

INTERNATIONAL JOURNAL OF LEGAL SCIENCE AND INNOVATION

[ISSN 2581-9453]

Volume 5 | Issue 5

2023

© 2023 *International Journal of Legal Science and Innovation*

Follow this and additional works at: <https://www.ijlsi.com/>

Under the aegis of VidhiAagaz – Inking Your Brain (<https://www.vidhiaagaz.com>)

This Article is brought to you for free and open access by the International Journal of Legal Science and Innovation at VidhiAagaz. It has been accepted for inclusion in International Journal of Legal Science and Innovation after due review.

In case of **any suggestion or complaint**, please contact Gyan@vidhiaagaz.com.

To submit your Manuscript for Publication at **International Journal of Legal Science and Innovation**, kindly email your Manuscript at editor.ijlsi@gmail.com.

Surrogacy: A Comparative Analysis between India and US, 2022

POORVI GYANCHANDANI¹

ABSTRACT

“To the world, you may be one person, but to one person you may be the world.”

Surrogacy is derived from the Latin word “surrogatus”, which means a person appointed to act in place of another person. Surrogacy is the process of carrying and delivering a child to the biological mother. A woman who cannot be a mother under normal circumstances or voluntarily decides to go for surrogacy chooses another woman who is in fit and healthy condition to keep the baby in her womb for a period of 9 months, later delivering and handing over the baby to the biological parents. It is a type of assisted reproduction in which a woman assents to becoming pregnant for the purpose of giving birth to a child who will be raised by others. Surrogacy has started to become the new normal. If you take a look around 4-5 years back, people were not aware of what surrogacy was and could not believe the fact that medical science has advanced so much that such a thing even exists. A woman who is unable to become a mother now has numerous options for experiencing motherhood through the process of surrogacy.

Keywords: *Surrogacy, baby, parents, analysis.*

I. INTRODUCTION

Surrogacy is derived from the Latin word "surrogatus", which means a person appointed to act in place of another person. Surrogacy is the process of carrying and delivering a child to the biological mother. A woman who cannot be a mother under normal circumstances or voluntarily decides to go for surrogacy chooses another woman who is in fit and healthy condition to keep the baby in her womb for a period of 9 months, later delivering and handing over the baby to the biological parents. It is a type of assisted reproduction in which a woman assents to becoming pregnant for the purpose of giving birth to a child who will be raised by others. Surrogacy has started to become the new normal. If you take a look around 4-5 years back, people were not aware of what surrogacy was and could not believe the fact that medical science has advanced so much that such a thing even exists. A woman who is unable to become a mother now has numerous options for experiencing motherhood through the process of

¹ Author is a student at IFIM Law School, Bangalore, India.

surrogacy.²

II. TYPES OF SURROGACIES

There are two types of surrogacies³ :

1. Traditional surrogacy
2. Gestational Surrogacy

In traditional surrogacy, the intended father's or donor's sperm is utilized to artificially inseminate the surrogate. As a result, her egg is fertilized, and the child is genetically related to her. The pregnancy is carried out by the surrogate, who gives birth to the baby. The intended parents, in particular, face greater legal risk in this form of surrogacy.

The first successful case of gestational surrogacy, also referred as host surrogacy, occurred in 1986.⁴ In the case of gestational, the surrogate is not genetically related to the baby. Unlike traditional surrogacy, here an embryo made in vitro fertilization (IVF) using the intended parent's or parents' genetic material (eggs and/or sperm) and/or the genetic material of the donor results in the conception of the child. The produced embryo is placed in the surrogate's uterus, and she uses it to carry the pregnancy and give birth.⁵

Gestational Surrogacy is the only surrogacy that is legal and permitted under Indian law. Only three states, Louisiana, Michigan, and Nebraska, however, have it outlawed completely.

III. EVOLUTION OF SURROGACY

The basic and initial roots of surrogacy were first introduced in Egypt, where it was believed that if a woman could not have a child, then she might undertake different practices of giving this option to another woman to bear the biological child of her husband for the purpose of saving their marriage. This process was not prevalent in common places but was an act and not an offense under the eyes of the law.⁶

The "Book of Genesis" contains the earliest known mention of surrogacy. The infertile Sarah handed her husband her servant Hagar to serve as the mother of his child because the married pair, Abraham, and Sarah, were unable to conceive on their own. Despite Hagar's involvement

² Nayana Hitesh Patel et al., *Insight into different aspects of surrogacy practices*, 11 J. HUM. REPROD. SCI. 212–218 (2018).

³ R. S. Sharma, *Social, ethical, medical & legal aspects of surrogacy: An Indian scenario*, 140 INDIAN J. MED. RES. 13–16 (2014).

⁴ Antim Amlan, *Is Surrogacy legal in India*, MYADVO, (Aug. 1 2022, 9:30PM), <https://www.myadvo.in/blog/surrogacy-laws-in-india-an-evaluation>.

⁵ *Id.*

⁶ Dev P Bhardwaj, *Surrogacy in India*, LEGAL SERVICE JOURNAL(2018).

in the birth, Sarah and Abraham were regarded as the parents of the child.

3. Lawyer Noel Keane mediated the first surrogacy contract in legal history in the year 1976. This was a conventional surrogacy, and the surrogate received no payment for carrying the child. The Infertility Centre, which would facilitate hundreds of surrogate pregnancies each year and play a significant part in the history of surrogacy in the United States, was founded by Keane using this expertise.
4. The first surrogacy in which the birth mother was compensated was the case of Elizabeth Kane in the year 1980. She was paid \$10,000 to give birth for another couple. She was unprepared for the hardships she faced after giving birth to the infant, despite the fact that she had already finished her family and given a child up for adoption. She ultimately came to regret her choice, as she detailed in the book "Birth Mother."

(A) Indian history of surrogacy

The stories about surrogacy in Hindu mythology show the ongoing secrecy surrounding the practice. In the Mahabharata, Maharishi Bhardwaj witnessed a divine nymph emerge from the water after taking a bath. He felt discerned upon seeing such a lovely woman and placed his sperm in the Darona, a yagna pot. Dronacharya, who was given the vessel's name at birth, was born here. The 24th Tirthankara, Mahavira, was born following the transfer of an embryo from one woman to another's womb thousands of years after the biblical events of 599 AD. He is one of the key figures in Jain mythology. Devananda, wife of a Brahmin named Rishabhadeva, conceived him. The embryo was cleverly moved to Trishala's womb by the gods.⁷

IV. COMMERCIALIZATION OF SURROGACY IN INDIA

In India, the year 2002 was marked by the recognition and legalization of commercial surrogacy, resulting in significant growth. Due to this, several commercial firms started introducing surrogacy law as their area of specialization and helped foreigners who wanted to hire an Indian woman to act as a surrogate mother. By assisting them with the necessary contractual agreements and paperwork related to surrogacy and assisting in the process of getting a passport and visa for the child to have a straightforward departure, this created pathways for the establishment of various branches of foreign businesses in India and diversification across the globe.

According to the 228th Law Commission Report, India believes that commercial surrogacy should be prohibited. The Indian Council of Medical Research (ICMR) has released certain

⁷ SURROGACY, https://surrogacy.ru/en/surrogacy/surrogacy_history/ (last visited Aug. 6, 2022).

information to regulate surrogacy arrangements. The guidelines mentioned what entitlement a surrogate mother possesses, i.e., in the form of monetary compensation. The surrogate mother will sign a contract with the husband and wife that will be decided upon beforehand by the couple and the surrogate mother.⁸

V. A COMPARATIVE ANALYSIS OF SURROGACY LAWS IN DIFFERENT COUNTRIES⁹

1. United States of America¹⁰

Surrogacy has historically been regulated at the state level in the United States. A number of state legislatures passed laws banning surrogacy in the wake of the infamous Baby M case in the late 1980s in an effort to prevent a situation similar to that one from happening again. In the Baby M case, a "traditional surrogate" decided to break her surrogacy contract and fight to keep the genetically related baby she had carried. The United States has a variety of surrogacy laws because of the implications of having a federal structure, although overall they appear to have favoured a laissez-faire attitude to legislating surrogacy arrangements. This section discusses the characteristics of American laws governing assisted reproductive technology (ART) and surrogacy. In contrast to the UK, there is no established national policy regarding surrogacy in the US. Surrogacy in the USA is governed by a patchwork of state laws that fall under four major categories of legal policy. 1) Prohibition 2) inaction 3) Status regulation, contractual ordering. The law governing surrogacy in the USA is quite intricate because it varies by state. States in the United States have different surrogate motherhood laws. Surrogacy is prohibited in some states but is legal in others. Since the USA is a federal nation, states are free to enact surrogacy laws. The US Supreme Court could utilize the commerce clause, substantive due process, or the idea that the right to procreate includes the right to surrogacy as the foundation for major legislation. The American Bar Association Model Act Governing Assisted Reproductive Technology, 200821, which supports the argument for uniform law, is the only significant surrogacy statute in the US. Some states have passed thorough laws that acknowledge and govern surrogacy, including court-approved surrogacy contracts with binding clauses that establish predetermined legal relationships.

2. India¹¹

In India, commercial surrogacy is permitted. Although the Indian Council of Medical Research

⁸ Dev, *supra* note 6.

⁹ Kriti Bhatia, Shubh Pareek & Saloni Bahl, *Comparative Study on Surrogacy Laws around the World*, 7 WWW.PENACCLAIMS.COM 1–10 (2019).

¹⁰ Shivani Sethi, *A Comparative Study of Surrogacy Laws in India and U.S*, LAW TIMES JOURNAL (2020).

¹¹ *Id.*

(ICMR) has established "National Guidelines" to regulate surrogacy, they are merely guidelines and there is currently no legislation in India that regulates surrogacy. This indicates that a "contract" must be signed by the surrogate mom and the childless pair. Furthermore, there are no provisions stating the consequences of breach of contract. It is questionable if these contracts can be enforced.¹² A surrogate agreement in India may be ruled void under section 23 of the Indian Contract Act, 1872, based on the grounds that it is immoral or against public policy. Not only that, but the idea of surrogacy has also been incorporated into Indian society as a means of commerce and surrogate tourism for international couples. They pay a lot less than they would in wealthy nations like the United States and the United Kingdom. There is no paperwork required, the spouses don't have to go through attorneys, and there is no litigation because it is a clean issue. The moral and ethical undertones on which public policy considerations are based must essentially color the legal perspective on surrogacy. It is crucial to outline the main ethical difficulties involved in this situation because the courts will need to deal with it. The Draft Assisted Reproductive Technology Regulation Bill and Rules (2013) seeks to regulate an "industry" that has been rapidly increasing in India, largely as a result of an increase in demand from international couples looking for surrogacy arrangements that are reasonably priced. This essay makes a start in this direction by arguing that there hasn't really been any public discussion of the ethical, social, and medical issues surrounding infertility and surrogacy in our culture.

VI. LANDMARK CASE LAWS

1. **Baby Yamji Mada v. Union of India 1968**¹³

A Japanese couple used an Indian surrogate mother to conceive their child, Baby Manji Yamada, but the pair split up before the baby was even a month old, leaving the child's future uncertain. The child's biological father, Ikufumi Yamada, attempted to bring the child to Japan, but neither the Japanese government nor the legal system permitted it.¹⁴

In the end, the Supreme Court of India had to step in, and the youngster and her grandmother were given permission to leave the country. The Baby Manji Yamada decision had the biggest impact since it led to the Indian government passing regulations regulating surrogacy. In 2008, the Supreme Court of India ruled that surrogacy was acceptable in India following the Manji

¹²Ranjana Kumari, *Surrogate Motherhood-Ethical or Commercial*, CENTRE FOR SOCIAL RESEARCH,(2020).

¹³ Baby Manji Yamada v. Union of India & Another, (2009) 13 SCC 518.

¹⁴ Case Law, *REPORTABLE IN THE SUPREME COURT OF INDIA CIVIL ORIGINAL JURISDICTION Dr D Y CHANDRACHUD , J*, 1950 1–21 (2014).

case. This choice gave foreigners more reason to choose India as their surrogacy destination.¹⁵

2. Jan Balazz v. Anand Municipality¹⁶

In this instance, the Gujarat High Court ruled that the surrogate mother had to deliver the child to the German couple who had requested the assistance of an Indian surrogate mother in order for the child to receive an Indian passport, which verifies his citizenship, and for the surrogate mother's name to appear on the birth certificate rather than the biological mother's.

The Supreme Court is still considering an appeal against this ruling, and during the hearing it saw a pressing need to address the issue, which allowed for the introduction of the proposed measure from Parliament. Due to the scholarly curiosity sparked by all of these cases, a bill banning surrogacy that prohibits foreigners from seeking Indian mothers for surrogacy has been passed.

The prohibition is already in effect, according to a letter from the ICMR sent to all clinics in India on September 28, 2015, telling them not to help international couples who want to become parents through an Indian surrogate mother.

VII. THE SURROGACY ACT, 2021

Early in December 2021, the Indian Parliament passed two legislation that later became historic laws, the Surrogacy (Regulation) Act and the Assisted Reproductive Technology (Regulation) Act. The Surrogacy (Regulation) Bill was previously passed by the Lok Sabha, but it was unable to be passed by the Rajya Sabha, sending it to a Parliamentary Standing Committee for consideration. The Surrogacy (Regulation) Act, 2021, which regulates the practise and procedure of surrogacy, was approved by the President on December 25, 2021. The key features of the surrogacy (Regulation) Act, 2021 are as follows:

- Commercial surrogacy is categorically prohibited, and only charitable surrogacy is permitted.
- Unless licensed under this Act, no surrogacy clinics shall engage in any surrogacy-related activities or procedures or hire any individual who does not meet the requirements outlined in the Act.
- Within sixty days following the relevant authority's appointment, each clinic that provides surrogacy treatments must apply for clinic registration. Every three years, the

¹⁵ Sanskar Garg, *A Study on Surrogacy: Issues and Perspectives in Indian Scenario*, LEXPEEPS, (Jul 30, 2022, 6:30PM), <https://lexpeeps.in/a-study-on-surrogacy-issues-and-perspectives-in-indian-scenario/>.

¹⁶ Jan Balazz v. Anand Municipality, AIR 2010 GUJ 21.

registration must be renewed.

- Gynaecologists, embryologists, surrogacy facilities, and other sorts of medical professionals are not permitted to practice or promote commercial surrogacy in any way. The 2021 Act only permits surrogacy for charitable purposes.
- The intended couple must consist of a legally married Indian man and an Indian woman who are both between the ages of 25 and 50 and have never given birth to a child naturally, through adoption, or through surrogacy.
- The surrogate mother must be an Indian woman between the ages of 35 and 45 in order to use surrogacy. Every woman is only permitted to use a surrogate mother once in her lifetime.
- When an intended couple needs a surrogate due to a medical ailment, the National/State Assisted Reproductive Technology and Surrogacy Board must provide a "Certificate of Essentiality/Infertility."
- All known side effects and post-operation repercussions of such a procedure must be thoroughly disclosed to the surrogate mother. The surrogate mother must also give her written, informed consent in a language that she can understand.
- The National Assisted Reproductive Technology and Surrogacy Registry must be created in order to register surrogacy clinics under this Act. In addition to the Centre, each State and Union Territory must establish an equivalent Board for surrogacy cases.

Any couple that engages in commercial surrogacy will be penalised under the Surrogacy (Regulation) Act of 2021 with up to five years in prison and punishment of up to Rs. 50,000, and up to ten years in prison and a fine of up to Rs. 1,000,000 for a subsequent crime. Any individual, group, or facility involved in the exploitation of surrogate mothers or children born through surrogacy may be punished with up to 10 years in prison and a fine up to Rs 10 lakhs.

VIII. CONSTITUTIONAL SCRUTINY OF THE SURROGACY (REGULATION) ACT, 2021¹⁷

The major hurdle in our country is creating a balance between varied interests lying between both the parties entered into the surrogacy contract. To start with, it is the responsibility of the state to protect the surrogate mothers in order to provide them security from being exploited along with protecting the rights of the unborn child. In addition to that, it should be the right of the woman to make her own free reproductive choices and the rights of the intended parents.

¹⁷ Bhumika Indulia, *Surrogacy (Regulation) Act, 2021*, SCC, (Jul. 31, 2022, 3:00AM), <https://www.sconline.com/blog/post/2021/12/27/surrogacy-regulation-act-2021/>.

The regulations under Indian surrogacy are yet to find an accurate balance between these conflicting interests.

It was rightly observed by the Supreme Court in *Devika Biswas v. Union of India* that the right to reproduction is an essential ingredient of 'Right to Life' guaranteed under article 21 of the Indian Constitution. The right to reproduce encompasses the ability to conceive, give birth, and nurture children. Therefore, restricting surrogacy to only heterosexual couples in a certain age range results in a partial imbalance. A possible infringement of both Article 21 and Article 14 of the Indian Constitution is the total denial of the right to make reproductive decisions to groups including single persons, elderly couples, and LGBTQ+ couples. According to experts, the Surrogacy (Regulation) Act, 2021's conflicting sections would not be able to safeguard the rights and interests of intended parents and surrogate mothers. It has been feared that these flaws may encourage the growth of an unauthorised industry for surrogacy services. As surrogacy should be acknowledged as a reproductive right available to all persons regardless of their standing in the community, concerns have been expressed about hurdles like age restrictions and barring gay couples, not helping in the advancement of society. Indian society is evolving dramatically from patriarchal norms to a more feministic ethos as a result of the revolution the country is through. As a result, there is scepticism regarding the existing surrogacy legislation's ability to advance Indian society.¹⁸

IX. THE ADVANTAGES AND DISADVANTAGES OF BEING A SURROGATE MOTHER¹⁹

It is one of the beautiful feelings to create a new family any surrogate can ask for. It becomes obvious that before starting this path, the majority of women would like to weigh the benefits and drawbacks of becoming surrogate moms. There are a few small drawbacks to being a surrogate that one should be aware of even if the majority of surrogates think their experience is great and lovely.

Women can choose to become surrogates for a number of reasons. The majority of surrogate moms find it to be tremendously gratifying and pleasant to have the opportunity to contribute to the happiness of another family. Below are a few additional benefits and rewards of making this important life choice.

X. THE ADVANTAGES OF BEING A SURROGATE MOTHER

¹⁸ Priyanka Mangaraj, *Surrogacy Regulations in India: Surrogacy (Regulation) Act, 2021*, LEGALBOTS, (Aug. 5, 2022, 6:30PM), <https://legalbots.in/blog/surrogacy-regulations-in-india-surrogacy-regulation-act-2021>.

¹⁹ *Surrogacy Pros & Cons: What You Should Know*, THOMPSON DOVE LAW GROUP LLC., (Jul. 31, 2022, 5:24PM), <https://tdlawgroup.com/home/surrogacy-and-assisted-reproduction/surrogacy-information/surrogacy-pros-cons/>.

- Surrogacy is a gratifying experience

The joy of bearing a child for a parent who is unable to do so themselves is unmatched. The majority of surrogates feel content and accomplished as they reflect back on their experience. Typically, surrogate mothers are kind, sympathetic people who have a great desire to aid those in need. Giving those who struggle with infertility the chance to conceive a child and complete their family can be a life-changing experience that brings happiness and fulfilment to all parties involved.²⁰

- Surrogates may experience subsequent pregnancies

The majority of women who decide to become surrogate moms genuinely love being pregnant. Experience as a mother is one requirement for surrogates. One can enjoy being pregnant once more without having to worry about raising the child alone if one decides to carry for someone else. Surrogates are compensated well.

The devotion, sacrifice, and risk-taking of gestational carriers are compensated. In exchange for their readiness to bear a child, surrogates frequently received payments of \$50,000–\$60,000. Travel and medical costs are also covered. Receiving health insurance during the surrogacy process is an additional perk. The compensation which the surrogate mother gets can help her in paying off her debts, loans and can assist in her buying a new home for her family altogether

- Surrogates are legally guarded

Once the matching has taken place, legally binding contracts are put in place to protect both the intended parents and one as the surrogate mother. These agreements clarify each party's responsibilities for ensuring a healthy pregnancy. The contract will also reaffirm that one has no further obligations to the child after birth.

XI. THE DISADVANTAGES OF BEING A SURROGATE MOTHER

While gestational surrogates can provide hopeful couples the gift of life, there are some risks and drawbacks also to consider.

- Surrogacy is emotionally and physically exhausting.²¹

To make sure they are healthy enough to carry a child to term, prospective surrogates must

²⁰ Melinda Guy, *The Pros and Cons of Being a Surrogate Mother*, FAMILY TREE, (Aug. 2, 2022, 6:21PM), <https://familytreesurrogacy.com/blog/pros-cons-surrogate/>.

²¹ Chohan & Manveer, *Pros and Cons of Surrogacy*, COURSE HERO, (Aug. 2, 2022, 4:02PM), <https://www.coursehero.com/file/84244035/Pros-and-Cons-of-Surrogacy-Chohan-TM1Ddocx/>.

submit to a battery of medical exams and screenings. One needs to manage all the physical demands of pregnancy, go to appointments, and get care. Being a surrogate is a difficult emotional decision. It's a great responsibility to carry a child for another person, and most surrogates go through ups and downs along the way.

- The surrogacy procedure takes time.

Being a surrogate mother demands dedication and a protracted application process. There are several monitoring appointments to attend between submitting the online application and delivering the baby. It takes a few months to complete the medical process and the legal contract. Surrogates should avoid making any significant preparations to leave their state or nation during this time, as the complete procedure typically takes 12 months or longer.

- Pregnancy through surrogacy involves health concerns and prescription medicines.

A pregnancy always entails some risk, just like any other pregnancy. There's a potential that one won't become pregnant after the initial transfer, and pregnancy difficulties could harm one's health. If one is considering embarking on this adventure, she must determine whether she can emotionally withstand the risks. Medication is a part of every cycle of gestational surrogacy. Birth control may be administered to surrogates. Estrogen and progesterone may be used in additional drugs. As a surrogate, one will also have blood tests and ultrasounds to make sure the cycle is proceeding normally.. Some women are a little taken aback by the number of heavy-dose medications prescribed both before and during pregnancy.

XII. CONCLUSION

A complex web of social, ethical, legal, and technological concerns surrounds surrogacy. Surrogacy is not simply a legal issue that needs to be thought through; society as a whole also needs to consider it as a social issue and deal with it in a way that preserves our ethical principles while also allowing us to benefit from the developing technology. In order to create such legislation, governments must consider the relevant stakeholders. To create best practises in surrogacy contracts with the fewest ethical lapses, it is necessary to consider the individual experiences of surrogates.²²

States need to understand that for some women, becoming a surrogate mother is a respectable career they choose to engage in. To stop any exploitation of surrogate mothers and intended parents, strict regulation of surrogacy agents and clinics is necessary. However, because it has

²² Radhika Yadav & Pavan Kasturi, *A Comprehensive Analysis on Reproductive Health and Surrogacy in India: A Study on the Law, Policy, and Practice*, SCC, (Aug. 10, 2022, 3:44PM), <https://www.sconline.com/blog/post/2021/09/27/reproductive-health-and-surrogacy-in-india/>.

not yet taken effect, there is still a potential for it to be modified to better suit the needs of the society and the people who make up it. Therefore, parliament should take advantage of this chance to fulfil its duties, close any legal gaps and weaknesses, and create a comprehensive statute that is free of flaws and violations of the law and can withstand judicial scrutiny.
