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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provided dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

# **BEYOND BIOLOGY- EXPLORING LEGAL, ETHICAL AND SOCIETAL DIMENSIONS OF SURROGACY**

AUTHORED BY: KIRTI JAYASWAL

## **ABSTRACT**

The act of surrogacy involves a woman willingly choosing to carry a child for another individual or couple who are unable to conceive. Despite its apparent benefits for all parties involved, there are intricate legal matters that must be addressed to safeguard the rights of both the surrogate mother and the intended parents. The prohibition of commercial surrogacy in India, as mandated by a law passed in August 2016, reflects the global trend towards regulating this practice. The rising rates of infertility worldwide have led to significant advancements in Assisted Reproductive Technology (ART), making surrogacy a viable option for those struggling with infertility. Whether for financial gain or out of altruism, surrogacy involves a surrogate mother carrying and delivering a child for another individual or couple. In gestational surrogacy, an embryo created through in vitro fertilization is implanted in the surrogate's womb, allowing her to carry the child to term. This process establishes the surrogate as both the genetic and gestational mother of the child.

The landscape of surrogacy is complex and polarizing, as it navigates the realms of reproductive technology, ethical considerations, and legal frameworks. While it offers a lifeline for those struggling with infertility, it also raises critical questions about the autonomy and well-being of all parties involved, including surrogate mothers and the children born through this process. To effectively address the multifaceted issues surrounding surrogacy, it is essential to delve into the intricate web of legal, ethical, and societal implications in order to shape informed policies, clinical practices, and public discourse on this contentious topic.

The realm of surrogacy is governed by a complex web of laws and regulations spanning different nations, mirroring diverse cultural, religious, and legal viewpoints on assisted reproduction. In India, the rise of commercial surrogacy in the early 2000s gave rise to a flourishing surrogacy sector, alluring prospective parents from various corners of the globe.

Nevertheless, apprehensions regarding exploitation, objectification, and the welfare of surrogate mothers prompted the Indian authorities to introduce the Surrogacy (Regulation) Bill, 2019, with the objective of outlawing commercial surrogacy and permitting only altruistic surrogacy under stringent criteria.

The well-being and health outcomes of surrogate mothers and children born through surrogacy are paramount factors to consider when evaluating the ethical and societal impacts of this practice. Surrogate mothers may encounter medical complications, emotional hurdles, and financial insecurities, underscoring the necessity for extensive healthcare assistance and follow-up services post-surrogacy. Likewise, it is imperative to protect the rights and welfare of children born via surrogacy, guaranteeing that their needs are always at the forefront during the entire surrogacy journey.

Surrogacy, as a practice, encompasses a complex web of legal, ethical, and societal considerations that necessitate a comprehensive understanding. By exploring the legal frameworks surrounding surrogacy, we can gain insight into the rights and responsibilities of all parties involved, ensuring that the interests of both the intended parents and the surrogate are protected.

Ethical dilemmas arise when contemplating the commodification of reproductive services and the potential exploitation of vulnerable individuals. Examining these quandaries allows us to establish guidelines and regulations that promote fairness, autonomy, and informed consent in surrogacy arrangements. It also enables us to address concerns related to the potential exploitation of surrogates, ensuring that they are adequately compensated and supported throughout the process.

Society's perception of surrogacy varies widely, with cultural, religious, and moral beliefs shaping public opinion. By delving into societal viewpoints, we can identify areas of consensus and disagreement, fostering dialogue and understanding. This, in turn, can lead to the development of policies that reflect the diverse perspectives and values of the communities affected by surrogacy.

Furthermore, understanding the health implications associated with surrogacy is crucial for safeguarding the well-being of all parties involved. By examining the physical and

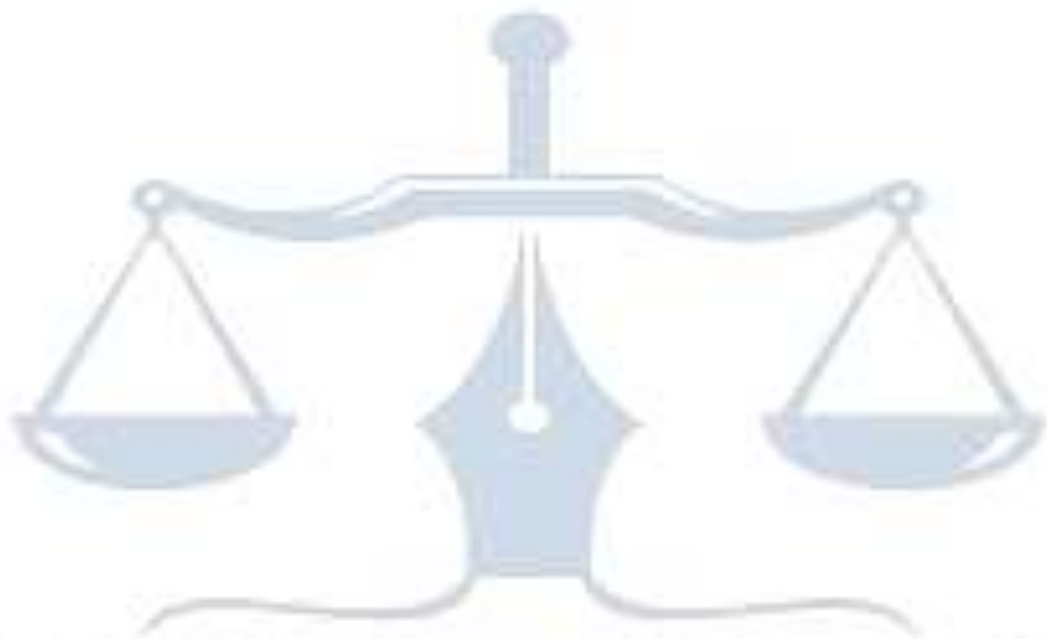


psychological risks faced by surrogates, we can establish guidelines that prioritize their health and ensure appropriate medical care and support. Similarly, understanding the potential health risks for the intended parents and the child born through surrogacy allows us to provide comprehensive healthcare and support services.

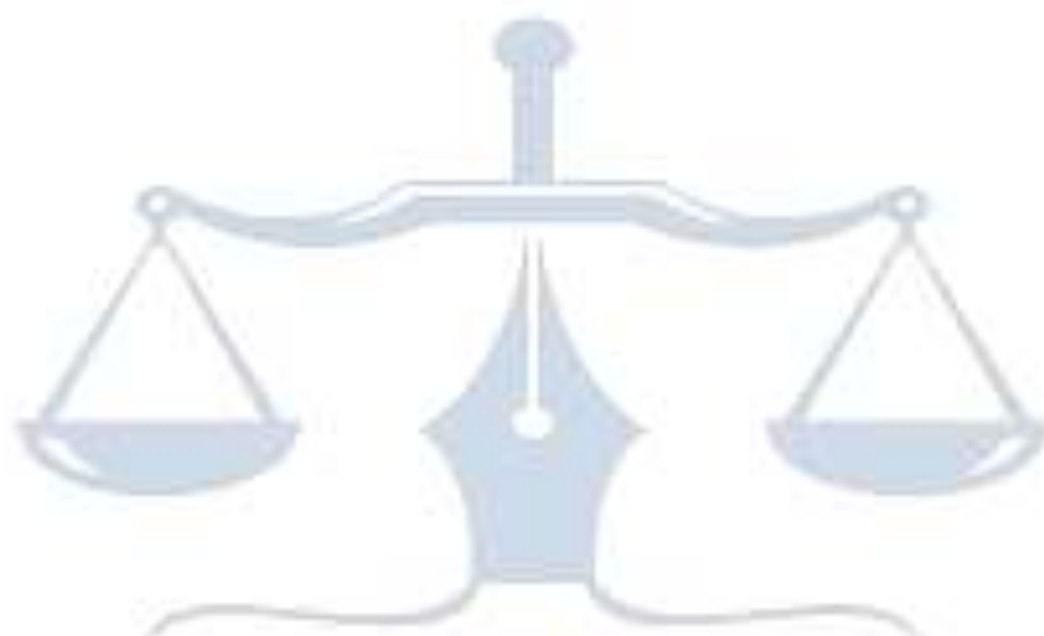
Ultimately, a nuanced comprehension of surrogacy is essential for navigating the intricate landscape of assisted reproduction. By engaging in enlightened discussions, formulating evidence-based policies, and establishing ethical standards, we can create a framework that



protects the rights and welfare of all participants in surrogacy agreements. This comprehensive approach ensures that surrogacy remains a viable option for individuals and couples seeking to build their families while upholding the principles of fairness, autonomy, and respect for all involved.



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# **CHAPTER 1**

## **1.1 INTRODUCTION**

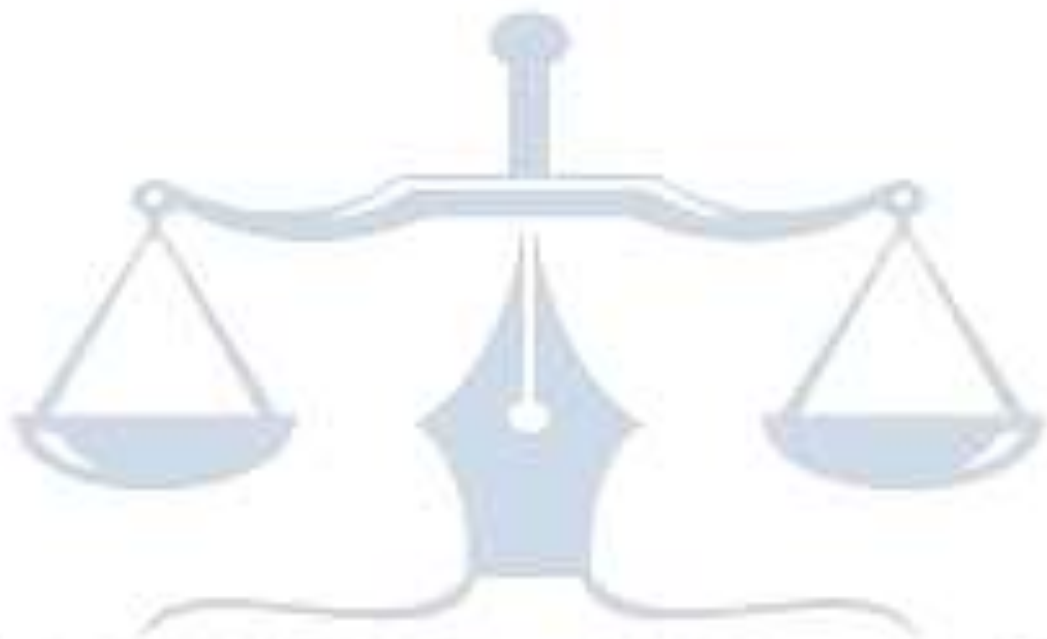
Surrogacy is a process or arrangement wherein an individual who intends to become a parent of a new-born child is allowed to have another person carry the pregnancy on their behalf. This may be due to various reasons such as the inability to conceive a child naturally, the potential risks associated with pregnancy that are deemed unacceptable for the mother's well-being, or the preference of a same-sex couple to have children. The involvement of monetary compensation in this arrangement may vary. If the surrogate receives financial compensation for their services, the agreement is referred to as commercial surrogacy. However, if the surrogate is only reimbursed for medical and other necessary expenses, it is considered altruistic surrogacy. The legality and costs associated with surrogacy arrangements differ significantly across jurisdictions, often resulting in the need for inter-state or international surrogacy arrangements.

Surrogacy, the act of one woman carrying a pregnancy for another person or couple, has become a topic of great interest and controversy in both India and the rest of the world. This reproductive technology provides hope for those struggling with infertility, same-sex couples, and individuals who are unable to carry a pregnancy due to medical reasons. However, it also brings forth complex legal, ethical, and societal issues that differ across various cultural, religious, and legal contexts.

Let's take a closer look at surrogacy in India. In the early 2000s, commercial surrogacy gained popularity in the country due to factors such as affordable medical costs, skilled healthcare professionals, and the absence of comprehensive surrogacy regulations. India quickly became a global destination for surrogacy attaining the title "Surrogacy capital of the world"<sup>1</sup>, attracting intended parents from all corners of the globe who were seeking affordable fertility solutions.

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<sup>1</sup> <https://proactiveforher.com/blogs/pregnancy-and-fertility/surrogacy-everything-you-need-to-know-about-indias-current-laws/>



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Commercial surrogacy in India involves contractual agreements between intended parents and surrogate mothers, with the assistance of surrogacy agencies and fertility clinics<sup>2</sup>. These agreements typically outline the rights and responsibilities of all parties involved, including financial compensation for surrogate mothers, medical expenses, and legal considerations.

However, the rapid growth of the commercial surrogacy industry in India also raised concerns about exploitation, commodification, and the rights of surrogate mothers. Critics argued that this practice turned women's bodies into commodities, especially those from economically disadvantaged backgrounds, and raised ethical questions regarding autonomy, consent, and reproductive rights.

In response to these concerns, the Indian government introduced several legislative attempts to regulate surrogacy, culminating in the Surrogacy (Regulation) Bill of 2019. This bill aimed to ban commercial surrogacy and only allow altruistic surrogacy for Indian citizens under strict conditions<sup>3</sup>. The goal was to protect the rights and well-being of surrogate mothers and the children born through surrogacy.

Surrogacy is a complex and multifaceted issue that requires careful consideration of the legal, ethical, and societal implications. As the world continues to grapple with these challenges, it is crucial to find a balance that respects the rights and well-being of all parties involved.

Surrogacy practices around the world exhibit a remarkable diversity, reflecting the intricate tapestry of cultural, legal, and ethical perspectives on assisted reproduction. While certain nations, such as the United States and Ukraine, boast flourishing commercial surrogacy industries with relatively lenient regulations, others, like France and Germany, have taken a firm stance by either banning or imposing stringent restrictions on surrogacy.

In the United States, commercial surrogacy thrives within the legal frameworks of several states, where meticulous regulations govern surrogacy agreements, parental rights, and the protection of surrogate mothers. Surrogacy agencies and fertility clinics assume pivotal roles in facilitating these arrangements, offering invaluable services such as pairing intended parents

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<sup>2</sup> <https://timesofindia.indiatimes.com/blogs/voices/commercialization-of-surrogacy-in-india-the-effects-of-globalisation/>

<sup>3</sup> <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC10199460/>



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with surrogate mothers, providing legal guidance, and delivering comprehensive medical care throughout the entire surrogacy journey.

Similarly, Ukraine and Russia have emerged as alluring destinations for international surrogacy, offering reasonably priced surrogacy services and fostering favourable legal environments for intended parents. Nevertheless, concerns have been raised regarding the potential exploitation of surrogate mothers and the absence of comprehensive regulations to safeguard their rights and well-being.

Conversely, countries like France, Germany, and Italy have taken a resolute stance against surrogacy, either banning it outright or imposing severe restrictions. These nations cite ethical concerns, including the commodification of women's bodies, the potential for exploitation, and the rights of the child born through surrogacy. Consequently, surrogacy agreements hold no legal recognition within these countries, leaving individuals or couples seeking surrogacy to grapple with legal obstacles and limited options for assisted reproduction.

In conclusion, surrogacy is a fascinating and intricate phenomenon that gives rise to a wide range of legal, ethical, and societal dilemmas, both within India and on a global scale. While it provides hope for individuals and couples longing to start a family, it also presents obstacles concerning autonomy, consent, exploitation, and the rights of surrogate mothers and the children born through surrogacy.

To truly comprehend the intricacies of surrogacy practices, it is crucial to carefully consider the diverse cultural, legal, and ethical perspectives that influence the regulation and implementation of surrogacy in various contexts. By delving into the complexities of surrogacy and examining its occurrences worldwide, we can facilitate informed discussions, develop effective policies, and establish ethical guidelines that safeguard the well-being of all individuals involved in surrogacy arrangements.



## TYPES OF SURROGACY

Surrogacy can be categorized into various classifications depending on the genetic connection between the surrogate mother and the child, as well as the agreement between the prospective parents and the surrogate. The main types are mentioned below:

- Traditional Surrogacy

In the realm of traditional surrogacy, the surrogate mother shares a genetic bond with the child she carries, as her own eggs are utilized for conception. This process usually entails artificial insemination with sperm from the intended father or a donor, resulting in the surrogate taking on both a genetic and gestational role during the pregnancy. Traditional surrogacy arrangements can bring about a more intricate legal and emotional landscape, given the biological connection between the surrogate and the child. However, this method is becoming less prevalent in modern times due to the potential complications and ethical dilemmas it presents.

- Gestational Surrogacy

In the world of gestational surrogacy, an embryo conceived through in vitro fertilization (IVF) is implanted into the uterus of the surrogate mother. Typically, the embryo is formed using the eggs and sperm of the intended parents or donors, meaning the surrogate has no genetic ties to the child she carries. This form of surrogacy is often favoured for its clear genetic distinction between the surrogate and the child, which helps to minimize legal and emotional intricacies. It stands as the most prevalent form of surrogacy utilized in contemporary times.

- Altruistic Surrogacy

Altruistic surrogacy epitomizes the epitome of selflessness, where the surrogate mother graciously offers her services without any financial gain, except for the reimbursement

%20surrogacy.



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of medical and pregnancy-related expenses. The driving force behind the surrogate's decision is to assist the intended parents in fulfilling their deepest desire of parenthood. This noble act of altruistic surrogacy is often perceived as a beautiful display of kindness and empathy, fostering strong bonds between the surrogate and the intended parents.

- **Commercial Surrogacy**

This form of surrogacy involves monetary transactions between the intended parents and the surrogate mother, where the surrogate is compensated beyond mere reimbursement for expenses. The amount of compensation can vary based on factors like location, medical background, and the surrogate's personal preferences.

While commercial surrogacy is more common in countries with legal regulations, it sparks ethical debates regarding the potential exploitation and objectification of women's bodies.

- **International Surrogacy**

International surrogacy epitomizes the harmonious convergence of intended parents and surrogate mothers hailing from diverse nations. This extraordinary phenomenon unfolds when the sacred act of surrogacy is unjustly forbidden or excessively regulated within the borders of the intended parents' motherland, compelling them to embark on a quest for surrogacy services in foreign lands.

The realm of international surrogacy unveils a myriad of intricate complexities, encompassing legal intricacies, logistical hurdles, and ethical dilemmas, all stemming from the stark disparities in laws, regulations, and cultural mores that exist between nations.

Every form of surrogacy comes with its own set of consequences, advantages, and obstacles, and the decision on which surrogacy option to pursue is influenced by a multitude of factors such as legal matters, personal desires, and unique situations.

### *Who can go for surrogacy?*

At first glance, the idea of substitutes may appear alluring, as it offers an infertile couple much-needed financial support, the joy of having a biological child, and benefits the country with foreign currency. However, a closer examination <sup>5</sup>reveals the bitter truth behind this facade. Due to the lack of proper legal regulations, both surrogate mothers and intended parents are left in a precarious situation. The entire system lacks accountability, and the unpredictable laws governing surrogacy in India often lead to legal complications.

In 2005, the ICMR introduced guidelines for the accreditation, supervision, and regulation of ART clinics in India<sup>6</sup>. However, the dissatisfaction of Children without Borders is understandable, as they not only have to overcome language barriers but also endure a lengthy legal battle to bring their children home. Even if everything goes smoothly, they are required to stay in India for two to three months to complete the necessary formalities after the birth of their child. Transboundary surrogacy gives rise to complex issues related to citizenship, ethnicity, marriage, parenthood, and the rights of the children involved.

Children may be denied the nationality of their intended parent's country, leading to protracted legal disputes. For instance, a <sup>7</sup>German couple with twin surrogates or an Israeli gay couple may have to undergo DNA tests to establish their parentage, or worse, face the grim prospect of their children being placed in an orphanage. The child handed over to the couple after the surrogacy procedure is not genetically related to them, and as a result, the intended parents often neglect the child, leaving them to be raised in an orphanage.

### *Positive points*

- The primary objective is to ensure the surrogate mother's elevated well-being and longevity. By prohibiting commercial substitution and implementing an altruistic substitution model, it is mandated that a woman can only become a surrogate after meeting certain living criteria.
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<sup>5</sup> [medalsciencejournal.com/2017/vol3/issue5/3-5-17](http://medalsciencejournal.com/2017/vol3/issue5/3-5-17)

<sup>6</sup> <https://research.vu.nl/ws/portalfiles/portal/88639526/complete+dissertation.pdf>

<sup>7</sup> [medalsciencejournal.com/2017/vol3/issue5/3-5-17](http://medalsciencejournal.com/2017/vol3/issue5/3-5-17)



- This measure aims to prevent those who are unaware of their rights from exploiting women.
- Furthermore, it seeks to curb child trafficking and illegal substitution by proposing severe punishments and penalties for engaging in commercial substitution, abandoning an infant, or trafficking human embryos (with penalties ranging from 10 years imprisonment to substantial fines).
- The legislation aims to halt the donation of eggs. This ground-breaking surrogacy bill establishes a comprehensive legal framework at both the central and state levels to effectively regulate substitution.
- The stringent requirements outlined in this bill will not only safeguard the well-being of the orphaned but also ensure the happiness of the adopting couple as they embark on their journey towards parenthood.

## **1.2 BACKGROUND OF SURROGACY IN INDIA**

- Surrogacy, a practice where a woman carries a pregnancy for another individual or couple, has a complex and multifaceted history globally<sup>8</sup>. In India, the emergence of commercial surrogacy gained momentum in the early 2000s, marking a significant shift in the landscape of assisted reproduction and reproductive rights.
- The roots of surrogacy in India can be traced back to altruistic forms of surrogacy, where close relatives or friends would offer to carry a child for couples facing infertility challenges. However, with advancements in reproductive technologies and increasing global demand for surrogacy services, India quickly became a hub for commercial surrogacy.
- Several factors contributed to the rise of commercial surrogacy in India. Firstly, the relatively lower cost of surrogacy procedures compared to Western countries attracted individuals and couples from around the world seeking affordable fertility solutions. This cost advantage was further amplified by the availability of skilled medical professionals and state-of-the-art fertility clinics in India.

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<sup>8</sup> Parvina Fazail Ismayilova. "EXAMINING LEGAL REGULATIONS OF THE SURROGACY INSTITUTION: A COMPREHENSIVE FRAMEWORK AND ONGOING CHALLENGES" <https://jilc.e-science.space/wp-content/uploads/2024/01/2.pdf>

- Moreover, the absence of comprehensive surrogacy laws in India initially created a favorable environment for the growth of the surrogacy industry. While other countries grappled with stringent regulations and legal ambiguities surrounding surrogacy, India offered a relatively lax regulatory framework, making it an attractive destination for intended parents and surrogates alike.
- The Indian government's initial permissiveness towards commercial surrogacy contributed to the proliferation of surrogacy clinics and agencies across the country, particularly in states like Gujarat and Maharashtra. These clinics offered a range of services, including in-vitro fertilization (IVF), embryo transfer, and surrogate recruitment, catering to the diverse needs of domestic and international clients.
- However, the exponential growth of the commercial surrogacy industry in India also raised several ethical, legal, and societal concerns. Critics argued that the commodification of surrogacy commodified women's bodies and reproductive capacities, exploiting economically vulnerable women as surrogate mothers. Additionally, concerns were raised about the lack of regulatory oversight, leading to instances of exploitation, coercion, and health risks for surrogate mothers.
- In response to these concerns, the Indian government introduced various attempts to regulate commercial surrogacy. In 2008, the Indian Council of Medical Research (ICMR) issued guidelines to govern assisted reproductive technologies, including surrogacy, aimed at protecting the interests of surrogate mothers and ensuring the ethical practice of surrogacy.
- However, it was not until 2013 that the Indian government introduced the first comprehensive legislative attempt to regulate surrogacy with the Assisted Reproductive Technology (ART) Regulation Bill. This bill sought to establish a legal framework for surrogacy, outlining eligibility criteria for intended parents and surrogate mothers, as well as procedures for surrogacy agreements and the rights of the child born through surrogacy.
- Despite these regulatory efforts, the commercial surrogacy industry in India continued to face scrutiny and controversy, leading to a series of legal and policy reforms. In 2019, the Indian government introduced the Surrogacy (Regulation) Bill, which aimed to prohibit commercial surrogacy altogether, allowing only altruistic surrogacy for Indian citizens under strict conditions.

- In conclusion, the background of surrogacy in India reflects a complex interplay of economic, social, and legal factors that have shaped the evolution of surrogacy practices in the country. While India emerged as a global leader in commercial surrogacy due to its cost advantages and medical expertise, concerns about exploitation, commodification, and regulatory gaps have prompted significant legislative reforms aimed at addressing these challenges and protecting the rights of all stakeholders involved in surrogacy arrangements.

### **1.3 RISE OF SURROGACY IN INDIA**

- For couples who are unable to conceive or who suffer from severe medical issues that prevent them from becoming parents, surrogacy has grown in popularity. In recent years, India has emerged as a leading destination for surrogacy due to its relatively inexpensive costs and the availability of willing surrogates. However, the surge in surrogacy in India has also sparked questions about ethical dilemmas and exploitation. In this research paper, we will explore the history of surrogacy in India, the benefits and drawbacks of surrogacy in India, and the future of surrogacy in India.
- Surrogacy first became popular in India in the early 2000s, when a combination of factors – such as the availability of affordable medical technology, a large pool of poor and illiterate women willing to become surrogates, and a lack of regulation – made it an attractive option for intended parents from around the world. In 2002, the Indian government established guidelines for surrogacy, which allowed for commercial surrogacy arrangements as long as certain conditions were met. These conditions included the requirement that the surrogate be a close relative of the intended parents, that the arrangement be made through a registered agency, and that the surrogate be given adequate medical care and compensation.
- In India, agencies played a key role in facilitating surrogacy arrangements, acting as intermediaries between deliberate parents and surrogates. These agencies not only helped to match intended parents with surrogates but also provided a range of services, such as medical care, accommodation and legal advices. But despite that, the lack of regulation in the surrogacy industry led to concerns about the exploitation and abuse of surrogates, with some reports coming in light of surrogates being paid very little and being subjected to poor living conditions.



- One of the main benefits of surrogacy in India is the economic benefits as it provides for surrogates and their families. Many surrogates come from poor backgrounds and see surrogacy as a way to improve their financial situation. The remuneration they receive for carrying a child for someone else can be life-changing, allowing them to pay off debts, buy a house, or start a business<sup>9</sup>. In addition, surrogacy can also provide economic benefits for intended parents, who may be able to save tens of thousands of dollars by choosing to have a child through surrogacy in India rather than in their home country. However, there are also concerns about the exploitation of surrogates in India. Some critics argue that surrogates are being paid too little for the risks they take and that they are not being adequately protected by the legal framework. In addition, there are ethical concerns about the commodification of women's bodies and the potential for surrogacy to reinforce gender inequalities.
- The Indian government has recently introduced changes to the legal framework for surrogacy in India, which have been aimed at addressing some of the concerns about exploitation and ethical issues<sup>10</sup>. The new regulations prohibit commercial surrogacy and only allow altruistic surrogacy arrangements, where the surrogate is not paid but only reimbursed for expenses.

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<sup>9</sup> Effects of surrogacy on surrogate mothers in India <http://www.atlantis-press.com/article/125982141>

<sup>10</sup> <https://www.ivfconceptions.com/latest-surrogacy-law-in-india/>

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## **CHAPTER 2**

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### **2. HISTORICAL CONTEXT OF SURROGACY**

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#### **2.1 HISTORY**

In the ancient Hindu society, there was a remarkable practice known as Niyog-Pratha, where a woman who was unable to conceive due to her husband's impotence was permitted to bear a child through her in-law. The child rightfully belonged to the couple, and the in-law had no claim over it. Niyog-pratha can be seen as a form of surrogate fatherhood, which was both legally and emotionally simpler compared to modern surrogate relationships. The scholars of Islam have expressed their disapproval of surrogacy, deeming it as unclean and immoral for a woman to carry the child of any man other than her husband. On the other hand, the Bible promotes the concept of surrogate relationships, while earlier Christian law supports surrogate fatherhood. Surrogacy was recognized and practiced in earlier times, as evidenced by the Mahabharata, where Gandhari, the wife of Dhritarashtra, conceived but her pregnancy lasted for nearly two years before she gave birth to a mass. Bhagwan Vyasa discovered that there were 101 normal cells within the mass, which were then placed in a nutrient medium and grown in vitro until full term. Out of these cells, 100 developed into male children known as Kauravas, and one daughter named Dusheela<sup>11</sup>.

Balram, the seventh child of Devki and Vasudev, was transferred to the womb of Rohini, Vasudev's first wife, as an embryo to protect him from being killed by Kansa<sup>12</sup>.

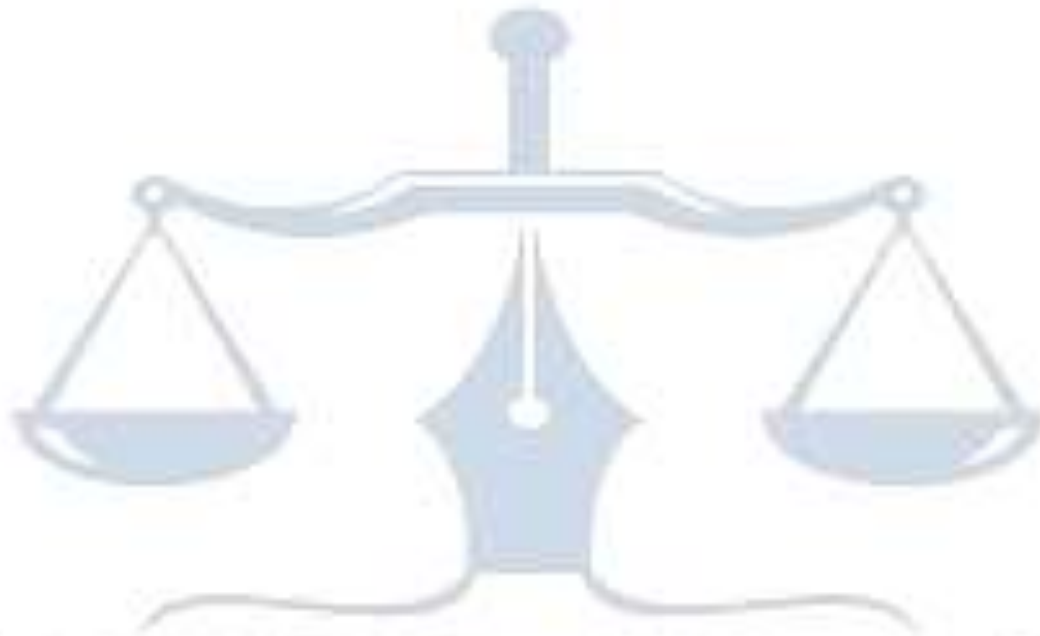
Balram was born as the elder brother of Lord Krishna, and he played a crucial role in the epic of Mahabharata. He was known for his immense strength, loyalty, and bravery. Balram was also a skilled warrior and a master of the mace, known as the gada.

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<sup>11</sup> [http://dlmssv.inflibnet.ac.in/bitstream/123456789/56/11/11\\_Chapter-II.pdf](http://dlmssv.inflibnet.ac.in/bitstream/123456789/56/11/11_Chapter-II.pdf)

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Throughout his life, Balram stood by Krishna's side and supported him in his various endeavours. He was a trusted advisor and confidant to Krishna, and together they faced many challenges and enemies. Balram's presence was a source of strength and protection for Krishna, and he was always ready to defend his brother and their loved ones.

Originally, surrogacy took place within families and among close friends. Well-known surrogates would selflessly give birth to infertile relatives or friends, without any financial compensation. However, in recent decades, there has been a noticeable shift towards the commercialization of surrogacy. Some argue that this development is undesirable, as the conception of a child should not be treated as the creation of a commodity. They believe that surrogacy is akin to the trade of babies, and that a law similar to the one prohibiting the sale of human organs should be applied to the sale of childbearing.

## **2.2 EVOLUTION OF SURROGACY GLOBALLY**

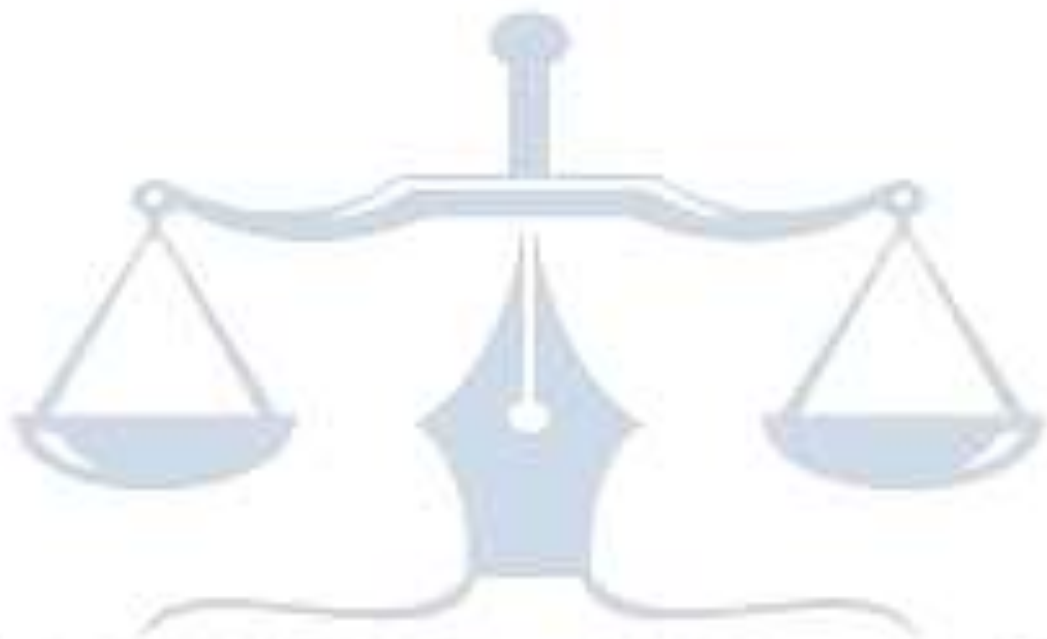
Surrogacy, a practice where a woman carries a pregnancy for another individual or couple, has undergone significant evolution globally, shaped by changing legal landscapes, evolving ethical considerations, and shifting societal attitudes towards reproduction and family formation. This transformation has been influenced by alterations in legal frameworks, the development of ethical perspectives<sup>13</sup>, and changing societal views on reproduction and the establishment of families. This narrative follows the progression of surrogacy from its inception to the intricate nature of modern surrogacy practices, leading up to the year 2023.

### *Early Beginnings and emergence:*

During ancient times, surrogacy was not a formalized practice but rather an informal arrangement between individuals. In early civilizations, such as ancient Egypt and Greece, it was not uncommon for a woman to carry a child for a family member or friend who was unable to conceive or carry a pregnancy to term. These arrangements were often based on trust and kinship ties, with the surrogate mother offering her assistance out of a sense of duty or compassion.

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<sup>13</sup> <https://timesofindia.indiatimes.com/readersblog/maternitybenefitactboonandbaneforthenation/surrogacy-in->



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However, as societies evolved and medical advancements were made, the concept of surrogacy began to take on a more structured form. In the latter part of the 20th century, surrogacy started to gain recognition as a legitimate reproductive method. This shift was influenced by various factors, including advancements in reproductive technologies, changing social attitudes towards family structures, and the increasing demand for alternative means of having children.

The development of in vitro fertilization (IVF) in the 1970s played a significant role in the evolution of surrogacy. IVF allowed for the creation of embryos outside the womb, which could then be transferred to a surrogate mother for gestation. This breakthrough opened up new possibilities for individuals and couples struggling with infertility or medical conditions that prevented them from carrying a pregnancy.

Legal and ethical considerations also played a crucial role in the recognition of surrogacy as a structured reproductive method. As the practice became more prevalent, lawmakers and medical professionals began to grapple with the complex issues surrounding surrogacy, such as the rights and responsibilities of all parties involved, the potential for exploitation, and the need for legal protections.

In response to these concerns, countries around the world started to develop laws and regulations to govern surrogacy arrangements. These laws varied significantly from one jurisdiction to another, reflecting the diverse cultural, social, and ethical perspectives on surrogacy. Some countries, such as the United States, embraced surrogacy and established legal frameworks to protect the rights of all parties involved. Others, like France and Germany, adopted more restrictive approaches, either banning or heavily regulating surrogacy.

The recognition of surrogacy as a structured reproductive method also sparked debates and discussions about the ethical implications of the practice. Critics raised concerns about the commodification of women's bodies, the potential for exploitation of vulnerable individuals, and the potential psychological and emotional consequences for all parties involved. These debates continue to shape the legal and ethical landscape surrounding surrogacy today.

### *Legal and Ethical Milestones:*

During the 1980s, a significant shift occurred in the landscape of surrogacy, notably highlighted by the well-known Baby M case in the United States. This legal battle involved Mary Beth Whitehead, a surrogate mother who contested giving up the child she had carried for the intended parents, sparking debates on the legal and ethical dimensions of surrogacy.

Following the Baby M case and growing ethical concerns related to surrogacy, numerous nations took steps to introduce laws aimed at overseeing surrogacy agreements. Nevertheless, the regulatory approaches towards surrogacy varied greatly across different countries, with some opting for lenient frameworks that permitted commercial surrogacy, while others opted for stringent regulations or complete bans on surrogacy.

### *Commercialization and Globalization:*

During the late 20th and early 21st centuries, there was a significant expansion of the commercial surrogacy industry due to various factors such as advancements in assisted reproductive technologies, the process of globalization, and the emergence of fertility tourism. Countries like India, Thailand, and Ukraine gained prominence as favoured destinations for international surrogacy, primarily because they offered affordable surrogacy services and had relatively relaxed regulatory frameworks.

The globalization of surrogacy resulted in the proliferation of cross-border surrogacy arrangements, whereby individuals from high-income countries sought surrogacy services in low-income countries where costs were lower and regulations less stringent. Nonetheless, this globalization also brought forth concerns regarding exploitation, inequality, and the commodification of women's bodies within the surrogacy markets.

### *Regulatory Responses and Legal Challenges:*

As the commercial surrogacy industry expanded, nations faced the task of establishing regulations to safeguard the rights and well-being of surrogate mothers, intended parents, and children born through surrogacy. Some nations, such as the United States and Ukraine, devised comprehensive legal frameworks to govern surrogacy agreements, parental rights,

and the rights of surrogate mothers.

However, other countries took stricter approaches to surrogacy regulation, either banning it altogether or imposing strict regulations due to ethical concerns. These concerns included the commodification of women's bodies, the risk of exploitation, and the rights of children born through surrogacy. These legal challenges underscored the complexity of surrogacy regulation and emphasized the need for nuanced approaches that consider the interests of all parties involved.

#### *Contemporary Trends and Future Directions:*

In recent times, the practice of surrogacy has undergone significant transformations in response to shifting societal norms, technological progress, and legal changes. Nations like India, Nepal, and Thailand have introduced new regulations to address concerns regarding exploitation and to guarantee the ethical conduct of surrogacy.

Furthermore, advancements in reproductive technologies, such as in-vitro fertilization (IVF), preimplantation genetic diagnosis (PGD), and mitochondrial replacement therapy (MRT), have introduced fresh possibilities and ethical dilemmas in the realm of surrogacy. These technological breakthroughs have sparked debates on the utilization of surrogacy for purposes like sex selection, genetic enhancement, and the development of "designer babies."

Looking towards the future, the landscape of surrogacy is expected to be influenced by ongoing discussions and advancements in law, ethics, and society. The progression of surrogacy will rely on the capacity of policymakers, healthcare professionals, and society at large to navigate the intricate ethical, legal, and social aspects of assisted reproduction and to ensure the protection of the rights and well-being of all individuals involved in surrogacy agreements.

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## **2.3 EMERGENCE OF COMMERCIAL SURROGACY IN INDIA**

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The rise of commercial surrogacy in India marks a pivotal moment in the worldwide realm of assisted reproduction, influenced by a blend of economic, social, and technological



elements<sup>14</sup>. During the early 2000s, India became a top choice for commercial surrogacy, drawing in hopeful parents from various countries in search of cost-effective fertility

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<sup>14</sup> <https://bmcwomenshealth.biomedcentral.com/articles/10.1186/s12905-020-01087-2>



options. This shift was propelled by numerous crucial factors that turned India into a centre for surrogacy services.

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#### *Economic Factors:*

The emergence of commercial surrogacy in India can be attributed to various economic factors. One of the key drivers was the significantly lower cost of surrogacy procedures compared to Western countries. In nations like the United States and the United Kingdom, the high expenses associated with assisted reproduction made surrogacy financially unattainable for numerous individuals and couples. Conversely, India provided more affordable surrogacy services, encompassing in-vitro fertilization (IVF), embryo transfer, and surrogate recruitment. Consequently, this made India an appealing choice for intended parents who were seeking cost-effective fertility solutions.

#### *Medical Expertise and Infrastructure:*

India's rapidly expanding medical tourism sector and robust healthcare infrastructure were instrumental in driving the development of commercial surrogacy. The nation possessed a plethora of highly trained medical experts, such as gynaecologists, embryologists, and fertility specialists, who were adept in various assisted reproduction methods. Cutting-edge fertility centres furnished with state-of-the-art technologies also bolstered India's attractiveness as a hub for surrogacy, providing top-notch medical assistance to both prospective parents and surrogate women.

#### *Legal Ambiguities and Regulatory Gaps:*

The lack of clear surrogacy laws in India initially provided an advantageous setting for the expansion of the surrogacy sector. In contrast to nations facing strict regulations and legal uncertainties regarding surrogacy, India presented a comparatively lenient regulatory structure, which facilitated the emergence of commercial surrogacy facilities and organizations with limited supervision. This absence of regulatory guidance facilitated the swift growth of surrogacy services in India, drawing in clients from both within the country and overseas who were interested in surrogacy agreements.

### *Globalization and Fertility Tourism:*

Globalization has transformed the world into a more interconnected and accessible place, allowing for the exchange of goods, services, and ideas across borders. This interconnectedness, coupled with advancements in travel technology, has given rise to a phenomenon known as fertility tourism. Fertility tourism refers to the practice of individuals or couples traveling to another country to seek fertility treatments or services that may be unavailable, illegal, or prohibitively expensive in their home country.

India, with its relatively low cost of living, well-established medical infrastructure, and a large pool of educated and English-speaking medical professionals, quickly emerged as a favoured destination for fertility tourism, particularly for commercial surrogacy. Commercial surrogacy involves a contractual agreement in which a woman agrees to carry and give birth to a child for another individual or couple, who will become the legal parents of the child<sup>15</sup>.

In Western nations, where surrogacy was either highly regulated or outright banned, the emergence of fertility tourism provided a lifeline for individuals or couples struggling with infertility or same-sex couples seeking to start a family. The high costs associated with surrogacy in countries like the United States or the United Kingdom, coupled with legal restrictions, made India an attractive option for those seeking affordable and accessible surrogacy services.

Fertility tourism agencies and surrogacy intermediaries played a crucial role in facilitating international surrogacy arrangements. These agencies acted as intermediaries, connecting intended parents with surrogate mothers in India. They provided a range of services, including matching intended parents with suitable surrogates, coordinating medical procedures, and handling legal and logistical aspects of the surrogacy process<sup>16</sup>.

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<sup>15</sup> Universidade Nova De Lisboa on 2023-10-24

<sup>16</sup> smithfieldtimes.com [<https://www.smithfieldtimes.com/author/staffreportssmithfield>]

The increasing demand for surrogacy services, combined with the ease of travel and the interconnectedness of the world, created a thriving industry in India. Surrogacy clinics and agencies sprouted up across the country, catering to the needs of international clients. The availability of affordable medical treatments, coupled with the cultural acceptance of surrogacy in India, further fuelled the growth of the industry.

However, the rise of India as a favoured location for commercial surrogacy also raised ethical concerns and sparked debates about exploitation and the commodification of women's bodies. Critics argued that the lack of comprehensive regulations and oversight in India's surrogacy industry left surrogate mothers vulnerable to exploitation and abuse. There were instances of surrogate mothers being underpaid, subjected to poor living conditions, or coerced into signing contracts they did not fully understand.

#### *Cultural Attitudes and Social Dynamics:*

Cultural perspectives and societal dynamics have greatly influenced the development of commercial surrogacy in India. The country's traditional values, which place a strong emphasis on family and procreation, along with a cultural acceptance of altruistic acts, have paved the way for the acceptance of surrogacy as a means of assisting individuals in becoming parents. Moreover, the prevailing socioeconomic disparities and economic inequalities have provided economically disadvantaged women with opportunities to engage in commercial surrogacy as a means of enhancing their financial situations.

#### *Ethical and Legal Challenges:*

Commercial surrogacy in India faced significant ethical and legal challenges despite its rapid growth and popularity. Critics expressed concerns regarding the potential exploitation and commodification of women's bodies, especially surrogate mothers from economically disadvantaged backgrounds. Issues related to autonomy, consent, and the rights of surrogate mothers and children born through surrogacy highlighted the necessity for comprehensive regulations to safeguard the interests of all parties involved.

The emergence of commercial surrogacy in India reflects a multifaceted interaction of economic, social, and regulatory elements that positioned the country as a prominent hub

for assisted reproduction on a global scale. While commercial surrogacy provided a ray of hope for intended parents grappling with infertility, it also brought forth profound ethical, legal, and societal dilemmas that spurred discussions for regulatory revisions. A nuanced exploration of the economic, social, and cultural dynamics that influenced the growth and impact of commercial surrogacy in India is essential for a comprehensive understanding of this phenomenon in the realm of global assisted reproduction.

To summarize, the rise of commercial surrogacy in India is a result of a multifaceted interaction between economic, social, and regulatory elements that turned the nation into a prominent hub for assisted reproduction services. Although commercial surrogacy provided a ray of hope for couples facing fertility challenges, it also brought about significant ethical, legal, and societal dilemmas, leading to demands for regulatory changes. A comprehensive analysis of the emergence of commercial surrogacy in India necessitates a detailed exploration of the economic, social, and cultural factors that influenced its growth and influence on the worldwide assisted reproduction industry.

## **2.4 KEY MILESTONES AND LEGAL DEVELOPMENTS**

Surrogacy has undergone significant legal evolution and milestones over the past few decades. The evolution of this journey has been influenced by shifting societal perspectives, progress in assisted reproductive techniques, and the acknowledgment of the rights and welfare of surrogate mothers, prospective parents, and offspring conceived via surrogacy. Presented are several significant achievements and legal changes within the realm of surrogacy:

### *Early Legal Precedents:*

The legal framework surrounding surrogacy started to develop in the latter part of the 20th century, marked by significant cases that set initial precedents and shed light on the intricate legal issues surrounding surrogacy. A prominent example is the Baby M case in the United States in 1986, involving a surrogate mother named Mary Beth Whitehead who contested giving up custody of the child she had carried for the intended parents. This particular case ignited a widespread discussion and prompted the introduction of surrogacy legislation in numerous states.

### *Legislative Responses in the United States:*

Legislative measures in the United States were implemented as a direct response to the Baby M case and various legal disputes pertaining to surrogacy. Numerous states within the country took the initiative to pass laws aimed at regulating surrogacy agreements and establishing parental rights. Notably, states like California and Illinois embraced a more lenient approach by enacting legislation that not only legalized commercial surrogacy but also offered comprehensive guidelines concerning surrogacy agreements, parental rights, and the protection of surrogate mothers' rights.

### *International Surrogacy Arrangements:*

The phenomenon of surrogacy becoming a globalized practice has resulted in a surge of international surrogacy agreements. In this new era, affluent individuals hailing from prosperous nations have been seeking surrogacy services in economically disadvantaged countries, where costs are lower and regulations are less stringent. However, this growing trend has sparked apprehension regarding the potential exploitation, inequality, and the fundamental rights of surrogate mothers involved in these cross-border surrogacy transactions. Consequently, there has been a resounding call for the establishment of comprehensive international regulatory frameworks to effectively tackle these pressing concerns.

### *Regulatory Reform in India:*

India rose as a prominent hub for international commercial surrogacy in the early 2000s, drawing in prospective parents from various corners of the globe in search of cost-effective fertility options. Nevertheless, apprehensions regarding exploitation, objectification, and the welfare of surrogate mothers prompted the Indian authorities to implement regulatory changes to tackle these concerns. The Surrogacy (Regulation) Bill, 2019, was designed to outlaw commercial surrogacy and permit solely altruistic surrogacy for Indian nationals under stringent guidelines.

### *Legalization of Surrogacy in Ukraine:*

Ukraine has become a sought-after haven for those seeking international surrogacy,

providing accessible surrogacy services at a reasonable cost and a welcoming legal landscape for prospective parents. The year 2020 marked a significant milestone as Ukraine enacted laws to officially sanction surrogacy for both local and foreign intended parents, establishing transparent regulations governing surrogacy contracts, parental responsibilities, and the protection of surrogate mothers.

### *Bans and Restrictions on Surrogacy:*

In the realm of surrogacy, a divergence of perspectives emerges as nations tread different paths. While certain countries have gracefully embraced this practice, enacting liberal legal frameworks to regulate it, others have chosen to impose bans or impose heavy restrictions, casting a shadow over the entire concept. Countries such as France, Germany, and Italy have resolutely prohibited surrogacy, driven by ethical concerns that revolve around the commodification of women's bodies<sup>17</sup>, the potential for exploitation, and the fundamental rights of the children born through this method. These prohibitions have ignited legal battles and ignited fervent debates, delving into the intricate realms of reproductive rights and individual autonomy.

### *International Efforts to Address Surrogacy:*

In recent years, there has been a growing momentum in addressing the intricate legal and ethical issues surrounding surrogacy on a global level. Various organizations, such as the Hague Conference on Private International Law and the International Federation of Fertility Societies, have actively organized meetings and discussions to establish international guidelines and promote best practices in the field of surrogacy. Nevertheless, the task of reaching a consensus on surrogacy regulation remains arduous due to the wide array of cultural, legal, and ethical viewpoints pertaining to assisted reproduction.

The legal framework surrounding surrogacy has undergone substantial changes in recent decades, influenced by important court cases, legislative actions, and global initiatives aimed at tackling the intricacies of surrogacy. Although advancements have been achieved in defining the rights and obligations of surrogate mothers, intended parents, and children born through surrogacy, there are still obstacles to overcome in establishing consistent and widely accepted regulations for surrogacy, both within countries and across borders. Ongoing discussions, cooperation, and regulatory improvements are crucial in addressing

these hurdles and guaranteeing the ethical and fair implementation of surrogacy on a global scale.

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<sup>17</sup> Universiteit van Amsterdam on 2023-03-06





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