

## WOMEN'S RIGHTS, AND SURROGACY: THE EXPLOITATION OF FAIR SEX CONTINUES

Harpreet Kaur\*  
Prof. (Dr.) Geeta Joshi\*\*

### ABSTRACT

*The scientific age, marked by advancements in reproductive technologies, has significantly impacted the discourse on women's rights, particularly in the context of surrogacy. This practice, where a woman carries and gives birth to a child for another person or couple, raises complex ethical, legal, and social questions. While surrogacy offers a solution for couples facing infertility, it also raises concerns about the potential exploitation and commodification of women's bodies. This paper explores the intricate relationship between scientific advancements, women's rights, and surrogacy. It explores the varying legal frameworks across different jurisdictions, highlighting the disparities in protection offered to surrogate mothers. It delves into the positive aspects of surrogacy, such as addressing infertility and improving reproductive outcomes, while also critically examining the potential for exploitation and the commodification of women. The paper also shed a light on the Commercial surrogacy, which a contentious issue and banned by many countries such as in India **The Surrogacy (Regulation) Act, 2021 section 4(ii) (c)** which allowed the altruistic form of surrogacy and prohibits the commercial surrogacy similarly, The European Union, **Article 3 of the Charter of Fundamental Rights of the European Union** also makes commercial surrogacy illegal but where permitted as in some states of USA(California), it offers numerous benefits such as it allows single people and others who traditionally been unable to produce children, such as LGBTQ community, to do so. Further, it also pushes the society boundaries and can be seen as an empowering choice for women by allowing them to make choices after informed consent about their reproductive capabilities and earn financial compensation for their services. Author/s by analysing relevant case studies and legal frameworks and comprehensively review of academic articles, books, and legal documents related to surrogacy, women's rights, and reproductive health this research aims to illuminate the ethical dilemmas and challenges associated with surrogacy and its commercialization. Ultimately, this paper advocates for a balanced approach that prioritizes the well-being of both surrogate mothers and intended parents, while upholding women's rights and ensuring the ethical practice of surrogacy by giving priority to fair sex.*

**KEYWORDS:** Reproductive technologies, Commercial, Surrogacy, Women Rights, Scientific Advancements, Legal Framework.

### 1. INTRODUCTION

The intersection of scientific advancements and women's rights has opened new horizons while also rekindling age-old debates about ethics, autonomy, and equity. One of the most contentious topics in this space is surrogacy—a practice where a woman carries a pregnancy for another individual or couple, often as a solution to infertility. While surrogacy represents a remarkable achievement in reproductive technology, enabling countless people to realize their dreams of parenthood, it has also sparked a host of ethical, legal, and social questions. Chief among these is the concern about the exploitation and commodification of women's bodies, particularly in the context of commercial surrogacy. This introduction seeks to explore the intricate relationship between surrogacy and

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\* Senior Research Fellow, Department of Laws, Panjab University, Chandigarh.

\*\* Professor, Department of Laws, Panjab University, Chandigarh.

women's rights, focusing on the ongoing challenges and contradictions inherent in this practice.

The era of advanced reproductive technologies has significantly expanded the options available to individuals and couples facing infertility or other barriers to natural conception. Surrogacy, whether traditional (where the surrogate's egg is used) or gestational (where the surrogate carries an embryo created via in-vitro fertilization), has emerged as a powerful tool for addressing reproductive challenges. These technologies have pushed the boundaries of parenthood, offering possibilities to single individuals and members of the LGBTQ+ community who might otherwise have been unable to have biological children. However, while scientific advancements have made surrogacy possible, they have also magnified its ethical and legal complexities. The very mechanisms that enable surrogacy—medical procedures, contracts, and financial transactions—raise questions about the commodification of human reproduction. Critics argue that surrogacy, particularly its commercial form, risks reducing pregnancy and childbirth to a transactional relationship, where a woman's body is treated as a means to an end.

## 1.1 RESEARCH QUESTIONS

1. What are the ethical and emotional issues of surrogate mothers, intended parents, doctors etc and to fill the gap of natural affection in a child born through surrogacy,
2. How commercial surrogacy addresses women's rights, of bodily autonomy, and economic justice?
3. What role/procedure do surrogacy agencies and fertility clinics, play in implementing the Surrogacy (Regulation) Act, 2021?

### 1. Scientific Advancements and the Rise of Surrogacy

The rise of surrogacy as a solution for infertility and alternative family-building is inseparable from the profound advancements in reproductive technologies, particularly in-vitro fertilization (IVF) and preimplantation genetic diagnosis (PGD). IVF, developed in the late 20th century, has revolutionized reproductive medicine by enabling the creation of embryos outside the human body. This process involves extracting eggs from a woman's ovaries, fertilizing them with sperm in a laboratory, and then implanting the resulting embryos into the uterus. Initially a breakthrough for infertile couples, IVF has since been widely adopted as the foundation for surrogacy, as it allows embryos created from the genetic material of intended parents to be carried by a surrogate mother.<sup>1</sup> PGD has further enhanced the success and appeal of these procedures by enabling the

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<sup>1</sup> Virginie Rozée, Sayeed Unisa, *et.al.*, “.”, the Social Paradoxes of Commercial Surrogacy in Developing Countries: India Before the New Law of 2018” 20 *BMC Women's Health* 1-14 (2020).

screening of embryos for genetic disorders before implantation, significantly increasing the chances of healthy pregnancies and births. These technologies have not only addressed biological barriers to reproduction but also empowered individuals who are unable to conceive or carry a child to still have biological offspring.<sup>2</sup>

Surrogacy's viability as a reproductive option has also been bolstered by advancements in fertility preservation methods such as egg and sperm freezing, hormone therapies, and improved techniques for embryo transfer. These innovations have expanded the range of people who can access surrogacy, including cancer survivors who have preserved their reproductive cells and LGBTQ+ individuals seeking biological children. For instance, gay male couples can use IVF in conjunction with a surrogate and a donated egg to achieve parenthood. Similarly, single individuals desiring biological children have found surrogacy to be an inclusive and viable pathway. These medical advancements have dismantled traditional reproductive limitations, enabling family-building in ways that were once deemed impossible.<sup>3</sup>

Social and cultural factors have also played a significant role in the increasing demand for surrogacy. The growing acceptance of assisted reproductive technologies has reduced the stigma surrounding infertility and non-traditional pathways to parenthood. Changing societal norms, such as the delay in marriage and childbearing due to career or personal priorities, have led to an increase in individuals seeking alternatives like surrogacy when natural conception is no longer viable. Additionally, the broader acceptance of diverse family structures, including same-sex couples and single parents, has contributed to a surge in demand for reproductive services. Media portrayals of surrogacy, often showcasing high-profile celebrities and successful outcomes, have further normalized and popularized this practice, creating an aspirational model for many.

Moreover, the globalization of surrogacy has influenced its accessibility and demand. Cross-border surrogacy arrangements, where intended parents seek surrogates in countries with more affordable or permissive surrogacy laws, have added a layer of economic and cultural complexity to the practice. Countries like the United States, particularly states such as California, have positioned themselves as hubs for surrogacy due to robust legal protections and advanced

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<sup>2</sup> Ido Alon, Zacharie Chebance, *et.al.*, "Mapping International Research Output Within Ethical, Legal, and Social Implications (ELSI) of Assisted Reproductive Technologies" 40 *Journal of Assisted Reproduction and Genetics* 2023-2043 (2023).

<sup>3</sup> Sharon Shakargy, "Choice of Law for Surrogacy Agreements: In the In-Between of Status and Contract" 16 *Journal of Private International Law* 138-162 (2020).

healthcare infrastructure.<sup>4</sup> Conversely, in countries like India, the availability of commercial surrogacy until recent bans created a cost-effective option for international clients, reflecting the economic and legal disparities that often define surrogacy markets.<sup>5</sup>

## 2. LEGAL AND ETHICAL FRAMEWORKS OF SURROGACY

### 2.1 International Legal Perspectives:

The international legal landscape of surrogacy is incredibly diverse, with some countries prohibiting it entirely, while others permit it with varying degrees of regulation. Key concerns include the potential exploitation of surrogate mothers, particularly in countries with less robust legal protections, and ensuring the best interests of the child, including their identity, nationality, and access to information about their origins. Cross-border surrogacy arrangements raise complex legal questions regarding jurisdiction, parental rights, and child citizenship. The lack of a single international legal framework creates significant challenges for individuals and families involved in these arrangements.<sup>6</sup>

Here are some countries where surrogacy is legal, though regulations vary significantly:

- **United States:** Some states allow commercial surrogacy, while others have restrictions.
- **Canada:** Allows altruistic surrogacy (where the surrogate receives minimal or no compensation beyond expenses).
- **Mexico:** Known for its more liberal surrogacy laws, allowing for commercial arrangements.
- **Georgia:** A popular destination for international surrogacy.
- **Ukraine:** Allows surrogacy for married heterosexual couples.
- **Colombia:** Has become an emerging destination for international surrogacy.

On the other hand, there are several countries have outright bans on surrogacy, both commercial and altruistic. Here are some examples:

- **France:** Surrogacy is considered illegal and against public policy.

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<sup>4</sup> A. Shaji George, "Artificial Womb Technology: Analyzing the Impact of Lab-Grown Infants on Global Society" 1.1 *Partners Universal International Innovation Journal* 106-120 (2023).

<sup>5</sup> Sujata N. Patil, S. M. Madiwalar, *et.al.*, "Machine Learning Techniques to Improve the Success Rate in In-Vitro Fertilization (IVF) Procedure" 1 *IOP Conference Series: Materials Science and Engineering*. Vol. 925. No. 1 (2020).

<sup>6</sup> Alexandria Hammond, "Canadian Surrogacy as an Ideological Struggle" *McGill University, Canada*, (2023).

- **Germany:** The German Embryo Protection Act prohibits surrogacy to prevent reproductive exploitation and uphold the dignity of pregnancy.
- **Italy:** All forms of surrogacy are banned.
- **Sweden:** Surrogacy is prohibited, although there have been discussions about potential changes to the law.
- **Spain:** Surrogacy is illegal, and any agreements made abroad are not recognized.<sup>7</sup>

The legal status of surrogate mothers and their rights vary significantly across jurisdictions. Countries with legal surrogacy often prioritize the surrogate's well-being, ensuring informed consent, adequate medical care, and fair compensation. In contrast, countries with restricted or prohibited surrogacy primarily focus on concerns about exploitation of women and the commodification of children, resulting in limited or non-existent rights for surrogate mothers. Key legal and ethical considerations include ensuring informed consent, preventing exploitation, prioritizing the child's best interests, and addressing complexities arising from international surrogacy arrangements.<sup>8</sup>

## 2.2 Ethical Considerations:

One of the most controversial aspects of surrogacy is the potential commodification of women's bodies. In commercial surrogacy, the surrogate's labour, time, and even emotional investment are essentially treated as commodities in a market-driven transaction. This commodification raises questions about the intrinsic value of pregnancy and childbirth, as well as the ethical boundaries of placing a price on these intimate and deeply personal experiences.

Critics argue that such commodification dehumanizes surrogate mothers, reducing them to vessels for fulfilling the reproductive desires of others. This perspective is particularly relevant in cross-border surrogacy arrangements, where wealthier intended parents from one country commission surrogates from another, often in economically disadvantaged regions. The resulting power dynamics can exacerbate existing inequalities, perpetuating a cycle of exploitation under the guise of economic opportunity.<sup>9</sup>

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<sup>7</sup> Nayana Hitesh Patel, Yuvraj Digvijaysingh Jadeja, *et.al.*, "Insight into Different Aspects of Surrogacy Practices" 11 *Journal of Human Reproductive Sciences* 212-218 (2018).

<sup>8</sup> Victoria R. Guzman, "A Comparison of Surrogacy Laws of the US to Other Countries: Should There Be a Uniform Federal Law Permitting Commercial Surrogacy" 38 *Hous. J. Int'l L* 619 (2016).

<sup>9</sup> Amel Alghrani and Danielle Griffiths, "The Regulation of Surrogacy in the United Kingdom: The Case for Reform" 29 *Child and Family Law Quarterly* 165-186 (2017).

## The Emotional Toll on Surrogate Mothers and Intended Parents

Surrogacy also carries significant emotional implications for all parties involved. For surrogate mothers, the experience of carrying a child for someone else can be both fulfilling and emotionally challenging.<sup>10</sup> While some surrogates report a sense of pride and accomplishment in helping others become parents, others struggle with the psychological toll of relinquishing a child they carried for nine months.

For intended parents, surrogacy can be a fraught emotional journey, marked by anxieties about the surrogate's well-being, the outcome of the pregnancy, and societal perceptions of their family-building choices. These emotions are further complicated by the legal and logistical challenges that often accompany surrogacy arrangements, particularly in jurisdictions with restrictive laws.

### 2.3 The Rights of the Child Born Through Surrogacy

The ethical and legal debates surrounding surrogacy also extend to the rights of the child. Children born through surrogacy may face questions about their identity, particularly in cases of anonymous or international surrogacy. Ensuring that these children have access to information about their origins is critical for their psychological well-being and sense of self.<sup>11</sup>

## 3. COMMERCIAL SURROGACY: A CONTENTIOUS ISSUE

The debate over surrogacy is further complicated by the distinction between altruistic and commercial surrogacy. In altruistic surrogacy, the surrogate mother receives no financial compensation beyond medical expenses and insurance, emphasizing the voluntary and non-commercial nature of the arrangement. Commercial surrogacy, by contrast, involves significant financial compensation, often creating a market for surrogate services.<sup>12</sup>

Many countries, including India through the Surrogacy (Regulation) Act, 2021, have banned commercial surrogacy in favor of altruistic arrangements. Section 4(ii)(c) of this Act prohibits commercial surrogacy to prevent exploitation and commodification, instead allowing only altruistic surrogacy under strict regulations. Similarly, the European Union has taken a firm stance against commercial surrogacy, with Article 3 of the Charter of Fundamental Rights explicitly prohibiting the practice. These legislative measures reflect a

<sup>10</sup> Ido Alon, Zacharie Chebance, *et.al.*, "Mapping International Research Output Within Ethical, Legal, and Social Implications (ELSI) of Assisted Reproductive Technologies" 40 *Journal of Assisted Reproduction and Genetics* 2023-2043 (2023).

<sup>11</sup> Okoye Ifeoma Blessing and Chioma O. Nwabachili, "Rethinking a Legal Framework for Assisted Reproductive Technology" 30 *Ijole* 4 (2023).

<sup>12</sup> Susan L. Crockin, Meagan A. Edmonds, J.D., *et.al.*, "Legal Principles and Essential Surrogacy Cases Every Practitioner Should Know" 113 *Fertility and Sterility* 908-915 (2020).

broader ethical concern about the implications of commercializing reproduction and the potential harm to surrogate mothers.<sup>13</sup>

However, in some jurisdictions, such as certain states in the United States (e.g., California), commercial surrogacy is legal and regulated. Proponents argue that this approach offers numerous benefits, including providing pathways to parenthood for single individuals, LGBTQ+ families, and others traditionally excluded from biological reproduction. Furthermore, advocates contend that when properly regulated, commercial surrogacy can respect women's rights by ensuring informed consent and equitable compensation, transforming what might otherwise be exploitative into a mutually beneficial arrangement.<sup>14</sup>

### 3.1 Arguments for Commercial Surrogacy:

- **Bodily Autonomy:** Proponents argue that women should have the right to decide what they do with their bodies, including choosing to be compensated for carrying a child for others.
- **Economic Opportunity:** Commercial surrogacy can provide significant financial benefits to women, particularly in developing countries where economic opportunities may be limited.
- **Addressing Infertility:** It offers a solution for individuals and couples who cannot conceive or carry a pregnancy due to medical conditions.
- **Building Families:** Enables individuals and couples, including same-sex couples and single individuals, to build families who might otherwise be unable to do so.
- **Regulation and Oversight:** Proper regulations can protect the rights and well-being of both the surrogate mother and the intended parents.<sup>15</sup>

### 3.2 Arguments Against Commercial Surrogacy:

- **Exploitation of Women:** Critics argue that commercial surrogacy can exploit vulnerable women, particularly in developing countries, who may be coerced or pressured into surrogacy due to economic hardship.
- **Commodification of Children:** Some argue that commercial surrogacy treats children as commodities, reducing them to a product that can be bought and sold.<sup>16</sup>

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<sup>13</sup> Columbus N. Ogbujah, Stanley O Amanze, *et.al.*, “.”, Surrogacy and Parenting in a Hyper-Technological World: Ethical Considerations” 11 *Philosophy and Praxis* (2021).

<sup>14</sup> Chandra Thapa and Seyit Camtepe, “Precision Health Data: Requirements, Challenges and Existing Techniques for Data Security and Privacy” 29 *Computers in Biology and Medicine* 104-130 (2021).

<sup>15</sup> Raywat Deonandan, “Thoughts on the Ethics of Gestational Surrogacy: Perspectives from Religions, Western Liberalism, and Comparisons with Adoption” 37 *Journal of Assisted Reproduction and Genetics* 269-279 (2020).

- **Ethical Concerns:** There are concerns about the potential for psychological harm to both the surrogate mother and the child born through surrogacy.
- **Blurring of Family Structures:** Critics argue that surrogacy can blur traditional family structures and lead to confusion about parental rights and responsibilities.
- **Potential for Abuse:** There is a risk of exploitation and abuse, both of the surrogate mother and the intended parents, in unregulated commercial surrogacy arrangements.<sup>17</sup>

#### 4. SURROGACY AND WOMEN'S RIGHTS

##### 4.1 Upholding Women's Autonomy and Informed Consent in surrogacy is paramount to ensure ethical and just practices. This involves:

- **Meaningful Consent:** Surrogate mothers must have the capacity and freedom to make an informed and voluntary decision. This requires:
- **Comprehensive Information:** Clear and unbiased information about the medical risks, emotional implications, and legal aspects of surrogacy.
- **Counselling:** Access to independent counselling to assess suitability and address potential concerns.
- **Time for Reflection:** Sufficient time to consider the decision without pressure.
- **Protecting Against Exploitation:** Safeguards are crucial to prevent exploitation, particularly in vulnerable populations.
- **Fair Compensation:** Ensuring fair and adequate compensation for surrogates, without undue influence or coercion.
- **Regulation of Agencies:** Strict oversight of surrogacy agencies to prevent unethical practices.
- **Protecting Against Coercion:** Ensuring women are not pressured into surrogacy due to economic hardship or social pressures.
- **Respecting Changing Circumstances:** Allowing surrogate mothers, the right to change their minds during the pregnancy, even if it means terminating the arrangement.

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<sup>16</sup> Okoye Ifeoma Blessing and Chioma O. Nwabachili, “, Rethinking a Legal Framework for Assisted Reproductive Technology” 30 *Ijolacle* 4 (2023).

<sup>17</sup> Ibid.



- **Post-Birth Support:** Providing ongoing support to surrogate mothers after the birth, including psychological counselling and addressing potential emotional challenges.

These services help ensure that potential surrogate mothers make informed decisions, understand the emotional and physical implications, and have access to the necessary support throughout the process. By providing these essential services, we can help safeguard the well-being and autonomy of surrogate mothers and promote ethical practices within the field of surrogacy.

#### **4.2 Addressing Potential for Exploitation:**

To prevent the exploitation of vulnerable women in surrogacy, a multi-pronged approach is crucial. This includes:

##### **Strict Regulations and Licensing Requirements:**

- **Licensing for Surrogacy Agencies:** Implementing strict licensing requirements for surrogacy agencies to ensure they adhere to ethical standards and operate transparently.
- **Regulations on Compensation:** Setting clear guidelines on fair and adequate compensation for surrogate mothers, preventing exploitative practices.
- **Medical Oversight:** Ensuring rigorous medical oversight throughout the surrogacy process to protect the health and safety of the surrogate mother.<sup>18</sup>

##### **Robust Legal Protections for Surrogate Mothers:**

- **Contractual Safeguards:** Enforcing clear and enforceable contracts that protect the rights and interests of surrogate mothers.
- **Right to Withdraw Consent:** Guaranteeing the right of surrogate mothers to withdraw consent at any stage of the pregnancy without facing repercussions.
- **Access to Legal Aid:** Providing access to legal aid and representation for surrogate mothers to ensure their rights are upheld.<sup>19</sup>

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<sup>18</sup> Sharon Shakargy, “, Choice of Law for Surrogacy Agreements: In the In-Between of Status and Contract” 16 *Journal of Private International Law* 138-162 (2020).

<sup>19</sup> Kirsty Horsey, Mimi Arian-Schad, *et.al.*, “UK Surrogates’ Characteristics, Experiences, and Views on Surrogacy Law Reform” 36 *International Journal of Law, Policy and the Family* (2022).

### Access to Legal and Social Support Services:

- Pre-Surrogacy Counselling: Mandatory counselling sessions for potential surrogate mothers to assess their understanding, motivations, and emotional preparedness.
- Ongoing Support: Providing comprehensive support services throughout the pregnancy, including medical care, psychological counselling, and social support.
- Post-Birth Support: Offering continued support to surrogate mothers after the birth, addressing potential emotional and psychological challenges.
- By implementing these measures, we can create a more ethical and just framework for surrogacy, ensuring that the rights and well-being of surrogate mothers are protected and that exploitation is minimized.<sup>20</sup>

### 4.3 Balancing the Rights of all Parties:

Balancing the rights of all parties involved in surrogacy is a complex endeavour. Here's an examination of how to achieve this:

#### Surrogate Mother's Rights:

- Informed Consent: Prioritize obtaining truly informed consent from the surrogate mother. This involves providing clear, unbiased information about the risks, emotional implications, and legal aspects of surrogacy.
- Protection from Exploitation: Implement strict regulations to prevent exploitation, such as setting fair compensation standards, prohibiting coercion, and ensuring access to quality medical care.
- Right to Withdraw: Guarantee the surrogate mother's right to withdraw consent at any point during the pregnancy without facing repercussions.<sup>21</sup>

#### Intended Parents' Rights:

- Legal Parenthood: Establish clear legal pathways for intended parents to obtain parental rights and responsibilities.
- Protection of Parental Interests: Ensure legal safeguards to protect the intended parents' rights and interests throughout the surrogacy process.

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<sup>20</sup> Virginie Rozée, Sayeed Unisa, *et.al.*, “.”, the Social Paradoxes of Commercial Surrogacy in Developing Countries: India Before the New Law of 2018” 20 *BMC Women's Health* 1-14 (2020).

<sup>21</sup> Ezra Kneebone, Kiri Beilby, *et.al.*, “Surrogates’ and Intended Parents’ Experiences of Surrogacy Arrangements: A Systematic Review” 38 *International Journal of Law, Policy and the Family* (2024).

**Child's Best Interests:**

- Open Communication: Facilitate open communication between the surrogate mother, intended parents, and the child (as they mature) about their origins, if appropriate.
- Long-term Well-being: Prioritize the child's long-term physical, emotional, and psychological well-being.
- Access to Information: Ensure the child has access to information about their origins and, if desired, the opportunity to connect with their biological mother.<sup>23</sup>

**Balancing Mechanisms:**

- Comprehensive Legislation: Develop clear, comprehensive legislation that addresses the rights and responsibilities of all parties involved.
- Independent Oversight: Establish independent oversight bodies to monitor surrogacy arrangements and ensure compliance with ethical guidelines.
- Cross-border Considerations: Address the complexities of international surrogacy arrangements, including issues of jurisdiction, child citizenship, and parental rights.

By carefully considering the rights and needs of all parties involved, and by implementing robust legal and ethical frameworks, we can strive to create a system of surrogacy that is both safe and just for all concerned.<sup>24</sup>

**5. RESULT & DISCUSSION****5.1. Ethical and commercial issues**

Surrogacy, while a transformative solution for individuals and couples facing infertility, involves a web of ethical, emotional, and commercial challenges that demand careful consideration and balanced solutions. Ethically, the potential exploitation of surrogate mothers, especially in commercial arrangements, raises concerns about informed consent, commodification of the human body, and socio-economic disparities. To mitigate these issues, robust regulatory frameworks should ensure surrogate mothers are adequately compensated, provided with comprehensive health care, and shielded from undue pressure, particularly in low-income regions where financial desperation might coerce participation. Emotional challenges in surrogacy span all parties involved.

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<sup>22</sup> Sophia Fantus, "Two Men and a Surrogate: A Qualitative Study of Surrogacy Relationships in Canada" 70 *Family Relations* 246-263 (2021).

<sup>23</sup> Sharon Shakargy, "Choice of Law for Surrogacy Agreements: In the In-Between of Status and Contract" 16 *Journal of Private International Law* 138-162 (2020).

<sup>24</sup> Semra Kahraman, Murat Cetinkaya, *et.al.*, "The Birth of a Baby with Mosaicism Resulting from a Known Mosaic Embryo Transfer: A Case Report" 35 *Human Reproduction* 727-733 (2020).

Surrogate mothers often grapple with the psychological impact of relinquishing a child they carried, while intended parents may feel disconnected from the pregnancy experience. Furthermore, children born through surrogacy may face identity questions or societal stigma, especially in contexts where surrogacy is less accepted.<sup>25</sup> Addressing these concerns requires psychological support for all participants, promoting transparency and open communication about the surrogacy process, and fostering environments where children can understand their origins with dignity and respect. On the commercial front, the commodification of surrogacy raises alarms about the fairness of market-driven practices, where wealthier intended parents may have greater access to surrogacy options, exacerbating inequalities. To address this, surrogacy programs must prioritize ethical practices, including equitable access and stringent oversight to prevent the exploitation of surrogate mothers. By implementing well-regulated, ethically grounded, and emotionally sensitive practices, surrogacy can be a more compassionate solution for building families, respecting the dignity of all involved, and ensuring long-term well-being.

## **5.2 The Role of Surrogacy Agencies and Fertility Clinics in Implementing the Surrogacy (Regulation) Act, 2021**

The **Surrogacy (Regulation) Act, 2021**<sup>26</sup>, enacted in India, aims to regulate surrogacy practices, prevent exploitation, and ensure ethical and legal compliance in surrogacy arrangements. Surrogacy agencies and fertility clinics play a critical role in implementing this Act by adhering to its provisions and facilitating safe, ethical, and transparent surrogacy procedures.

The Act mandates that all surrogacy clinics must register with the appropriate authorities to operate legally. Fertility clinics are required to obtain certification from the respective state or national surrogacy boards, which ensures adherence to the Act's guidelines. Surrogacy agencies, meanwhile, must operate within the legal framework by connecting intended parents and surrogate mothers in compliance with the law.<sup>27</sup> Surrogacy agencies and clinics are tasked with verifying the eligibility of intended parents and surrogate mothers. The Act allows only altruistic surrogacy, where the surrogate is a close relative of the intended parents and receives no financial compensation beyond medical expenses and insurance. Agencies and clinics must ensure that all participants meet the legal criteria, such as age limits, marriage status, and

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<sup>25</sup> Bruce Baer Arnold and Erina Mikus Fletcher, "Whose Constitution: Sovereign Citizenship, Rights Talk, and Rhetorics of Constitutionalism in Australia" 14 *Jindal Global Law Review* 99-122 (2023).

<sup>26</sup> Surrogacy (Regulation) Act, 2021

<sup>27</sup> Sivan Tamir, "Artificial Intelligence in Human Reproduction: Charting the Ethical Debate Over AI in IV" 33 *AI and Ethics* 947-961 (2023).

medical eligibility, and that surrogate mothers are undertaking the process voluntarily and without coercion.<sup>28</sup>

Ensuring informed consent is a cornerstone of ethical surrogacy. Fertility clinics and agencies are responsible for educating both surrogate mothers and intended parents about the medical, legal, and emotional aspects of surrogacy. This includes providing detailed information on the risks, obligations, and rights involved. Counselling services are also crucial for addressing emotional concerns, preparing all parties for potential challenges, and fostering a transparent relationship between them. Clinics must adhere to strict medical protocols during fertility treatments, embryo transfer, and prenatal care, ensuring the surrogate's health and safety. The Act prohibits practices such as sex selection and commercial surrogacy, and agencies and clinics are responsible for upholding these regulations. Regular medical monitoring and ethical oversight prevent malpractice and exploitation of surrogate mothers.

Under the Surrogacy (Regulation) Act, surrogacy agreements must be legally binding and clearly outline the rights and responsibilities of all parties. Surrogacy agencies play a key role in drafting and enforcing these contracts, ensuring compliance with legal standards. Fertility clinics must maintain accurate medical and procedural records, which can be audited by regulatory authorities. The Act emphasizes the well-being of all parties after the surrogacy process is complete. Clinics and agencies should provide post-birth counselling to help surrogate mothers transition emotionally and assist intended parents in navigating legal formalities, such as birth registration and parental rights. Follow-up medical care for surrogate mothers is also essential to ensure their long-term health. Surrogacy clinics and agencies must regularly report their activities to the appropriate authorities, including information about ongoing surrogacy cases and compliance with the Act's provisions. This transparency helps curb unethical practices and promotes accountability in the surrogacy industry. Finally, surrogacy agencies and clinics have a broader responsibility to raise awareness about the legal and ethical aspects of surrogacy. By educating society about the provisions of the Surrogacy (Regulation) Act, 2021, they can help destigmatize surrogacy and encourage its ethical practice.<sup>29</sup>

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<sup>28</sup> Aneesh V Pillai, "Surrogacy and its Regulation: An Overview of Legislative and Judicial Responses in India" *Health Laws in India* 179-195 (2022).

<sup>29</sup> Susan L. Crockin, Meagan A. Edmonds, J.D., *et.al.*, "Legal Principles and Essential Surrogacy Cases Every Practitioner Should Know" 113 *Fertility and Sterility* 908-915 (2020).

### 5.3 Assisted reproductive technology legislation

The Assisted Reproductive Technology (Regulation) Act, 2021<sup>30</sup>, is a landmark legislation in India that aims to regulate the functioning of assisted reproductive technology (ART) clinics and banks. The Act addresses various aspects of ART, including gamete donation, surrogacy, and in vitro fertilization, with the primary objectives of ensuring ethical practices, safeguarding the rights of women undergoing treatment, and preventing exploitation. The Surrogacy (Regulation) Act, 2021, aims to regulate assisted reproductive technologies (ART) in India. Key provisions include mandatory registration of all ART clinics and banks with the National Registry of Banks and Clinics (NRBC) to enhance transparency and accountability. The Act regulates gamete donation, outlining eligibility criteria for donors, prohibiting commercial surrogacy, and mandating informed consent and record-keeping. It emphasizes the protection of women's rights by prohibiting sex selection and ensuring no coercion or exploitation. The Act provides guidelines for altruistic surrogacy, specifying eligibility criteria for intending couples and surrogates. Finally, it establishes the National Surrogacy Board and State Surrogacy Boards to oversee implementation and resolve disputes. The Act has been widely welcomed as a significant step towards regulating the ART sector in India. It provides a legal framework for ART procedures, ensuring transparency, accountability, and ethical practices. The Act also aims to protect the rights and interests of women undergoing treatment, prevent exploitation, and promote responsible parenthood. However, some challenges remain in the implementation of the Act.<sup>31</sup> One of the major challenges is the lack of awareness among the general public about the provisions of the Act. This can lead to confusion and misconceptions, particularly regarding surrogacy. Another challenge is the need for adequate infrastructure and trained personnel to effectively implement the Act. The government will need to invest in training programs for healthcare professionals and setting up robust monitoring mechanisms to ensure compliance with the Act. Overall, the Assisted Reproductive Technology (Regulation) Act, 2021, is a progressive piece of legislation that has the potential to transform the ART landscape in India. By addressing ethical concerns, safeguarding women's rights, and promoting responsible parenthood, the Act can help ensure that ART procedures are conducted in a safe and ethical

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<sup>30</sup> Susanna Marinelli, Francesca Negro, *et.al.*, "The Legally Charged Issue of Cross-Border Surrogacy: Current Regulatory Challenges and Future Prospects" *European Journal of Obstetrics & Gynecology and Reproductive Biology* (2024).

<sup>31</sup> Kris Vera Hartmann, Nadia Primc, *et.al.*, "Lost in Translation? Conceptions of Privacy and Independence in the Technical Development of AI-Based AAL" *26 Medicine, Health Care and Philosophy* 99-110 (2023).

manner. However, effective implementation of the Act will require sustained efforts from the government, healthcare professionals, and the general public.<sup>32</sup>

#### 5.4 Legal Challenges and Gaps in Current frameworks

Current surrogacy laws present several legal challenges and gaps. Inconsistencies in regulations across jurisdictions lead to legal uncertainty and complexity, particularly in international surrogacy arrangements. Issues such as the enforceability of surrogacy agreements, the legal status of the child, and the rights and obligations of the parties involved are not uniformly addressed. For example, in some jurisdictions, surrogacy agreements are not legally binding, which can result in disputes if the surrogate or intended parents change their minds.<sup>18</sup> Additionally, the lack of clear legal frameworks for cross-border surrogacy can leave children born through these arrangements in legal limbo regarding citizenship and parentage.

#### CASE STUDY 1: BABY M CASE (USA)

In 1986, the Baby M case<sup>33</sup> became one of the most famous surrogacy legal disputes in the United States. After giving delivery, Baby M's surrogate, Mary Beth Whitehead, made the decision to keep the kid, despite having signed a surrogacy contract with the intended parents, William and Elizabeth Stern. The New Jersey Supreme Court invalidated the surrogacy contract on grounds that it violated public policy, awarding custody to the Sterns but granting Whitehead visitation rights. This case highlighted the legal and ethical complexities surrounding surrogacy agreements and the rights of surrogates.

#### CASE STUDY 2: THE RE EVELYN CASE (AUSTRALIA)

In 1998, the Re Evelyn case<sup>34</sup> in Queensland, Australia, involved a dispute between a surrogate mother and the intended parents.<sup>35</sup> The surrogate, who was the child's biological aunt, decided to keep the child after birth. The court ruled in favour of the surrogate, citing the child's best interests, and emphasized the importance of clear legal agreements and the surrogate's rights. This case underscored the potential for conflict and the need for robust legal protections in surrogacy arrangements.

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<sup>32</sup> Ido Alon, Zacharie Chebance, *et.al.*, "Mapping International Research Output Within Ethical, Legal, and Social Implications (ELSI) of Assisted Reproductive Technologies" 40 *Journal of Assisted Reproduction and Genetics* 2023-2043 (2023).

<sup>33</sup> 9 109 N.J. 396 (1988)

<sup>34</sup> (1998) 145 FLR 90

<sup>35</sup> Bruce Baer Arnold, & Erina Mikus Fletcher, Whose constitution: Sovereign citizenship, rights talk, and rhetorics of constitutionalism in Australia, 14 *Jindal Global Law Review*, 99-122 (2023).

### CASE STUDY 3: JAN BALAZ VS. ANAND MUNICIPALITY (INDIA)

In 2008, the Jan Balaz case<sup>36</sup> in India involved a German couple who commissioned a surrogacy arrangement with an Indian surrogate.<sup>37</sup> The twin children born from the arrangement faced legal limbo regarding citizenship, as India did not grant citizenship to children born through surrogacy to foreign nationals, and Germany did not recognize surrogacy. The Supreme Court of India ultimately granted Indian citizenship to the children. This case highlighted the legal complexities and the need for international cooperation in addressing cross-border surrogacy issues.

These cases illustrate the diverse legal challenges and gaps in surrogacy frameworks, emphasizing the need for clear, consistent, and ethical guidelines to safeguard the interests and rights of all parties engaged in surrogacy agreements.

### 6. CONCLUSION AND SUGGESTIONS:

Surrogacy, as a product of modern reproductive technology, exemplifies both the triumphs and challenges of scientific advancements in addressing infertility and expanding family-building options. However, it remains a deeply polarizing practice, particularly in the context of women's rights. While surrogacy offers hope and joy to intended parents, it also exposes surrogate mothers to potential exploitation, commodification, and emotional strain, especially in commercial arrangements. The legal and ethical challenges surrounding surrogacy underscore the need for a balanced and equitable approach that prioritizes the dignity and well-being of all parties involved. Women's rights, particularly the rights to bodily autonomy and economic justice, must remain at the forefront of the surrogacy discourse. Empowering women to make informed choices about their reproductive capabilities is vital, but it must be coupled with safeguards to prevent coercion and exploitation, especially in contexts where socio-economic disparities create power imbalances. Striking this balance requires comprehensive legal frameworks that regulate surrogacy practices, ensure fair compensation, and provide psychological and medical support to surrogate mothers and intended parents alike. Additionally, the rights and emotional well-being of children born through surrogacy must be carefully considered. Open communication, transparency about origins, and efforts to foster loving, secure environments can help bridge any perceived gaps in natural affection, ensuring these children grow up with a strong sense of identity and belonging. Ultimately, the surrogacy debate reflects broader societal tensions between technological progress, economic disparities, and ethical responsibility. By advocating for informed consent, equitable treatment, and robust protections for

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<sup>36</sup> AIR 2010 Gul 21

<sup>37</sup> Aneesh V Pillai, Surrogacy and its Regulation: An Overview of Legislative and Judicial Responses in India, *Health Laws in India*, 179-195 (2022).



women, we can ensure that surrogacy evolves as a practice that empowers rather than exploits, offering a humane and ethical path to parenthood while upholding the rights and dignity of women—the very cornerstone of its success.