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

With this thought, we hereby present to you

SURROGACY LAWS AND ETHICAL CONSIDERATIONS

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Abstract

Procreation remains a core objective of marriage, deeply rooted in human instinct and social structure, with the desire to raise biological offspring being both a natural and cultural aspiration. Childlessness often results in emotional distress, social stigma, and a perceived discontinuity of lineage. Assisted reproductive technologies (ART), particularly surrogacy, have revolutionized the possibilities for infertile couples. Unlike adoption, surrogacy offers a unique alternative where the child maintains a genetic link to one or both parents, fulfilling both emotional and biological desires.

India's surrogacy journey began in 1978 with the birth of its first IVF baby, shortly after the world's first in the UK¹. The practice gained prominence and international attention following the 2008 Supreme Court decision that effectively legalized commercial surrogacy, positioning India as a leading destination for fertility tourism. Factors such as low medical costs, availability of willing surrogate mothers, absence of stringent regulations, and judicial tolerance encouraged this boom. However, the rapid commercialization of surrogacy also revealed its darker facets—exploitation of impoverished women, commodification of reproductive capabilities, and legal ambiguity concerning the rights of surrogate mothers and children born through such arrangements.

In response to these challenges, the Government of India introduced the *Surrogacy (Regulation) Bill, 2016*, which marked a legislative shift from permissive commercial surrogacy to a more restrictive altruistic model. The Bill prohibits commercial surrogacy and limits surrogacy services to Indian heterosexual married couples under specific conditions.

¹ Report of the Law Commission of India, 228 (2009) P 9

While aimed at preventing exploitation and ensuring ethical practice, the Bill has also drawn criticism for its restrictive nature and for potentially infringing on reproductive autonomy.

This paper delves into the evolution and current legal framework of surrogacy in India, examining constitutional rights such as the right to privacy, bodily autonomy, and reproductive choice under Article 21 of the Indian Constitution. It also explores contract law issues surrounding enforceability, consent, and the legal status of surrogate agreements. The discussion extends to international human rights standards and the ethical dilemmas posed by cross-border surrogacy arrangements.

Crucially, the paper emphasizes the need to balance regulation with empowerment. Issues such as the surrogate mother's informed consent, health rights, psychological well-being, and post-birth custody arrangements must be carefully addressed. Likewise, the rights and identity of the child born through surrogacy—such as citizenship, parentage, and inheritance—demand comprehensive legal recognition.

The study concludes with recommendations for a more nuanced legal framework that ensures the dignity, autonomy, and welfare of all parties involved, particularly women acting as surrogates. This includes the establishment of transparent ART and surrogacy boards, enforceable ethical guidelines, and a rights-based approach that aligns domestic laws with international best practices. Surrogacy, when regulated justly and ethically, holds the potential not just as a reproductive option, but as a tool of empowerment—provided it respects the fundamental human rights of every individual involved.

Keywords- Surrogacy, Assisted Reproductive Technologies (ART), Reproductive Autonomy, Bodily Autonomy, Surrogate Mother's Rights, Legal and Ethical issues in Surrogacy

1. Introduction of Surrogacy: Meaning, Kinds and Historical Background

Introduction and Meaning

Surrogacy, derived from the Latin term *Surrogatus* meaning “to substitute,” refers to an arrangement where a woman agrees to carry and deliver a child for another person or couple. As defined by *Black's Law Dictionary*², it involves non-coital conception and a contractual

² Report of the Law Commission of India, No.228, p.9.

<http://www.lawcommissionofindia.nic.in/reports/report228.pdf>

agreement, often with provisions for relinquishing parental rights and possible compensation. Surrogacy is a crucial part of Assisted Reproductive Technologies (ART), offering hope to infertile couples for whom biological parenthood is otherwise unattainable.

In India, the significance of family and procreation is deeply rooted in cultural and legal traditions. Infertility often leads to emotional distress and social stigma. Surrogacy gained prominence after the birth of India's first IVF baby in 1978 and the Supreme Court's decision in *Baby Manji Yamada v. Union of India* (2008)³, making India a hub for commercial surrogacy. However, ethical concerns such as exploitation, commodification of women, and legal ambiguities led to the enactment of the Surrogacy (Regulation) Act, 2021, which bans commercial surrogacy and permits only altruistic arrangements under strict guidelines.

Kinds of Surrogacy

I. Based on Genetic Connection

1. Traditional Surrogacy (also called Partial or Straight Surrogacy)

In traditional surrogacy, the surrogate mother is genetically related to the child. Her own egg is fertilized with the sperm of the intended father (or a donor) through artificial insemination. This method is rarely used today due to emotional, legal, and ethical complications.

Example: In the U.S., a well-known early case was “Baby M” (1988), where the surrogate, Mary Beth Whitehead, was the biological mother. She refused to give up the baby after birth, leading to a custody battle. This case highlighted the legal risks of traditional surrogacy.

2. Gestational Surrogacy (also called Full or Host Surrogacy)

In gestational surrogacy, the surrogate has no genetic link to the child. The embryo is created using the egg and sperm of the intended parents (or donors) via In Vitro Fertilization (IVF) and then implanted in the surrogate. This is the most commonly used and legally accepted form of surrogacy worldwide.

Example: Kanupriya alias Durga, India's first IVF baby born in 1978 in Kolkata, was delivered using a gestational surrogacy technique, making it a pioneering case in Indian reproductive technology.

II. Based on Financial Arrangement

1. Commercial Surrogacy

³ 13 SCC 518

In commercial surrogacy, the surrogate is financially compensated for carrying the child, beyond reimbursement of medical expenses. It was legal and popular in India until the Surrogacy (Regulation) Act, 2021, banned it in favour of altruistic models.

Example: In *Baby Manji Yamada v. Union of India* (2008), a Japanese couple commissioned an Indian surrogate. The legal complications that arose after their divorce and India's lack of surrogacy laws at the time led to a Supreme Court decision that spotlighted the need for regulation.

2. Altruistic Surrogacy

In altruistic surrogacy, the surrogate does not receive monetary compensation beyond medical costs and insurance. It is typically arranged within close family or friends. This is the only form of surrogacy legally allowed in India under the Surrogacy (Regulation) Act, 2021.

Example: A case in Gujarat (2012) involved a woman who carried a baby for her infertile sister without accepting any financial compensation, demonstrating a successful altruistic arrangement under medical supervision.

III. Based on Jurisdiction

1. Domestic Surrogacy

Both the intended parents and the surrogate are from the same country. It is easier to regulate and legally safer for all parties involved.

Example: In the United Kingdom, domestic altruistic surrogacy is allowed under strict guidelines by the Human Fertilisation and Embryology Authority (HFEA).

2. International (or Cross-Border) Surrogacy

Intended parents hire a surrogate in another country, often due to cost, legal restrictions, or availability of services. This can involve complex immigration, citizenship, and parentage issues.

Example: In the Case of *Baby Manji Yamada*, a Japanese couple hired a surrogate in India. After their divorce, the legal battle to obtain a passport and bring the child back to Japan created an international debate on surrogacy and children's rights.

Historical background

Surrogacy, though modernized through scientific advancement in recent decades, is not a new phenomenon. The idea of a woman bearing a child on behalf of another has existed across cultures and civilizations, deeply interwoven with societal expectations around lineage, fertility, and family continuation.

Ancient Origins

The earliest recorded instances of surrogacy can be traced to ancient civilizations, particularly in Mesopotamia and biblical times. In the Book of Genesis (Chapter 16), the story of Abraham, Sarah, and Hagar is often cited as a proto-surrogacy arrangement. Unable to conceive, Sarah permitted her maid Hagar to bear a child for Abraham, highlighting early recognition of surrogate motherhood as a means to overcome infertility.

Similarly, in ancient Hindu traditions, there are references in mythological texts where gods and sages employed divine intervention and surrogate-like arrangements to ensure procreation, underscoring the spiritual and cultural importance of offspring in Indian society.

Medieval and Pre-Modern Era

Throughout the medieval period, infertility remained a private affliction, often attributed to divine punishment or moral failing. The absence of scientific understanding meant surrogacy, in the absence of formal arrangements, was limited to informal or socially frowned-upon practices such as concubinage or levirate marriages to ensure continuity of the male lineage.

The Advent of Medical Technology: IVF and Modern Surrogacy

The modern history of surrogacy begins with the rise of assisted reproductive technologies (ART) in the late 20th century. A significant breakthrough came in 1978, when Louise Joy Brown, the world's first baby conceived through in vitro fertilization (IVF), was born in the United Kingdom. This landmark event marked the beginning of gestational surrogacy, where the surrogate mother has no genetic link to the child.

Shortly thereafter, India entered the global reproductive stage with the birth of its first IVF baby, Kanupriya alias Durga, in Kolkata on October 3, 1978, through the efforts of Dr. Subhas Mukherjee. Despite facing scientific scepticism at the time, this achievement placed India on the map of reproductive innovation.

Commercialization and Global Surrogacy Boom

During the late 1990s and early 2000s, surrogacy evolved into a global commercial enterprise, with countries like India, Ukraine, and Thailand becoming hubs for international fertility tourism. India's legal vacuum and low-cost medical services led to a surge in commercial surrogacy, drawing foreign couples seeking to bypass stricter laws in their home countries.

The 2008 Supreme Court decision in *Baby Manji Yamada v. Union of India* (2008) 13 SCC 518 further legitimized commercial surrogacy in India, sparking legal, ethical, and social

debates on the rights of surrogate mothers and the children born through such arrangements.

Regulatory Evolution

As concerns of exploitation, lack of consent, and child trafficking rose, several countries began regulating or banning commercial surrogacy. In India, this led to the introduction of the Surrogacy (Regulation) Bill, 2016, and its eventual enactment as the Surrogacy (Regulation) Act, 2021. The new legal framework shifted India from a permissive commercial model to a restrictive altruistic one, allowing only Indian heterosexual married couples to opt for surrogacy under strict conditions.

Surrogacy Agreement

Surrogacy agreements are essential legal instruments that define the rights, responsibilities, and expectations of all parties involved in a surrogacy arrangement. Generally, there are two primary types of agreements recognized under surrogacy law:

- 1. Surrogacy Parenting Agreement**
- 2. Surrogacy Arrangement Agreement**

1. Surrogacy Parenting Agreement

The Surrogacy Parenting Agreement is a contractual arrangement between the surrogate mother and the intended parents, typically an infertile couple, wherein the surrogate agrees to carry a pregnancy to term using an embryo created through assisted reproductive technology. This agreement legally stipulates that:

- The surrogate mother will carry and deliver a child for the intended parents.
- Upon birth, the surrogate will relinquish all parental rights to the child.
- If the surrogate is married, her husband must also consent to the agreement, affirming acknowledgment and support for the arrangement.

The core purpose of the Surrogacy Parenting Agreement is to establish clarity regarding the roles and obligations of the surrogate mother and intended parents throughout the surrogacy process. It addresses critical issues such as:

- The nature of parental rights and the surrogate's renunciation thereof.
- The terms of compensation or reimbursement to the surrogate mother, if applicable.
- The liabilities and responsibilities of each party during pregnancy, delivery, and post-birth.

- Consent and acknowledgment by all relevant parties, including the surrogate's spouse, to prevent future legal disputes.

This agreement also often includes provisions for the appointment of a third party (such as a legal guardian or custodian) who may assume custody of the child in case the intended parents are unable or unwilling to do so at the time of birth. The enforceability of this contract is paramount to protecting the interests of all involved, particularly in jurisdictions like India where surrogacy law is evolving.

2. Surrogacy Arrangement Agreement

The Surrogacy Arrangement Agreement is a contract primarily between the intended parents and the fertility clinic, hospital, or surrogacy agency facilitating the process. This agreement governs the procedural and logistical aspects of the surrogacy program.

Key components of this agreement typically include:

- The detailed fee structure, outlining payments for medical procedures, agency services, and surrogate compensation if applicable.
- A clear timeline for medical procedures, such as ovarian stimulation, egg retrieval, embryo fertilization, and embryo implantation.
- The medical tests and screenings to be conducted on the surrogate and intended parents.
- Specific terms of payment and refund policies, ensuring financial transparency.
- Guarantees or backup plans for multiple implantations attempts or procedures, ensuring the intended parents receive adequate support until pregnancy is successfully established.
- Ethical and legal compliance commitments from the hospital or agency.

This contract is legally binding and assures the intended parents that the services agreed upon will be delivered as promised. It also protects the medical service providers and agencies by clearly defining their obligations and limitations.

Importance of Surrogacy Agreements

Surrogacy agreements serve as the legal backbone of the surrogacy process. They ensure:

- Clarity and mutual understanding between all parties.
- Protection of rights for the surrogate mother, intended parents, and the child.
- Prevention of future disputes by detailing each party's commitments and responsibilities.

- Compliance with relevant laws and ethical standards, especially crucial in countries like India where surrogacy is regulated under specific legal frameworks.

2. Indian Legislature of Surrogacy

2.1 Assisted Reproductive Technology (Regulation) Bill 2008

The Assisted Reproductive Technology (Regulation) Bill, 2008 was introduced by the Indian Council of Medical Research (ICMR) as one of the first comprehensive attempts to regulate the rapidly growing field of assisted reproductive technologies (ART) in India. With the increasing use of medical techniques like In Vitro Fertilization (IVF), Intrauterine Insemination (IUI), and surrogacy, the need for a legal framework became imperative to address ethical, legal, and medical concerns, especially to protect the rights of infertile couples, surrogate mothers, and children born through these methods.

The 2008 Bill aimed to regulate ART clinics and banks, promote ethical medical practices, and prevent the exploitation of women and children. One of its key provisions was the mandatory registration and accreditation of ART clinics under a proposed National Advisory Board and State Boards. This was to ensure uniform standards of care, accountability, and transparency in services provided by fertility clinics.

The Bill also laid down specific eligibility criteria for prospective parents, including age, marital status, and medical necessity, ensuring that ART services were not misused. Importantly, it recognized the right of single women and foreigners to avail ART services, subject to compliance with Indian laws. It provided for clear guidelines on informed consent, confidentiality, and counselling, making it compulsory for all parties involved—donors, surrogates, and intending parents—to understand the implications of ART procedures before proceeding.

In terms of donor rights, the Bill proposed restrictions on gamete donation, including anonymity of the donor and limits on the number of times a person could donate sperm or eggs, thus aiming to minimize health risks and ethical concerns. The Bill also addressed the legal parentage of children born through ART, granting full parental rights to the intending couple and absolving the donor or surrogate from any parental claims or responsibilities.

Although the 2008 Bill was a pioneering step in the Indian context, it remained a draft and was not enacted into law. However, it laid the foundational groundwork for the Assisted Reproductive Technology (Regulation) Act, 2021, which finally codified and implemented many of the principles and protections first proposed in the 2008 Bill. The 2008 version remains significant for its role in shaping discourse and policy around reproductive health and the rights of parties engaged in ART processes.

2.2 The Surrogacy (Regulation) Bill, 2016⁴

The Surrogacy (Regulation) Bill, 2016 marked a significant legislative effort by the Indian government to regulate and monitor the practice of surrogacy in India. The primary aim of the Bill was to prohibit commercial surrogacy and to promote ethical, altruistic surrogacy arrangements, particularly to prevent the exploitation of poor and vulnerable women often used as surrogate mothers under unregulated and profit-driven systems.

Under the provisions of the Bill, only altruistic surrogacy is permitted, where the surrogate mother receives no financial compensation other than medical expenses and insurance coverage related to the pregnancy. Commercial surrogacy, which includes any form of monetary payment or reward beyond essential costs, is strictly prohibited and made punishable by law. This was a substantial shift from earlier practices in India where commercial surrogacy had flourished due to minimal regulation, attracting numerous international clients and resulting in a booming fertility industry.

The Bill allows surrogacy only for Indian heterosexual married couples, who have been married for at least five years and are medically certified as infertile. They must also not have any surviving biological, adopted, or surrogate children (with exceptions in cases of mentally or physically challenged children). Single individuals, live-in couples, foreign nationals, homosexuals, and transgender persons are barred from seeking surrogacy under this Bill, which has been a major point of criticism for being exclusionary and non-progressive in light of evolving constitutional jurisprudence on equality and privacy.

Another key feature of the Bill is that only a close relative of the intending couple can act as a

⁴ J. P. Nadda, Minister for Health and Family Welfare, introduced the Surrogacy (Regulations) Bill, 2016 in Lok Sabha on November 21, 2016.

surrogate mother. This clause was intended to ensure that surrogacy remains a genuinely altruistic act and not a commercial transaction disguised as such. However, the lack of a clear definition of “close relative” has raised concerns about ambiguity and practical feasibility.

To oversee the implementation and enforcement of the Bill, it proposed the establishment of national and state surrogacy boards, tasked with regulating surrogacy clinics, ensuring compliance with ethical guidelines, maintaining records, and addressing grievances. These authorities were also expected to grant eligibility certificates to both the intending couple and the surrogate mother before the procedure could commence.

The Bill also included penal provisions for violations, with imprisonment up to ten years and a fine up to ₹10 lakh for engaging in commercial surrogacy, abandoning a surrogate child, or exploiting a surrogate mother.

2.3 The Surrogacy (Regulation) Bill, 2019

The Surrogacy (Regulation) Bill, 2019, was introduced in the Lok Sabha to establish a structured legal framework for regulating surrogacy practices in India. It marked a legislative shift from the earlier unregulated and commercial model to a more ethical, altruistic form of surrogacy. The Bill was framed in response to growing concerns over the exploitation of poor and illiterate women, the commodification of reproductive services, and the legal complexities arising from commercial surrogacy arrangements, especially those involving foreign nationals. The primary objective of the Bill was to ban commercial surrogacy and permit only altruistic surrogacy, wherein a woman voluntarily agrees to become a surrogate mother without receiving any financial compensation other than medical expenses and insurance coverage. The Bill aims to protect the rights and welfare of surrogate mothers and children born through surrogacy, while also upholding ethical reproductive practices.

Key provisions of the Bill include:

- 1) Eligibility Criteria for Intended Parents:** Only Indian married couples who have been legally married for at least five years and are proven to be infertile are permitted to commission a surrogacy arrangement. The couple must also not have any surviving biological, adopted, or surrogate children (with exceptions for children who are mentally or physically challenged or suffer from life-threatening disorders).

- 2) **Eligibility of Surrogate Mother:** A surrogate mother must be a close relative of the intending couple, be married, and have at least one child of her own. She must also be between the ages of 25 to 35 years and can act as a surrogate only once in her lifetime. She must also undergo a medical and psychological screening before entering the arrangement.
- 3) **Establishment of Regulatory Authorities:** The Bill proposes the establishment of National Surrogacy Board at the central level and State Surrogacy Boards at the state level. These bodies are tasked with advising the government on policy matters, reviewing and monitoring the implementation of the Act, and ensuring compliance with prescribed ethical and procedural norms.
- 4) **Prohibition of Commercial Surrogacy and Related Offenses:** Commercial surrogacy, including offering or advertising surrogacy services for a monetary benefit, is strictly prohibited. The Bill prescribes stringent penalties for violations, including imprisonment of up to ten years and fines up to ₹10 lakh. Clinics engaging in illegal practices are also subject to punishment.
- 5) **Surrogacy Clinics Regulation:** All surrogacy clinics must be registered under the Bill. These clinics are subject to inspection and must adhere to ethical medical and legal standards.
- 6) **Insurance Cover for Surrogate Mother:** The Bill mandates that the intending couple must provide a medical and insurance cover for the surrogate mother for a period of 36 months to take care of any complications arising out of pregnancy and post-delivery.
- 7) **Rights of the Child:** The child born through a surrogacy arrangement is deemed to be the biological child of the intending couple and is entitled to all rights and privileges available to a natural child.

While the Bill was introduced with the intention of curbing exploitation and regulating the surrogacy industry, it faced significant criticism. Critics argued that it was overly restrictive, particularly by excluding single individuals, LGBTQ+ persons, and foreigners from accessing surrogacy services. The requirement that the surrogate mother must be a close relative was also seen as impractical and limiting.

Nevertheless, the Surrogacy (Regulation) Bill, 2019 laid the foundation for a legally robust surrogacy framework in India. It was later revised and passed as the Surrogacy (Regulation) Act, 2021, incorporating some changes based on feedback from stakeholders and the Standing Committee on Health and Family Welfare.

2.4 Assisted Reproductive Technology (Regulation) Bill, 2020⁵

The Assisted Reproductive Technology (Regulation) Bill, 2020 was introduced with the objective of regulating and standardizing the rapidly growing Assisted Reproductive Technology (ART) industry in India. ART includes all fertility treatments in which both eggs and sperm are handled outside the human body, such as in vitro fertilization (IVF), intrauterine insemination (IUI), cryopreservation of gametes, and embryo transfer. The unregulated expansion of ART clinics and banks across the country raised several concerns relating to ethical practices, medical standards, exploitation of women, and the rights of children born through ART procedures. The Bill thus aims to ensure that ART services are offered in a safe, ethical, and legally accountable manner.

One of the key features of the Bill is the mandatory registration of all ART clinics and banks with a National Registry and appropriate State Boards. This registry will act as a central database to monitor and track ART services throughout the country. ART clinics are required to adhere to specific guidelines relating to staff qualifications, laboratory standards, and equipment. Failure to register or comply with standards can result in significant penalties or closure of operations.

The Bill also lays down detailed eligibility criteria for both donors and recipients. Only married heterosexual couples and certain categories of women, including widows and divorcees between 35–45 years, are allowed to access ART services. The use of ART by single men, LGBTQ+ individuals, and live-in couples is restricted under this framework. This provision has drawn criticism for potentially violating the principles of equality and reproductive autonomy.

Furthermore, the Bill addresses issues of gamete donation and storage. It prohibits the sale or trade of gametes and embryos and allows only altruistic donation. The identity of donors is to be kept confidential, though children born through ART will be entitled to know certain non-identifying information about the donor upon reaching adulthood. Importantly, commercial surrogacy is not covered under this Bill, as it is governed separately by the Surrogacy (Regulation) Act, 2021.

⁵ The Bill, first tabled in the Lok Sabha on 14 September 2020

To safeguard against exploitation, the Bill mandates informed consent, counselling, and comprehensive insurance coverage for both donors and recipients. Clinics must ensure that all parties involved are aware of the medical procedures, risks, and legal implications. Additionally, the Bill introduces offences and penalties for non-compliance, including fines and imprisonment for practices such as sex-selective ART procedures or fraudulent representation.

Overall, the Assisted Reproductive Technology (Regulation) Bill, 2020 represents a significant step toward institutionalizing reproductive technologies within a legal and ethical framework. However, concerns remain about its restrictive eligibility norms and its limited recognition of non-traditional family structures. As reproductive technologies continue to evolve, the law must also adapt to uphold constitutional values of privacy, autonomy, and non-discrimination, as laid down in *Justice K.S. Puttaswamy v. Union of India* (2017). The Bill, once implemented, is expected to bring uniformity, transparency, and accountability to ART practices in India.

2.5 Surrogacy (Regulation) Act, 2021

Enacted on 25 December 2021, the Surrogacy (Regulation) Act, 2021 represents India's first binding legal framework to regulate surrogacy comprehensively. The Act prohibits commercial surrogacy and legalizes only altruistic surrogacy under strict eligibility criteria and regulatory oversight.

Key Provisions of the Act:

a) Prohibition of Commercial Surrogacy:

Commercial surrogacy, involving monetary compensation to the surrogate mother beyond medical expenses and insurance, is strictly prohibited. Violation of this provision is punishable with imprisonment and fines.

b) Permitted Altruistic Surrogacy:

Only altruistic surrogacy is allowed, in which the surrogate mother receives no monetary benefit other than reimbursement of medical expenses and insurance coverage. The surrogate must be a close relative of the intending couple.

c) Eligibility Criteria for Intended Parents:

- Indian citizens.

- Legally married heterosexual couples (wife aged 23–50 and husband aged 26–55).
- Childless and medically certified as infertile.
- No previous surrogacy undertaken.

d) Eligibility of Surrogate Mother:

- Must be a married woman aged between 25 and 35 years.
- Must have at least one biological child of her own.
- Can act as a surrogate only once in her lifetime.
- Must be medically and psychologically fit.

e) Establishment of National and State Boards:

The Act provides for the constitution of the National Assisted Reproductive Technology and Surrogacy Board and corresponding State Boards to oversee implementation, set standards, and ensure compliance.

f) Legal Parentage and Rights of the Child:

The child born through a valid surrogacy arrangement is deemed the biological child of the intending couple. The surrogate mother has no parental rights over the child.

g) Consent and Documentation:

Written informed consent from the surrogate, her spouse (if married), and the intended parents is mandatory. All surrogacy arrangements must be documented and approved by the appropriate authority.

3. Related Legislation Governing Surrogacy in India

The regulation of surrogacy in India does not operate in isolation but is supported and complemented by several existing legal statutes. Firstly, **the Indian Contract Act, 1872** plays a crucial role, as surrogacy arrangements are primarily contractual in nature. Any agreement entered into between the surrogate mother and the intended parents must fulfil the essentials of a valid contract—free consent, lawful object, and consideration. If the contract involves elements prohibited by law, such as commercial compensation, it may be deemed void under this Act.

Additionally, the **Guardians and Wards Act, 1890** and **Juvenile Justice (Care and Protection of Children) Act, 2015** may be invoked in cases where custody, guardianship, or adoption of the child born through surrogacy becomes an issue—particularly when intended parents are unable to assume custody. These laws ensure the welfare and legal protection of the child. Moreover, in the context of international surrogacy arrangements, **the Citizenship Act, 1955** and relevant passport and immigration rules come into play, determining the citizenship and travel rights of the child. The Ministry of Home Affairs has also issued guidelines for granting visas and documentation in cross-border surrogacy cases, especially after the Supreme Court's intervention in *Baby Manji Yamada v. Union of India* (2008). Collectively, these legal provisions contribute to a cohesive framework, ensuring that the surrogacy process is not only ethically conducted but also legally enforceable and protective of all involved parties.

4. Ethical Considerations of Surrogacy

Surrogacy, while offering hope to childless couples, also raises profound ethical questions concerning human dignity, bodily autonomy, exploitation, and the commodification of reproduction. The ethical considerations in surrogacy are multifaceted, involving not only the rights of the intended parents and surrogate mother but also the welfare of the child born through such arrangements. As assisted reproductive technologies (ART) have advanced, the ethical landscape surrounding surrogacy has become increasingly complex and necessitates a careful balancing of interests.

1) Autonomy and Informed Consent

A central ethical principle in any medical or contractual relationship is respect for autonomy. Surrogacy arrangements must ensure that the surrogate mother provides free, prior, and informed consent without coercion. In cases where women from economically disadvantaged backgrounds become surrogates, there is a risk that financial pressures might undermine the voluntariness of consent. Ethical frameworks demand that surrogates fully understand the medical, emotional, and legal implications of their decision before entering into an agreement.

2) Exploitation and Commercialization

One of the most debated ethical concerns is the potential exploitation of poor and vulnerable women, particularly in countries like India where commercial surrogacy was once prevalent.

Critics argue that when surrogacy becomes a transactional arrangement, it commodifies the female body and reproductive capabilities. Surrogates may be subjected to intensive medical procedures and restricted autonomy during pregnancy, sometimes with limited postnatal care or support. The Surrogacy (Regulation) Act, 2021 attempts to address this concern by banning commercial surrogacy and allowing only altruistic surrogacy, thereby aiming to eliminate profit motives.

3) Rights and Welfare of the Child

Ethically, the best interests of the child must be paramount in any surrogacy arrangement. This includes ensuring the child's right to identity, nationality, and legal parentage. Disputes between the surrogate and intended parents, especially in cross-border surrogacy, can result in statelessness or abandonment of the child. Ethical surrogacy demands legal safeguards to protect the child's right to a stable and nurturing family environment, including provisions for citizenship and inheritance.

4) Bodily Autonomy and Health Risks

The surrogate mother undergoes numerous medical interventions, including hormonal treatments, embryo transfer, and potential caesarean deliveries. Ethical concerns arise if surrogates are pressured into undergoing these procedures or if their health is compromised for the benefit of intended parents. Respect for bodily integrity requires that surrogates receive adequate healthcare, psychological support, and the right to make decisions about their own bodies during the course of pregnancy.

5) Emotional and Psychological Impact

Surrogacy involves a deeply emotional process, and ethical concerns arise around the psychological well-being of the surrogate. Forming a bond with the unborn child and then relinquishing custody can lead to emotional distress, depression, or trauma. Intended parents may also experience anxiety and attachment issues. Ethical surrogacy demands comprehensive counselling and emotional support for all parties involved.

6) Equality and Non-Discrimination

Current Indian legislation, including the Surrogacy (Regulation) Act, 2021, permits only heterosexual Indian couples to pursue altruistic surrogacy, excluding single parents, LGBTQ+ individuals, live-in partners, and foreign nationals. From an ethical standpoint, such restrictions

may violate principles of equality and non-discrimination by denying reproductive autonomy based on marital status, gender identity, or nationality. Ethical policy-making must aim to be inclusive, ensuring that reproductive rights are not reserved only for a specific group.

7) Contractual Clarity and Legal Enforcement

Ethically, it is imperative that surrogacy agreements are drafted with clarity, transparency, and enforceability. Any ambiguity can lead to disputes, particularly over custody, financial obligations, or medical decision-making. Legal enforceability ensures that the surrogate is compensated fairly and that the intended parents are recognized as legal guardians without procedural hurdles.

5. Challenges and Controversies of Surrogacy in India

Surrogacy in India has emerged as a complex socio-legal phenomenon that, while providing solutions to infertility, also faces significant challenges and controversies. These issues stem from the interplay of ethical concerns, legal ambiguities, socio-economic factors, and cultural perceptions, making surrogacy a subject of ongoing debate and reform.

1) Exploitation of Surrogate Mothers

One of the foremost challenges is the exploitation of surrogate mothers, who are often from economically disadvantaged and marginalized backgrounds. The commercial surrogacy market, prior to the 2016 regulatory measures, was largely unregulated, leading to situations where women were coerced or economically compelled to become surrogates without adequate healthcare, psychological counselling, or post-delivery support. Reports of poor living conditions, lack of medical safeguards, and insufficient financial compensation have fueled concerns about treating women's reproductive capabilities as commodities rather than respecting their bodily autonomy.

2) Legal Ambiguity and Lack of Uniform Regulation

Before the enactment of the Surrogacy (Regulation) Act, 2021, surrogacy in India was governed by a patchwork of court judgments, guidelines, and varying state-level rules, leading to significant legal ambiguity. The absence of a comprehensive law created uncertainties regarding the enforceability of surrogacy agreements, parental rights, citizenship of the child, and compensation issues. This legal vacuum often resulted in prolonged litigations and disputes, particularly in cross-border surrogacy arrangements involving foreign couples.

3) Commercial vs. Altruistic Surrogacy Debate

A major controversy revolves around the commercialization of surrogacy. India was once considered the “surrogacy capital of the world,” attracting foreign couples due to lower costs and lax regulations. Critics argue that commercial surrogacy commodifies both women and children, reducing reproductive labor to a market transaction. The government's response through the Surrogacy (Regulation) Act, 2021, which bans commercial surrogacy and permits only altruistic surrogacy, has itself sparked debate. While aimed at preventing exploitation, the ban raises concerns about restricting reproductive rights and pushing surrogacy underground, thereby potentially increasing risks for surrogate mothers.

4) Rights of the Child

Surrogacy raises critical questions about the legal status and rights of the child, including issues related to parentage, citizenship, and inheritance. Children born through surrogacy, especially in cross-border contexts, have faced instances of statelessness and legal limbo when intended parents are unable or unwilling to take custody. Indian law has struggled to keep pace with these challenges, and there remains a lack of clear guidelines on recognizing parentage and protecting the best interests of the child born via surrogacy.

5) Discrimination and Exclusion

The current legal framework imposes restrictive eligibility criteria, allowing only heterosexual married Indian couples to opt for surrogacy. This exclusion of single individuals, LGBTQ+ couples, live-in partners, and foreign nationals has generated criticism for violating the principles of equality and reproductive autonomy. The limitations reflect traditional views of family and raise ethical and human rights concerns about access to reproductive technologies.

6) Health Risks and Psychological Impact

Surrogacy entails significant health risks for the surrogate mother, including complications from hormonal treatments, multiple embryo transfers, and delivery procedures. There are also potential psychological consequences, such as emotional distress resulting from the separation from the newborn. The lack of mandated psychological counselling and adequate medical safeguards further exacerbates these risks. Ensuring holistic health care and emotional support for surrogates remains a critical challenge.

7) Ethical Concerns and Societal Perceptions

Surrogacy in India intersects with deeply rooted cultural and ethical norms related to family, motherhood, and womanhood. Some societal groups view surrogacy with suspicion or moral judgment, associating it with the commodification of motherhood or unnatural reproduction. Ethical debates also focus on the autonomy of the surrogate versus the interests of the intended parents and the child. Balancing these often-conflicting interests continues to challenge lawmakers, healthcare providers, and society at large.

8) Cross-Border Surrogacy Issues

India was a major hub for international surrogacy, attracting many foreign intended parents. However, this gave rise to complex legal issues around the nationality and citizenship of children born to foreign nationals through Indian surrogates. The absence of clear international legal frameworks and coordination led to cases where children were stranded without legal identity or rights. Consequently, many countries have since restricted their citizens from pursuing surrogacy in India, reducing the demand but not fully resolving cross-border legal challenges.

Conclusion

Surrogacy represents a significant development in reproductive technologies, offering hope to couples unable to conceive naturally. In the Indian socio-cultural context, where motherhood and childbirth are deeply revered, surrogacy has served as a means for many couples to fulfil the essential marital expectation of procreation. However, despite its growing acceptance and the enactment of the Surrogacy (Regulation) Act, 2021, the legislative framework continues to exhibit several critical shortcomings that hinder its inclusive and effective implementation.

The Act, while well-intentioned in addressing the exploitation of surrogate mothers and regulating surrogacy practices, fails to uphold constitutional guarantees of equality and personal liberty. By excluding LGBTQ+ individuals, single men, and unmarried women, the Act contradicts the spirit of Articles 14 and 21 of the Indian Constitution, which guarantee equality before the law and the right to personal autonomy, respectively. Furthermore, the narrow definition of "intending couple" and the complete ban on commercial surrogacy — rather than its regulation — reflects a conservative and restrictive approach that may unintentionally drive the practice underground.

Other challenges, such as the difficulty in finding altruistic surrogate mothers, the exclusion of Non-Resident Indians and foreign nationals, and the enduring societal stigma surrounding surrogacy, further underscore the need for a more comprehensive, inclusive, and rights-based framework. Lawmaking, especially in sensitive areas like reproductive rights, must be preceded by transparent public dialogue, expert consultation, and human rights-based impact assessments. The current legal provisions fall short of meeting the dynamic needs of a diverse and evolving Indian society.

It is therefore imperative that the Surrogacy (Regulation) Act be amended to ensure greater inclusivity — recognizing surrogacy as a legitimate reproductive right not only for married Indian couples but also for LGBTQ+ partners, live-in couples, and single individuals, irrespective of gender. In doing so, India can progress toward a balanced model that protects the dignity of surrogate mothers while upholding the reproductive rights of all individuals, in line with its constitutional values and international human rights commitments.