

Comparative analysis: Surrogacy regulation in India and global perspectives

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Abstract - This research paper examines the complex regulatory environment surrounding surrogacy in India, investigating its historical development and the intricate interplay of legal, ethical, and cultural factors. The paper examines the regulatory reforms that ensued after India became a prominent international hub for commercial surrogacy, with a specific emphasis on the intricate provisions of the Surrogacy (Regulation) Act, 2021. It emphasizes the impact of the act and addresses any limitations that were previously present. This study investigates the constitutional and legal ramifications that arise from the criteria for eligibility, with a particular focus on the effects on the infant, surrogate mothers, and intended parents. With the assistance of a global comparative analysis, this paper provides a nuanced perspective on surrogacy laws in Ukraine, the United States, and the United Kingdom, among others. These three jurisdictions were selected due to the fact that their surrogacy legislations regulate the industry to varying degrees: Ukraine regulates commercial surrogacy, the United States has state-made legislation, and the United Kingdom's legislation is very similar to that of India. The core of the manuscript consists of ten recommendations that are specifically designed for the Indian context. These recommendations promote the following: comprehensive legislation, parental rights recognition, autonomy for surrogate mothers, and ethical guidelines. The aforementioned suggestions encompass public education initiatives, anti-discrimination protocols, and international surrogacy regulations. In conclusion, the paper proposes a legal structure that is congruent with the cultural heterogeneity of India, thereby cultivating an atmosphere for surrogacy arrangements that is ethical, inclusive, and transparent.

Keywords - Surrogacy Regulation, India, Global Perspectives, Analysis.

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1. INTRODUCTION

Women possess a distinctive capacity to bestow the invaluable gift of childbirth, creating new life. Women have the unique ability to conceive and nurture life within their bodies, and the experience of motherhood is highly valued by all women. Many women consider pregnancy to be a significant and unforgettable period in their life¹. Creating a life within oneself is an unparalleled sensation. Maternity is sometimes described as a woman's second birth. However, there are several prospective parents today who are unable to conceive through natural means. Today, there are feasible solutions for couples and individuals to help them have the kid they desire. They seek alternate options due to their wish to have offspring². Recent advancements in birthing have provided opportunities for individuals who previously thought they could not have children. A surrogate woman bears a baby throughout pregnancy for another person or couple and returns the baby to the intended parents after birth. This technique, known as Assisted Reproductive Technology (ART), was developed in response to the rising incidence of infertility worldwide³.

The practice of surrogacy is a form of third-party reproduction in which a woman agrees to carry a pregnancy for the purpose of carrying a child for the intended parent or parents, who are either gay or unable to conceive due to medical reasons. Traditional surrogacy and gestational surrogacy are the two types of surrogacy that are available to individuals. In a normal case of surrogacy, the egg of the surrogate mother is used to conceive the child⁴. A gestational surrogacy, on the other hand, involves the transfer of embryos that have been created by in vitro fertilization (IVF) using the eggs of either the intended mother or a donor. When it comes to commercial surrogacy arrangements, the surrogate may be compensated for the services that she provides⁵.

It is estimated by the World Health Organization (WHO) that around one in every six adults of reproductive age throughout the world may experience infertility at some point in their lives. Surrogacy may be advantageous for individuals or couples dealing with infertility or health problems, since it allows them to become parents to a biological child by using a surrogate mother to bring

the pregnancy to term. Different nations have different legal and ethical issues with surrogacy, and these problems vary from country to country⁶. At the beginning of the twenty-first century, India emerged as a prominent global hub for commercial surrogacy, providing people and couples who were struggling with infertility with choices that were more affordable. Surrogacy in India developed as a prominent global hub for surrogacy⁷. Taking into consideration the study that has been given previously the following objectives will be determined by this article.

- To assess the surrogacy legislation in India and a global views on the issue.
- To assess the legal, cultural and ethical concerns related to surrogacy under various legal systems.

2. RESEARCH METHODOLOGY

A systematic technique is utilized for the purpose of achieving a thorough knowledge and comparison of regulatory frameworks that regulate surrogacy agreements across various jurisdictions. This methodology is utilized for the comparative examination of surrogacy legislation in India and global perspectives. The current approach is based upon doctrinal study.

3. SURROGACY REGULATION IN INDIA

The Surrogacy (Regulation) Act, which was issued in 2002 and later revised to address gaps and concerns, was the catalyst for the evolution of the legal environment. India's attraction as a surrogacy destination can be attributed, in part, to its economic aspects, which include much cheaper costs and more modern healthcare facilities⁸. Not only was the sector praised for its accessibility, but it was also criticized for ethical problems, which gained attention from all around the world.

Legal measures were implemented as a reaction, one of which was a prohibition on commercial surrogacy for foreign nationals in the year 2015. This resulted in a shift in emphasis towards surrogacy for the purpose of altruism performed on Indian people⁹. With this background information, it is clear that the trajectory of surrogacy in India has been formed by a complex interaction of legal, economic, and global pressures. In order to conduct ethical scrutiny, comply with legal regulations, and have a knowledge of the economic consequences, it is essential to investigate the business aspects of surrogacy¹⁰. The well-being of surrogate mothers and intended parents is ensured as a result of this, which prompts a global comparative investigation. This analysis determines the best standards and encourages openness by analyzing the practices that are prevalent in businesses.

As a result of the substantial social and cultural ramifications that the commercialization of surrogacy

has, politicians are better able to match restrictions with the values that are held by society¹¹. When accessibility and equality are evaluated, affordability and inequities are addressed, which in turn influences the formation of policy. In the ever-changing world of surrogacy, ongoing investigation makes it easier to include continuous improvement, which involves adapting legislation and practices to changing situations and ethical issues¹².

4. GLOBAL PERSPECTIVES ON SURROGACY

Surrogacy is not governed by any particular laws or norms anywhere in the world at the moment. In this sense, the formulation of legislation is left up to separate national jurisdictions. However, in their many publications over the years, the United Nations International Children's Emergency Fund (UNICEF) and the Office of the High Commissioner for Human Rights (OHCHR) have offered a number of recommendations. Approximately thirty countries worldwide, including those in North America, Europe, Asia, and certain parts of Africa, allow surrogacy in one way or another. Many nations, including those in Europe, the Middle East, and even parts of Asia, have passed legislation making surrogacy illegal¹³.

As a result of the lack of clear legislation on surrogacy in a number of nations, particularly in Africa and certain regions of Asia, a legal ambiguity has been created. There is a possibility that the numbers will vary due to the ever-changing legal settings. Within the realm of law, it is of the utmost importance to build a solid framework that protects the rights and safeguards of surrogates. To do this, extensive and legally enforceable agreements that outline the surrogate's rights, obligations, and pay must be drafted¹⁴. Surrogates are given the ability to make decisions regarding their own health and well-being when informed permission is obtained, which is a crucial legal factor. In addition, there is a requirement for the establishment of legal processes that manage the surrogate's access to healthcare, psychological support, and frequent medical exams. It is imperative that the legal recognition and rights of intended parents be properly established from the very beginning of the surrogacy procedure¹⁵. This involves addressing parental rights and obligations, as well as settling any disputes relating to custody and visitation via the use of legally enforceable agreements. Transparency in financial matters is another legal component that requires attention.

It is necessary to have transparent communication regarding the financial capacity of intended parents to meet medical expenditures, surrogate remuneration, and other connected costs. Counseling and support services should be made available as part of legal systems in order to handle emotional factors as well¹⁶.

5. LEGAL, ETHICAL AND CULTURAL CONSIDERATIONS

Legal Considerations

Surrogate:

It is important to establish a strong legal framework that ensures the protection and rights of surrogates. This requires the creation of legally binding, all-encompassing contracts that specify the rights, obligations, and remuneration of the surrogate¹⁷. It is a legal necessity to guarantee informed assent, which grants surrogates the authority to determine matters pertaining to their own health and welfare. Furthermore, it is imperative that legal frameworks be established to supervise the surrogate's access to routine medical examinations, psychological assistance, and healthcare.

Intended Parents:

It is imperative that intended parents' legal recognition and rights be thoroughly established throughout the surrogacy procedure¹⁸. This includes the establishment of legally binding agreements to address parental rights and responsibilities, as well as to resolve prospective custody and visitation disputes. An additional legal element that requires consideration is financial transparency, which requires intended parents' financial capability to cover surrogate compensation, medical expenses, and other related costs to be communicated in a plain manner. Additionally, emotional considerations should be addressed by legal mechanisms through the provision of counseling and support services¹⁹.

Child:

The child's best interests including their rights, identity, and general well-being should come first when creating legal frameworks. It is essential to give the right to know one's biological origins enough thought. Legal provisions should be in place to guarantee transparency regarding surrogacy arrangements, genetic parentage, and the child's past. Legal frameworks that promote cultural and social acceptability are essential for safeguarding the rights of children and facilitating their successful reintegration into society.

Cultural Considerations

Surrogate:

The practice of surrogacy is characterized by a significant role for cultural sensitivity, which necessitates acknowledgment and respect for the surrogate's cultural heritage. A surrogate's cultural values and beliefs has to be taken into consideration during the surrogacy procedure. In addition, it is important to take into account the potential difficulties that may arise as a result of the different perspectives held by members of the surrogate's community.

Intended parents:

It essential to have a solid understanding of the cultural background of the intended parents and the community they come from. Within their group, the acceptance of surrogacy need to be influenced by cultural concerns, and the prospective views of society ought to be negotiated with cultural sensitivity.

Child:

It is imperative that ethical considerations place a primary emphasis on the cultural identity and background of the kid²⁰. When making decisions about the child's upbringing, social integration, and acceptability within their cultural community, it is important to act with cultural sensitivity and acceptance in mind.

Ethical Considerations:

Surrogate:

It is imperative that the autonomy and dignity of surrogates be protected in the context of surrogacy due to ethical reasons. By adhering to ethical norms that prioritize the well-being and rights of surrogates, it is possible to ensure that surrogates are able to actively participate in decision-making without being exploited²¹.

Intended parents:

Ethical issues of the utmost importance are honesty and visibility. Motivating intended parents to keep honesty regarding financial concerns and expectations is something that should be promoted. In order to maintain ethical standards, it is necessary to offer emotional support during the surrogacy process²².

Child:

Ethical issues relevant to the kid require that their rights and well-being be brought to the forefront of the discussion. An ethical approach must respect the child's right to know and understand their background, which includes keeping lines of communication open about the child's origins²³.

6. EVOLUTION OF SURROGACY LAWS IN INDIA

In India, the surrogacy practice has been prevalent for a while, although it was previously uncontrolled due to a lack of defined regulations. Hope for surrogacy as an alternative reproductive method (ART) was given to the people of India when the first in vitro fertilization (IVF) child, Kanupriya alias Durga, was successfully delivered in Kolkata on October 3, 1978. In 2002, the Indian Council of Medical Research (ICMR) released suggestions aimed at legalizing the technique²⁴. Due to the absence of precise restrictions, however, affordable

fertility clinics were able to engage in unregulated surrogacy, which disproportionately included women from disadvantaged backgrounds.

When India developed became a major hub for surrogacy, a lot of foreigners were drawn to it. The lessons learned from incidents like Baby Manji Yamada and Jan Balaz highlighted the need for law in this area. In response, the government of India made it illegal for foreigners to use surrogacy services in the year 2015²⁵. The surrogacy procedure was redefined as a result of the specific limitations specified in the Surrogacy (Regulation) Bill of 2016. This legislative action, which attempted to address ethical concerns and provide tighter control, significantly changed the surrogacy environment.

The requirement that couples must first demonstrate their "infertility" before ever contemplating surrogacy was a crucial factor that contributed to the provision's negative impact²⁶. The act defines infertility as the inability to conceive after five years of unprotected coitus or as a result of another medical condition that makes conception impossible. On the other hand, this definition does not account for all of the circumstances in which a couple can experience difficulties in conceiving, such as the many medical disorders that might result in unwanted pregnancies after conception.

As per the Surrogacy (Regulation) Bill, 2019, introduced in the Lok Sabha on July 15, 2019, the act of a woman giving birth to a child with the intention of giving it to the intended parents is referred to as "surrogacy"²⁷. As per the law, only Indian married couples who have been together for at least five years and whose man is between the ages of 26 and 55 and who has never had a child before, and whose woman is between the ages of 23 and 50, are eligible to choose to become parents through surrogacy for medical reasons.

Women who are unmarried and between the ages of 35 and 45 who have been widowed or divorced are eligible, however men who are single are not. While the legislation does not prevent commercial surrogacy that involves financial incentives, it does permit surrogacy for socially beneficial purposes²⁸. The Surrogacy Regulation Bill, 2021, adopted by the parliamentary body, received presidential assent on December 25, 2021. This signifies a significant advancement in the regulation of surrogacy in India.

7. CRITIQUE OF THE PRESENT LAW

As per Section 4(iii) (b) (I) of The Surrogacy (Regulation) Act, 2021, only married women between the ages of 25 and 35 who are already mothers can be surrogate mothers or assist in surrogacy by donating eggs. Section 4(iii) (b) (IV) prohibits a woman from being a surrogate mother more than once in her lifetime. When deciding whether to become a surrogate, these constraints constrain a woman's autonomy²⁹. This violates Article 14 of the Indian

Constitution, which guarantees equal protection and equality before the law for all individuals.

As to Section 2(h) of The Surrogacy (Regulation) Act, 2021, a "couple" is defined as a lawfully married Indian man and woman who are at least 21 and 18 years old, respectively. This definition of "couple" excludes same-sex couples³⁰. Due to the fact that the Act confines surrogacy to only heterosexual couples and single women, it violates the equality rights of LGBTQIA+ persons, which are protected by Article 14 of the Constitution. This verdict contradicts the precedent set by the landmark judgment in Navtej Singh Johar, Union of India, which decriminalized Section 377 of the Indian Penal Code and confirmed the rights of LGBTQIA+ individuals³¹. The discriminatory clauses in the Surrogacy Act violate several international human rights agreements, such as Article 16 of the Universal Declaration of Human Rights (UDHR) guaranteeing the right to marry and establish a family, Article 17 of the International Covenant on Civil and Political Rights (ICCPR) safeguarding privacy from government intrusion, and Article 10 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) acknowledging the fundamental right to parenthood³².

In accordance with Section 38(1), no individual, organization, surrogacy clinic, laboratory, or clinical establishment of any kind is permitted to engage in commercial surrogacy, provide commercial surrogacy or its related component procedures or services in any form. This prohibits the provision of monetary compensation to surrogates, and the only time that it is permissible to engage in surrogacy is when it is done out of altruism³³.

The judgment that was made in the case of Suchita Srivastava Chandigarh Administration, which declared that reproductive decisions are within the ambit of Article 21 of the Constitution, is in direct contradiction to this comprehensive restriction, which is in contrast to the rule that was made in that instance. Because it disregards the physical, mental, and emotional labor that is required, as well as the medical expenditures that are endured by women during and after pregnancy, the prohibition denies them the ability to exploit their reproductive potential for financial profit³⁴. Along with Article 237 of the Universal Declaration of Human Rights, the Surrogacy Act disregards the recommendation that surrogates be compensated, which was made in the 102nd report.

It is common for women in rural India to be the major bearers of the burden of home financial duties. This is because male family members are frequently engaged in underemployment. The pursuit of monetary recompense for delivery or surrogacy is largely dependent on the participation of these women. Regarding the possibility for surrogate mothers to be exploited, the legalization of altruistic

surrogacy while forbidding commercial surrogacy raises issues. This is especially true in the context of an uncontrolled black market for products and services of this kind.

No surrogacy clinic, registered medical practitioner, gynecologist, pediatrician, embryologist, intending couple, or any other person shall conduct or cause abortion during the period of surrogacy without the written consent of the surrogate mother and on authorization of the same by the appropriate authority concerned, as stated in Section 3(vi). This provision applies to all of the relevant parties³⁵. All people are subject to the provisions of this paragraph. Despite the fact that the intended parents are considered to be the child's biological parents, the legislation mandates that any abortion must be allowed by the competent authorities. Additionally, the surrogate mother is required to obtain a written authorization prior to the procedure being carried out. A distance exists between the intended parents and the surrogate mother due to the fact that the surrogate mother does not have any influence over the decisions about abortion. In a culture where surrogacy is seen to be unorthodox, the fact that the law does not provide express protection for the right to privacy and dignity leaves both the surrogate and the couple vulnerable to the judgment of society. The Bill does not address the emotional dangers that are connected with surrogacy, such as the problems that the mother may have when she is forced to give up the kid after nine months of pregnancy. This might possibly lead to disputes after the child is delivered.

8. SUGGESTIONS

Complete Surrogacy Legislation: Create legislation that is both clear and complete, and that is specific to India. This law should include eligibility, legal recognition, and ethical requirements, and it should also take into account the specific socio-cultural aspects that are at play.

Empowering Surrogate's Autonomy: By ensuring that Indian surrogate mothers have the liberty to make decisions about their participation in surrogacy, as well as legal measures that protect them from coercion and exploitation, can empower surrogate moms to exercise their autonomy.

Acknowledgment of Intended Parents: In order to prevent legal uncertainties and to ensure a seamless succession of parental rights, it is important to establish legal processes that openly from the very beginning, it is important to recognize the intended parents as the legal parents.

Guidelines for Ethical Conduct and Cultural Responsibilities: In order to accommodate India's varied population, ethical rules that are culturally sensitive should be enforced. This involves taking into account concerns regarding religious views, the structures of families, and the standards of society.

Programs for the Education and Awareness of the Public: A greater knowledge of surrogacy should be fostered among the legal, medical, and general populations through the implementation of public education and awareness programs that are suited to the Indian context. These programs should address cultural subtleties, debunk myths, and promote social awareness.

9. CONCLUSION

In conclusion, this study of surrogacy in India gives insight on the cultural, ethical, and legal elements of the practice. Taking a look at the development of laws, researchers see that there are some restrictions, which ultimately leads to particular suggestions. These proposals, which are based on examples from throughout the world, are intended to produce legislation that are equitable, inclusive, and culturally conscious. Through the promotion of clear regulations, the acknowledgment of parental rights, and the implementation of open financial procedures, the objective is to establish a legal environment for surrogacy in India that is in accordance with a variety of societal values. This path envisions a legal framework that resonates with the richness of our culture, so promoting an atmosphere that is both ethical and inclusive for surrogacy. Legislators and civic society should collaborate to create law that is passed with the intention of eliminating surrogacy-related exploitation and ambiguity, in accordance with the tradition of justice for everyone. Many childless couples have benefited from India's rise as a center for assisted reproductive technologies; however, researchers must make sure that the medical community, intended parents, and surrogates are properly taken care of in order to prevent any issues for the family as a whole, particularly for the children born through surrogacy.

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