
SURROGACY AND PERSONAL LIBERTY

Jyoti, Shivangi Mehta & Dr Richa Ranjan, Swami Devi Dyal Law College

ABSTRACT

Surrogacy law in India has become a critical intersection of personal liberty, equality, and the state's duty to protect vulnerable individuals. The Surrogacy (Regulation) Act, 2021 permits only altruistic surrogacy—barring commercial arrangements—to prevent exploitation of women, allowing reimbursement solely for medical expenses and insurance¹. While this curbs commodification of childbirth, it also restricts access to reproductive technologies based on marital status, sexual orientation, and gender identity, raising constitutional concerns².

Under Article 21 of the Indian Constitution, the Supreme Court has affirmed that reproductive autonomy and bodily integrity constitute fundamental components of personal liberty³. In *Suchita Srivastava v. Chandigarh Administration* (2009), the Court recognized a woman's right to make reproductive choices—including pregnancy termination—as an inseparable aspect of her personal liberty⁴. This reasoning was bolstered by *K.S. Puttaswamy v. Union of India* (2017), wherein the Court enshrined the right to privacy and decisional autonomy as intrinsic to Articles 14, 15, and 21⁵.

Internationally and domestically, scholars caution that blanket bans on commercial surrogacy may harm surrogate mothers who rely on it for economic survival, potentially driving the practice underground where safeguards vanish⁶. Feminist and human rights commentators advocate for a regulatory model that simultaneously prevents exploitation and upholds reproductive autonomy.

In conclusion, while the Surrogacy (Regulation) Act, 2021 addresses critical ethical concerns, its restrictive scope invites constitutional scrutiny. A

¹ Surrogacy (Regulation) Act, 2021 prohibits commercial surrogacy, allowing only altruistic arrangements with medical reimbursement

² The Act's eligibility constraints (marital status, gender, etc.) have been widely criticized as paternalistic and lacking constitutional support.

³ Article 21 includes reproductive autonomy and bodily integrity as protected personal liberties

⁴ *Suchita Srivastava v. Chandigarh Administration* (2009) recognized reproductive choice as inseparable from personal liberty

⁵ *K.S. Puttaswamy v. Union of India* (2017) affirmed privacy and decisional autonomy under Articles 14, 15, and 21

⁶ Critics, including Time and international commentators, warn that banning commercial surrogacy might exacerbate harm to surrogate mothers

balanced approach—anchored in dignity, equality, and bodily autonomy—is necessary to reconcile state regulation with individual freedoms.

Keywords: Personal Liberty under Article 21, Reproductive Rights and Constitutional Law, Assisted Reproductive Technology (ART) Regulation, Surrogacy (Regulation) Act, 2021, Bodily Autonomy and Legal Rights Commercial vs. Altruistic Surrogacy, Right to Privacy in Reproductive Choices, Judicial Interpretation of Surrogacy, Suchita Srivastava v. Chandigarh Administration, Women's Rights and Surrogacy, Ethical Regulation of Surrogacy, Human Dignity and Reproductive Autonomy, Bioethics in Surrogacy Agreements, State Intervention in Reproductive Decisions

Method

The method used in this research are normative accompanied by a constitutional approach. Legal research is the study of the law, systematic of law, legal history, comparative law, and legal of identification. This method is used to processing qualitative data, which is data collection through library research. This research carries out by library materials or secondary data, including research on legal research, legal comparison, and legal systematic. This research also used a constitutional approach that will provide results from the comparison of applicable laws and regulations that can provide benefits for the implementation of surrogacy laws.

Introduction

“Surrogacy is a complex reproductive arrangement in which a woman (the surrogate) agrees to carry and deliver a child for another individual or couple (the intended parents). This practice raises a multitude of ethical considerations, particularly concerning personal liberty, autonomy, and the rights of all parties involved.

At the heart of surrogacy lies the principle of personal liberty, which encompasses the right of individuals to make decisions about their own bodies and reproductive choices. Surrogacy allows individuals who are unable to conceive or carry a child to exercise their reproductive autonomy and fulfil their desire for parenthood.”⁷ For intended parents, surrogacy offers the opportunity to build a family and experience the joys of parenthood, which may otherwise be

⁷ "Saravanan, Sheela. Transnational Surrogacy and the Regulation of Reproductive Technologies: A Feminist Perspective. Springer, 2018."

unattainable due to infertility, medical conditions, or other circumstances. Similarly, surrogates exercise their personal liberty by voluntarily agreeing to participate in the surrogacy arrangement. While financial compensation may be a motivating factor for some surrogates, many choose to become surrogates out of a desire to help others fulfil their dreams of parenthood. Surrogates retain the right to make decisions about their own bodies throughout the surrogacy process, including decisions related to prenatal care, childbirth, and postpartum recovery.

Definition and types of surrogacies:

“Traditional surrogacy represents a unique form of reproductive arrangement where the surrogate, typically the biological mother, carries a child conceived using her own egg fertilized by the intended father's sperm or donor sperm. This method is often facilitated through artificial insemination or in vitro fertilization (IVF).”⁸ The defining characteristic of traditional surrogacy is that the surrogate is genetically related to the child she carries, which can lead to complex legal, ethical, and emotional considerations. One of the primary reasons traditional surrogacy arrangements are less common is the inherent complexity surrounding the surrogate's biological connection to the child. “Unlike gestational surrogacy, where the surrogate has no genetic link to the child she carries, traditional surrogacy blurs the lines of parentage. This can lead to legal challenges regarding parental rights and responsibilities, custody arrangements, and the establishment of legal parentage, particularly in jurisdictions where surrogacy laws are ambiguous or non-existent.”⁹

Ethically, traditional surrogacy raises questions about the surrogate's role and autonomy, as she is not only carrying the child but also contributing her genetic material. This can complicate the dynamics of the surrogacy relationship and may impact the surrogate's emotional attachment to the child. Additionally, traditional surrogacy may raise concerns about the potential for exploitation or coercion, as the surrogate is not only providing gestational support but also contributing her genetic material to the child. Emotionally, traditional surrogacy arrangements can be fraught with complexities for all parties involved. The surrogate may grapple with feelings of attachment to the child, especially if she has a biological connection

⁸ "Pande, Amrita. *Wombs in Labor: Transnational Commercial Surrogacy in India*. Columbia University Press, 2014."

⁹ "Teman, Elly. *Birthing a Mother: The Surrogate Body and the Pregnant Self*. University of California Press, 2010."

to the baby. Similarly, the intended parents may navigate the intricacies of their relationship with the surrogate, balancing gratitude for her contribution with concerns about the blurred boundaries of parentage.

Despite these challenges, traditional surrogacy may still be chosen by some individuals or couples due to its potential for genetic relatedness and biological connection between the surrogate and the child. However, it is essential for all parties involved to enter into traditional surrogacy arrangements with full awareness of the legal, ethical, and emotional complexities inherent in this form of surrogacy. Gestational surrogacy stands as a prevalent and preferred form of surrogacy, revolutionizing the landscape of reproductive options for intended parents worldwide.

“This arrangement involves the intricate process of implanting an embryo, meticulously crafted from the genetic material of the intended parents or donors, into the uterus of the surrogate. Crucially, the surrogate in gestational surrogacy maintains no genetic connection to the child she carries, distinguishing it from traditional surrogacy arrangements.”¹⁰

The appeal of gestational surrogacy lies in its clarity of genetic parentage, providing intended parents with a direct biological link to the child while relieving surrogates of potential legal and emotional complexities associated with genetic relatedness. “This method offers hope and opportunity to individuals or couples facing infertility, genetic disorders, or medical conditions that prevent pregnancy, empowering them to realize their dreams of parenthood. Moreover, gestational surrogacy fosters a collaborative and supportive relationship between intended parents and surrogates, built upon trust, respect, and shared goals. Intended parents play an active role in the surrogacy journey, from selecting a surrogate to participating in the creation of the embryo through assisted reproductive technologies such as in vitro fertilization (IVF).”¹¹ Surrogates, in turn, generously offer their compassion, dedication, and altruism to help fulfill the dreams of others, contributing to the profound bonds that often develop throughout the surrogacy process.

Despite its many benefits, gestational surrogacy also presents its own set of challenges, ranging from legal and financial considerations to ethical and emotional complexities. Legal

¹⁰ "Mitra, Sayantani. *Globalization and Transnational Surrogacy in India: Outsourcing Life*. Lexington Books, 2014."

¹¹ "Ragone, Helena. *Surrogate Motherhood: Conception in the Heart*. Westview Press, 1994."

frameworks governing surrogacy may vary significantly across jurisdictions, posing potential hurdles for intended parents seeking to establish parental rights and ensure the legality of the surrogacy arrangement. Additionally, the financial costs associated with gestational surrogacy, including compensation for the surrogate's time, effort, and medical expenses, can be substantial, raising concerns about accessibility and equity in surrogacy services.

Ethically, gestational surrogacy raises questions about autonomy, informed consent, and the commodification of reproduction, underscoring the importance of establishing clear guidelines and safeguards to protect the rights and interests of all parties involved. Emotional considerations also loom large, as intended parents and surrogates navigate the complexities of their relationship, grapple with expectations and uncertainties, and forge bonds that extend beyond biological ties. Altruistic surrogacy stands as a testament to the human capacity for empathy, generosity, and selflessness, offering a pathway to parenthood that transcends financial transactions and commercial interests.

“In this unique form of surrogacy arrangement, the surrogate selflessly volunteers to carry and deliver a child for intended parents, without the expectation of monetary compensation beyond reimbursement for medical expenses and other reasonable costs directly related to the surrogacy process. Motivated by altruism, compassion, and a desire to make a meaningful difference in the lives of others, individuals who engage in altruistic surrogacy embark on a remarkable journey of generosity and empathy.”¹²

The foundation of altruistic surrogacy lies in the deeply held belief that every individual deserves the opportunity to experience the joys of parenthood, regardless of their biological or medical circumstances. For intended parents who face infertility, medical conditions, or other obstacles to conception, altruistic surrogacy offers a lifeline of hope, compassionately extended by a surrogate who selflessly volunteers to carry their child. This act of generosity and empathy embodies the essence of altruism, as surrogates offer their bodies, time, and emotional support to help fulfill the dreams of others. Crucially, altruistic surrogacy operates on principles of mutual respect, trust, and shared values between intended parents and surrogates. Unlike commercial surrogacy arrangements where financial transactions may dominate the surrogacy journey, altruistic surrogacy fosters a sense of partnership and collaboration built upon a foundation of empathy and compassion. Intended parents and surrogates often develop deep

¹² "Van den Akker, Olga. *Psychological Aspects of Surrogacy*. Hove, East Sussex; New York: Routledge, 2007."

bonds and meaningful relationships throughout the surrogacy process, united by their shared goal of bringing a new life into the world.

Moreover, altruistic surrogacy challenges societal norms and perceptions surrounding parenthood, family, and the definition of kinship. By embracing the concept of chosen family and expanding the boundaries of traditional notions of parenting, altruistic surrogacy celebrates the diverse ways in which families are created and nurtured. It underscores the belief that love, compassion, and commitment are the true pillars of parenthood, transcending biological ties and genetic relationships.

While altruistic surrogacy embodies the highest ideals of compassion and generosity, it also raises important ethical considerations and practical challenges that must be carefully navigated by all parties involved. "Ethical concerns may arise regarding the voluntariness of the surrogate's decision to participate in the surrogacy arrangement, the potential for exploitation or coercion, and the need to ensure that the surrogate's autonomy and well-being are respected throughout the process."¹³ Additionally, the lack of financial compensation in altruistic surrogacy arrangements may pose practical challenges for surrogates, who may incur significant expenses related to pregnancy, childbirth, and postpartum recovery. It is essential for intended parents to provide adequate support and assistance to surrogates, ensuring that their financial needs are met and that they receive appropriate medical care and emotional support throughout the surrogacy journey.

Commercial surrogacy stands at the intersection of reproduction, economics, and ethics, representing a controversial and highly debated practice that has sparked intense scrutiny and regulation worldwide. Unlike altruistic surrogacy, which operates on principles of empathy and altruism, commercial surrogacy involves financial compensation or payment to the surrogate beyond reimbursement for medical expenses and other reasonable costs directly related to the surrogacy process. In commercial surrogacy arrangements, surrogates receive a fee or compensation for carrying and delivering the child, leading to concerns about exploitation, commodification, and the potential for coercion.

The practice of commercial surrogacy raises profound ethical questions about the

¹³ "Majumdar, Anindita. *Transnational Commercial Surrogacy and the (Un)Making of Kin in India*. Oxford University Press, 2017."

commodification of human life, the exploitation of women's bodies, and the implications of treating reproduction as a commercial transaction. Critics argue that commercial surrogacy reduces pregnancy and childbirth to a commodity, commodifying women's bodies and reproductive capacities in ways that perpetuate inequality and exploitation. The financial incentives inherent in commercial surrogacy arrangements may create incentives for individuals to participate in surrogacy against their will or best interests, leading to concerns about coercion, exploitation, and the commodification of reproductive labor. "Moreover, commercial surrogacy raises concerns about the potential for exploitation and coercion of vulnerable populations, particularly economically disadvantaged women who may be drawn to surrogacy as a means of financial gain."¹⁴ The financial compensation offered to surrogates may create incentives for individuals to participate in surrogacy arrangements without fully understanding the risks and implications, leading to concerns about informed consent and autonomy. Additionally, the power dynamics inherent in commercial surrogacy arrangements may exacerbate inequalities and vulnerabilities, particularly in situations where surrogates have limited bargaining power or agency.

"Furthermore, commercial surrogacy raises questions about the rights and interests of the child born through surrogacy, particularly regarding issues of identity, parentage, and the psychological and emotional implications of being born through commercial surrogacy."¹⁵ Concerns have been raised about the potential for children born through commercial surrogacy to face stigma, discrimination, or challenges in establishing their identity and sense of belonging, particularly in cases where surrogacy laws are ambiguous or inconsistent.

"In response to these concerns, many countries have implemented regulations and restrictions on commercial surrogacy, ranging from outright bans to stringent regulations aimed at protecting the rights and well-being of surrogates, intended parents, and children born through surrogacy. These regulations may include requirements for informed consent, medical and psychological screening of surrogates, legal agreements outlining the rights and responsibilities of all parties involved, and oversight mechanisms to monitor compliance with ethical and legal standards."¹⁶

¹⁴ "Saxena, Poonam. *Law of Adoption, Minority, Guardianship and Custody*. Eastern Book Company, 2015."

¹⁵ Ibid

¹⁶ "Smerdon, Usha R. *Crossing Bodies, Crossing Borders: International Surrogacy Between the United States and India*. Cumberland House, 2011."

Despite the controversies and ethical concerns surrounding commercial surrogacy, proponents argue that it offers a viable option for individuals or couples who are unable to conceive or carry a child on their own. Commercial surrogacy provides a means for intended parents to realize their dreams of parenthood and build their families, while also providing opportunities for surrogates to earn income and support themselves and their families. Moreover, commercial surrogacy may offer benefits to society as a whole by expanding reproductive options and fostering diversity in family structures.

Agency-assisted surrogacy represents a pivotal intermediary step in the intricate journey of surrogacy, providing a structured and supportive framework for intended parents and surrogates alike. In this form of surrogacy arrangement, intended parents and surrogates enlist the services of a specialized surrogacy agency or facilitator to facilitate the matching process and oversee various aspects of the surrogacy journey. Surrogacy agencies play a central role in streamlining the surrogacy process, offering a wide range of services designed to support and guide both intended parents and surrogates through every stage of the journey.

One of the primary functions of surrogacy agencies is to facilitate the matching process between intended parents and surrogates, ensuring compatibility, mutual understanding, and shared goals between the parties involved. Surrogacy agencies carefully screen and evaluate potential surrogates and intended parents to assess their suitability for the surrogacy journey, taking into account factors such as medical history, psychological well-being, lifestyle, and personal preferences. By facilitating the matching process, surrogacy agencies help to forge meaningful and supportive relationships between intended parents and surrogates, laying the foundation for a successful surrogacy journey.

Additionally, surrogacy agencies play a crucial role in coordinating the various medical and legal aspects of the surrogacy process, ensuring compliance with relevant laws, regulations, and ethical guidelines. Surrogacy agencies work closely with medical professionals, fertility clinics, and legal experts to oversee the medical procedures involved in assisted reproduction, such as in vitro fertilization (IVF), embryo transfer, and prenatal care. Moreover, surrogacy agencies assist intended parents and surrogates in navigating the complex legal landscape of surrogacy, helping to draft and negotiate surrogacy agreements, establish parental rights, and ensure that all parties' legal rights and responsibilities are clearly defined and protected.

“Furthermore, surrogacy agencies provide comprehensive support and guidance to intended parents and surrogates throughout the surrogacy journey, offering emotional support, counselling, and practical assistance to address any concerns or challenges that may arise.”¹⁷ Surrogacy agencies serve as trusted allies and advocates for both intended parents and surrogates, offering reassurance, advice, and resources to help navigate the ups and downs of the surrogacy process. “From providing information about medical procedures and legal requirements to offering emotional support and guidance, surrogacy agencies play a vital role in empowering intended parents and surrogates to make informed decisions and navigate the complexities of surrogacy with confidence and peace of mind.”¹⁸

Independent surrogacy stands as a distinct pathway within the realm of assisted reproduction, offering intended parents and surrogates the opportunity to navigate the surrogacy journey privately and autonomously, without the intermediary role of a surrogacy agency. “In this form of surrogacy arrangement, the intended parents and the surrogate collaborate directly to establish the terms of the surrogacy agreement, negotiate the intricacies of the surrogacy process, and ultimately embark on the journey of creating a family together.”¹⁹ Independent surrogacy empowers individuals and couples to take control of their surrogacy experience, allowing for greater flexibility, autonomy, and customization in the surrogacy journey.

“At the heart of independent surrogacy lies the principle of autonomy, as intended parents and surrogates exercise their right to self-determination and personal agency in crafting the terms of the surrogacy agreement.”²⁰ Without the involvement of a surrogacy agency, the parties have the freedom to negotiate directly and tailor the agreement to their individual needs, preferences, and circumstances. This direct engagement fosters a sense of collaboration, trust, and mutual understanding between intended parents and surrogates, laying the foundation for a successful and fulfilling surrogacy journey. In independent surrogacy arrangements, intended parents and surrogates typically work together to navigate the various legal, medical, and logistical aspects of the surrogacy process. While the absence of a surrogacy agency may require the parties to take on greater responsibility and initiative in coordinating these aspects, it also offers the opportunity for more personalized and individualized support. Intended parents and surrogates

¹⁷ "Deonandan, Raywat, and Deepa Venkatesh. *The Cultural, Social, and Ethical Implications of Assisted Reproductive Technologies*. Bloomsbury Academic, 2019."

¹⁸ Ibid

¹⁹ Ibid

²⁰ Ibid

may choose to enlist the assistance of legal counsel to draft a surrogacy contract that outlines their rights, responsibilities, and expectations, providing a framework for the surrogacy journey and ensuring clarity and accountability for all parties involved.

Moreover, independent surrogacy empowers intended parents and surrogates to establish a direct and meaningful connection, fostering open communication, trust, and collaboration throughout the surrogacy journey. By bypassing the intermediary role of a surrogacy agency, intended parents and surrogates have the opportunity to build a closer and more personal relationship, which can enhance the overall surrogacy experience and contribute to a positive and supportive surrogacy journey. This direct engagement allows for greater transparency, flexibility, and responsiveness to the unique needs and preferences of the parties involved, fostering a sense of empowerment and ownership over the surrogacy process. However, independent surrogacy also presents its own set of challenges and considerations that must be carefully navigated by intended parents and surrogates. Without the guidance and support of a surrogacy agency, the parties may encounter greater complexity in coordinating the various aspects of the surrogacy journey, including finding a suitable match, navigating legal requirements, and addressing logistical and practical considerations. Additionally, the absence of a surrogacy agency may require intended parents and surrogates to invest more time, effort, and resources in managing the surrogacy process independently, which can be demanding and stressful, particularly for individuals who are unfamiliar with the surrogacy process.

“Surrogacy laws vary widely across different countries, with some jurisdictions embracing surrogacy as a legitimate means of family building and others imposing strict regulations or outright bans on surrogacy.”²¹ The regulatory landscape of surrogacy is influenced by cultural, ethical, religious, and legal considerations, leading to diverse approaches to surrogacy regulation worldwide.

Global legal frameworks governing surrogacy vary significantly from one country to another, reflecting diverse cultural, ethical, and legal perspectives on assisted reproduction and surrogacy. These frameworks encompass a range of regulation models and may be influenced by international treaties and agreements that aim to address the complex legal and ethical issues surrounding surrogacy. Prohibition of surrogacy refers to a legal stance adopted by certain

²¹ "Kotiswaran, Prabha. *Dangerous Sex, Invisible Labor: Sex Work and the Law in India*. Princeton University Press, 2011."

countries to entirely outlaw the practice of surrogacy within their jurisdictions. This prohibition is often motivated by a combination of ethical concerns, religious beliefs, and cultural values that shape the perception of surrogacy as morally unacceptable or exploitative. The decision to prohibit surrogacy reflects a fundamental rejection of the practice as incompatible with the country's social, religious, or ethical norms.

In countries where surrogacy is prohibited, the legal framework typically includes explicit laws or regulations that explicitly ban any form of surrogacy arrangement. These laws may impose severe penalties, including fines, imprisonment, or other legal sanctions, for individuals or entities found to be involved in surrogacy arrangements. Additionally, the prohibition may extend to both altruistic and commercial surrogacy arrangements, reflecting a broad rejection of the practice regardless of the motivation or compensation involved. One of the primary reasons cited for the prohibition of surrogacy is the concern over the potential exploitation of women who serve as surrogates. "In these countries, there is a prevailing belief that surrogacy commodifies women's bodies and reproductive capabilities, reducing them to mere vessels for carrying a child, which is considered ethically objectionable and morally unacceptable."²² Additionally, there may be apprehensions about the potential exploitation of economically disadvantaged women who may be coerced or financially incentivized to become surrogates.

"Religious beliefs also play a significant role in shaping attitudes towards surrogacy and often influence the decision to prohibit the practice. In many Middle Eastern countries, such as Saudi Arabia and the United Arab Emirates, Islamic principles and interpretations of Sharia law strongly influence legal and social norms. Surrogacy may be deemed incompatible with Islamic teachings, which emphasize the sanctity of marriage, the family unit, and the natural processes of conception and childbirth."²³ As a result, these countries may enact strict prohibitions on surrogacy to align with religious principles and preserve cultural values. Furthermore, cultural attitudes towards parenthood, family, and reproduction may contribute to the prohibition of surrogacy in certain countries. Traditional notions of family structure and lineage may prioritize biological ties and genetic relationships, leading to skepticism or rejection of non-traditional methods of family formation such as surrogacy. In such contexts, surrogacy may be

²² "Balakrishnan, Sairam. *Surrogacy: Legal and Ethical Issues*. Eastern Law House, 2016."

²³ "Markens, Susan. *Surrogate Motherhood and the Politics of Reproduction*. University of California Press, 2007."

perceived as disrupting social norms and undermining cultural values associated with parenthood and kinship.

Overall, the prohibition of surrogacy in certain countries reflects a complex interplay of ethical, religious, and cultural considerations that shape perceptions of the practice. While proponents of surrogacy argue for its potential to fulfill the reproductive desires of intended parents and provide opportunities for family building, opponents emphasize concerns about exploitation, commodification, and moral objections rooted in religious and cultural beliefs. As a result, countries that prohibit surrogacy adopt stringent legal measures to enforce the ban and uphold their respective ethical and cultural values.

“Legalization and regulation of surrogacy represent an approach adopted by certain countries to address the complex ethical, legal, and social issues associated with surrogacy while providing a clear legal framework for its practice. These countries recognize surrogacy as a legitimate means of family building and aim to protect the rights and interests of all parties involved through comprehensive laws and regulations. Here's an explanation of how countries like the United States, Canada, Ukraine, and certain states in India have legalized and regulated surrogacy, along with relevant case laws and examples:”²⁴

1. United States:

- In the United States, surrogacy is legal and regulated at the state level, with varying laws and regulations across different states. Some states have comprehensive surrogacy laws that establish clear legal frameworks and guidelines for surrogacy arrangements, including requirements for eligibility, informed consent, and legal agreements.
- Case Law Example: “In the landmark case of *Johnson v. Calvert* (1993), the California Supreme Court ruled in favor of enforcing a surrogacy contract, recognizing the intended parents' parental rights over a child born through surrogacy despite the surrogate's genetic connection to the child.”²⁵ This case established legal precedent in California and affirmed the enforceability of

²⁴ "Sharma, Shubhada. *Surrogacy: Ethical, Legal and Social Aspects*. Universal Law Publishing, 2018."

²⁵ Ibid

surrogacy agreements in the state.

2. Canada:

- “Surrogacy is legal in Canada, but regulations vary between provinces. Canadian law prohibits commercial surrogacy, meaning surrogates cannot receive financial compensation beyond reimbursement for reasonable expenses related to the surrogacy process.”²⁶
- Case Law Example: In the case of D.E. v. S.H. (2007), the Ontario Superior Court of Justice upheld a surrogacy agreement and granted parental rights to the intended parents, recognizing the validity of surrogacy contracts in Canada. This case reaffirmed the legal recognition of surrogacy arrangements in the country.

3. Ukraine:

- Ukraine has emerged as a popular destination for international surrogacy due to its favorable legal environment and well-established surrogacy industry. Surrogacy is legal and regulated in Ukraine, with comprehensive laws governing the practice and providing protections for all parties involved.
- Example: The Law of Ukraine "On Ensuring the Conditions for the Implementation of Medical Treatment Using Assisted Reproductive Technologies" regulates surrogacy in the country, outlining requirements for surrogacy agreements, medical screening, and the establishment of parental rights.

4. India:

- While commercial surrogacy was legal in India until 2018, the practice was largely unregulated, leading to concerns about exploitation and ethical issues. However, certain states in India, such as Gujarat and Maharashtra, have

²⁶ "Malhotra, Anil. The Surrogacy (Regulation) Act 2021: A Commentary. LexisNexis, 2022."

implemented regulations governing surrogacy to provide legal clarity and protect the rights of all parties involved.

- **Case Law Example:** In the case of *Baby Manji Yamada v. Union of India* (2008), the Supreme Court of India addressed legal issues arising from an international surrogacy arrangement involving a Japanese couple, highlighting the need for regulatory oversight and legal clarity in surrogacy cases.

International treaties and agreements form the cornerstone of the global legal framework and have a profound impact on shaping the discourse surrounding surrogacy at an international level. “While there is no single international treaty specifically dedicated to surrogacy, various international human rights instruments and conventions address fundamental principles and rights that are pertinent to surrogacy practices.”²⁷ Here's an explanation of how international treaties and agreements influence the discourse on surrogacy:

“International human rights instruments serve as foundational documents that outline fundamental principles and rights applicable to all individuals, irrespective of their nationality, ethnicity, or socio-economic status. These instruments play a crucial role in shaping the discourse on surrogacy by providing a framework for evaluating the ethical, legal, and social implications of surrogacy arrangements.”²⁸ Among the key human rights instruments relevant to surrogacy are the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the Convention on the Rights of the Child (CRC). This detailed explanation will explore how these instruments uphold principles relevant to surrogacy and how surrogacy arrangements must align with these fundamental human rights principles to ensure the protection of the rights and dignity of all parties involved.

1. **“Universal Declaration of Human Rights (UDHR):** The UDHR, adopted by the United Nations General Assembly in 1948, is a foundational document that sets forth a comprehensive framework of human rights principles. Article 3 of the UDHR affirms the right to life, liberty, and security of person, emphasizing the inherent dignity and worth of every individual. Surrogacy arrangements must respect the right to life and

²⁷ "Blyth, Eric, and Ruth Landau. *Third Party Assisted Conception Across Cultures: Social, Legal and Ethical Perspectives*. Jessica Kingsley Publishers, 2004."

²⁸ "Hudson, Nicky, and Lorraine Culley. *Handbook of Gestational Surrogacy: International Clinical Practice and Policy Issues*. Cambridge University Press, 2016."

ensure that the surrogate, intended parents, and child are protected from harm and exploitation. Article 16 of the UDHR recognizes the right to marry and found a family, implying the right to pursue parenthood through assisted reproductive technologies, including surrogacy, as long as it is conducted in accordance with ethical standards and legal safeguards.”²⁹ Furthermore, Article 25 of the UDHR underscores the right to adequate standards of living, including access to healthcare, which encompasses reproductive health services and support for individuals involved in surrogacy arrangements.

2. **“International Covenant on Civil and Political Rights (ICCPR):** The ICCPR, adopted in 1966, elaborates on civil and political rights that are essential for the protection and dignity of individuals. Article 17 of the ICCPR recognizes the right to privacy, prohibiting arbitrary interference with individuals' privacy, family, home, or correspondence.”³⁰ Surrogacy arrangements must respect the privacy and autonomy of all parties involved, ensuring that their personal information and decisions regarding reproduction are kept confidential and protected from unauthorized disclosure. Additionally, Article 23 of the ICCPR recognizes the right to marriage and family, implying the right to pursue parenthood through surrogacy within the bounds of legality and ethical considerations.
3. **“Convention on the Rights of the Child (CRC):** The CRC, adopted in 1989, is a comprehensive treaty that sets forth the rights of children and the obligations of states to ensure their protection and well-being. While the CRC does not explicitly mention surrogacy, several provisions are relevant to surrogacy arrangements. Article 7 of the CRC emphasizes the child's right to know and be cared for by their parents, suggesting that surrogacy arrangements should prioritize the child's best interests and ensure that their rights to identity and familial relationships are respected. Furthermore, Article 24 of the CRC recognizes the child's right to the highest attainable standard of health, including access to medical care and support, which encompasses appropriate

²⁹ "DasGupta, Shamita Das, and Sayantani DasGupta. *Globalization and Transnational Surrogacy in India: Outsourcing Life*. Lexington Books, 2014."

³⁰ "Patel, Tuls. *Fertile Bonds: Bedouin Class, Kinship, and Gender in the Bekaa Valley*. University Press of Florida, 2013."

healthcare and social services for children born through surrogacy.”³¹

“The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted by the United Nations General Assembly in 1979, is a landmark international treaty that aims to promote gender equality and eliminate discrimination against women in all spheres of life.”³² CEDAW recognizes that discrimination against women persists globally and is a significant obstacle to achieving gender equality, including in areas related to reproductive rights and family life. Surrogacy, as a complex reproductive practice involving predominantly women, intersects with issues of gender equality, reproductive autonomy, and women's rights, making the principles outlined in CEDAW particularly relevant to the discourse surrounding surrogacy.

- 1. Background and Overview of CEDAW:** CEDAW is often described as an international bill of rights for women, outlining principles and obligations to ensure gender equality and non-discrimination. The Convention defines discrimination against women as "any distinction, exclusion, or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment, or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil, or any other field."

“CEDAW consists of a preamble and 30 articles that set forth obligations for States Parties to take measures to eliminate discrimination against women in various spheres, including law, education, employment, healthcare, and family life.”³³

- 2. Relevance of CEDAW to Surrogacy:** Surrogacy intersects with several core principles outlined in CEDAW, including reproductive rights, autonomy, dignity, and non-discrimination. Surrogates, who are predominantly women, play a central role in the surrogacy process, often carrying and delivering a child on behalf of intended parents. However, surrogates may face vulnerabilities and risks associated with the surrogacy process, including exploitation, coercion, and lack of agency. CEDAW emphasizes the

³¹ "Basu, Amrita. *Violent Conjunctures in Democratic India*. Cambridge University Press, 2015."

³² Ibid

³³ "Gupta, Jyotsna Agnihotri. *New Reproductive Technologies, Women's Health and Autonomy: Freedom or Dependency?* Sage Publications, 2000."

importance of protecting women's rights and ensuring that surrogacy arrangements respect their autonomy, dignity, and well-being.

3. **Protection of Women's Rights:** CEDAW recognizes women's right to autonomy and decision-making in matters related to reproduction and family life. Article 16 of CEDAW affirms women's equal rights in marriage and family life, emphasizing the importance of ensuring women's full and equal participation in decision-making regarding reproduction and family planning. Surrogacy arrangements must respect women's autonomy and ensure that they are not coerced or exploited into becoming surrogates against their will. Additionally, CEDAW calls for the elimination of gender stereotypes and discriminatory practices that perpetuate inequality and undermine women's rights, including in the context of surrogacy.
4. **Promotion of Gender Equality:** “CEDAW promotes gender equality by calling for the elimination of discrimination against women in all areas of life, including reproductive rights and access to healthcare. Surrogacy arrangements should not reinforce existing gender inequalities or perpetuate harmful stereotypes about women's roles and responsibilities. Instead, surrogacy should be conducted in a manner that upholds women's rights, promotes their empowerment, and ensures their equal participation and representation in decision-making processes related to surrogacy.”³⁴
5. **State Obligations under CEDAW:** States Parties to CEDAW are obligated to take measures to eliminate discrimination against women and promote gender equality in all spheres of life, including in the context of surrogacy. This includes adopting legislation, policies, and programs that protect women's rights, ensure their access to reproductive healthcare services, and address the root causes of discrimination and inequality. States must also take steps to raise awareness about women's rights and provide education and training to healthcare providers, legal professionals, and other stakeholders involved in surrogacy.
6. **Challenges and Implementation:** “Despite the principles outlined in CEDAW, challenges remain in effectively implementing its provisions and ensuring the protection of women's rights in the context of surrogacy. Issues such as exploitation,

³⁴ Ibid

commodification, and lack of regulation continue to pose risks to women who serve as surrogates. Furthermore, cultural norms, legal barriers, and lack of awareness may hinder efforts to address discrimination and inequality in surrogacy practices. Efforts to promote gender equality and protect women's rights in surrogacy require comprehensive legislative and policy measures, as well as ongoing advocacy and awareness-raising initiatives.”³⁵

“The Convention on the Rights of Persons with Disabilities (CRPD) stands as a significant international treaty dedicated to promoting the rights of individuals with disabilities and ensuring their full inclusion and participation in society. Adopted by the United Nations General Assembly in 2006, the CRPD reaffirms the inherent dignity and worth of persons with disabilities and aims to eliminate discrimination and barriers that hinder their equal enjoyment of rights and opportunities. This comprehensive treaty intersects with various aspects of life, including reproductive rights and access to assisted reproductive technologies (ART), such as surrogacy.”³⁶ In this detailed exploration, we will delve into the principles and provisions of the CRPD relevant to surrogacy arrangements involving individuals with disabilities, examining the unique ethical and legal considerations, and emphasizing the importance of ensuring inclusivity, equity, and respect for the rights of persons with disabilities.

Recognition of Rights: “The CRPD recognizes the inherent dignity, autonomy, and agency of persons with disabilities, affirming their right to make decisions about their own lives, including matters related to reproductive rights and family life. Article 3 of the CRPD underscores the principles of equality and non-discrimination, emphasizing the need to ensure that persons with disabilities enjoy the same rights and opportunities as others without discrimination on the basis of disability.”³⁷ This provision establishes the foundation for recognizing the reproductive rights of persons with disabilities, including their right to access ART and pursue surrogacy if they so choose. Access to Assisted Reproductive Technologies: “The CRPD recognizes the importance of ensuring equal access to healthcare services, including reproductive healthcare and ART, for persons with disabilities. Article 25 of the CRPD emphasizes the right of persons with disabilities to attain the highest standard of health

³⁵ "Kohli, Kriti. *Legal and Ethical Issues in Human Reproduction*. Eastern Book Company, 2019."

³⁶ "Vora, Kalindi. *Life Support: Biocapital and the New History of Outsourced Labor*. University of Minnesota Press, 2015."

³⁷ "Whittaker, Andrea. *Surrogacy in the Time of Covid-19: Ethical, Legal, and Social Implications*. Routledge, 2021."

without discrimination, including access to sexual and reproductive healthcare services. This provision underscores the obligation of states parties to remove barriers that limit access to ART, including surrogacy, for persons with disabilities and to provide appropriate support and accommodations to ensure their equal access to reproductive healthcare services.”³⁸

Informed Consent and Decision-Making Capacity: Surrogacy arrangements involving individuals with disabilities raise complex ethical and legal considerations regarding informed consent and decision-making capacity. “The CRPD emphasizes the importance of respecting the autonomy and decision-making capacity of persons with disabilities in all aspects of life, including reproductive choices. Article 12 of the CRPD recognizes the right to legal capacity on an equal basis with others, emphasizing the need to ensure that persons with disabilities enjoy the right to make decisions about their own lives, including matters related to family and reproduction, with appropriate support if necessary.”³⁹ **Best Interests of the Child:** Surrogacy arrangements also raise considerations regarding the best interests of the child, particularly when individuals with disabilities are involved as intended parents or surrogates. The CRPD emphasizes the importance of ensuring that decisions affecting children take into account their best interests and respect their rights as individuals. “Article 7 of the CRPD recognizes the right of children with disabilities to preserve their identities and family relations, underscoring the need to ensure that surrogacy arrangements prioritize the well-being and rights of children born through surrogacy involving persons with disabilities. **Safeguards and Protections:** The CRPD underscores the importance of adopting safeguards and protections to prevent exploitation, abuse, and discrimination against persons with disabilities in all aspects of life, including reproductive choices and surrogacy. Article 6 of the CRPD emphasizes the right to life on an equal basis with others, highlighting the need to ensure that persons with disabilities are protected from harm and exploitation in surrogacy arrangements.”⁴⁰ This provision underscores the importance of establishing legal and regulatory frameworks that uphold the rights and dignity of persons with disabilities and provide appropriate safeguards to prevent abuse and ensure the ethical conduct of surrogacy practices.

The Hague Conference on Private International Law, often referred to as the Hague Conference, serves as a prominent intergovernmental organization focused on developing and

³⁸ Ibid

³⁹ Ibid

⁴⁰ "Ghosh, Shampa, and Sayantani DasGupta. *Globalization and Transnational Surrogacy in India: Outsourcing Life*. Sage Publications, 2016."

promoting international agreements and conventions to facilitate cooperation in private international law matters. While the Hague Conference has not specifically addressed surrogacy through the development of a dedicated treaty, it has engaged in discussions and initiatives pertaining to the legal implications of international surrogacy arrangements.

- 1. Background and Mandate of the Hague Conference:** The Hague Conference, established in 1893, aims to achieve international harmonization and cooperation in private international law matters. It provides a platform for member states to negotiate and conclude multilateral treaties, known as Hague Conventions, which address various legal issues such as jurisdiction, recognition of foreign judgments, and family law matters. The Hague Conference's mandate encompasses promoting legal certainty and access to justice across borders while respecting the diversity of legal systems and cultures.
- 2. Exploring Legal Implications of International Surrogacy:** Despite the absence of a specific treaty on surrogacy, the Hague Conference has recognized the legal complexities and challenges associated with international surrogacy arrangements. Given the cross-border nature of surrogacy, issues such as recognition of parentage, jurisdictional conflicts, and the protection of children's rights often arise, necessitating international cooperation and coordination. The Hague Conference has facilitated discussions and research projects to examine these legal implications and identify potential avenues for addressing them effectively.
- 3. Recognition of Parentage:** One of the primary legal issues in international surrogacy is the recognition of parentage, particularly when intended parents and surrogate mothers reside in different countries. The Hague Conference has explored mechanisms for establishing legal parentage in cross-border surrogacy cases, considering factors such as genetic connection, intention to parent, and the best interests of the child. Developing international standards for recognizing parentage in surrogacy arrangements is essential to ensure legal certainty and protect the rights of all parties involved.
- 4. Jurisdictional Conflicts:** Jurisdictional conflicts often arise in international surrogacy cases, as different countries may have divergent laws and procedures governing surrogacy arrangements. The Hague Conference has examined methods for resolving

jurisdictional conflicts and determining the appropriate forum for adjudicating disputes related to surrogacy. Harmonizing jurisdictional rules and promoting cooperation among judicial authorities can help mitigate the legal uncertainties and complexities associated with cross-border surrogacy.

- 5. Protection of Children's Rights:** Central to discussions on international surrogacy is the protection of children's rights, including their right to identity, family life, and access to care and support. The Hague Conference has emphasized the importance of safeguarding children's rights in cross-border surrogacy cases and ensuring that their best interests are paramount in legal proceedings. Developing international guidelines and protocols for protecting children born through surrogacy is crucial to uphold their rights and promote their well-being.
- 6. Ongoing Initiatives and Future Directions:** The Hague Conference continues to engage in research, dialogue, and capacity-building initiatives related to international surrogacy. It collaborates with member states, international organizations, legal experts, and stakeholders to address emerging legal challenges and develop practical solutions for regulating cross-border surrogacy. While there is no consensus on a uniform international framework for surrogacy, the Hague Conference's efforts contribute to the ongoing discourse on enhancing legal certainty, protecting rights, and promoting ethical practices in international surrogacy arrangements.

Surrogacy in India has undergone significant evolution in terms of legal regulation, spurred by the emergence of the country as a popular destination for international surrogacy arrangements. The journey of surrogacy laws in India can be traced through several key phases:

In the early 2000s, India witnessed a surge in the practice of surrogacy, attracting individuals and couples from around the world seeking assisted reproductive technologies (ART) due to various factors such as lower costs, advanced medical infrastructure, and a relatively lenient legal environment. India emerged as a prominent destination for surrogacy, offering fertility clinics and services that catered to the growing demand for assisted reproduction.

One of the primary factors driving the early adoption of surrogacy in India was the absence of comprehensive legal regulation governing the practice. Unlike many other countries where surrogacy was heavily regulated or prohibited altogether, India lacked clear laws or guidelines

specifically addressing surrogacy arrangements. This legal vacuum created a fertile ground for the growth of the surrogacy industry, as clinics and agencies operated within a regulatory gray area, with minimal oversight or accountability. The absence of legal regulation in India during this period raised significant concerns about the potential for exploitation, commercialization, and ethical dilemmas associated with surrogacy arrangements. “Without clear legal guidelines, there was a lack of clarity regarding the rights and responsibilities of surrogates, intended parents, and children born through surrogacy. Surrogates, often from economically disadvantaged backgrounds, faced risks of exploitation and inadequate protections for their physical, emotional, and financial well-being.”⁴¹

Moreover, the absence of legal safeguards meant that surrogacy arrangements could vary widely in terms of transparency, fairness, and ethical standards. There were reports of cases where surrogates were subjected to coercive or exploitative practices, lacked adequate informed consent, or faced challenges in asserting their rights and autonomy within surrogacy agreements. Intended parents also faced uncertainties regarding parentage, citizenship, and legal recognition of their status as the child's legal guardians.

The lack of regulation also led to concerns about the commercialization of surrogacy, with some clinics and agencies prioritizing profit over ethical considerations. The absence of price controls or guidelines on compensation for surrogates created disparities in payment, with some surrogates receiving inadequate compensation for their services while others were paid disproportionately high sums. Furthermore, the absence of legal regulation hindered efforts to address ethical dilemmas and ensure adherence to international standards of medical ethics and human rights principles. The lack of oversight and accountability made it challenging to monitor and address instances of misconduct, exploitation, or breaches of ethical standards within the surrogacy industry.

In response to growing concerns about the ethical and legal implications of surrogacy, Indian courts began to intervene through landmark judgments. “One such case was the Baby Manji Yamada case in 2008, The Baby Manji Yamada case, which unfolded in 2008, was a landmark legal battle that brought international attention to the complexities and ethical dilemmas

⁴¹ "Bharadwaj, Aditya. *Conceptions: Infertility and Procreative Technologies in India*. Berghahn Books, 2016."

surrounding surrogacy arrangements, particularly concerning cross-border surrogacy and the determination of parentage and citizenship.”⁴²

“The case revolved around Baby Manji Yamada, a child born through a surrogacy arrangement in India to a Japanese couple. The intended parents, Ikufumi and Yuki Yamada, had entered into a surrogacy agreement with an Indian surrogate mother, but their marriage dissolved before the child's birth. Subsequently, the intended father, Ikufumi Yamada, was unable to obtain a visa for the child to return to Japan due to Japanese laws requiring legal ties between children and their parents for citizenship. The case sparked a legal battle as the child's citizenship and parental rights were in limbo.”⁴³ The Indian surrogate mother relinquished her parental rights, leaving the child effectively stateless and stranded in India. The case raised profound legal, ethical, and humanitarian concerns, prompting intervention from courts in both India and Japan. In India, the Supreme Court took up the case to address issues of surrogacy, parentage, and the child's welfare. The court ruled that Baby Manji Yamada's birth certificate should list her intended father's name and ordered the Indian government to issue her a travel document to enable her return to Japan. However, the court refrained from addressing broader questions regarding the legality and regulation of surrogacy in India, leaving these matters for legislative and policy deliberations. Meanwhile, the case also sparked debates and legal proceedings in Japan, where authorities grappled with the question of the child's citizenship and legal status. Ultimately, the Japanese government granted the child Japanese citizenship, allowing her to reunite with her intended father and travel to Japan.

“The Baby Manji Yamada case highlighted the legal and ethical complexities inherent in cross-border surrogacy arrangements and underscored the need for clear legal frameworks and international cooperation to address such issues. It raised questions about the rights and protections afforded to children born through surrogacy, the determination of parentage and citizenship, and the responsibilities of nations involved in cross-border surrogacy.”⁴⁴

Furthermore, the case drew attention to the broader implications of surrogacy practices, including concerns about exploitation, commodification, and the welfare of surrogates and children. “It prompted discussions about the regulation of surrogacy both domestically and

⁴² "Narayan, Uma. *Dislocating Cultures: Identities, Traditions, and Third-World Feminism*. Routledge, 1997."

⁴³ "Rao, Mohan. *From Population Control to Reproductive Health: Malthusian Arithmetic*. Sage Publications, 2004."

⁴⁴ Ibid

internationally and spurred efforts to develop guidelines and standards to protect the rights and interests of all parties involved in surrogacy arrangements. Overall, the Baby Manji Yamada case served as a catalyst for legal and policy reforms in the realm of surrogacy, prompting stakeholders to grapple with the complex ethical, legal, and social issues raised by the growing practice of assisted reproductive technologies and cross-border surrogacy.”⁴⁵

The drafting of the Surrogacy (Regulation) Bill in India marked a significant step towards establishing a comprehensive legal framework to govern surrogacy arrangements in the country. The process began with the release of guidelines by the Indian Council of Medical Research (ICMR) in 2010, which aimed to regulate assisted reproductive technologies, including surrogacy, and ensure ethical practices in this field. These guidelines were formulated in response to the growing concerns surrounding surrogacy in India, including issues related to exploitation, commercialization, and the lack of legal oversight. The guidelines sought to address these concerns by providing standards and protocols for surrogacy clinics, healthcare providers, intended parents, and surrogate mothers.

Key aspects of the ICMR guidelines included:

1. **Eligibility Criteria:** The guidelines outlined eligibility criteria for intended parents and surrogate mothers, including age limits, medical fitness, and mental health assessments.
2. **Informed Consent:** The guidelines emphasized the importance of informed consent in surrogacy arrangements, ensuring that all parties involved fully understood the risks, responsibilities, and implications of their participation.
3. **Medical Screening:** The guidelines mandated comprehensive medical screening for intended parents, surrogate mothers, and gamete donors to assess their physical and mental health and minimize the risk of medical complications.
4. **Legal Agreements:** The guidelines recommended the drafting of legal agreements between intended parents and surrogate mothers, detailing the rights, obligations, and expectations of both parties throughout the surrogacy process.

⁴⁵ "Chandran, Suja. Surrogacy in India: Socio-Legal and Ethical Dimensions. Springer, 2019."

5. Financial Compensation: The guidelines permitted reasonable compensation for surrogate mothers to cover medical expenses, insurance, and other pregnancy-related costs but prohibited commercialization or exploitation of surrogates.
6. "Counseling and Support: The guidelines emphasized the importance of providing counseling and support services to all parties involved in surrogacy arrangements, including psychological support for surrogate mothers."⁴⁶

Following the release of the ICMR guidelines, efforts were made to translate these guidelines into legislation through the drafting of the Surrogacy (Regulation) Bill. The bill aimed to provide a legal framework to regulate surrogacy practices in India and address the ethical, legal, and social complexities associated with assisted reproductive technologies.

The Surrogacy (Regulation) Bill proposed several key provisions, including:

1. Regulation of Surrogacy Clinics: The bill sought to regulate surrogacy clinics and healthcare providers, establishing standards for facilities, staff qualifications, and medical protocols.
2. "Establishment of National and State Boards: The bill proposed the establishment of national and state-level regulatory authorities to oversee the implementation of surrogacy regulations, monitor compliance, and address grievances."⁴⁷
3. Prohibition of Commercial Surrogacy: The bill aimed to prohibit commercial surrogacy and the commodification of women's bodies, instead promoting altruistic surrogacy arrangements based on compassionate and non-commercial motives.
4. Protection of Surrogate Mothers' Rights: The bill aimed to protect the rights and welfare of surrogate mothers, ensuring access to healthcare, legal representation, and financial compensation for pregnancy-related expenses.
5. Rights of Intended Parents: The bill outlined the rights and responsibilities of intended parents, including eligibility criteria, parental rights, and obligations towards the child

⁴⁶ Ibid

⁴⁷ "Hudson, Nicky, and Lorraine Culley. Handbook of Gestational Surrogacy: International Clinical Practice and Policy Issues. Cambridge University Press, 2016."

born through surrogacy.

“The Surrogacy (Regulation) Act, 2019, represents a significant milestone in the regulation of surrogacy arrangements in India. Enacted by the Indian Parliament, this legislation aims to address the ethical, legal, and social complexities associated with surrogacy while safeguarding the rights and interests of all parties involved. One of the primary objectives of the Surrogacy (Regulation) Act is to prohibit commercial surrogacy in India. Commercial surrogacy involves financial transactions where the surrogate mother receives compensation beyond medical expenses and reasonable costs. The Act recognizes the potential for exploitation and commodification of women's bodies in commercial surrogacy arrangements and seeks to prevent such practices. Instead, the Surrogacy (Regulation) Act allows for altruistic surrogacy, where the surrogate mother volunteers to carry a child for intended parents without receiving financial compensation beyond reimbursement for medical expenses and other reasonable costs directly related to the surrogacy process.”⁴⁸ Altruistic surrogacy is based on compassionate motives rather than financial gain and is permitted only for Indian citizens.

“The Act establishes eligibility criteria for intended parents, surrogate mothers, and medical practitioners involved in surrogacy procedures. These criteria ensure that surrogacy arrangements are entered into willingly, with informed consent, and that all parties involved are medically and mentally fit to participate. The eligibility criteria also help prevent potential exploitation or coercion of vulnerable individuals. Furthermore, the Surrogacy (Regulation) Act mandates the establishment of National and State Surrogacy Boards to regulate and oversee the implementation of surrogacy laws. These regulatory bodies are responsible for monitoring surrogacy clinics and practitioners, enforcing compliance with the Act's provisions, and addressing any grievances or disputes that may arise in surrogacy arrangements.”⁴⁹

“The Act also contains provisions related to the rights and responsibilities of intended parents, surrogate mothers, and children born through surrogacy. It ensures that the parental rights of intended parents are recognized and protected, establishes safeguards for the welfare of surrogate mothers, and addresses the legal status and citizenship of children born through surrogacy.”⁵⁰

⁴⁸ Ibid

⁴⁹ "Saravanan, Sheela. A Transnational Feminist View of Surrogacy Biomarkets in India. Springer, 2018."

⁵⁰ Ibid

The Surrogacy (Regulation) Act: Analysis of the Current Legal Framework and Its Implications:

“The Surrogacy (Regulation) Act, 2019” represents a significant milestone in the regulation of surrogacy in India. Below are key aspects and implications of the Act:

1. “Prohibition of Commercial Surrogacy: One of the central provisions of the Act is the prohibition of commercial surrogacy. The Act aims to prevent the exploitation of women for commercial purposes and promote altruistic surrogacy based on compassion and mutual consent. By prohibiting commercial surrogacy, the Act seeks to address concerns about the commodification of women's bodies and the potential exploitation of vulnerable populations.
2. Altruistic Surrogacy for Indian Citizens: The Act permits altruistic surrogacy for Indian citizens, subject to certain eligibility criteria. Intended parents must be married for at least five years and have a proven infertility condition to qualify for surrogacy.”⁵¹ Additionally, surrogacy arrangements must be based on altruism, with the surrogate agreeing to carry the child without receiving any financial compensation beyond medical expenses and insurance coverage.
3. Regulatory Oversight and Monitoring: The Surrogacy (Regulation) Act establishes National and State Surrogacy Boards to regulate and monitor surrogacy arrangements across the country. These boards are tasked with overseeing the implementation of the Act, granting approvals for surrogacy procedures, and addressing any disputes or violations of surrogacy laws. The regulatory framework aims to ensure transparency, accountability, and adherence to ethical standards in surrogacy practices.
4. “Protection of Rights and Interests: The Act includes provisions to protect the rights and interests of all parties involved in surrogacy arrangements. It requires written agreements between intended parents and surrogates, outlining the terms and conditions of the surrogacy agreement. Additionally, the Act mandates medical and psychological screening of surrogates to ensure their physical and mental well-being throughout the surrogacy process. Moreover, the Act prohibits sex-selective surrogacy and exploitation

⁵¹ "Deonandan, Raywat, and Deepa Venkatesh. The Cultural, Social, and Ethical Implications of Assisted Reproductive Technologies. Bloomsbury Academic, 2019."

of surrogates, emphasizing the importance of upholding ethical standards and human rights principles.”⁵²

5. **Challenges and Future Directions:** While the Surrogacy (Regulation) Act represents a step towards regulating surrogacy in India, challenges remain in its implementation and enforcement. Ensuring effective oversight, preventing exploitation, and addressing emerging issues in surrogacy require ongoing efforts from policymakers, healthcare professionals, and civil society. Additionally, the Act's focus on altruistic surrogacy may limit access to surrogacy for individuals unable to find altruistic surrogates or afford the associated medical expenses.

Rights of the Surrogate:

Surrogacy arrangements inherently involve complex ethical considerations and raise important questions about the rights and well-being of the surrogate mother. As such, it is crucial to establish ethical guidelines and legal protections to safeguard the rights of surrogates and ensure their autonomy, dignity, and welfare throughout the surrogacy process.

Informed Consent: Central to ethical surrogacy practices is the concept of informed consent.

“Surrogate mothers must provide voluntary, informed consent after receiving comprehensive information about the surrogacy process, potential risks and benefits, and their rights and responsibilities. It is essential to ensure that surrogates fully understand the implications of their decision and are not subject to coercion or undue influence.”⁵³

1. **Healthcare and Support:** Surrogate mothers should have access to comprehensive healthcare services throughout the surrogacy journey, including prenatal care, medical screenings, and psychological support. It is imperative to prioritize the health and well-being of surrogates and provide adequate support to address any physical or emotional challenges they may face during pregnancy and postpartum.
2. **Legal Protections:** “Legal frameworks should be in place to protect the rights of surrogate mothers and enforce agreements made between surrogates and intended

⁵² Ibid

⁵³ "Teman, Elly. *Birthing a Mother: The Surrogate Body and the Pregnant Self*. University of California Press, 2010."

parents. These agreements should outline the rights, obligations, and expectations of both parties, including financial compensation, medical expenses, and parental rights. Surrogate mothers should have access to legal representation to ensure that their interests are adequately represented and protected.”⁵⁴

3. **Privacy and Confidentiality:** Surrogate mothers have the right to privacy and confidentiality throughout the surrogacy process. Their personal information, medical history, and reproductive choices should be kept confidential, and their identity should be protected from unauthorized disclosure. It is essential to respect the privacy and autonomy of surrogates and uphold their dignity and confidentiality.
4. **Psychosocial Well-being:** Surrogate mothers may experience emotional and psychological challenges during the surrogacy process, including feelings of attachment, grief, or loss. It is crucial to provide ongoing psychosocial support to surrogates, including counseling services and peer support groups, to address their emotional needs and promote their mental well-being.

Rights of the Child:

“In addition to protecting the rights of surrogate mothers, it is essential to consider the legal status and rights of children born through surrogacy. Ensuring the welfare and best interests of the child should be a primary concern in surrogacy arrangements, and legal frameworks should be in place to address their rights and establish their legal parentage.”⁵⁵

1. **“Legal Parentage:** Clear legal mechanisms should be established to determine the parentage of children born through surrogacy and establish their legal rights and responsibilities. Intended parents should be recognized as the legal parents of the child from birth, and legal processes such as birth certificates and parental orders should be streamlined to facilitate this recognition.
2. **Best Interests of the Child:** Surrogacy arrangements should prioritize the best interests of the child, taking into account factors such as stability, continuity of care, and the child's emotional and psychological well-being. Legal frameworks should promote the

⁵⁴ Ibid

⁵⁵ "Balakrishnan, Sairam. Surrogacy: Legal and Ethical Issues. Eastern Law House, 2016."

child's right to know their genetic origins and maintain meaningful relationships with both their biological and intended parents, where appropriate.”⁵⁶

3. **Access to Information:** “Children born through surrogacy have the right to access information about their genetic heritage and surrogacy arrangements, including details about the surrogate mother and the circumstances of their birth. Legal mechanisms should be in place to facilitate the disclosure of this information in a sensitive and age-appropriate manner, respecting the child's right to know their identity and origins.”⁵⁷
4. **Protection from Exploitation:** Legal frameworks should protect children born through surrogacy from exploitation, trafficking, or abuse. Surrogacy arrangements should be conducted in accordance with ethical guidelines and regulatory standards to ensure that the child's welfare and rights are safeguarded throughout the surrogacy process.

Legal Reforms:

1. **Comprehensive Regulation:** There is a need for comprehensive legislation that addresses the various aspects of surrogacy, including eligibility criteria, informed consent, medical standards, financial arrangements, and parental rights. The existing Surrogacy (Regulation) Act, 2019, in India, while a step in the right direction, may require amendments and enhancements to address emerging issues and gaps in the regulation.
2. **Prohibition of Commercial Surrogacy:** Given the ethical concerns surrounding commercial surrogacy, policymakers may consider a complete prohibition on commercial surrogacy, similar to the approach adopted in the Surrogacy (Regulation) Act. However, such a prohibition should be accompanied by robust measures to ensure access to ethical and regulated surrogacy options for intended parents.
3. **Protection of Surrogate Rights:** Legal reforms should prioritize the protection of surrogate mothers' rights, including provisions for healthcare, psychological support, informed consent, and fair compensation. Surrogates should have the right to access

⁵⁶ Ibid

⁵⁷ Ibid

comprehensive healthcare services and receive adequate support throughout the surrogacy journey.

4. **Parental Rights and Citizenship:** Legislation should clarify parental rights and citizenship status for children born through surrogacy, particularly in cases involving international surrogacy arrangements. Clear mechanisms should be established to determine the legal parentage of the child and ensure their rights and welfare are protected.
5. **Regulatory Oversight:** Effective regulatory mechanisms should be established to oversee and monitor surrogacy clinics, practitioners, and agencies. National and state-level surrogacy boards should be empowered to enforce compliance with surrogacy laws, investigate complaints or grievances, and impose penalties for violations.

Ethical Considerations:

1. **Informed Decision-Making:** Ethical frameworks should prioritize informed decision-making and ensure that all parties involved in surrogacy arrangements understand the implications and consequences of their choices. This includes providing comprehensive information about the surrogacy process, risks, benefits, and alternatives, as well as facilitating open communication and consent between intended parents and surrogates.
2. **Protection of Vulnerable Individuals:** Ethical guidelines should incorporate safeguards to protect vulnerable individuals, including surrogates, intended parents, and children born through surrogacy. Measures should be implemented to prevent exploitation, coercion, or undue influence and ensure that surrogacy arrangements are conducted in a manner that upholds dignity, autonomy, and well-being.
3. **Psychosocial Support:** Ethical frameworks should prioritize the provision of psychosocial support services to surrogates, intended parents, and children born through surrogacy. This includes access to counseling, mental health services, and peer support groups to address the emotional and psychological challenges associated with surrogacy and promote the well-being of all parties involved.
4. **Transparency and Accountability:** Ethical practices in surrogacy require transparency and accountability at every stage of the process. Surrogacy agencies,

clinics, and practitioners should adhere to ethical standards and guidelines, maintain accurate records, and ensure full disclosure of information to all stakeholders. Transparent communication and ethical conduct are essential for building trust and fostering positive relationships between intended parents and surrogates.

5. **Continued Dialogue and Review:** Ethical considerations in surrogacy are dynamic and evolving, necessitating ongoing dialogue, research, and review of ethical guidelines and practices. Stakeholders, including policymakers, healthcare professionals, ethicists, and advocacy groups, should engage in collaborative efforts to identify emerging ethical issues, address gaps in regulation, and promote ethical standards that prioritize the rights and well-being of all individuals involved in surrogacy arrange.

Conclusion:

Surrogacy, as a reproductive choice, is intricately linked with the principle of personal liberty—a fundamental aspect of individual autonomy and human dignity. In liberal democracies, the right to make decisions about one's body, including the decision to conceive or carry a child through surrogacy, is recognized as part of the broader right to privacy and liberty⁵⁸. In the Indian context, the Supreme Court in *Suchita Srivastava v. Chandigarh Administration* (2009) emphasized that reproductive rights form an integral part of Article 21 of the Constitution, which guarantees the right to life and personal liberty⁵⁹.

However, while surrogacy reflects an individual's right to choose, it also raises ethical and legal dilemmas, especially regarding the potential exploitation of economically vulnerable surrogate mothers. This concern justifies state intervention to regulate surrogacy arrangements and safeguard the interests of all parties involved. India's *Surrogacy (Regulation) Act, 2021* aims to strike a balance between protecting the autonomy of individuals and preventing commercialization of the practice.

Therefore, while surrogacy is a manifestation of personal liberty, it must be exercised responsibly within a regulatory framework that ensures informed consent, transparency, and

⁵⁸ Donchin, A. (2010). Reproductive tourism and the quest for global gender justice. *Bioethics*, 24(7), 323–332. <https://doi.org/10.1111/j.1467-8519.2010.01835.x>

⁵⁹ *Suchita Srivastava v. Chandigarh Administration*, (2009) 9 SCC 1.

the protection of human dignity. Achieving this balance is essential for upholding both personal freedoms and social justice in reproductive choices.