

Ethical and Legal Challenges in Surrogacy: Comparative Study of India and USA

Author: **Anjali**, LLB 6th semester (3 years)

Amity Law School, Lucknow.

Co-author: **Dr. Mudra Singh** (Assistant Professor Grade-I) Amity Law School, Lucknow.

Abstract:

This paper explores the development of the legal framework governing surrogacy in India, particularly through the lens of the Surrogacy Regulation Act, 2021. In contrast to the state-centric surrogacy regulations present in the USA. This paper examines the reasons for the transition from being a prominent global commercial surrogacy destination to implementing stringent regulations that facilitate the altruistic model of surrogacy, aimed at preventing the exploitation of women by intermediaries and agencies while upholding the traditional values of the Indian family. The new legislation bans commercial surrogacy, as well as services for LGBTQ individuals, single parents, and foreign nationals, while considering the autonomy of reproductive choices. In the USA, there are no overarching federal laws concerning surrogacy, leading to the dominance of state law.

The primary drawback of surrogacy in the United States is its high cost, which can range from \$49,000 to \$300,000 or even more. This expense is beyond the reach of a significant portion of the population. This paper discusses the definition of surrogacy, various types of surrogacy arrangements, the laws governing these two nations, the enforceability of surrogacy contracts, parental rights, and the treatment of the surrogate mother. Additionally, it concludes with a comparison of the laws in the two countries, focusing on the legal framework that protects the dignity of the mother and preserves the reproductive rights of families.

Key words: Surrogacy, Commercial surrogacy, Altruistic surrogacy, Parental right, Surrogate mother, Surrogacy (Regulation) Act 2021, U.S. Surrogacy Law, Reproductive autonomy, Surrogacy contract, legal framework.

1. INTRODUCTION

Surrogacy is a process under which a woman agrees to carry a baby and give birth for other intended person/ parent, who ultimately becomes the parent of that child after birth.¹

The two important characters in surrogacy are-

- 1) Surrogate mother - Is the woman who carries the baby for another aggrieved person.²
- 2) Intended Parent - Those couples who are less fortunate to conceive of the child naturally and willing to enter the surrogacy process.

The surrogacy has been classified into two Categories:

- 1) Traditional surrogacy: In this surrogacy process the surrogate (mother) is inseminated artificially with the sperm of the intended father or any other donor and she will be the biological mother of that child.
- 2) Gestational Surrogacy: In this surrogacy process the embryo is developed by using the hi-tech machines and labs which form the embryo, which is further implanted in the surrogate mother. In this case the surrogate is not the biological mother of the child, and she does not have any genetic relation with the child.³

Legal and Medical definition of Surrogacy:

“A practice where a woman gives a child to an intending couple and agrees to hand over the child to them after the birth” is defined under section 2(zd) of the Surrogacy (Regulation) Act 2021.

Historical background of surrogacy:

The history of surrogacy can be divided into three parts: Ancient, medieval, and modern period.

Ancient period:

From the book of “Genesis”- There was a couple named Sarah and Abraham, who suffered from infertility for almost 90 years. But God gave them a promise to become parents one

¹ P. Saxena, *Law and Policy of Surrogacy in India* (LexisNexis, New Delhi, 2016).

² Surrogacy (Regulation) Act, 2021, s. 2(zg).

³ V.K. Ahuja, *Law Relating to Women and Children* (LexisNexis, 2019).

day, but Sarah never bears any child, and she becomes old. They thought that their promise would never be fulfilled.

To have a child Sarah offered her maid servant Hagar to become a surrogate. Later Hagar bears a child for Abraham on Sarah's behalf, and Hagar gives birth to Ishmael.

However, after the birth the conflict arises between the two women and later miraculously Sarah gave birth to Isaac.

Medieval Advancement and modern period:

In the 20th century with the help of medieval advancement the traditional surrogacy was converted into a clinical and legal process.⁴

In the year 1986, Baby Mary case of the USA gained attention where Mary Beth Whitehead decided not to give the baby to the intended parent.⁵

This case leads to legal battle and brings the ethical and legal complication of traditional Surrogacy. It gave a push to gestational surrogacy and IVF.

Current surrogacy around the world:

From 1990 and early 2000 various nations started adopting laws to regulate surrogacy. In some countries surrogacy is totally legal, in some it is restrictive while some countries have banned this process.

In the UK and India, altruistic surrogacy is allowed. In the USA, surrogacy laws vary from state to state.⁶

In Ukraine and Russia, commercial surrogacy is very popular.

Due to lack of regulations, the surrogacy industry creates both opportunity and exploitative situations.

⁴ Sheila A.M. McLean, *First Do No Harm: Law, Ethics and Healthcare* (Ashgate Publishing, 2014).

⁵ *In re Baby M*, 537 A.2d 1227 (New Jersey Supreme Court, 1988).

⁶ John A. Robertson, *Children of Choice: Freedom and the New Reproductive Technologies* (Princeton University Press, 1994).

2 .DETAILS OF EVOLUTION OF SURROGACY IN INDIA:

Surrogacy became very popular, and India became a global hub for the foreigners. Early development of ivf and ART began in the 1990s and in the year 2002 commercial surrogacy was legal which led to a huge surge in foreign countries' best destination for surrogacy because of its affordability and advancement of medical arrangement.⁷ However, this rapid growth brings ethical concern such as-

- i) Exploitation of uneducated and poor females.⁸
- ii) Legal protection lacking for Surrogate and child.
- iii) Legal cross border conflict.

Legal policy shift:

In 2008 case of Baby Manji - AIR 2009 SC 84;(2008) 13 SCC 518.⁹

Summary of the case—Japan's intended parents (couple) get divorced before the birth of the child which led to legal parentage of the child, and it turned out to be a complex issue.

2015: The Government banned foreign nationals from visiting India for surrogacy due to concern of baby selling.¹⁰

2016: Bill introduced to ban commercial surrogacy and altruistic surrogacy is only allowed.

2021: After so many years of debate in the year 2022, Surrogacy (Regulation) Act 2021 was passed and came into force on January 2022.

After enactment of surrogacy law:

Surrogacy (Regulation) Act 2021 defines surrogacy as an altruistic practice. Altruistic Surrogacy in which financial compensation is nil and only medical expenses are allowed.

Important features of Altruistic surrogacy are:

⁷ P. Saxena, *Law and Policy of Surrogacy in India* (LexisNexis, New Delhi, 2016).

⁸ Amrita Pande, "Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker," (2010) 35 *Signs: Journal of Women in Culture and Society* 969.

⁹ *Baby Manji Yamada v. Union of India*, AIR 2009 SC 84; (2008) 13 SCC 518.

¹⁰ Ministry of Home Affairs, Government of India, Notification on Surrogacy Visa Restrictions (2015).

- i. Only available to Indian nationality couples with a proven infertility report.
- ii. The surrogate must be a close relative and must have her own child.
- iii. Commercialization of surrogacy is abolished.
- iv. This law aims to prevent the exploitation of women.

Aim of this Act is to prioritize ethics, protection of women's vulnerabilities, dignity and children over market demand.

Reason behind surrogacy law enactment:

Surrogacy law was enacted in the year 2021 and came into force on January 25, 2022, to address and regulate the growing problems, ethical dilemmas and complex legality associated with practice of surrogacy. India became a global hub for the commercial surrogacy back in 2000's because of very low medical cost, absence of strict regulations, and Hi-tech reproductive technology. This gives rise to the world called "Rent a womb" industry.

Later various issues and exploitation of this industry became apparent:

- i. Poor women's exploitation - less fortunate women were incentivized into surrogacy in lieu of money, without having a proper knowledge of emotional and medical consequences.
- ii. Abandonment of child- there are various cases under which the children born under surrogacy are abandoned by their intended parents, even in some cases the child born with disability or in some case where the intended parents separated or died during the process of surrogacy.¹¹
- iii. Lack of legal protection- before 2021 there were no comprehensive laws available in India for protecting the right of surrogate mother, intended parent or child born from surrogacy. These three parties of the surrogacy do not have any law to protect their rights.
- iv. Ethics and morality- commercial surrogacy has been commodified and turned into reproduction as a business.
- v. Commercial surrogacy and foreign nationals- In the early 2000's India became the hot spot for surrogacy by foreigners, which led to various legal issues like custody of child , citizenship, trafficking concerns.

¹¹ V.K. Ahuja, *Law Relating to Women and Children* (LexisNexis, 2019).

Hence, surrogacy law was enacted in India to reduce the unethical practices, protect the rights of vulnerable women and child those who are born through surrogacy.

3. METHODOLOGY OF RESEARCH:

The research approach utilized for this study relies mainly on doctrinal and comparative legal research techniques to investigate and assess surrogacy legislation in India and the United States.

The doctrinal approach entails a comprehensive examination of legal statutes, court rulings, and principles related to surrogacy. This study critically examines the legal framework created by the Surrogacy (Regulation) Act, 2021 to comprehend the regulatory strategy implemented in India regarding altruistic surrogacy and safeguarding surrogate mothers. In the same way, pertinent legal statutes and state-specific regulations related to surrogacy in the United States, including those noted in the California Family Code Surrogacy Provisions, are analyzed to grasp how various states oversee commercial and altruistic surrogacy agreements. Alongside statutory analysis, significant judicial decisions, such as *Baby Manji Yamada v. Union of India*, are examined to grasp the judicial interpretation of surrogacy laws and their effects on reproductive rights and parental acknowledgment.

Additionally, a comparative legal analysis is utilized to recognize the similarities and distinctions between the legal systems of India and the U.S. regarding matters like the legality of commercial and altruistic surrogacy, criteria for intended parents, protections and rights for surrogate mothers, and the establishment of parentage and citizenship for children born via surrogacy. The study utilizes a qualitative analytical method to assess the efficiency of these legal structures and to examine the ethical, social, and legal consequences related to surrogacy in both regions. The research primarily utilizes secondary data sources, comprising books, scholarly articles, legal journals, governmental reports, and policy papers, in addition to pertinent legislation like the Assisted Reproductive Technology (Regulation) Act, 2021.¹² This comparative and analytical study seeks to evaluate the advantages and drawbacks of the surrogacy legislation in the two nations.

¹² Assisted Reproductive Technology (Regulation) Act, 2021 (Act No. 42 of 2021).

4. CONSTITUTIONAL VALIDITY OF SURROGACY IN INDIA:

The validity of surrogacy in the Indian constitution involves analyzing whether the surrogacy act aligns with the principles of constitution of India and fundamental rights.¹³

This act was passed to prevent exploitation of surrogates and to regulate surrogacy.

It also raised serious questions regarding reproductive rights, personal liberty and equality.

- i. The surrogacy act prohibits the commercial surrogacy to prevent exploitation of underprivileged women who may be wrongfully or coerced into surrogacy for money. It protects the woman to become a tool for reproduction in surrogacy technology. It also upholds the principle of states to promote social welfare.
- ii. This article guarantees personal liberty, inclusive of reproduction choices. The state can impose reasonable restrictions in the name of morality, public health and prevention of exploitation.¹⁴
- iii. This act discriminates the individual based on
 - marital status
 - sexuality
 - nationality.

5. ELEMENTS OF THIS ACT:

1. This act is legal to only married heterosexual Indian couples (The condition of marriage shall not be less than 5yrs) are only eligible.
2. Single person, LGBTQ, foreigners and unmarried couples are not eligible to get a child under the surrogacy act.

This classification is unreasonable and appears arbitrary without intelligible differentia and the test of rational nexus and intelligible differentia is failed in this act.

As per the Article 21 - Right to life and personal liberty, reproductive autonomy is a part of personal liberty, and any woman has the right to make their own decision about reproduction. This act prohibits women's right to enter surrogacy voluntarily. The intending parents cannot enter into the surrogacy contract due to not meeting the criteria mentioned in the act.

¹³ Surrogacy (Regulation) Act, 2021 (Act No. 47 of 2021).

¹⁴ *Justice K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1.

As per article 19 Freedom of profession - Since commercial surrogacy was banned, it may violate professional rights given under 19(1)(g).

6. PUNISHMENT FOR INFRINGEMENT OF SURROGACY ACT 2021:

1. Commercial surrogacy: Since commercial surrogacy is banned in India, accepting and offering money compensation to surrogates is not legal but the medical and insurance expense is acceptable.¹⁵

Punishment for violation is imprisonment for up to 5 years plus fines up to 10 lakhs. Repeat violation- imprisonment up to 10 years plus fine up to 15 lakhs

2. Running unregistered surrogacy clinic- Running clinic without registering into the act can lead to imprisonment up to 5 years plus fine up to 10 lakhs.

Repeat offence - imprisonment up to 10 years plus fine up to 20 lakhs.

3. Abandonment/ exploitation/ sale of surrogate children - when a child took birth from surrogacy and the intended parents abandoned child or exploitation of surrogate and child or selling or purchasing surrogate child is a punishable offence. Imprisonment up to 5 years plus fines up to 10 lakhs.

Repeat violation- imprisonment up to 10 years plus fine up to 15 lakhs

4. Performing and conducting surrogacy without eligibility entering surrogacy when the surrogate and intended parents are not eligible under the law then the Punishment for violation is imprisonment up to 5 years plus fines up to 10 lakhs.

5. Advertisement - Any kind of promotion or any offering of surrogacy for commercial gain is prohibited and imprisonment of up to 5 years will be imposed.

The list of people who can be penalized under this act are as follows: Clinic operator, medical practitioner
Intended parents

Surrogate mother

¹⁵ Surrogacy (Regulation) Act, 2021, s. 2(zd).

Agent Brokers

Third party who facilitate surrogacy.

7. COMPARISON OF SURROGACY LAW WITH USA:

State laws and public policy all have an impact on surrogacy laws in the US, which are complicated and differ greatly from one state to the next. Since there is no federal legislation governing surrogacy, state law is the only source of authority regarding the validity and enforceability of surrogacy agreements. A thorough analysis of U.S. surrogacy law is provided below, covering surrogacy types, state-specific regulations, legal procedures, and important factors.

STATE-SPECIAL LEGAL STATUS:

In terms of surrogacy, states can be divided into three general categories: States That Allow Surrogacy

Permit gestational surrogacy. contracts that can be enforced.

Pre-birth parentage orders, which assign legal parenthood before birth, are typically permitted by courts.¹⁶

For instance:

- California
- the state of Connecticut
- Delaware
- Nevada
- New Hampshire
- Illinois
- New Jersey

¹⁶ California Family Code, §§ 7960–7962.

- The state of Vermont

States with Ambiguities or Legal Restrictions Surrogacy is neither strictly forbidden nor entirely legal. Contracts may be enforced by courts on an individual basis. Prenatal orders could be limited or challenging. For instance:

In 2021, paid surrogacy became legal in New York, The state of Maryland, Oregon In 2019, Washington permitted commercial surrogacy.

States that are hostile or prohibit surrogacy

Surrogacy may be discouraged or outlawed, and contracts may not be enforceable. Typically, traditional surrogacy is prohibited.

Certain states limit surrogacy to selfless (unpaid) agreements. Establishment of Parents

Prenatal orders are filed during pregnancy, and the intended parents are listed on the birth certificate right away.

If a pre-birth order cannot be fulfilled, post-birth adoption is used; the child must be adopted by the intended parents after birth.

The state and the intended parents' marital status or gender will determine whether a prenatal or postpartum procedure is necessary.

COMPENSATION & COMMERCIAL SURROGACY

Many states allow commercial surrogacy, in which the surrogate receives compensation in excess of medical costs. Only altruistic surrogacy which involves no payment beyond reasonable expenses—is permitted in some states. Contracts must specify pay, costs, and reimbursements in detail.¹⁷

SINGLE INTENDED PARENTS AND LGBTQ+

Many states that allow surrogacy do not impose restrictions on people based on their sexual orientation or marital status.

The use of surrogacy by LGBTQ+ couples and single parents is now permitted by changes in parental laws.

Only married, heterosexual couples are permitted to use surrogacy in some conservative states.

International Citizenship and Surrogacy:

Children born to foreign intended parents through surrogacy in the United States are typically eligible for U.S. citizenship. Because of the favorable legal conditions in many states, the United States is a popular destination for international surrogacy.

Medical centers and Surrogacy Agencies:

Surrogacy agencies are used by many intended parents to handle the psychological, medical, and legal details. The cost, legality, and quality of agencies differ.

Additionally, IVF clinics frequently collaborate with agencies or attorneys.

SURROGACY COST

In the United States, surrogacy is costly, usually costing between \$90,000 and \$150,000 or more. This includes - Agency costs, Legal charges, IVF and healthcare expenses, Compensation for surrogates, Travel and insurance.

RISKS AND CONSIDERATION:

Since laws are subject to change, intended parents should consult with knowledgeable legal counsel. If possible, make sure that pre-birth parentage orders and contracts are

¹⁷ Deborah L. Spar, *The Baby Business: How Money, Science and Politics Drive the Commerce of Conception* (Harvard Business School Press, 2006).

unchangeable. Costs may vary depending on insurance coverage and unforeseen medical issues.¹⁸

FEDERAL ASPECTS

Despite state-based surrogacy laws, there may be some federal laws that overlap, including:

- i) Law about immigration (for foreign intended parents).
- ii) Regulation of health insurance.
- iii) Tax ramifications (expenses and compensation may influence tax status).

8. COMPARISON OF SURROGACY LAW OF INDIA AND USA:

The legal and ethical frameworks governing surrogacy in India and the US are very different. India has a centralized national policy that regulates surrogacy consistently throughout the nation, in contrast to the United States decentralized, state-based legal system, where surrogacy laws range greatly from fully supportive too restrictive.¹⁹

The Surrogacy (Regulation) Act, 2021, currently governs surrogacy laws in India. It prohibits all commercial surrogacy and permits only altruistic surrogacy. This law restricts access to surrogacy to Indian citizens who are heterosexual, married, and have been married for at least five years. Additionally, the couple must demonstrate medical infertility.²⁰

In India, surrogacy is prohibited for foreign nationals, LGBTQ+ people, single people, and even live-in couples. The surrogate must also have at least one child of her own, be a close relative of the intended parents, and be prohibited from engaging in surrogacy more than once in her lifetime. In India, surrogacy is legally considered completely altruistic since compensation is strictly restricted to medical and insurance costs.

On the other hand, both commercial and altruistic gestational surrogacy are legal in the United States, especially in states that allow it, such as California, Illinois, or Connecticut, and surrogates can receive compensation for their services in addition to medical costs.

¹⁸ John A. Robertson, "Surrogacy and the Law in the United States," (2016) 45 *Journal of Law and Medicine* 85.

¹⁹ Katarina Trimmings & Paul Beaumont, *International Surrogacy Arrangements* (Hart Publishing, Oxford, 2013).

²⁰ Surrogacy (Regulation) Act, 2021 (Act No. 47 of 2021), s. 2(zd).

Additionally, U.S. law is generally more accepting, permitting surrogacy for foreign nationals, LGBTQ+ couples,

and single people.

Furthermore, pre-birth orders can frequently be used to establish legal parentage in the United States, giving intended parents more clarity and protection. However, in India, the surrogate mother is initially regarded as the legal mother until a court order specifies otherwise, and parentage is only transferred after birth.

In conclusion, Indian law is more conservative, protectionist, and restrictive, with the goal of preventing exploitation but severely restricting access, whereas U.S. surrogacy law is varied and provides wide access with protections through legal contracts and pre-birth orders. In its surrogacy regulations, India places more emphasis on social norms, family structures, and ethics than the United States does on reproductive autonomy and contractual freedom.

9. CONCLUSION:

In conclusion, different legal and cultural perspectives on assisted reproduction are reflected in the surrogacy laws of the US and India. By strictly allowing only altruistic surrogacy for married, infertile Indian heterosexual couples and outlawing commercial surrogacy and access for singles, LGBTQ+ people, and foreigners, the Surrogacy (Regulation) Act, 2021 in India seeks to protect women from exploitation and preserve traditional family values. This law prioritizes moral considerations over reproductive autonomy, reflecting a protectionist and conservative viewpoint. State-specific laws in the United States, on the other hand, provide a more liberal and inclusive framework that acknowledges both commercial and altruistic surrogacy and makes a greater range of people, including singles and LGBTQ+ couples.

The Surrogacy (Regulation) Act, 2021 in India allows only altruistic surrogacy for married, infertile heterosexual couples, aiming to safeguard women from exploitation and uphold traditional family values. In contrast, Prenatal parentage orders frequently provide legal clarity, and the legal framework in the U.S. supports enforceable surrogacy agreements. The surrogacy laws of each country ultimately reflect their unique legal philosophies and societal values, with the United States focusing on individual rights and legal flexibility, while India prioritizes regulation and moral oversight.

9. SUGGESTIONS:

While the Surrogacy (Regulation) Act, 2021, which governs surrogacy in India, aims to prevent exploitation and uphold ethical standards, it would benefit from a number of significant reforms to make it more inclusive, workable, and rights based. Since reproductive autonomy shouldn't be restricted by marital status, sexual orientation, or nationality, one important recommendation is to expand the eligibility requirements to include single people, LGBTQ+ people, live-in couples, and foreign nationals. Allowing unrelated but medically and psychologically fit women to serve as surrogates with the right protections would also lessen the restriction that the surrogate must be a "close relative" of the intended couple, which is extremely restrictive and frequently impractical.

Although the complete prohibition of commercial surrogacy is intended to stop exploitation, it has unintentionally forced the industry underground and denied many women just compensation for their voluntary labor. Therefore, a more balanced approach that protects the rights of intending parents as well as surrogate welfare may be provided by regulated compensated surrogacy, which would be subject to stringent legal and ethical guidelines. Women's one-time surrogacy ban should be reexamined to permit multiple surrogates with informed consent and medical supervision. Additionally, establishing clauses for pre-birth parentage orders would protect all parties by avoiding disputes and bringing legal clarity.

Enhancing surrogate welfare is equally important; this includes postpartum care to guarantee the surrogate's wellbeing after giving birth, comprehensive insurance, and psychological counseling. Effective enforcement of the law also depends on responsible and well-funded regulatory agencies, like the State and National Surrogacy Boards, which need improved facilities and frequent audits. Lastly, to lessen stigma, encourage ethical behavior, and support informed

decision-making, national awareness campaigns are crucial. The law will remain responsive to practical needs if stakeholders, including intended parents, medical professionals, and surrogate mothers, are included in regular policy reviews. All things considered, a more inclusive, open, and rights-based reform of India's surrogacy legislation would respect moral principles and reproductive justice.

BIBLIOGRAPHY:

1. **Government of India.** (2021). *The Surrogacy (Regulation) Act, 2021*. Ministry of Law and Justice. Retrieved from: <https://egazette.nic.in>
2. Singh, M. (2022). *Surrogacy in India: Legal and Ethical Issues*. Journal of Indian Law and Society, 13(1), 45–60.
3. Sharma, R. (2021). *Understanding the Surrogacy (Regulation) Act, 2021*. Eastern Book Company.
4. Ministry of Health and Family Welfare. (2022). *FAQs on Surrogacy (Regulation) Act, 2021*. Retrieved from: <https://main.mohfw.gov.in> Raj, A., & Kapoor, S. (2022). *The Legal Landscape of Surrogacy in India: A Critique of the 2021 Act*. Indian Journal of Legal Studies, 14(2), 112–127.
5. Narayan, L. (2023). *Women's Rights and Surrogacy in India*. Oxford University Press.
6. The Hindu. (2021, December 25). *Lok Sabha passes Surrogacy (Regulation) Bill*. Retrieved from: <https://www.thehindu.com>
7. 2008 case of Baby Manji - AIR 2009 SC 84; (2008) 13 SCC 518
8. Jan Balaz v. UOI (2009) - AIR 2009 GUJ 21.
9. Baby Yamini (Sofi khan v. Anjuman Bibi And Others) (2011).