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A LEGAL ANALYSIS OF SURROGACY: A COMPARATIVE STUDY UNDER INTERNATIONAL AND INDIAN LAW

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Abstract

Surrogacy, as a form of assisted reproductive technology (ART), has raised profound ethical, social, and legal debates across the world. While it provides a path to parenthood for individuals and couples unable to conceive, it also presents challenges regarding the rights and responsibilities of the intended parents, the surrogate mother, and the child. This paper provides a legal analysis of surrogacy with a comparative lens, examining the framework in India alongside major international jurisdictions such as the United Kingdom, the United States, and Australia. It evaluates the evolution of surrogacy regulation, the balance between reproductive autonomy and exploitation concerns, and the need for harmonized global standards. The study concludes with recommendations for ethical and legally sound policy reforms that protect all stakeholders while ensuring the dignity of motherhood and the best interests of the child.

Keywords – Surrogacy; Assisted Reproductive Technology (ART); Surrogacy (Regulation) Act, 2021; Comparative Law; Reproductive Rights; Altruistic Surrogacy; Commercial Surrogacy; Ethical Issues; Parental Rights; Human Rights; International Law; India; United Kingdom; United States; Australia

1. Introduction

Surrogacy, derived from the Latin term *subrogare*, meaning “to substitute,” refers to an arrangement wherein a woman agrees to carry and give birth to a child for another person or couple (Van den Akker, 2007). The rapid advancement of reproductive technologies has transformed surrogacy from a marginal practice to a global phenomenon. However, it has simultaneously generated complex legal dilemmas concerning parental rights, contract enforceability, and potential exploitation of women, especially in developing nations (Sharma, 2020).

Globally, countries have adopted divergent approaches to surrogacy: some permit it under strict regulation, others prohibit it entirely, and a few maintain ambiguous legal positions. India, once known as the “surrogacy capital of the world,” has undergone a dramatic legislative transformation, shifting from commercial to altruistic surrogacy through the Surrogacy (Regulation) Act, 2021. In contrast, jurisdictions such as the United Kingdom, the United States, and Australia display varied models balancing freedom of choice and protection of vulnerable parties.

This paper explores the legal frameworks governing surrogacy in these jurisdictions, highlighting their evolution, ethical dimensions,

and judicial interpretations. The analysis aims to identify best practices and propose balanced policy recommendations for the future.

2. Concept and Classification of Surrogacy

Surrogacy can be broadly categorized as traditional or gestational. In traditional surrogacy, the surrogate is the genetic mother of the child, as her own egg is fertilized using the intended father's sperm. In gestational surrogacy, the surrogate carries an embryo created through in vitro fertilization (IVF), having no genetic link to the child (Imrie & Jadva, 2014).

Further, surrogacy may be commercial, involving monetary compensation beyond medical expenses, or altruistic, where the surrogate is reimbursed only for reasonable costs. The legality and ethical acceptability of these models vary widely across legal systems, reflecting differing cultural, moral, and policy priorities.

3. Legal Framework in India

3.1 Historical Context

Before the enactment of specific legislation, surrogacy in India was largely governed by contractual principles and limited judicial precedents. The landmark case of *Baby Manji Yamada v. Union of India* (2008) brought surrogacy to the forefront of legal discourse, exposing gaps in the absence of a statutory framework. India's popularity as a surrogacy destination was fueled by lower costs and minimal regulation, leading to ethical concerns over the exploitation of economically vulnerable women (Pande, 2010).

3.2 Surrogacy (Regulation) Act, 2021

The Surrogacy (Regulation) Act, 2021, effective from January 2022, introduced a comprehensive legal regime. The Act prohibits commercial surrogacy and allows only altruistic surrogacy for Indian married couples who fulfill specific medical conditions. Key provisions include:

- Surrogacy permitted solely for infertile heterosexual Indian couples married for at least five years (Section 4).
- Mandatory eligibility criteria for surrogate mothers (aged 25–35 years, married with one biological child).
- Establishment of national and state surrogacy boards for oversight.
- Prohibition of foreign nationals, single parents, and same-sex couples from accessing surrogacy in India.

While the Act seeks to prevent exploitation, it has been criticized for being overly restrictive, infringing upon reproductive autonomy, and discriminating based on marital and sexual status (Gupta, 2022).

4. Comparative International Perspective

4.1 United Kingdom

The United Kingdom regulates surrogacy under the Surrogacy Arrangements Act 1985 and the Human Fertilisation and Embryology Act 2008. Commercial surrogacy is prohibited, and all surrogacy arrangements are legally unenforceable (Crockin, 2010). Parental rights are transferred to the intended parents through a Parental Order, granted post-birth by a court if specific criteria are met, including the surrogate's consent.

The UK's framework prioritizes child welfare and surrogate autonomy but has been critiqued for being cumbersome and outdated in light of modern family forms (Horsey, 2021).

4.2 United States

The United States lacks a unified national surrogacy law; regulation varies by state. States like California and Illinois recognize and enforce surrogacy contracts, supporting both altruistic and commercial arrangements (Storrow, 2012). Conversely, states such as Michigan criminalize paid surrogacy.

The California model is often cited as progressive, emphasizing contractual freedom and judicial validation through pre-birth

parentage orders (Johnson v. Calvert, 1993). However, disparities among state laws lead to legal uncertainty and “reproductive tourism” within the U.S. itself.

4.3 Australia

Australia allows only altruistic surrogacy, with commercial arrangements criminalized under state and territory laws (Everingham et al., 2014). Surrogacy agreements are unenforceable, and the intended parents must apply for a parentage order post-birth. Australia’s model stresses ethical safeguards, informed consent, and counseling but faces criticism for procedural delays and limited accessibility.

4.4 Other Jurisdictions

Countries such as Ukraine and Georgia permit commercial surrogacy for foreign nationals, making them prominent global hubs (Whittaker, 2018). On the other hand, France, Germany, and Italy prohibit all forms of surrogacy, citing moral and public order concerns. This divergence underscores the lack of an international consensus on surrogacy ethics and regulation.

5. Ethical, Constitutional, and Human Rights Dimensions

The ethical debate on surrogacy centers on competing values: autonomy versus exploitation, and compassion versus commodification. Feminist scholars argue that commercial surrogacy risks treating women’s bodies as instruments of profit (Anderson, 1990), whereas others emphasize reproductive choice as an aspect of personal liberty and bodily autonomy (Millbank, 2019).

From a constitutional perspective, surrogacy implicates rights to privacy, reproductive autonomy, and equality under Article 21 of the Indian Constitution (Menon, 2022). Internationally, Article 16 of the Universal Declaration of Human Rights (UDHR) and Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) recognize the right to found a family. Balancing these rights with protection against exploitation remains a legislative challenge.

6. Judicial Approaches

Indian courts have adopted a cautious yet progressive stance. In *Baby Manji Yamada v. Union of India* (2008), the Supreme Court acknowledged surrogacy as a legitimate mode of parenthood, calling for regulatory intervention. Similarly, *Jan Balaz v. Anand Municipality* (2009) raised citizenship issues for children born through international surrogacy. The judiciary has underscored the need to reconcile compassion with legality, often highlighting the welfare of the child as paramount.

In other jurisdictions, *Johnson v. Calvert* (California, 1993) affirmed the intended parents’ rights in gestational surrogacy, establishing intent as a determinant of parenthood. In the UK, *Re X (A Child)* (2020) demonstrated judicial flexibility by granting parentage orders to same-sex couples, reflecting evolving family norms.

7. Challenges and Recommendations

Despite legislative progress, numerous challenges persist:

- Restrictive eligibility criteria in India exclude single persons and LGBTQ+ individuals, contravening principles of equality.
- Ambiguities in parentage laws often delay birth registration and legal recognition.
- Absence of international harmonization leads to cross-border surrogacy disputes and potential child statelessness.

Recommendations include:

1. Broader eligibility criteria to ensure inclusivity consistent with constitutional rights.
2. Regulation, not prohibition, of compensated surrogacy with ethical safeguards.
3. Recognition of international surrogacy arrangements through bilateral agreements.
4. Establishment of global ethical standards guided by the World Health Organization or United Nations.

8. Conclusion

Surrogacy embodies both the triumph of reproductive technology and the complexity of moral and legal boundaries. The Indian model, while rooted in protectionist intent, requires recalibration to align with constitutional freedoms and global best practices. Comparative insights reveal that effective regulation must balance autonomy, equity, and child welfare without succumbing to moral absolutism. Harmonized international norms and transparent domestic laws can ensure surrogacy remains a compassionate, ethical, and legally secure path to parenthood.

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