
SURROGACY LAWS: WORLDWIDE COMPARATIVE STUDY AND THE REGULATORY FRAMEWORK IN INDIA

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ABSTRACT

This study explores the complex regulatory environment surrounding surrogacy in India, looking at the practice's historical development as well as the many legal, moral, and cultural factors that come into play.

Certain legal and certain theological concerns with surrogacy were covered in the current study. The study compares the legal frameworks and concerns surrounding surrogacy in India and other nations. Although many countries have either passed or proposed legislation pertaining to surrogacy, those most impacted by the practice lack knowledge about these rules and how to apply them. This was seen in numerous instances all throughout the world. The article navigates the complexities of the Surrogacy (Regulation) Act, 2021, outlining its influence and resolving current restrictions, starting with the rise of India as a global hub for commercial surrogacy and continuing with later regulatory improvements.

The core of the article consists of eleven recommendations that are specific to the Indian context and call for broad law, surrogate mother autonomy, parental rights recognition, and ethical standards. These recommendations include regulations pertaining to overseas surrogacy, anti-discrimination measures, and public education campaigns.

The paper's ultimate goal is to create a legal framework that respects India's cultural diversity and promotes a moral, open, and transparent surrogacy arrangement environment.

Keywords: Surrogacy, comparative analysis, regulatory reforms, Law and Policy.

I. INTRODUCTION

The word "surrogatus" in Latin refers to a substitute, or someone designated to take another's place⁹. According to Black's Law Dictionary, surrogacy is the act of bearing and delivering a child on behalf of another individual¹⁰. Surrogacy is defined by The New Encyclopaedia Britannica as the process by which a woman births a child on behalf of a couple who is unable to conceive naturally¹¹. The practice of one woman carrying a child for another with the intention that the child be given to the other after delivery is known as surrogacy, according to the Warnock Report (1984) HF&E¹².

Like other nations, India too engages in the following two categories of surrogacy arrangements:

- **Altruistic surrogacy:** In this scenario, the surrogate mother only pays for essential medical care and receives no compensation for her pregnancy or for giving up the child to the biological parents.
- **Commercial surrogacy:** In this scenario, the surrogate mother receives compensation in addition to the required medical costs.

Although it is a desire for almost everyone, becoming a parent is a blessing that many people do not typically receive. Those who are willing can fulfil their wonderful dream of becoming parents through surrogacy. Expectant parents face difficulties because of India's discriminatory surrogacy laws. A third party agrees to carry a child for another couple who will become the child's parents through a type of assisted reproduction known as surrogacy. In this instance, there is a formal contract between the couple and the third party. Surrogacy has been legalized in India since 1978. This country is well-known for being a major centre for the fertility industry and for having a high percentage of "reproductive tourism." Given the extended history of surrogacy, there is still a significant.

After the Surrogacy (Regulation) Act was introduced in 2002 and later amended to address loopholes and concerns, the legal landscape underwent a transformation. India's attraction as a surrogacy destination was aided by economic factors, such as more modern healthcare facilities and reduced expenses. The business received international notice and was criticized for ethical issues as well as praised for being approachable. Legislative changes were made in response,

and in 2015, commercial surrogacy for foreign nationals was outlawed. This moved the emphasis to charitable surrogacy for Indian citizens. The aforementioned context highlights the intricate interplay of legal, economic, and global factors that have influenced the development of surrogacy in India.

II. Concerns in Surrogacy

The mother who is serving as the surrogate's financial protection is one of the primary concerns that must be clarified, as was previously said.

Legislation protecting surrogates is in place in some countries (like India, Russia, Georgia, Ukraine, Thailand, and some US states) where commercial surrogacy is legal. However, as media reports have revealed, most of the time, both the intended parents and the surrogate are taken advantage of under the guise of benefits, with the middlemen profiting in the end. The laws and regulations in force are not adequately implemented in these kinds of situations.

The child born through surrogacy is another issue that is ongoing. The United States of America enforces mandatory psychological and health testing; however, Indian laws only address the issue of infectious diseases, failing to take into consideration the surrogate's and the intended parents' potential effects on their mental health.

Surrogate abuse is widespread because the promise of easy money attracts and lures many women from low socioeconomic backgrounds to become surrogates. According to Indian guidelines, ART clinics and intermediaries take the majority of the payment and leave these ladies high and dry, providing no post-delivery care.

III. Cultural, Legal, and Moral Aspects / Considering the Law, Ethics, and Culture

Cultural Aspects

Surrogate:

The surrogate's cultural background must be acknowledged and respected, which is why cultural sensitivity is so important in surrogacy. Cultural values and beliefs of the surrogate should be respected throughout the surrogacy process. Additionally, possible difficulties

resulting from sociocultural views in the surrogate's community should be taken into consideration.

Desired Parent:

It is imperative to comprehend the cultural milieu of the intended parents and their community. Cultural factors ought to impact surrogacy acceptance in their community, and any societal attitudes ought to be handled with cultural sensitivity.

Jurisprudential Aspects**Surrogate:**

Establishing a strong framework in the legal domain to defend surrogates' rights and protections is essential. This entails creating thorough, legally binding contracts that specify the surrogate's obligations, rights, and pay. A crucial legal factor is obtaining informed permission, which gives surrogates the authority to decide what is best for their own health and welfare. Legal safeguards must also be in place to supervise the surrogate's access to healthcare, psychological support, and routine medical examinations.

Desired Parents:

It is imperative that the intended parents have legal recognition and rights from the beginning of the surrogacy procedure. This entails discussing the rights and obligations of parents as well as settling any possible disputes over custody and visitation through enforceable contracts. A further legal consideration that must be given careful thought is financial transparency, which calls for open communication regarding the intended parents' ability to pay for associated expenditures such as surrogate pay and medical bills. Counselling and other forms of help should be made available by legal processes in order to address emotional concerns.

Moral Aspects to Take into Account**Surrogate:**

A surrogate's autonomy and dignity must be respected due to ethical considerations in surrogacy. Adherence to ethical norms that prioritize surrogates' rights and well-being is necessary to ensure their active participation in decision-making without exploitation.

Desired Parents:

The highest ethical standards demand honesty and transparency. It is important to support intended parents in continuing to be transparent about expectations and financial matters. It is morally required to offer emotional support during the surrogacy process.

IV. India's Laws Regarding Surrogacy: Evolution

Surrogacy is not a new practice in India; nevertheless, it was previously unregulated because there was unclear law. Surrogacy as an alternative reproductive technology (ART) gained optimism for the Indian populace after the first IVF kid, Kanupriya alias Durga, was successfully delivered in Kolkata on October 3, 1978. The procedure was made legal by recommendations released in 2002 by the Indian Council of Medical Research (ICMR). But in the absence of clear regulations, low-cost fertility clinics engaged in unregulated surrogacy, which disproportionately involved poor women. Attracting many foreign nationals, India developed into a hotspot for surrogacy.

Laws in this area are necessary, as evidenced by the experiences of situations such as Baby Manji Yamada¹ and Jan Balaz². The Indian government forbade foreigners from becoming surrogates in 2015 as a response. Comprehensive regulations were introduced by the 2016 Surrogacy (Regulation) Bill, which redefined surrogacy. Aiming to resolve ethical concerns and guarantee better oversight, this legislative change represented a substantial shift in the surrogacy scene.

Couples had to prove their "infertility" before seeking surrogacy, which was a major disadvantage of this arrangement. A medical issue that prevents pregnancy or the inability to conceive five years after unprotected coitus are the two reasons listed in the statute as causes of infertility. But this definition does not address every situation in which a couple can experience difficulties becoming pregnant, such as different medical disorders that result in post-conception losses.

The practice by which a woman bears a child for the benefit of intended parents is known as surrogacy, according to the Surrogacy (Regulation) Bill, 2019, which was tabled in the Lok

¹ 13 SCC 518 (2008); Baby Manji Yamada v. Union of India

² AIR 2010 Guj 21 Jan Balaz v. Anand Municipality

Sabha on July 15, 2019. According to the legislation, only married Indian couples—a man and woman between the ages of 26 and 55 and without any prior children—who have been together for at least five years are eligible to choose surrogacy for medical reasons. Men who are single are not eligible, however widowed or divorced single women between the ages of 35 and 45 are. While charitable surrogacy is permitted by law, commercial surrogacy with financial incentives is not. Notably, the Surrogacy Regulation Bill of 2021 was granted presidential. A noteworthy development in surrogacy law in India was the Surrogacy law Bill, 2021, which, following parliamentary ratification, obtained presidential approval on December 25, 2021.

Critique of this legislation

Under The Surrogacy (Regulation) Act, 2021, Section 4(iii)(b)(I) prohibits any woman from acting as a surrogate mother or helping with surrogacy by donating her egg or oocyte, unless she is a married woman with her own child and between the ages of 25 and 35 on the day of implantation. Additionally, Section 4(iii)(b)(IV) prohibits any woman from acting as a surrogate mother more than once in her lifetime. The decision of a woman to volunteer as a surrogate is restricted by these clauses. Article 14 of the Indian Constitution, which guarantees equality before the law and equal protection under it, is violated by this.

A lawfully married Indian man and woman who are over the ages of 21 and 18, respectively, are referred to as a "couple" under Section 2(h) of The Surrogacy (Regulation) Act, 2021. Same-sex couples are not included in this definition of a "couple". The Act violates the equality rights of LGBTQIA+ people protected by Article 14 of the Constitution by limiting surrogacy to only heterosexual couples and single women. The decision in *Navtej Singh Johar v Union of India*³, which decriminalized Section 377 of the IPC and upheld the rights of LGBTQIA+ persons, set a precedent that is contradicted by this.

A number of international human rights instruments are also violated by the discriminatory provisions of the Surrogacy Act. These include Article 10 of the International Covenant on Economic, Social, and Cultural Rights (ICESCR), which recognizes the universal right to parenthood, Article 17 of the International Covenant on Civil and Political Rights (ICCPR), which protects privacy from state interference, and Article 16 of the Universal Declaration of

³ *Union of India v. Navtej Singh Johar*, 2018 AIR 4321 (2018)

Human Rights (UDHR), which safeguards the right to marry and start a family.

Section 38(1) states that no individual, group, surrogacy clinic, laboratory, or clinical establishment of any kind may: (a) engage in commercial surrogacy; (b) provide commercial surrogacy or any of associated component processes or services in any capacity; (c) run a ring or an association for the purpose of appointing or empanelling surrogate mothers; or (c) make use of specific brokers or middlemen. to arrange for surrogate mothers and surrogacy procedures, at such clinics, laboratories, or at any other location. This prohibits paying surrogates and allows only self-sacrificing surrogacy.

This broad ban runs counter to the ruling in *Suchita Srivastava v. Chandigarh Administration*⁴, which held that Article 21 of the Constitution governs reproductive choices. The restriction prevents women from using their reproductive capacities for financial gain by ignoring the physical, mental, and emotional labour required in pregnancy as well as the costs of care they bear throughout and after. Both Article 237 of the UDHR and Article 7 of the ICESCR, which emphasize just recompense for human labour, and the 102nd report's recommendation of surrogate compensation are disregarded by the Surrogacy Act.

Due to the underemployment of male family members, women in rural India frequently take on the majority of the financial duties for the household. These women are crucial in the fight for payment for surrogacy or childbirth. Legalizing selfless surrogacy while outlawing commercial surrogacy raises questions about how surrogate mothers can be exploited, especially in an unregulated underground market for these services.

Without the surrogate mother's written consent and authorization from the relevant authorities, no surrogacy clinic, registered medical professional, gynaecologist, paediatrician, embryologist, intending couple, or other person may perform or cause an abortion during the surrogacy process, according to Section 3(vi). The act requires written consent from the

surrogate mother and clearance from the relevant authorities before any abortion can occur, even though the intended parents are still the child's biological parents.

Due to their lack of control over abortion choices, there is a gulf between the intended parents and the surrogate mother. Because surrogacy is considered an unusual practice, the surrogate

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

and the couple are vulnerable to social criticism due to the lack of legal protection for their rights to privacy and dignity. Under the Bill, emotional risks related to surrogacy are not addressed, which could result in post-delivery problems. One such risk is the mother's inability to give up the kid after nine months.

V. Indian Amendments Lately

Why did the Indian government amend the 2022 Surrogacy (Regulation) Rules? ⁵ The Surrogacy (Regulation) Rules, 2022, have been changed by the Indian government, permitting married couples to use a donor's egg or sperm in the event that one spouse has a medical issue. This nullified an earlier rule change that forbade the use of donor gametes and was made in March 2023.

Which are the main points of the revised surrogacy regulations?

Background: Couples with certain medical issues are prohibited from using surrogacy to have biological children through the March 2023 modified laws, which only allowed the intended couple to use their own gametes.

- These limitations upset impacted couples and put their right to parenthood in jeopardy.
- A woman who suffered from Mayer-Rokitansky-Kuster-Hauser (MRKH) Syndrome, a hereditary condition that results in infertility, challenged it in court.
- The Supreme Court expressed doubts about these regulations' effectiveness, claiming that they compromised the core goals of surrogacy.

The District Medical Board may certify one spouse of the intended couple to need donor gametes for a medical ailment, which permits surrogacy using donor gametes. These provisions were recently amended.

- It would seem from this that couples with medical problems in both partners are still unable to choose surrogacy.

⁵ Drishtias.com

- It requires the use of the woman's own eggs in addition to donor sperm for women who are divorced or widowed and choose to become surrogates.

VI. Surrogacy Statutes in Different States

The legitimacy of surrogacy agreements has been a source of issue for legislators and courts as the usage of surrogates has increased. While most nations have not yet enacted laws governing surrogacy, during the past 20 years, several jurisdictions—mostly common law jurisdictions—have increased their levels of regulation.

States in the USA have their own set of regulations regarding surrogacy; there is no federal law governing the practice. All types of surrogacies are permitted, and foreign nationals who identify as gay or straight are able to participate. State-by-state variances exist in the well regulated legal protections for intended parents. The nation's attractiveness for surrogacy agreements is partly attributed to the fact that foreigners are allowed to pursue the practice.

Agencies help intended parents connect with surrogates, even though commercial surrogate advertising is typically prohibited. Although commercial surrogacy is forbidden in the UK, surrogacy is still lawful. Only selfless surrogates are permitted, meaning that their compensation must not exceed justifiable costs. The surrogate and, if any, her partner initially shares legal parenting of the kid. In order to obtain legal parentage, intended parents must file for a Parental Order once the baby is born. Legal enforcement of surrogacy agreements is not available. The UK forbids surrogate advertisement and places a high priority on the welfare of the child. Altruistic surrogacy is permitted in Canada and New Zealand, while commercial surrogacy has been prohibited since 2004. Commercial or not, surrogacy is prohibited in France, Germany, and Italy. The law in Israel prohibits commercial surrogacy and solely recognizes the surrogate mother as the biological mother. It's critical to understand that there is currently no national surrogacy policy. Every state has developed its own set of laws pertaining to this relatively novel mode of reproduction.

Legally, heterosexual couples from outside can use surrogates in Ukraine, and compensation for surrogates is allowed. The legal protection offered to intended parents by the well-regulated process. Advertisements for surrogates are not specifically prohibited, although specialty agencies are frequently used to facilitate agreements. The intended parents receive parental rights upon birth, guaranteeing a family structure that is accepted by law. In Ukraine, surrogates

can expect to pay anything from \$30,000 to \$50,000 dollars.

The regulations range from making surrogacy agreements legally binding to outlawing commercial surrogacy in its entirety. A large number of laws have generally been the outcome of court cases, meaning that judges have effectively written the laws with each decision they make. These regulations typically aim to shield women from abuse and do not treat genetic fathers with the same respect as birth mothers.

A common question in cases that influence legislation today is: Can a contract be enforceable? Does a woman need to give informed consent before signing a contract for the custody of an unborn child? For reproductive services rendered, may a woman be paid, but not for the surrogate's offspring? These are, at best, politically and morally perplexing questions, and as a result, many states have laws requiring parents to adopt their own genetic child or take other actions that, on the surface, seem senseless while legislators attempt to keep up with the constantly shifting reproductive needs of their constituents. Adoption laws, which are designed to safeguard birth mothers and prohibit baby sales, which is prohibited in many jurisdictions, are akin to rules in many other states.

The financial compensation for living and pregnancy expenses allowed in adoption is defined by people participating with surrogate arrangements in those states as paying the surrogate. In some states, commercial surrogacy is strictly forbidden, and the intended parents are exclusively responsible for covering the medical costs of the surrogate mother. Certain states have laws that allow surrogacy but have very specific custody requirements with little to no mention of financial compensation. Legality or illegality surrounds surrogacy in most states.

It is crucial to remember that you can still lawfully participate in a surrogacy arrangement even if you live in a state with anti-surrogacy legislation. The state in which the birth occurs determines the surrogacy laws and how those rules are interpreted. Several states and other international nations were addressing their surrogacy laws at the time the researcher was researching on this chapter of the thesis. Because state laws are always evolving and new interpretations of the broad wording of the law are established every month, it is difficult to define state laws in any one country.

VII. The International and Indian Scenario

The Indian Council for Medical Research, or ICMR, created and passed a set of regulations in

2005 that all people and organizations working in the surrogacy and assisted reproductive technology fields must adhere to.

It established clear guidelines for the surrogacy procedure and made it clear that gestational surrogacy is the recognized method used for commercial purposes in India. State and district level forums were established to oversee these clinics, and comprehensive regulations were in place for the accreditation and recognition of ART clinics across the US.

The Assisted Reproductive Techniques Bill was then put forth but has not yet been passed by the nation. The proposed bill follows the same guidelines as stated in the ICMR notification, although it differs from the earlier version of the rules. There is room for improvement even if many of the concerns were handled and adjusted in an appropriate manner.

It was not possible for intended parents or surrogate mothers to resolve their grievances through a single point redressal procedure that was either established or planned by legislation. A detailed set of demographic requirements for the intended parents was not specified in the proposed law, despite the fact that it listed numerous parameters for the surrogate, including age, number of embryo implantations, blood transfusions, etc.

Even though the act hasn't yet distinguished between castes or creeds, the authors believe that a minimal level of caution needs to be taken to ensure that the intended parents are real and not involved in criminal activity, that they are stable and able to support a new family member, and that the children are receiving fair and impartial treatment in their new home. This is a drawnout procedure that ought to be carried out using the same methodology as adopted child welfare is verified repeatedly and in an inconspicuous manner for adoptive parents in western nations. In India, the government launched the Integrated Child Development Services (ICDS) program to help achieve this.

"The Delhi Artificial Insemination (Human) Bill 1995" is another piece of law that is worth mentioning. It was first developed to regulate the growth of different ART clinics in the state, even though it is exclusively effective in that state. Additionally, the ICMR guidelines have since taken its place.

Per prevailing norms, there is no suggested punitive action regarding medical malpractice committed by clinic doctors. The Medical Council of India (MCI) and the relevant State

Medical Councils (SMC) have jurisdiction over the matter.

The Indian Contracts Act recognizes the surrogate's agreement as legally binding on behalf of the intended parents, and the surrogate gives up all rights to the child.

In certain places of the United States, the situation is comparable to that of India, where surrogates give up all parental rights due to contentious situations. In the UK, however, things operate differently. There, a woman may apply for custody of her child for up to two years following delivery, subject to the court's approval.

There isn't a centralization of laws in the USA, nevertheless, because of its federal structure of government. In contrast to Washington, which views commercial surrogacy as unacceptable, the state of California permits the practice. Traditional surrogacy is not recognized by law in the UK or India; however, it is permitted in California where the biological mother is still the legal mother in this situation.

Traditional surrogacy is forbidden in the US state of Utah, and gestational surrogacy requires the donation of at least one gamete from each intended parent. In Virginia, the intended parents are not registered as the child's legal parents at birth; rather, a formal procedure must be followed to alter the parents' names after consent is obtained, both before and after surrogacy is completed.

Surrogacy agreements including any form of compensation are deemed null and unenforceable in the state of New York, USA. This is in line with the rules in the UK and goes against the planned legislation in India.

VIII. CONCLUSION

The practice of surrogacy has been legalized in many countries, including India. India has allowed surrogacy long time ago based on some viewpoints. Positive effects of surrogacy include a decrease in prostitution and unreported marriage, a reduction in conflict, and the promotion of science. Moreover, surrogacy has grown into a potential sector since it was made commercially available in India.

Maintaining the custom of fairness for all parties, the Lawmakers and public society should collaborate to create legislation that aims to stop surrogacy practices from being exploited and

confusing.

The kid, intended parents, and surrogate parents must be the final beneficiaries of the process, not the middlemen, according to the regulations that are passed. Only after completing the necessary paperwork and verifications through the relevant organizations and embassies can foreigners who wish to have surrogate children in India be granted permission.

Finally, after careful deliberation and conversation involving all relevant parties or groups, including medical professionals, social activists, and surrogacy clinics, a favourable and stringent law must be passed.

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