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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated 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

# **NAVIGATING THE LANDSCAPE OF COMMERCIAL SURROGACY: INSIGHTS FROM INDIA AND THE UNITED STATES**

AUTHORED BY: ANUSHKA SONI  
National Law University, Odisha

## **ABSTRACT**

This research paper investigates the significance of commercial surrogacy as a viable solution for addressing infertility and fulfilling family-building desires. Surrogacy, especially in its commercial form, provides options for couples who face challenges in conceiving, thereby raising important ethical, legal, and social considerations. The study conducts a comparative analysis of commercial surrogacy policies in the United States and India, two countries with markedly different regulatory environments. In the U.S., surrogacy is often governed by state laws, resulting in a patchwork of regulations that prioritize individual autonomy and contractual agreements. This decentralized approach fosters innovation but can lead to significant disparities in protections for surrogate mothers and intended parents.

Conversely, India has historically positioned itself as a hub for international surrogacy, driven by a combination of lower costs and less stringent regulations. However, recent policy changes have introduced stricter guidelines aimed at protecting surrogates and regulating the industry. This paper discusses the implications of these differing frameworks, highlighting the strengths and weaknesses inherent in each system.

The analysis suggests that while the U.S. model promotes personal choice, it often lacks adequate safeguards for surrogate mothers, who may be vulnerable to exploitation. Conversely, India's regulatory measures, though well-intentioned, may unintentionally limit access to surrogacy for many intended parents.

To create a more equitable and ethical surrogacy landscape, the paper proposes a hybrid model that incorporates the strengths of both countries' approaches. Recommendations include establishing standardized legal protections for surrogates, promoting transparency, and



ensuring fair compensation. By fostering a balanced regulatory environment, stakeholders can enhance the integrity and accessibility of commercial surrogacy, benefiting all parties involved while safeguarding ethical principles.

## **CHAPTER I- INTRODUCTION**

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*“The only freedom which deserves the name is that of pursuing our own good, in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it.”*

*- John Stuart Mill*

The word surrogacy finds its origin from the word ‘surrogatus’ which means a person in substitute for another, which here refers to an adult female. Surrogacy as we know today, is a medico-legal procedure where one woman carries a baby for intending parents and later give them back the baby once its born and get compensated for the same. The embryo in such procedures can be created with either the egg of the surrogate or the egg of the intending mother, and her male counterpart in heterosexual couples. In case of homosexuals, it has to be decided whose eggs or sperms are to be used in the process or they can go forward with choosing a known or an unknown donor. So eventually the surrogate mother does not have any genetic link with the foetus. Surrogacy is known to be a complicated process that has slowly been eased down by IVF professionals but is still very expensive and most unaffordable.

### **History of Surrogacy in India**

Commercial Surrogacy was legalised in 2002, which was done to increase medical tourism in India which in turn made India as a ‘hub for surrogacy’. Reasons for the increase for the demand of foreign and domestic couples to seek surrogates in India had a lot to do with the economic feasibility i.e. low costs. The surrogate industry was approximately \$2 billion a year<sup>1</sup>. The major problems with this sector was that it was unregulated which gave rise to abandonment of children by intending parents, poor medical facilities, low compensation to surrogates. The middleman and the clinics involved profited the most out of these cases leading to exploitation of these women.

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<sup>1</sup> Shetty, P. (2012) ‘The Lancet | The best science for better lives’ (The Lancet | The best science for better lives) <[www.thelancet.com](http://www.thelancet.com)> accessed 20 October 2022.

## CHAPTER II- INDIAN LAWS & SURROGACY

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### **Laws regulating Surrogacy in India**

In the 208<sup>th</sup> report the Law Commission of India recommended prohibition of commercial surrogacy for the main reasons that it was used predominately used by foreign nationals, no legal statute was in place, lack of awareness regarding surrogacy of the expecting mother. Consequently in 2015, Government of India banned surrogacy for foreign nationals and in 2019, Surrogacy (Regulation) Bill was introduced and passed by the Lok Sabha and the same received the assent of the President on 25<sup>th</sup> December, 2021 making it an act.

### **THE SURROGACY (REGULATION) ACT, 2021**

It starts with the establishment of surrogacy boards in both national and state levels. This act specifies that only altruistic surrogacy is allowed, putting a ban on commercial surrogacy. It defines altruistic surrogacy as the surrogacy in which no compensation except medical and insurance expenses can be provided. Eligibility of intending parents is a couple i.e. a man and a woman who are 21 and 18 years or more respectively, and eventually have be married for five years and provide proof that they are infertile. Moreover if they already have a child and cannot conceive a second child, they cannot go forward with surrogacy. This bill only allows one child to a couple. The surrogate mother has to be genetically related to the intending couple, bearing the age between the age of 25-35, married, and should have a child of her own. Any woman in the definition of this act be a surrogate once in her lifetime and lastly she cannot provide her gametes i.e. the egg for the procedure.

### **Why is this act problematic?**

Firstly, this act mandates the couple to be citizens of India, which bans any foreign nationals to seek surrogacy services here in India. Looking into the financial aspect, India was booming in the surrogacy industry and there were women who were duly compensated for their services which in turn helped them to lead a better life with higher living standards. Restricting it to domestic nationals who still battle from stigmas and taboos regarding infertility and adoption, surrogacy is a fairly new concept. Banning compensated surrogacy here would lead to other countries economizing on the same.

Secondly, this act is very restrictive and conservative in its approach for multiple reasons. As years pass by, the institutions of marriage and reproduction have evolved. People are no longer

getting married in their mid twenties and research shows that most of the issues regarding reproduction are caused because of this reason. As there are major lifestyle changes in both males and females, people now conceive late than early, roughly in their thirties. The more the age of the female, the more chances are there for her to have problem conceiving. Lifestyle changes are also a big cause for troubled pregnancies as now gender roles are blurry and both men and women are equally involved in every sphere of life which means equal stress levels, substance abuse etc. Diseases like PCOD, PCOS, thyroid, diabetes are major game changers in pregnancies which are very common now days. Restricting genetically connected women can be a major drawback which can be seen because firstly not every relative close to the couple may agree to conceive and the intending parents stand with their hopes on a woman who might be their only hope which acts as an indirect duress if we take into the emotional and psychological turmoil which the former goes through. Pregnancies are tough and now days as people are going into a nuclear family setup, with both husband and the wife working 9-5 jobs, it can definitely be a major life changing decision to bear a child for a different couple. A working woman would not be willing in such a setup to give away her job and comfort to bear a child without any compensatory benefits. The dark presumption here dates back to the medieval era where it was considered a sacred and a moral duty of a woman, to bear a child and conceive but times have changed now. Also here the state is definitely treating autonomous individuals well aware to take decisions about their body as a property, by restricting a woman who is not genetically connected to the couple to not be eligible as a surrogate, whereas the women who actually share close ties with the latter to be a surrogate. It leaves such a woman at a very vulnerable spot. Also, infertility can be determined within a year of trying to have a baby and the five-year bar before considering surrogacy as an option just seems very fatal.

Thirdly, female infertility is not seen as a factor to be considered. There can be situations where the egg of the female cannot be fertile and in such cases the embryo might not form. If the surrogate mother cannot in any condition give her eggs in this procedure such a couple might not be able to avail such services.

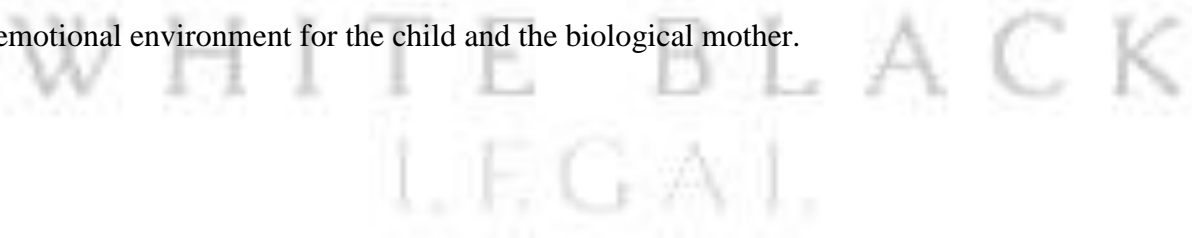
Fourthly, the act is not-inclusive of the LGBTQ communities, live-in couples and even people seeking to be single parents. Homosexuals and single parenthood is a reality now and denying them access to have children is a clear violation of the principle of equality. If at all they have to be differentiated from heterosexuals couples, there should be a rational nexus between the object to be achieved. Here, no such reason can be found which makes the law orthodox and

unconstitutional which will eventually be up for discussion in the coming future. There have been cases of couples going forward with surrogacy to have a genetic connect with the born child and they equally have the right to experience the same.

Fifthly, the act provides that only a married woman can become a surrogate which rules out unmarried woman who can be willing for bearing the child for the couple. This reinstates the idea of virginity and rules out women who might be willing to conceive without being married. Sexually active population is not necessarily married and that is what the law ignores.

Sixthly, there is no binding contract between the parties and that can result in major issues in this scenario. There can be circumstances where the surrogate mother might not be willing to give the new born to the couple and there is no compelling provision to mandate her to do the same. Pregnancy comes with hormonal changes that can be both emotional and physical for the expectant. India makes no such provisions and there can be a breach of an agreement which is not legally enforceable and provides no sanction for the same.

Seventhly, the advantages of commercial surrogacy are completely ignored. Such a surrogacy agreement was very simple where the surrogate was compensated for her services, medical expenses and insurance. The interaction between the baby and her was not as much because the connection sustained until the baby was born and both continued with their lives. Altruistic surrogacy now, in India mandates a close female relative to carry the child which means the interaction between the same would be more often which may lead to awkward and unhealthy emotional environment for the child and the biological mother.



## CHAPTER III- COMPARATIVE ANALYSIS

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### **United States of America:**

The topic of surrogacy agreements was first raised in the United States of America in the well-known Baby M case of 1980. Even though the nation at the time followed the New Jersey Supreme Court's limited stance on surrogacy agreements. However, as time went forward, judicial decisions such as Johnson v. Calvert, Bunzacca v. Bunzacca, and others allowed surrogacy arrangements to become legal ones<sup>2</sup>. Despite the fact that there is now no federal law on surrogacy in the nation, it is the most favorable country for such agreements. Understanding American surrogacy law is not an easy undertaking because it is quite complicated and varies from state to state.

North Dakota, the District of Columbia, Arizona, and Michigan are the States which forbid Surrogacy as a whole. The remaining states have either statutes in favour of surrogacy or the courts have given affirming orders for the same. In cases where there stands a legislation that prohibits, surrogacy is still seen to be carried out pretty smoothly with something as basic as entering into contracts by the involved parties and the courts can pass orders related to parentage for the same. The major distinctions and sameness in these cases are on same parameters, the first being the procedure determining parentage in the states. Mostly the parentage of the newborn is to be determined by the genetics of the child while gestation and law established in the states. Basically, once the court which is situated in any of these states confirms the parentage of such a child, then it does not matter whether the law in the state affirms the same or not. Also, under the 14<sup>th</sup> amendment any child who is born to a surrogate who is a US resident and intending parents, who reside outside US, will still hold a US citizenship when he/she is born, and no legal action will stand against it. He/she will be entitled to have a US passport, immediately. Further, I would discuss some jurisdictions in detail.<sup>3</sup>

### **California:**

Uniform Parentage Act governs the cases of surrogacy in the State of California. The intending parents are to be seen as natural and legal parents of the unborn child in cases where the surrogate mother is not biologically related to the child, such was held in the case of Johnson

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<sup>2</sup> Owner (2022) History of surrogacy: When did surrogacy become legal? Creative Family Connections. Available at: <https://www.creativefamilyconnections.com/history-of-surrogacy/> (Accessed: October 20, 2022).

<sup>3</sup> 'Chapter 2 - Definition of Child and Residence for Citizenship and Naturalization' (USCIS) <[www.uscis.gov/policy-manual/volume-12-part-h-chapter-2](http://www.uscis.gov/policy-manual/volume-12-part-h-chapter-2)> accessed 20 October 2022.

v Calvert (1993). Also in the case of Buzzanca(1998) wherein a non-genetically connected embryo was also held to belong to the intending couple which was implanted in the surrogate and they were held to be the legal parents of the child<sup>4</sup>. In the year 1999, the case of Delwit Balow v Bellamy was heard by the apex court where the name of a homogenous couple was put on the birth certificate of the child, paving way for the LGBTQ community to lawfully avail surrogacy services. Also, in numerous decisions, it was held that women can also be the legal parent of a child eventually bringing in single parenthood possible through surrogacy.

California has recently passed the California Assembly bill 1217, which has brought in new and improved provisions to help the dynamics related to surrogacy in the new social era<sup>5</sup>. The new law has provisions that provide that if an assisted reproduction agreement has been entered into parties can bring an action under the Uniform Parentage Act for helping establish their relationship with the child. The key points in the new law are as follows:

1. A separate legal counsel has to represent both the intended parents and the surrogate respectively.
2. Requires enrollment of gestational surrogacy agreements.
3. Such enrollment has to be done as the first stage before medication is given to the surrogate to start the biological procedure.
4. The parties have to attest to the agreement, including a penalty that can be levied on them in cases of perjury.
5. In the determination of parentage, this law states that the child would be under the parentage of the intended parents before birth.
6. Jurisdiction issues are cleared in the cases related to these agreements in the new law wherein any action related to it can be brought in the place where the baby would be born, either country where the intended parents or the surrogate resides, the country where execution of the agreement took place or lastly where the medical procedure would be performed.
7. The contract entered into has to be filed to the court to establish parentage.
8. All documents regarding these cases are to be protected except the two parties and the state Department of Social Services.

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<sup>4</sup> Johnson v. Calvert (1993) 'Supreme Court of California Decisions' (Justia Law) <<https://law.justia.com/cases/california/supreme-court>> accessed 20 October 2022.

<sup>5</sup> Katie (2014) 'California Surrogacy Bill is the Most Progressive in the World' (*Surrogate Parenting Services*) <[www.surrogateparenting.com/blog/new-california-surrogacy-bill-progressive-world](http://www.surrogateparenting.com/blog/new-california-surrogacy-bill-progressive-world)> accessed 20 October 2022.

## **Florida:**

Florida has a more restrictive approach when it comes to surrogacy but is more liberal compared to other states such as Washington D.C. Gestational as well as traditional surrogacy is allowed and governed by different statutes respectively. The Florida Statutes administer Gestational surrogacy in Chapter 742 wherein the 'surrogacy contract' has to be between 2 parties i.e. the 'commissioning couple' and the 'gestate surrogate'<sup>6</sup>. The surrogate agreeing for gestational surrogacy must be eighteen years or older. The intending parents should be legally married and both are 18 or above. The contract can be drafted in presence of a physician who will certify medical certainty.

The contract must contain:

1. Agreement of the couple that only the consent of the surrogate would matter when it comes to matters of clinical intervention and matters of pregnancy.
2. Agreement of the surrogate to go through necessary medical treatment and concur to instructions given to her by the medical professionals.
3. As the child is born, the surrogate has to agree to give up her right on such child and go forward with requisite judicial proceedings.
4. Regardless if the child is born with impairments, once he/she is born the commissioning couple has to assume all parental rights and responsibilities.
5. The surrogate has to agree to assume parental rights if neither one of the couple are genetically related to the child.
6. The couple has to pay only reasonable living, legal, medical, psychiatric expenses to the surrogate which are related to the period in and after the pregnancy is conceived and concluded.

## **New York:**

The Baby M case changed New York from being surrogacy friendly to anti-surrogacy. The main reason for the same was that the law which was prevailing that concentrated on adoption was not inclusive of surrogacy contracts. Therefore, surrogate contracts now stand to be void, unenforceable and against public policy. The New York court has interpreted surrogate contracts in line with trafficking of children generally. A task force was formed

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<sup>6</sup> *The Florida Senate Chapter 742 Section 15 - 2011 Florida Statutes - The Florida Senate*. Available at: <https://www.flsenate.gov/Laws/Statutes/2011/742.15> (Accessed: October 20, 2022).

in the year 1988, to look into issues relating to infertility, surrogacy etc. The report was titled as “Surrogate Parenting: Analysis and Recommendation for Public Policy”. After research, the force concluded that commercial surrogate parenting should be abolished as it cannot be differentiated from sale of children who can be at risk of being harmed. Surrogacy was seen as a practice which subverts women dignity, the child, and the whole process of reproduction. Inspired by the same, the 1992 statute was formed. It bases its foundation on family law and keeps surrogacy out of the purview of contract law. Consequently, surrogacy contracts are considered void and any payment to a surrogate or the middleman stands banned.

For clarity, the law does not prohibit voluntary and altruistic agreements, which are not commercial in nature. The other way of surrogacy agreements is for a woman to give up her child after birth voluntarily which is legal and acceptable practice in New York. In such a situation, the mother can be compensated medical expenses that arise from the pregnancy to childbirth. Anybody who enters into surrogacy contracts, can be made subject to civil penalties which can go up to \$500. Even felony charges can be instituted against the third party if they help in arranging any such contract and can be charged with a fine of \$10,000. Gestational surrogacy and traditional surrogacy are not distinguished in the state of New York<sup>7</sup>.

Therefore it can be concluded, that The USA, is not certain and completely uniform when it comes to surrogacy laws. If one state is liberal, the other state is highly restrictive but there are definitely options for an infertile couple to have a genetically related child one way or the other as it is easy for them to travel to the state where they can enter into a contract, which allows surrogacy. As the law varies so much, at the end it is left upto the courts to determine parentage and here the state interference is not seen to be hindering in the lives of civilians.

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<sup>7</sup> ‘Contract Pregnancies Exposed: Surrogacy Contracts Don’t Protect Surrogate Mothers and Their Children’ (*Public Discourse*) <[www.thepublicdiscourse.com/2017/11/20390/](http://www.thepublicdiscourse.com/2017/11/20390/)> accessed 20 October 2022.



## **CHAPTER IV- CONSTITUTIONAL ASPECTS AND SURROGACY**

### **Procreation and Constitutional Law**

All individuals have a right to reproduce which is guaranteed by the Indian Constitution which is synonymous to rights relating to marriage, family and even pregnancy. Though, it has not been expressly mentioned in the Constitution but it can be read with articles 19 & 21, and a woman's right to bear and give birth to a child can be her personal liberty. When we accept that right to procreation is an innate right, it becomes evident that people who are not able to procreate biologically can very well go forward with other means to achieve the same. Alternative methods can include both adoption and surrogacy. As technological advancements increase, surrogacy has become a very common recourse for such couples. Part III of the Constitution, i.e. the Fundamental Rights are known to be paramount and any law which goes against it is to be held void and ultra vires to the constitution. Indian courts in series of landmark judgments such as *AK Gopalan v State of Madras*, fundamental rights were held to be sacrosanct. Also, in the case of *Champakam Dorairajan*, fundamental rights were held to be rights which are sought by people.

In the case of *B.K Parthasarathi v Govt. of A.P.* was held that the right of reproductive autonomy was a facet of right to privacy u/a 21 of the constitution. This decision came as an inspiration from the decision in the case of *Skinner v State of Oklahoma*, where the US Supreme Court upheld that the right to reproduce was one of the fundamental civil rights of man<sup>8</sup>. The right of reproductive autonomy thus finds its roots in precedents. Therefore, such a right has to be free, personal and distanced from governmental control. Simply, if a person has made a decision to have a child through IVF, surrogacy in a democracy should be a personal decision and away from state hindrance.

In the case of *Hema Vijay Menon v State of Maharashtra*, "the right to motherhood" was recognized, which can mean that she can get pregnant, abort in due time, use contraceptives. This also means that she can procreate and also well in her rights, abstain from procreating.<sup>9</sup>

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<sup>8</sup> 'REPRODUCTIVE AUTONOMY: A VARIABLE DEPENDENT ON MARITAL STATUS - RGNUL Student Research Review (RSRR)' (*RGNUL Student Research Review (RSRR)*) <<https://rsrr.in/2018/10/27/reproductive-autonomy-a-variable-dependent-on-marital-status/#:~:text=Parthasarathi%20v.,of%20a%20right%20of%20privacy.>> accessed 20 October 2022.

<sup>9</sup> 'The emerging laws relating Surrogacy: A procreational right for Single Parent, Transgenders and Foreigners | SCC Blog' (*SCC Blog*) <[www.sconline.com/blog/post/2018/04/10/the-emerging-laws-relating-surrogacy-a-procreational-right-for-single-parent-transgenders-and-foreigners/](http://www.sconline.com/blog/post/2018/04/10/the-emerging-laws-relating-surrogacy-a-procreational-right-for-single-parent-transgenders-and-foreigners/)> accessed 20 October 2022.

## **International Law and Right to Parenthood**

The right to parenting is reflected in the ICCPR and UDHR. The Universal Declaration of Human Rights from 1948 and the International Covenant on Civil and Political Rights from 1966 both recognise the right to parenthood as a fundamental human right.<sup>10</sup> The ability to "create a family" is recognised as belonging to everyone, regardless of colour, ethnicity, or religion. According to the law, no one "shall be subjected to arbitrary or unlawful interference with his privacy, family, home, or communications, nor to unlawful attacks on his honour and character," and everyone has a right to legal protection from such intrusions or attacks. Additionally, the International Convention on the Protection and Promotion of The right to reproductive health and education is included in the 2006 Declaration on the Rights and Dignity of Persons with Disabilities. The entrenchment of reproductive rights in international law can be attributed to four broad health-related categories: (i) the right to start a family; (ii) the right to decide how many children to have; (iii) the right to family planning information and services; and (iv) the right to benefit from scientific advancement. It is implied that there is a right to procreation and reproductive health in the package of human rights outlined in international law in numerous human rights declarations.

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<sup>10</sup> McCrudden Christopher, 'Human Dignity and Judicial Interpretation of Human Rights' (*OUP Academic*, 1 September 2008) <<https://academic.oup.com/ejil/article/19/4/655/349356>> accessed 20 October 2022.

## CHAPTER V- CONCLUSION

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Bodily autonomy remains a fundamental principle in any legislation concerning women's rights, yet we continue to struggle to uphold this principle in the 21st century. The current surrogacy laws in India exemplify the ongoing stigma and societal baggage associated with women's sexuality and their bodies. This situation draws parallels to discussions about sex work, where the recognition of women's right to choose to engage in sex work is acknowledged by many progressives. While there are certainly issues of exploitation in that field, the solution is not to eliminate the profession entirely, but rather to create a safer, more regulated environment. Limiting options does not equate to protection.

Women should have the same right to engage in compensated activities involving their bodies—whether through sex work or surrogacy—as they do in other forms of employment. This perspective underscores the need for a shift in how we perceive surrogacy: it should be recognized as a legitimate choice for women, not stigmatized or restricted by outdated notions of morality or exploitation.

However, the concept of choice is complex and shaped by socio-political and economic factors. Despite these complexities, it is evident that surrogacy fundamentally relates to women's rights, embodying the core issues of physical freedom and decision-making. Empowering women to make choices about their bodies is essential for achieving true autonomy and equity in reproductive rights.

In conclusion, we must rethink our approach to surrogacy, embracing it as an extension of women's rights rather than a contentious moral issue. This change is crucial for fostering an environment where women can exercise their autonomy freely and safely.