
SURROGACY IN INDIA: COMPARATIVE ANALYSIS WITH GLOBAL LEGAL TRENDS

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ABSTRACT

Infertility, a rising health issue affecting both men and women, stems from a complex interplay of factors like age, genetics, lifestyle, and environment. As infertility rates climb, so does the demand for alternative reproductive solutions. Surrogacy, bolstered by progress in assisted reproductive technologies (ART), has become a prominent option. In contemporary society, infertility is increasingly recognized as a medical condition, and parenthood is no longer defined by heterosexual relationships. Thanks to advancements in ART, individuals of all gender identities can pursue parenthood, with surrogacy offering a compelling pathway. Surrogacy, particularly in its commercial and altruistic forms, offers a transformative opportunity for same-gender couples and single parents to experience parenthood, providing a solution where biological reproduction may not be feasible.

In India, however, while surrogacy has emerged as a significant avenue for assisted reproduction, its accessibility remains constrained due to legal barriers, especially the Surrogacy (Regulation) Act of 2021.

This research explores the impact of the Act on the rights and opportunities of same-gender couples and single parents, analyzing the intricate legal framework that limits their access to surrogacy services. The paper delves into the dynamics of the Act, highlighting its restrictions on commercial surrogacy, its focus on altruistic surrogacy, and its implications for marginalized family structures. Through a critical examination of the legal and ethical dimensions of surrogacy in India, this study evaluates the balance between protecting vulnerable surrogates and intended parents, and the need for reform to ensure equitable access to reproductive choices. The paper aims to contribute to a nuanced understanding of how India's evolving surrogacy laws impact diverse family formations while considering the global implications of such legal developments.

SURROGACY DEFINED:

Surrogacy, derived from the Latin "subrogate" meaning "substitute," involves a woman carrying a pregnancy to term for another individual or couple who will raise the child. This can be achieved through two main types: **traditional surrogacy**, where the surrogate is genetically related to the child, and **gestational surrogacy**, where the surrogate carries an embryo created via in vitro fertilization (IVF), with no genetic relation to the child. Surrogacy is typically used when the intended parents cannot conceive or carry a pregnancy due to medical, biological, or other reasons.

Surrogacy is broadly categorized into two types: altruistic and commercial.

Altruistic surrogacy, as the name suggests, is driven by compassion, with the surrogate receiving no financial compensation beyond reimbursement for direct expenses. As per section 2(b) of Surrogacy (Regulation) Act, 2021 (*Surrogacy (Regulation) Act, 2021*, n.d.) "altruistic surrogacy" means the surrogacy in which no charges, expenses, fees, remuneration or monetary incentive of whatever nature, except the medical expenses and such other prescribed expenses incurred on surrogate mother and the insurance coverage for the surrogate mother, are given to the surrogate mother or her dependents or her representative.

Commercial surrogacy, on the other hand, involves payment to the surrogate for carrying the child, often with a profit motive.

Between 2002 and 2015, commercial surrogacy was legal in India, leading to a boom in the industry. As per section 2(g) of Surrogacy (Regulation) Act, 2021, (*Surrogacy (Regulation) Act, 2021*, n.d.) "commercial surrogacy" means commercialisation of surrogacy services or procedures or its component services or component procedures including selling or buying of human embryo or trading in the sale or purchase of human embryo or gametes or selling or buying or trading the services of surrogate motherhood by way of giving payment, reward, benefit, fees, remuneration or monetary incentive in cash or kind, to the surrogate mother or her dependents or her representative, except the medical expenses and such other prescribed expenses incurred on the surrogate mother and the insurance coverage for the surrogate mother.

EVOLUTION OF SURROGACY LAWS IN INDIA:

The evolution of surrogacy laws in India has been shaped not only by legislative developments but also by landmark court cases that have influenced the legal landscape. These cases have

helped define the rights of intended parents, surrogate mothers, and the child born through surrogacy.

The Early Days: A Wild West of Surrogacy (1990s-2000s)

Back in the 90s, surrogacy in India was like the Wild West – no rules, no regulations. Fertility clinics were popping up, offering surrogacy services to anyone who could pay, whether they were from India or abroad. This lack of oversight raised serious concerns. Without clear legal guidelines, there were worries about women being exploited and the whole process becoming a free-for-all.

A Wake-Up Call: The Baby Manji Yamada Case (2008)

Then came the landmark case of Baby Manji Yamada. This case was a real game-changer. A Japanese couple had arranged for a surrogate in India. But after the baby was born, the couple split up, and the intended mother didn't want the child. The surrogate mother, who wasn't even married, was left in a terrible situation, unable to get the legal documents needed for the baby to travel to Japan. The Supreme Court stepped in and said that the Indian government had to create laws to protect everyone in these situations, especially when surrogacy crossed international borders. This case exposed the gaping holes in India's surrogacy laws and made it clear that something had to be done.

Guidelines, But No Teeth (2008-2010)

In response, the Indian Council of Medical Research (ICMR) came up with some guidelines in 2008. These guidelines tried to set some standards for surrogacy, especially when money was involved. But here's the catch: these guidelines weren't legally binding. They were more like suggestions, and clinics could choose whether to follow them or not. So, while it was a step in the right direction, it wasn't enough to really make a difference.

First Attempts at Law: The Surrogacy Bill (2015-2016)

The government finally tried to create some real laws around surrogacy in 2015 with the first Surrogacy Bill. This bill aimed to ban commercial surrogacy (where the surrogate mother is paid beyond medical expenses) and only allow altruistic surrogacy (where she's only compensated for medical costs and related expenses). It also limited

surrogacy to Indian couples who were legally married and heterosexual. The idea behind this was to protect surrogate mothers and intended parents from being taken advantage of, and to address some of the issues that came up in the Baby Manji Yamada case.

Another International Complication: The Jan Balaz Case (2016)

Around the same time, another case highlighted the legal tangles of international surrogacy. A German couple had a child through surrogacy in India and wanted to take the child back to Germany. The court ruled that the child had the right to be with their biological parents and that the Indian government had to provide the necessary travel documents. This case further emphasized the need for clearer rules around surrogacy, especially when foreign nationals were involved.

The Surrogacy (Regulation) Act, 2021: A New Era

In response to all these issues and the growing demand for surrogacy, India passed the Surrogacy (Regulation) Act in 2021. This Act solidified the provisions of the earlier bill, banning commercial surrogacy and only allowing altruistic surrogacy for married heterosexual Indian couples. It also set up a National Surrogacy Board to keep an eye on things and make sure the process is ethical, safe, and transparent.

IMPLICATIONS OF THE PROVISIONS OF THE ACT ON THE REPRODUCTION ALTERNATIVES AVAILABLE TO PEOPLE:

1. Restriction on Commercial Surrogacy

Provisions: Section 38 of the SRA 2021 bans commercial surrogacy, allowing only altruistic surrogacy, where the surrogate mother is compensated only for medical expenses and insurance.

Implications:

Reduced Access to Surrogacy: People who previously relied on commercial surrogacy may find it less accessible, particularly if they cannot afford to support a surrogate beyond medical costs.

Increased Costs: Without the ability to offer financial compensation to surrogates, the overall cost of surrogacy services might rise, leading to a potential rise in the cost of

legal services and medical procedures related to surrogacy.

Shift in Reproductive Choices: With the ban on commercial surrogacy, individuals may seek reproductive alternatives abroad or look into other fertility treatments, leading to a decrease in accessible options within India.

2. Eligibility Criteria for Intended Parents

Provisions: Section 4 of the act establishes strict eligibility requirements for intended parents, such as being married for at least five years, being Indian citizens, and having medical conditions that necessitate surrogacy.

Implications:

Exclusion of Certain Groups: This limits access to surrogacy for single individuals, foreign nationals, and same-sex couples, making it more difficult for these groups to exercise their reproductive rights.

Restricted Reproductive Autonomy: Individuals or couples who may have struggled with infertility but don't meet the eligibility criteria are denied surrogacy, reducing reproductive freedom and options for those who don't fit the prescribed framework.

3. Medical and Psychological Criteria for Surrogate Mothers

Provisions: Section 4 of the SRA 2021 stipulates that surrogate mothers must meet strict criteria, such as being aged between 25 to 35 years and having at least one biological child.

Implications:

Limited Pool of Surrogates: These strict criteria reduce the pool of potential surrogates, which can make finding a suitable match more challenging and time-consuming.

Potential for Exploitation: Despite the altruistic nature of surrogacy being promoted, the rigid criteria may push some women in vulnerable situations to take risks, particularly in areas where regulation and enforcement are weak.

Ethical Concerns: Surrogate mothers' autonomy could be compromised, as some may feel pressured into surrogacy for financial reasons, which may not be adequately

addressed by the regulatory framework.

4. Role of Assisted Reproductive Technology (ART) Clinics

Provisions: Section 11 of the act said that No person shall establish any surrogacy clinic for undertaking surrogacy or to render surrogacy procedures in any form unless such clinic is duly registered under this Act.

ART clinics are responsible for managing surrogacy arrangements and must be registered and comply with legal guidelines.

Implications:

Regulation of ART Practices: The strict oversight of ART clinics ensures better safety standards and ethical practices within the sector.

Access to ART Services: However, increased regulation may lead to higher costs for ART services, which could price out some individuals seeking fertility treatments, thereby reducing accessibility to affordable reproductive care.

5. Reproductive Rights and Autonomy

Provisions: The SRA 2021 emphasizes the welfare of both the surrogate mother and the child, ensuring counselling, medical care, and legal safeguards are in place.

Implications:

Balancing Autonomy and Protection: While these protections are essential, they can restrict the autonomy of individuals seeking surrogacy, especially those who do not fit the prescribed legal criteria.

Impact on Personal Choice: The extensive regulatory framework, though beneficial in many ways, may limit reproductive alternatives for individuals who want more flexibility in choosing their surrogates or managing surrogacy arrangements.

6. International Implications

Provisions: The act restricts surrogacy arrangements to Indian nationals, thus barring foreign

nationals from accessing surrogacy services within India.

Implications:

Decrease in Global Demand for Surrogacy: India has long been a popular destination for international surrogacy. The ban on foreign nationals seeking surrogacy will likely reduce the demand for such services, affecting the industry's dynamics.

Rise in Cross-Border Surrogacy: This may lead foreign nationals to seek surrogacy in other countries, creating a potentially complex landscape of legal, ethical, and financial issues.

7. Increase in Underground Market for Surrogacy

Provisions: Despite the legal ban on commercial surrogacy, the demand for paid surrogacy remains high, which may lead to an underground market.

Implications:

Exploitation and Coercion: With the legal restrictions on commercial surrogacy, individuals and clinics may resort to operating outside the law. This underground market may lead to the exploitation of vulnerable surrogate mothers, particularly from lower-income backgrounds, who are coerced or pressured into illegal surrogacy arrangements.

Underground Economy: The lack of oversight on illegal surrogacy arrangements creates a hidden, unregulated market that often operates in poor conditions, with risks for all parties involved. This may lead to unsafe medical practices and potentially harmful situations for both surrogate mothers and children born through such arrangements.

Globalization of the Underground Market: In response to India's stricter laws, people may look for surrogacy services in other countries with looser regulations or turn to underground arrangements within India. This may result in cross-border surrogacy operations that are difficult to track, leading to legal and ethical implications.

COMPARATIVE ANALYSIS OF SURROGACY LAWS ACROSS THE GLOBE:

Government policies on surrogacy range from complete bans to regulated allowances, reflecting diverse societal values and ethical considerations.

Some countries, like France, Germany, and Italy, have implemented comprehensive bans, prohibiting both commercial and altruistic surrogacy. These bans often stem from concerns about commodifying motherhood and protecting the dignity of pregnancy. For example, France's Civil Code explicitly prohibits surrogacy, viewing it as a violation of public policy. Germany's Embryo Protection Act similarly bans surrogacy to prevent reproductive exploitation. Italy even criminalizes citizens who engage in international surrogacy arrangements, demonstrating a strong stance against the practice. These countries prioritize protecting traditional family structures and preventing potential exploitation of women.

Other countries, such as the United Kingdom and Canada, take a more nuanced approach, permitting altruistic surrogacy while strictly prohibiting commercial arrangements. This approach attempts to balance the desire to help individuals build families with the need to prevent the exploitation of surrogate mothers. In the UK, while altruistic surrogacy is allowed, financial compensation beyond reasonable expenses is prohibited. Canada follows a similar model, permitting only altruistic surrogacy and implementing strict regulations on surrogacy contracts to ensure transparency and fairness. This approach balances the ethical dilemmas surrounding surrogacy by permitting it under strict regulations, acknowledging the complexities while still providing a pathway for individuals to build families.

Comparative Analysis of Surrogacy Bans:

Feature	Complete Bans (e.g., France, Germany, Italy)	Partial Restrictions (e.g., UK, Canada)
Surrogacy Type	Prohibited (both commercial & altruistic)	Altruistic permitted, commercial banned

Rationale	Protection of motherhood, prevention of exploitation, upholding traditional family structures	Balancing reproductive rights with ethical concerns, preventing exploitation
Legal Framework	Explicit prohibitions, often with criminal penalties	Regulations on altruistic surrogacy, restrictions on compensation and contracts
Enforcement	Strict enforcement, including penalties for international surrogacy	monitoring of surrogacy arrangements, restrictions on advertising and payments
Impact	Limited access to surrogacy, potential for black market activities	Reduced access compared to commercial surrogacy, emphasis on ethical considerations

Success of surrogacy in California :

California is a popular destination for gestational surrogacy due to its advanced fertility clinics and, more importantly, its exceptionally clear and protective legal framework. Unlike some states with restrictive laws, California allows commercial surrogacy, ensuring surrogates are properly compensated and cared for. It boasts a well-developed legal process designed to protect the rights of all parties involved: intended parents, surrogates, babies, and egg donors. A streamlined process, often avoiding court appearances, establishes parental rights, aided by decades of supportive case law. Crucially, California allows pre-birth parentage orders, ensuring intended parents are recognized as the legal parents from the start, granting them medical decision-making authority and placement on the birth certificate. This process is accessible to everyone, regardless of marital status, sexual orientation, or genetic connection to the child. Furthermore, California asserts jurisdiction in most surrogacy cases connected to the state, offering protection to families even if they reside elsewhere, solidifying its position as a leading jurisdiction for surrogacy.

WAY FORWARD: SURROGACY IN INDIA AND BEYOND – NAVIGATING LEGAL CHALLENGES AND ETHICAL DILEMMAS

The global landscape of surrogacy is diverse, ranging from complete prohibitions to regulated systems that allow commercial surrogacy. India's legal framework surrounding surrogacy, particularly with the introduction of the Surrogacy (Regulation) Act, 2021, introduces both necessary safeguards and considerable limitations. The Act seeks to protect surrogate mothers and ensure ethical practices, but its restrictive provisions raise significant concerns, particularly for marginalized family structures such as same-gender couples and single parents.

India, once a global hub for surrogacy, shifts dramatically in its approach, banning commercial surrogacy and restricting the practice to married, heterosexual Indian couples. This leaves many individuals, including LGBTQ+ communities and single parents, with fewer reproductive options. While the intention to regulate the industry and protect vulnerable women is commendable, the stringent eligibility criteria and the ban on commercial surrogacy create barriers that limit access to assisted reproductive technologies (ART). For many, the rise in surrogacy costs, combined with the prohibitive legal framework, further narrow their opportunities to pursue parenthood through surrogacy within India.

A key question for the future is whether these restrictions genuinely serve the best interests of all parties involved or if they restrict reproductive autonomy. The exclusion of single individuals, foreign nationals, and LGBTQ+ couples raises ethical questions about access to reproductive rights. If India is to maintain a progressive stance in reproductive healthcare, there is a need for a more inclusive legal framework that supports the rights of diverse families while still ensuring the welfare of surrogate mothers. This can be achieved by adopting a more flexible approach to eligibility, allowing access to surrogacy for a wider range of people without compromising the protections in place for surrogate mothers.

Another pressing concern is the underground market for surrogacy, which emerges as a consequence of the Act's restrictions. Although the intention behind the legislation is to prevent exploitation, the ban on commercial surrogacy inadvertently pushes surrogacy arrangements into unregulated spaces, leaving surrogate mothers vulnerable to exploitation and unsafe practices. This underscores the need for stricter enforcement of ethical guidelines and the establishment of transparent channels through which surrogacy can be conducted safely and equitably.

In the broader global context, India's approach to surrogacy contrasts sharply with the practices in other countries like California, where commercial surrogacy is legal and well-regulated. California's clear legal framework, which ensures protection for all parties involved in surrogacy arrangements, provides a model that India could consider. By balancing the ethical considerations of surrogacy with the right to reproductive autonomy, India could develop a legal system that supports all families while prioritizing the health, dignity, and autonomy of surrogate mothers.

Globally, nations approach surrogacy with varying degrees of caution. While countries like France, Germany, and Italy enact outright bans, the UK and Canada adopt models that regulate altruistic surrogacy to prevent exploitation while allowing individuals to pursue parenthood. India's path forward involves a careful review of its current legislation, seeking a balance between protecting surrogate mothers and expanding access to reproductive options for all people, regardless of gender, marital status, or nationality.

The future of surrogacy in India depends on its ability to adapt its legal framework to the evolving needs of society. It is essential to address the challenges presented by the Surrogacy (Regulation) Act, ensuring that reproductive autonomy is upheld for all individuals, while providing robust protections against exploitation. India must embrace the opportunity to create a more inclusive, ethical, and transparent surrogacy system that respects the dignity and rights of surrogate mothers and intended parents alike. This requires legal reform, the implementation of comprehensive safeguards, and a commitment to equal access for diverse family structures in the evolving world of assisted reproduction.