangements Act (1985) and the Human Fertilization and Embryology Act (1990). They make surrogacy legal but the surrogacy arrangement is not enforceable in the court of law.⁹ The surrogate mother is considered mother of the surrogate child till the child is adopted by the intended couple as per the parental order granted by the family court. The parental order transfers the parenthood from surrogate mother to the intended couple who can either be heterosexual couple or homosexual couple or a single adult.¹⁰ However these two laws are having many loopholes and that is why the Law Commission of England and Wales in association with Scottish Law Commission studied and made a comprehensive 473 page

⁹ The surrogacy pathway: surrogacy and the legal process for intended parents and surrogates in England and Wales, Department of Health and Social Care, Govt. of UK available at <https://www.gov.uk/government/publications/having-a-child-through-surrogacy/the-surrogacy-pathway-surrogacy-and-the-legal-process-for-intended-parents-and-surrogates-in-england-and-wales#parentalorder> , last visited on 02 January 2025.

¹⁰ Ibid

detailed report in 2023 to their respective governments on the matter of surrogacy and its regulation through a joint consultative paper titled “Building families through surrogacy: a new law”¹¹. But till now the government of England & Wales has not made a new law based on this report titled “Building families through surrogacy: a new law.”¹²

b. United States of America

United States of America is a federation of fifty states. But unfortunately there is no federal law on surrogacy till date.¹³ Some states permit surrogacy and others do not. Mentioned below is examples of different states of USA:

Arizona: Surrogacy is completely banned in Arizona as they see it against the public policy as surrogates cannot be considered as mere the vessels for child birth.

District of Colombia: it permits only altruistic surrogacy and compensation to surrogate mother beyond medical expenses is penalized. Commercial surrogacy is strictly prohibited as law makers think that surrogacy can commodify the motherhood and tilt the balance in favor of wealthy intending parents exploiting surrogate mother.

Michigan: Surrogacy was completely banned as a criminal act in Michigan till 2024 as Surrogate Parenting Act of 1988 of the State completely prohibited surrogacy contract and their enforcements. But to a great joy for Michiganders, the Michigan Senate passed the Michigan Family Protection Act, 2023 which got the accent of the Governor Gretchen Whitmer and became a law dealing with surrogacy and other related issues.¹⁴ The Act is a package of nine bills from Bill No. 5207 to 5215. The new laws decriminalize surrogacy and give equal

¹¹ Law Commission Consultation Paper No 244 & Scottish Law Commission Discussion Paper No 167, “ Building families through surrogacy: a new law” A joint consultation paper , 6 June 2019, available at chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://webarchive.nationalarchives.gov.uk/ukgwa/20250109171358mp_/https://s3-eu-west-2.amazonaws.com/cloud-platform-e218f50a4812967ba1215eaece923f/uploads/sites/30/2019/06/Surrogacy-consultation-paper.pdf , also see, Surrogacy, Next Step, Law Commission of England & Wales, available at <https://lawcom.gov.uk/project/surrogacy/>, last visited on 24 February 2025, full report of the law commission of England & Wales is available at chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://webarchive.nationalarchives.gov.uk/ukgwa/20250109102443mp_/https://cloud-platform-e218f50a4812967ba1215eaece923f.s3.amazonaws.com/uploads/sites/30/2023/03/2.-Surrogacy-full-report.pdf , last visited on 24 February 2025

¹² Department of Health & Social Care, Govt. of UK, is still studying the report. See, Letter of Maria Caulfield, MP & Under Secretary of State, Department of Health & Social Care, Letter dated 08 November 2023, available at <chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://cloud-platform-e218f50a4812967ba1215eaece923f.s3.amazonaws.com/uploads/sites/30/2023/03/Law-Commission-Letter.pdf>, last visited on 24 February 2025.

¹³ What You Need to Know About Surrogacy Laws in the U.S., American Surrogacy, available at <https://www.americansurrogacy.com/surrogacy/surrogacy-laws-in-the-united-states> last visited on 24 December 2024

¹⁴ Gov. Whitmer Signs Bills Decriminalizing Surrogacy and Protecting IVF, 01 April 2024, available at <https://www.michigan.gov/whitmer/news/press-releases/2024/04/01/whitmer-signs-bills-decriminalizing-surrogacy-and-protecting-ivf>

protection to LGBTQ+ parents who avail the facilities of surrogacy.

California: The case of *Johnson v. Calvert* (1993) is one of the landmark U.S. cases dealing with surrogacy and parental rights decided by the Supreme Court of California. The court held that In case of dispute between intending couple and surrogate mother over the custody of surrogate child, the child will be legitimate child of the intending couple as per the surrogate arrangement or contract. In *Buzanca v. Buzanca* (1998) the California Supreme Court held that even if the intended parents have no biological connection to the child, both eggs and sperms are taken from donors they can still be the legal parents if they arranged for the surrogacy. At present the gestational surrogacy is permitted in California under California Family Law.¹⁵

Prof. Kalantry argues that surrogacy law in the United States has shifted from prohibition to permission over the past few decades, with significant changes occurring at the state level.¹⁶ This evolution reflects advances in medical technology and changing societal attitudes towards surrogacy.¹⁷ She takes the case study of New York and New Jersey. These two states had prohibited surrogacy after Baby M case in 1986. In the Baby M case the New Jersey Supreme Court declared traditional surrogacy contracts against public policy but few years later California Supreme Court in *Johnson v. Calvert* (1993) took a different approach¹⁸ and allowed gestational surrogacy along with medical and other compensation to the surrogate mother. New Jersey and New York have recently legalized compensated surrogacy in 2021 after initially completely prohibiting it in 1992 after the report of the New York Task Force for Life and Law recommended the ban, citing risks to children and women.

Thus it is seen that there is no uniform approach to surrogacy laws across the U.S., with states adopting varying regulations and practices but the trend is generally towards legalizing compensated surrogacy contracts.

c. South Africa:

South Africa follows regulatory approach in regulating surrogacy as it is practiced in South Africa.¹⁹ **Children's Act 38 of 2005** (specifically Chapter 19- surrogate motherhood) deals with

¹⁵ California Family Law, Sections 7960 – 7962 (2013), see, California Surrogacy Laws, available at <https://creativefamilyconnections.com/us-surrogacy-law-map/california/>

¹⁶ S. Kalantry, "Surrogacy in the United States of America: From Prohibition to Permission" in Research Handbook on Surrogacy Law, Katrina Trimmings (ed.), et. al., Elgar Publishing, 2024, available at chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.skalantry.com/_files/ugd/7a3922_d13992ca50fc49158657d323df0379e4.pdf, last visited on 24 December 2024.

¹⁷ Ibid

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¹⁹ Professor Julia Sloth-Nielsen (University of Western Cape, South Africa), pp. 20-21, International Surrogacy Forum, 27-28 June 2019, University of Cambridge, England, United Kingdom, available at chrome-

surrogacy procedure.²⁰ Altogether this chapter has only 12 sections from section 292 to 303 but it has been amended many times and the last one being in 2016 to accommodate the new requirements and the legal judgments of the courts.

Through these 12 sections the surrogacy is highly regulated in South Africa as only altruistic surrogacy is permissible²¹, genetic link of at least one parent is necessary²², no lump sum money to be paid except medical expense to surrogate mother and direction of a High Court judge²³ is a must among other requirements. As per section 297 of the Children's Act 2005 the child belongs to the commissioning parents and the child must be handed over to them by the surrogate mother as soon as possible after the birth. These requirements and regulations highly match with the present surrogacy laws of India in the form of the Surrogacy Regulation Act, 2021 and Surrogacy Regulation Rules 2022. Some of the cases before the South African Court challenging Children's Act 2005 are:

1. **Ex Parte WH (2011)**²⁴: the court ruled that the same sex couple have the same right under surrogacy law as the opposite sex couples. This confirmed that sexual orientation is no barrier to have a surrogate child and form a family with genetically related child.
2. **AB and Another v. Minister of Social Development (2016)**²⁵: a single infertile female challenged the genetic requirement to have a surrogate child. The High Court upheld her plea and made this provision unconstitutional but later on the Constitutional Court reversed the judgment and upheld the genetic requirement as constitutional even in the case of a single infertile woman.

d. Italy:

Recently Italy proposed a bill dealing with surrogacy and advocating universal jurisdiction for surrogacy.²⁶ This bill, Bill No. 887 was passed in July 2024 by Chamber of Deputies, one of the two Chambers of Italian Parliament. Universal jurisdiction is a term in international law which means a national court of any jurisdiction may try a person who commits a crime which

extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.family.law.cam.ac.uk/sites/www.law.cam.ac.uk/files/images/www.family.law.cam.ac.uk/documents/surrogacy/isf2019_final_report_29oct19.pdf , last visited on 24 February 2025

²⁰ Children's Act 2005, South African Legal Information Institute, available at https://www.saflii.org/za/legis/consol_act/ca2005104/ last visited on 24 February 2025.

²¹ *Ibid*, Section 301 prohibits payment for surrogacy.

²² *Ibid*, Section 294

²³ *Ibid*, sections 292 & 295

²⁴ Para 54.1, Judgment available at <https://www.saflii.org/za/cases/ZAGPPHC/2011/185.html>

²⁵ Judgment available at <https://www.saflii.org/za/cases/ZACC/2016/43.html>

²⁶ Paolo Caroli & Antonio Vercellone, "Rented Uterus" as a Universal Crime:

The Italian bill proposing universal jurisdiction for surrogacy , 15 February 2024, available at <https://verfassungsblog.de/uterus/> last visited on 24 February 2025.

is universally recognized as a crime or crime against all human kind such as war crimes, crimes against humanity, genocide, apartheid, torture etc.²⁷ Commentators argue that surrogacy should not be brought under universal jurisdiction as in Italy this bill is directed to divide between left and right oriented part ideologies.²⁸

V. INDIA: A CASE STUDY OF INDIAN SURROGACY LAWS

Surrogacy in India was legalized in 2002 and banned in 2016.²⁹ But the latest laws on the subject include The Surrogacy (Regulation) Act, 2021, The Assisted Reproductive Technology (Regulation) Act, 2021 and The Surrogacy Regulation Rules 2022. The 2005 ICMR (Indian Council of Medical Research) guidelines were non-binding giving rise to commercial surrogacy.

A. The Surrogacy Regulation Bill 2016³⁰:

Section 35 of Chapter VII provided for complete prohibition of commercial surrogacy. Section 4 (ii) (b) clearly mentions that only altruistic surrogacy is permissible. Section 35 made it clear that no group or organization shall advertise for commercial surrogacy or start the process of commercial surrogacy in any form. Section 36 provides punishment for violation of section 35 by any medical practitioner or gynecologist or clinic even if they support the surrogacy on honorary basis. The punishment ran from five year imprisonment and up to rupees ten lakh in fine. Section 37 provided punishment for intending couple for initiating commercial surrogacy attracting imprisonment up to five year and fine up to rupees five lakh. The seriousness of the offence of commercial surrogacy can be imagined from the words of section 40 of the 2016 Bill where it is said that the offence of commercial surrogacy shall be cognizable, non- bailable and compoundable under Code of Criminal Procedure 1973.

²⁷ International Justice Resource Centre, available at ijrcentre.org/cases-before-national-courts/domestic-exercise-of-universal-jurisdiction/

²⁸ Paolo Caroli & Antonio Vercellone, "Rented Uterus" as a Universal Crime:

The Italian bill proposing universal jurisdiction for surrogacy , 15 February 2024, available at <https://verfassungsblog.de/uterus/> last visited on 24 February 2025.

²⁹, Lopamudra Goswami (PhD candidate at Griffiths University, Australia), International Surrogacy Forum, 27-28 June 2019, University of Cambridge, England, United Kingdom, available at chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.family.law.cam.ac.uk/sites/www.law.cam.ac.uk/files/images/www.family.law.cam.ac.uk/documents/surrogacy/isf2019_final_report_29oct19.pdf , last visited on 24 February 2025

³⁰ Bill No. 257 of 2016, available at chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://judicialacademy.nic.in/sites/default/files/1482212179_Surrogacy%20%28Regulation%29%20Bill%2C%202016.pdf

- People eligible for surrogacy under 2016 Bill: only a heterosexual couple with proven infertility can opt for surrogacy³¹. It excluded single individual, same sex couples and LGBTQ+ from seeking surrogate child.
- Regulatory bodies under this bill: The Bill intended to regulate surrogacy through Surrogacy Boards at state and national level. Section 14 provided for constitution of National Surrogacy Board and section 23 provided for constitution of State Surrogacy Boards.
- Protection of surrogate child and surrogate mother: section 3 (d) provided that the intending couple shall not abandon their surrogate child in any circumstance and they shall be treated as their biological child. Section 4 (iii) provided for compulsory life insurance of surrogate mother from a registered insurance company.

This 2016 Bill on surrogacy was criticized for being too restrictive and leaving out many eligible person from getting the surrogate child such as divorced couples, single women or man and regulation of international surrogacy arrangements. Therefore an amendment to this Bill of 2016 was brought and some defects were removed. The amended 2016 Surrogacy Regulation Bill added the following:

- i) Eligibility was extended to divorced individuals, widows, widowers and unmarried couples to get the benefits of surrogacy.
- ii) LGBTQ+ Individuals: they were also given permission to have surrogate baby. Infact this was a bold move from the government to include them in eligibility list.
- iii) The amended bill made stricter the regulatory rules for surrogacy clinics by mandatory registration etc.
- iv) In international surrogacy cases the legality of citizenship and parentage was made more clear.

B. The Latest Surrogacy Laws in India

The Surrogacy Regulation Act, 2021, The Assisted Reproductive Technology (Regulation) Act, 2021 and Surrogacy Regulation Rules 2022 are the current laws regulating surrogacy in India. This is the latest law made after a lot of deliberation taking in to account existing bills, guidelines and practices. The important provisions or the key features of the Act are as follows:

³¹ Section 4 (ii) (a) & Section 4 (iii) (a) of The Surrogacy Regulation Bill 2016 as presented in Lok Sabha

- i. Complete ban on commercial surrogacy³². Only altruistic surrogacy is permissible³³. Surrogacy is not permitted for sale of babies or prostitution or money making³⁴. It is permissibly only on medical grounds³⁵.
- ii. The surrogate child must be genetically linked to either intended mother or intended father and should not be genetically linked to surrogate mother.³⁶
- iii. There is requirement of compulsory licensing of surrogacy clinics³⁷.
- iv. No single parent or LGBTQs can have surrogate child³⁸.
- v. A widow or divorcee between the age of 35 and 40 year can also avail the facility of surrogate child.³⁹ So there is age restriction for getting surrogate child by a widow or divorcee. But there is no mentioning of a divorced man or widower getting a surrogate child.⁴⁰ This discriminatory provision is challenged as it violates the reproductive autonomy of a person and the matter is in apex court.⁴¹

➤ **Eligibility to become a surrogate mother: the requirements are that:**

- i. The woman must be married, have her own child, and must be between 25 year to 35 year of age.
- ii. A woman can be a surrogate only once in her life span.
- iii. She must be declared physically and psychologically fit and declared so by a registered medical clinic.

➤ **Eligibility for the intended couples to get surrogate child:**

- i. Certificate of essentiality' and a 'certificate of eligibility' is a prerequisite for an intending couple to get a child through surrogacy.

³² Sec 3 (ii), The Surrogacy (Regulation) Act 2021

³³Ibid, Sec. 4

³⁴ Ibid, section 4 (ii) (d)

³⁵ Ibid, section 4 (ii) (a)

³⁶ Ibid, Sec 2 (1) zg read with sec 4 (iii)

³⁷ Ibid, Section 3 & 11

³⁸ This conclusion can be drawn from the several provisions in the Act which defines, couple, intending parent, intending women etc. Ibid, sections 2(h), 2(r), 2(s), 4(iii) (a) etc.

³⁹ Ibid, sec. 2(i) (s)

⁴⁰ Ibid, it reads: (s) "intending woman" means an Indian woman who is a widow or divorcee between the age of 35 to 45 years and who intends to avail the surrogacy.

⁴¹ Krishnadas Rajagopal, SC Seeks Response from the Govt. on Plea Challenging Bar on Single, Divorced Men from Becoming Parents Through Surrogacy, The Hindu, April 26, 2025, 8:14 pm, available at https://www.thehindu.com/news/national/sc-seeks-response-from-govt-on-plea-challenging-bar-on-single-divorced-men-from-becoming-parents-through-surrogacy/article69494714.ece#:~:text=A%2045%2Dyear%2Dold%20single%20and%20divorced%20man%20from,married%20couples%20*%20Widowed%20or%20divorced%20women

“Certificate of essentiality”: means that the appropriate authority i.e. District Medical Board must certify that due to medical conditions the couple can’t get their own child and surrogacy is the way to have their genetically linked child. There should also be a certificate from judicial magistrate that parentage of the surrogate child will go to the intending couple. Other requirement is that the surrogate mother must get her life ensured for thirty six months covering after delivery period also.

‘certificate of eligibility’ for intended couples require that the age of wife must be between 23 to 50 year, and age of husband must be between 26 to 55 year. This intended couple must not have any surviving child of their own or adopted child or a surrogate child. The only exception is that they may have a child who is mentally and physical challenged to a level where it is life threatening disorder.

Rights of the surrogate child: In the latest Act of 2021 and its rules the surrogate child is given the same legal right as the own biological child of the intended couple or individual. Abortion is prohibited strictly and no clinic or laboratory or person can force surrogate mother for abortion except in certain situation as is prescribed in case of life threat of surrogate mother.

Rights of the surrogate mother: All surrogate mothers shall be compulsorily given a health insurance by the intending couple for thirty six months including post birth of the child which shall be sufficient to cover all kinds of expenditures of after effect of delivery and surrogacy.

➤ **Criticism of the current surrogacy laws of 2021:**

1. **The eligibility criteria to get surrogate child is too restrictive**: the Act has many restrictions such as it bans commercial surrogacy, allows only married heterosexual couples to have surrogate child, couple must have been married for at least five years, surrogate mother must be a close relative and not outsider, age restrictions for widows and divorcees, age restrictions for surrogate mother and she must have her own child, surrogacy can be tried only once in a life time by surrogate mother, couple must have medically proven infertility report, and no homosexual couple or single parent can get a surrogate child.

2. **Violation of fundamental rights guaranteed by the constitution**: it can be argued that the Act violates the right to equality in many ways. For example, widows and divorcee can get a surrogate child but not a divorced man or widower which is discrimination on the basis of gender under Article 15. By not allowing single individual and LGBTQs to have a surrogate child is violation of right to form a family of his choice and the reproductive autonomy under Article 21. Also ban on commercial surrogacy has a bearing on livelihood of interested women

under Article 19 (1) (g). The essentiality of a proven certificate from the medical board has the tenets of infringement of privacy of the intended couple.

3. **A step in backward direction: backward looking Act:** The Act is supposed to be forward looking and progressive. In the balance between morality and individual liberty, the Act is more tilted towards morality and state regulation.

4. **Inadequate compensation for surrogate mothers:** Apart from medical expenses and health insurance for thirty six months the surrogate mother does not get any monetary benefit in the name of altruistic surrogacy. But in that long period the surrogate mother can't work and remain unemployed which is again a matter of concern and goes against the surrogate mother.

5. **Complete neglect of single individual, homo sexual couple and LGBTQs:** the Act talks of intending couple, divorced women and widows who are eligible to get surrogate child. Hence it neglects a good number of people falling in the category of homo sexual couple and LGBTQs or single individuals.

6. **Social and cultural dimensions:** the Act is criticized on this point also as having a child is considered good in our society and culture. But there are many kinds of restrictions as discussed above in getting a surrogate child.

VI. CONCLUSION

Surrogacy laws and regulations in India have seen a profound change since 2002 to till date. The Surrogacy Act 2021, ART Act 2021 and the Rules of 2022 try to completely prohibit commercial surrogacy and allow very strict rules for altruistic surrogacy. These stricter regulatory laws are result of a two decade long process to the response of exploitation of poor surrogate mothers and the unethical practices making India as hub of the commercial surrogacy. The present law try to balance the reproductive rights of individual with morality of the society so that there is no exploitation as prevalent just prior to enactment of these laws and the tag of commercial surrogacy hub is also removed. As discussed above, the new laws completely prohibit commercial surrogacy and allow altruistic surrogacy only with close relative. But there is no definition of close relative. Can a neighbor be considered a close relative with whom the family has very good bonhomie? The Act is silent on it making it ambiguous. Similarly the Act does not allow single person, homosexual couples and LGBTQs to get a surrogate child. This makes the law stricter and it could have been better if its periphery could have expanded and have been more accommodative. Similarly the Act provides for inadequate compensation to surrogate mothers even if it is for altruistic purpose. It may be criticized as backward looking Act instead for progressive and forward looking. The legislations have serious criticisms for

practical implementation affecting constitutional guaranteed rights of individuals. That is why some of the provisions of the present laws are challenged in different courts including the Supreme Court of India.⁴² The outcomes of the different court verdicts will shape the surrogacy jurisprudence in India.

⁴² See, “Gursimran Kaur Bakshi, Supreme Court to Hear Petitions Challenging Upper-Age Limit in Surrogacy Laws on February 11”, Live Law, 07 Jan 2025, available at <https://www.livelaw.in/top-stories/supreme-court-to-hear-petitions-challenging-upper-age-limit-in-surrogacy-laws-on-february-11-280251>, also see, Editorial, “The second issue: On surrogacy for a second child”, The Hindu, available at <https://www.thehindu.com/opinion/editorial/the-second-issue-on-surrogacy-for-a-second-child/article70247684.ece>, also see, “Excluding Infertile Couples From Surrogacy Violates Rights: Delhi High Court”, NDTV, Oct. 18, 2023 available at <https://www.ndtv.com/india-news/excluding-infertile-couples-from-surrogacy-violates-rights-delhi-high-court-4493269>