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Legal Framework of Surrogacy for Same-Sex Couples in India: A Comparison with UK

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ABSTRACT

With the advent of time, new beliefs and practices evolve in society that changes the mindset of people. Surrogacy is one such practice that is becoming very common in the society. Instead of practice, it has become to regulate business and to earn money. Surrogacy is a mechanism where a woman carries and gives birth to a baby for a person who is not able to have children. In simpler words, eggs from the woman who will carry the baby or from an egg donor are fertilized with sperm from a sperm donor to make an embryo. It was first mentioned in the book of Genesis. In western countries like UK, USA, etc surrogacy is legal for every gender and for every couples like LGBTQ, same sex, etc. In UK, The Surrogacy Arrangements Act 1985 & the Human Fertilisation Embryology Act 2008 states that the intended parents for surrogacy can be single, unmarried, or same sex couples (Gay/LGBT). The same is not applicable in India, surrogacy is allowed for same sex couples as the word 'couple' means as legally married biological man and woman as per the Surrogacy Act in India. Indian legislatures have restricted the rights of LGBTQ community to form a family despite the decriminalization of homosexuality in 2018. This is the reality of the law makers in India, in the constitution it's clearly stated that no one shall be discriminated on any basis under Article 14 and as per Article 21 people have right to life and liberty that also includes right to family, but the opposite happens.

KEYWORDS

Surrogacy, same sex couples, LGBTQ, Constitution,

Article 14, Article 21, homosexuality.

STATEMENT OF RESEARCH PROBLEM

The statement of Research problem is there is lack of provisions related to same sex couples in respect with surrogacy in India. Despite of having a separate legislation for surrogacy which is The Surrogacy Regulation Act, it neither gives right to surrogate mother nor it mentioned about LGBTQ community. The legislations in India are somewhere discriminatory as on one hand it says that discrimination is against our right and on the other hand it discriminates among individuals. The laws in India are weak as compared to UK laws because UK support and care about each and every individual. One of the main reason can be that India is a developing country where laws are made but not being implemented much whereas UK is a developed nation where laws are properly implemented and followed.

The problem my paper focuses on that why same sex couples do not have right to have children through surrogacy and how they are being affected. The constitution of India which is known to be the Bible of country states that people have the right to have family. Stopping someone to not to have children through surrogacy is somewhere seems taking away their right to have family. People have their own reasons as to why they can't have children and why they adopted for surrogacy, then why same sex couples are allowed to have surrogacy?

RESEARCH OBJECTIVE

- To understand the concept of surrogacy for same sex couples in India.
- To compare the legal provisions related to surrogacy with UK laws

RESEARCH METHOD

The research method involved in my research is Exploratory method as I have explored legal recognition of same sex couples rights in surrogacy is significantly more advanced in UK as compared to India. This method had allowed for a more comprehensive examination of the legal framework.

INTRODUCTION

Surrogacy is not per se bad but using it for business purpose is bad.

Right to reproduce their young and right to have a family are rights that each individual have. Despite that it is not mentioned in the constitution but it can interpreted and come under Article 21 of Constitution of India. There are some people who are unable to have children and for that they do the practice of surrogacy.

Surrogacy is a form of third party reproductive practice in which intending parents contract a surrogate mother to give birth to a child¹. Surrogacy is a practice that Indian families in the earlier times thought was not good as carrying someone else baby and being becoming the mother was against their beliefs and values. But with the change of time, people started considering it as a normal practice. In present time, many things have changed that has impacted the thinking of society as well. With the growing of modern practices of surrogacy, it has become a business to earn money by carrying the baby of an unknown person and then giving the child in return of money. There can be various reasons of committing this kind of act, one of the main reason is poverty, there are many females especially in rural areas who don't possess much knowledge about the surrogacy but they do the act because they need money and to run their household. It has now become a way to earn money. This has created a negative impact on surrogate mother. Surrogacy usually involves opposite genders in India but the same is not the case in UK. LGBTQ community in India is considered as a vulnerable section of the society. Indian society have a negative mentality related to the LGBTQ community as they think that they abnormal and cannot fit in the society. But after the NAZ FOUNDATION CASE², LGBTQ people in India are entitled to all constitutional rights which lead to give them a place in society. Surrogacy in same sex couples is not allowed in India but it is allowed in UK.

HISTORY OF SURROGACY IN INDIA

Indian civilization, rich in history and culture, holds vast knowledge across a wide range of topics in its ancient texts. These texts cover subjects from philosophy and medicine to everyday life practices, including surrogacy, as referenced in the Manusmriti, the Mahabharata, and other mythological works. Known as "Niyog

¹ <https://www.ohchr.org/en/special-procedures/sr-sale-of-children/surrogacy>

² AIR 2018 SC 4321.

Dharma" in the Mahabharata, one example involves Queen Satyawati, who instructs her eldest son Vyasa to engage in niyoga with the widows of her younger son Vichitravirya. This union led to the birth of Dhritarashtra, Pandu, and Vidura. In this practice, if a husband is incapable of fathering a child or has died without having children, a woman could ask a respected man to help her bear children³.

PRESENT TIME

In 2002, commercial surrogacy, often called "Rent a Womb," was legalized in India to boost medical tourism. This made India a major hub for surrogacy, largely due to the low costs compared to places like the U.S., where surrogacy costs approximately \$100,000, and the absence of stringent regulations. By 2012, according to a CII report, India's surrogacy industry was valued at \$2 billion annually, with over 3,000 fertility clinics across the country. However, the unregulated nature of the surrogacy industry led to significant ethical concerns, such as middlemen and agencies benefiting disproportionately, exploitation of surrogate mothers, and abandonment of children. Additionally, issues like organ trade and embryo import raised further alarm, which ultimately prompted the introduction of legislation to regulate surrogacy in India⁴.

HISTORY OF SURROGACY IN UK

Surrogacy has been regulated in the UK since 1985, with the Surrogacy Arrangements Act 1985 shaped by the prevailing knowledge and societal attitudes of the time, as well as recommendations from the Warnock Report. Subsequent legislation, including the Human Fertilisation and Embryology (HFE) Acts of 1990 and 2008, introduced further regulations—particularly regarding the transfer of legal parenthood from the surrogate and her partner to the intended parents—but the core legal framework governing surrogacy is now thirty years old⁵.

³ *Cache://enrouteindianhistory.com/what-are-the-laws-of-surrogacy-in-india/ - Google search.* (n.d.). Heritage Walks in Delhi | Cultural Walks in Delhi | Custom Walks. <https://enrouteindianhistory.com/what-are-the-laws-of-surrogacy-in-india/>

⁴ *Surrogacy in India: History, impact on poor and facts.* (2020, August 17). Jagranjosh.com. <https://www.jagranjosh.com/general-knowledge/surrogacy-in-india-1597665040-1>

⁵ *Cache://blogs.kent.ac.uk/law-news/files/2020/02/surrogacy-in-the-UK-Report-FINAL - Google search.* (n.d.). <https://blogs.kent.ac.uk/law-news/files/2020/02/Surrogacy-in-the-UK-Report-FINAL>

SURROGACY IN LGBTQ COMMUNITY IN INDIA

In India, surrogacy in same sex couples is not allowed and it is believed that it is against the society. India is a country where citizens have right to have a family and under Article 14 of Constitution of India, it states that 'no one shall be discriminated on the basis of gender, caste, race, etc' It is written in the constitution but still people are being discriminated solely because they belong to LGBTQ community (Gay, lesbian, heterosexual, etc). Despite of having a right to have a family, gay couples, lesbian couples, etc don't have the right to practice surrogacy. India has The Surrogacy (Regulation) Act, 2021 which prohibits commercial surrogacy and only allows altruistic surrogacy. It mentioned that only intending couples who have a certificate of essentiality and a certificate of eligibility are eligible for surrogacy. Here the word 'couple' is defined under S2(h) of the Act, the states 'only legally married Indian man and woman above the age of 21 years and 18 years respective', that means a man married to a man or a woman married to a woman are not considered as couples as per this Act which is a clear cut violation of their Fundamental right under Art 14 of Constitution of India. Not only this, it further says that there should be an eligibility certification, now the question arises, 'What is this Eligibility certification' and 'Why it is mandatory' and 'Why it is only restricted to couples that include man and woman'. LGBTQ community has gained some rights after the NAZ FOUNDATION case as the Supreme Court has decriminalized consensual homosexual sex between adults.

Even though this right protect their identity but at the same time, they are not been granted to do surrogacy. People that are included in the LGBTQ community such as Gay, lesbian, etc do have a right to have children through surrogacy not in the commercial form but in an altruistic arrangement. If a normal man and woman can have children through surrogacy because they can't have one due to some medical reasons then why can't a gay/lesbian couple can have because they also have some medical reasons? There is neither a provision pertaining to surrogacy in LGBTQ community nor any Supreme court ruling that is in favour of them. The government, in fact, argued with the Supreme Court that the inclusion of live-in and same-sex couples within the ambit of the Surrogacy Act would lead to 'misuse'. Further the government added that same sex couples and live-in partners are not included in surrogacy and assisted reproduction

laws to avoid 'misuse' and provide children a 'complete family'⁶.

This should not be the case as it contradicts the Supreme Court's 2018 landmark judgment of *Navtej Johar vs Union of India*⁷ as contended by one of the professors from University College of Medical Sciences, Delhi. Adding onto it, experts have stated that surrogacy bill discriminates against LGBTQIA+ community and single parents as no incentives such as remuneration, travel expense, food expenses are provided for the surrogate mother by the couple⁸. In my view, it is equal to taking away the right of same sex couples and not allowing them to have children, family, etc due to some reasons such as medical, financial, etc. On one hand, it is said that India is a country where the rights of the citizens are protected and no one is deprived of their right as mentioned under Article 21 of the Constitution of India but on the other hand it seems like the right is being taken away from same sex couples or LGBTQ community. Despite of having a separate law for Surrogacy in India, nowhere it's mentioned about the same sex couples.

SURROGACY IN LGBTQ COMMUNITY IN UK

The UK is a country where citizen rights are taking into account if violated. Surrogacy is legal but the enforcement of surrogacy arrangements are not enforceable in UK. The act of surrogacy has become an option for starting a family for people who are unable to conceive a child themselves. In the Guidance- THE SURROGACY PATHWAY: SURROGACY AND THE LEGAL PROCESS FOR INTENDED PARENTS AND SURROGATES IN ENGLAND AND WALES under the DEPARTMENT OF HEALTH AND SOCIAL, mentions about the reasons as to why Intended parents turn to surrogacy. These include⁹-

- Recurrent miscarriage
- LGBT+ parent(s) wanting to create a family

⁶ <https://www.thehindu.com/news/national/same-sex-couples-live-in-partners-not-included-in-surrogacy-and-assisted-reproduction-laws-says-govt-in-supreme-court/article66831323>.

⁷ 2018 INSC 790.

⁸ Pathak, S. (2021, December 12). *Surrogacy bill discriminates against LGBTQIA+ community, single parents: Experts*. Zee News. <https://zeenews.india.com/india/surrogacy-bill-discriminates-against-lgbtqia-community-single-parents-experts-2418707.html>

⁹ *The surrogacy pathway: Surrogacy and the legal process for intended parents and surrogates in England and Wales*. (2021, July 23).

GOV.UK. <https://www.gov.uk/government/publications/having-a-child-through-surrogacy/the-surrogacy-pathway-surrogacy-and-the-legal-process-for-intended-parents-and-surrogates-in-england-and-wales>

- Repeated failure of IVF treatment
- A serious risk to health that may result from pregnancy

The Surrogacy Arrangements Act 1985 clearly mentions that it is an offence to advertise to seek a surrogate or potential surrogate looking for Intended Parents. Further, it is an offence under the respective Act to arrange or negotiate a surrogacy arrangement as commercial enterprise. According to Human Fertilisation Embryology Authority, in 2018 UK has 48% of families using surrogacy as same-sex couples¹⁰. Not only this, TwoDads UK were the first social media based account to launch Fertility Clinic Partnerships back in 2018 as a way to educate people about surrogacy.

From the above guidance, it can be stated that LGBTQ community also have right to have children and family. UK offers a care and support towards LGBTQ community as well because they think that each and everyone's right should be protected whether male, female, bisexual, etc.

CONCLUSION/SUGGESTIONS

In my opinion, there are two diversified views about surrogacy if we compare with India and UK. The legal frameworks enabling surrogacy for same-sex couples in India and the United Kingdom range considerably due to differences in societal values, legal precedents, and policy agendas. Surrogacy in India is strictly regulated by the Surrogacy (Regulation) Act, 2021, which prevents same-sex couples and foreign nationals from seeking surrogacy services. This exclusion mirrors greater societal and legal issues confronting LGBTQ+ people in India, notwithstanding the decriminalization of homosexuality in *Navtej Singh Johar v. Union of India* (2018). The limited legal regime emphasizes the need for more comprehensive reproductive rights to achieve equality and non-discrimination. In contrast, the UK provides a more inclusive framework under the Human Fertilization and Embryology Act and the Surrogacy Arrangements Act of 1985. These rules allow same-sex couples to pursue surrogacy agreements and petition for parental orders that recognize their legal parenthood after delivery. The UK's strategy focuses on protecting the interests of all parties involved, including the surrogate and the child, within a supportive legal framework.

¹⁰ *Family formations in fertility treatment 2018*. (2020, September 22). HFEA: UK fertility regulator. <https://www.hfea.gov.uk/about-us/publications/research-and-data/family-formations-in-fertility-treatment-2018/#fn8>.

The comparative analysis emphasizes the need for India to adopt a more progressive and inclusive posture that is consistent with international human rights norms. India might amend its surrogacy laws by learning from places such as the United Kingdom to offer more access while preserving ethical measures. Such reforms would be a big step towards establishing equality and meeting the reproductive needs of all people, regardless of sexual orientation or marital status.