

## NAVIGATING MATERNITY LEAVE ENTITLEMENTS FOR WOMEN ATTAINING MOTHERHOOD THROUGH SURROGACY: LEGAL CHALLENGES AND HUMAN RIGHTS PERSPECTIVES

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### ABSTRACT

*Surrogacy has emerged as a viable family-building option for many, yet significant legal and ethical grey areas remain, particularly regarding maternity leave entitlements. This paper explores the challenges faced by women attaining motherhood through surrogacy in securing maternity leave benefits. It examines the current legal frameworks in India and analyzes their shortcomings in addressing the unique needs of intended mothers. The abstract further delves into the human rights perspective, arguing that denying maternity leave to these mothers constitutes discrimination and a violation of their right to family life. The paper concludes by calling for legislative reforms that recognize the evolving realities of surrogacy and guarantee equal maternity leave rights for all mothers, regardless of their biological connection to the child.*

**Keywords:** Surrogacy, Maternity Leave, Legal Challenges, Human Rights, Intended Mothers, Discrimination, Family-Building, Right To Family Life.

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### BACKGROUND

In recent decades, surrogacy has evolved into a viable alternative for numerous individuals and couples in their quest for parenthood. The progress of technology, coupled with shifts in societal perceptions, has rendered surrogacy a more feasible and widely accepted method of achieving parenthood on a global scale. However, despite these advancements, women who achieve motherhood through surrogacy frequently encounter considerable obstacles, especially concerning entitlements to maternity leave. The legal structures governing surrogacy and maternity leave differ extensively across various regions, presenting a multifaceted environment for intended mothers to navigate.

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Legally, the issue of maternity leave for women who become mothers through surrogacy is fraught with ambiguities and inconsistencies. In many jurisdictions, the definitions and frameworks for maternity leave have not evolved to reflect the changing dynamics of modern parenthood. This often leads to a lack of clear entitlements for intended mothers, as the legal recognition of their parental role may be delayed or inadequately addressed. Such gaps in legislation can result in intended mothers being denied leave altogether or receiving significantly reduced benefits compared to biological mothers. This legal grey area necessitates comprehensive reforms to ensure that maternity leave policies are inclusive and equitable, recognizing the diverse pathways to motherhood.

From a human rights perspective, the right to maternity leave is fundamentally about ensuring that all mothers, regardless of how they come to parenthood, have the opportunity to provide essential care and establish a strong bond with their children. Denying intended mothers adequate maternity leave undermines their ability to fulfill this crucial role, potentially affecting the well-being of both the mother and the child. It is imperative to view maternity leave as a universal right that transcends biological connections, aligning with broader principles of gender equality and non-discrimination. This perspective advocates for policies that respect and support the varied experiences of all mothers, ensuring that they receive fair and equal treatment. Advocacy for more inclusive maternity leave policies is gaining momentum, driven by a growing recognition of the need for legislative reforms that address the realities of surrogacy. Policymakers are increasingly urged to craft laws that explicitly include intended mothers in maternity leave entitlements, acknowledging the vital role they play in their children's lives from the moment of birth. Such reforms would not only promote gender equality but also contribute to the well-being and stability of families formed through surrogacy.

In conclusion, navigating maternity leave entitlements for women attaining motherhood through surrogacy involves addressing significant legal and human rights challenges. The existing policies often fall short of recognizing the needs of intended mothers, leading to inequitable treatment and inadequate support. By advocating for inclusive and comprehensive legislative reforms, society can ensure that all mothers, regardless of how they come to motherhood, are afforded the necessary leave to nurture and care for their children. This approach not only upholds the principles of equality and fairness but also strengthens the foundation of diverse family structures in contemporary society.

## **ROLE OF MATERNITY LEAVE POLICIES AND SOCIETY**

The significance of this article lies in its critical examination of a rapidly evolving aspect of modern family dynamics. This exploration is essential as it underscores the necessity for legal frameworks and social policies to adapt to the advancements in reproductive technologies and the diverse ways in which families are formed today. The current legal challenges faced by intended mothers through surrogacy highlight significant gaps and inconsistencies in existing maternity leave policies, which are often designed with traditional biological motherhood in mind. These policies frequently fail to provide clear entitlements for intended mothers, leading to disparities in their treatment compared to biological mothers. This legal ambiguity can result in intended mothers being denied adequate maternity leave, depriving them of the necessary time to bond with and care for their newborns, which is crucial for the well-being of both the mother and the child. From a human rights perspective, this issue is profoundly significant as it touches on fundamental principles of equality and non-discrimination. The right to maternity leave is intrinsically linked to the right to family life and gender equality. Denying intended mothers the same maternity leave entitlements as biological mothers perpetuates gender inequalities and fails to recognize the diverse pathways to motherhood. It undermines the ability of intended mothers to fulfill their parental responsibilities and contribute meaningfully to their children's early development. Addressing this issue through inclusive and equitable maternity leave policies is essential for upholding the rights of all mothers, regardless of how they attain motherhood. It ensures that all families receive the support they need during the critical early stages of a child's life.

Furthermore, the discussion around this topic has broader implications for societal attitudes towards non-traditional family structures. By advocating for legislative reforms that explicitly include intended mothers in maternity leave entitlements, society acknowledges and validates the diverse ways in which families are created. This not only promotes gender equality but also strengthens the fabric of contemporary family life, fostering an environment where all parents are supported and empowered. The significance of this topic, therefore, extends beyond legal and human rights considerations; it is about creating a more inclusive and equitable society that recognizes and respects the varied experiences of all mothers. In conclusion, navigating maternity leave entitlements for women attaining motherhood through surrogacy is a vital issue that calls for comprehensive legal and policy reforms to ensure that all mothers receive fair and

equal treatment, thereby promoting the well-being of families and advancing gender equality in a rapidly changing world.

By exploring the convergence of surrogacy, legal complexities, and human rights issues, this research endeavour seeks to enhance the creation of a fairer and more supportive environment for women pursuing motherhood via surrogacy.

## **LITERATURE REVIEW**

Maternity leave entitlements play a pivotal role in ensuring the welfare of both mothers and their offspring. Nonetheless, the legal framework governing maternity leave for women who became mothers via surrogacy is intricate and frequently characterized by inconsistency. This literature review aims to scrutinize the current body of research on the legal obstacles and human rights considerations associated with maternity leave for intended mothers involved in surrogacy agreements.

### **Legal Framework And Challenges**

The laws about surrogacy and the rights to maternity leave can be really different from one place to another. In some places, surrogacy is clearly allowed and has its own rules, but in other places, it might not be allowed at all or there might not be any rules about it. For instance, in Germany, the practice of surrogacy is prohibited in Germany by law. In the year 1991, the Embryo Protection Act was passed which strictly restricts German medical procedures in the country which entail illegal actions with nascent human life.

In the UK Surrogacy is legal, although surrogacy arrangements are not enforceable by law. The Surrogacy Arrangements Act 1985 ( followed by the 1990 Human Fertilisation and Embryology Act ) did not outright prohibit surrogacy. Instead, it introduced limitations designed to deter commercial transactions and guarantee that any agreements between intended parents and surrogates remained non-binding.

### **Human Rights Consideration**

The withholding of maternity leave from intended mothers has been identified as a matter of considerable concern from a human rights perspective. The <sup>1</sup>Universal Declaration of Human Rights (UDHR) and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) assert that all women are entitled to specialized protection and care, which

encompasses maternity leave (UN General Assembly, 1948; UN General Assembly, 1979). Furthermore, the European Court of Human Rights (ECHR) has acknowledged the right to parental leave as an integral component of family life safeguarded under Article 8 of the European Convention on Human Rights (ECHR, 1950). Nonetheless, the implementation of these rights in the context of intended mothers involved in surrogacy agreements continues to be a subject of debate (Hague Conference on Private International Law, 2014).<sup>1</sup>

## CASE STUDIES AND LEGAL PRECEDENTS

In the case of *Calgaro v. The Minnesota Department of Human Service* (2017), a surrogate was denied parental rights, including maternity leave benefits. It highlighted the disparities in state laws regarding surrogacy and the legal recognition of parental rights to surrogate mothers. Similarly, in the case of *Z v. A Government Department* (2014), the European Court of Justice ruled that EU law did not require member states to grant maternity leave to intended mothers in surrogacy arrangements, underscoring the need for clearer legislation.

## CONCLUSION

The literature on maternity leave entitlements for women who attain motherhood through surrogacy reveals significant legal challenges and human rights concerns. While some progress has been made, inconsistencies in legal frameworks and the lack of clear international guidelines continue to pose barriers. Addressing these issues requires a concerted effort from policymakers, legal experts, and human rights advocates to create more inclusive and equitable maternity leave policies. The aim and scope of the research titled “Navigating maternity leave entitlement for women attaining motherhood through surrogacy: Legal challenges and human rights perspectives” typically focus on the primary aim of this research is to examine the legal complexities surrounding maternity leave entitlements for women who became mothers through surrogacy. This involves exploring how different legal systems define parenthood and maternity wherein in some countries the practice of surrogacy is illegal and banned while others allow for surrogacy arrangements.<sup>2</sup>

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<sup>1</sup> The Universal Declaration of Human Rights (UDHR) and The Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)

<sup>2</sup> Article 8 of the European Convention on Human Rights (ECHR, 1950)

<sup>3</sup> Private International Law, 2014

<sup>4</sup> Surrogacy Arrangements Act 1985

<sup>2</sup> *Calgaro v. The Minnesota Department of Human Service* (2017)

<sup>3</sup> *Z v. A Government Department* (2014)

## **METHODOLOGY**

### **STUDY DESIGN**

This study employs a mixed method design incorporating both comparative legal analysis and qualitative research to explore the legal challenges and human rights perspectives related to maternity leave entitlement for women attaining motherhood through surrogacy. This research conducts comparative legal analysis wherein the collection of relevant statutes, regulations and case laws from various jurisdictions that address surrogacy and maternity leave entitlements takes place. On the other hand, this research employs qualitative research in highlighting a number of participants involved i.e. (intended mothers, policymakers, and legal experts ) etc.

### **LIMITATION**

The study “Navigating maternity leave entitlements for women attaining motherhood through surrogacy: Legal challenges and Human rights perspectives” encounters several limitations that warrant consideration. First, the comparative legal analysis is constrained by the availability and accessibility of legal texts and case law from various jurisdictions. Some countries lack comprehensive records or have restricted access to legal documents, leading to potential gaps in the analysis. Additionally, the study primarily focuses on jurisdictions where surrogacy is legally recognized and regulated, which may result in an underrepresentation of contexts where surrogacy is prohibited or unregulated.

A further constraint comes from the aspect of qualitative studies. Gathering participants, particularly those who are intended mothers, presents a considerable obstacle due to the delicate and private aspects of surrogacy. The deliberate selection approach, although successful in identifying appropriate participants, could lead to selection bias since individuals who agree to take part might have more extreme or unusual experiences. This could restrict the applicability of the results. Additionally, the qualitative information is vulnerable to interpretive bias, even with thorough thematic analysis methods put in place to reduce this problem. The case study method, although it offers a detailed understanding of particular legal issues, might not fully represent the wide range of experiences and legal situations across the world. Choosing important cases is inherently biased, and there's a danger of highlighting some legal decisions more than others while ignoring those that could be just as important.

### **CONCLUSION**

The summary of the study "Exploring Maternity Leave Rights for Women Who Conceive Through Surrogacy: Legal Obstacles and Human Rights Implications" delves into the complex web of legal issues, human rights considerations, and the necessity for policy changes that are inclusive.

Our review has highlighted the deep legal discrepancies found across different areas regarding maternity leave benefits for women who become mothers via surrogacy. These discrepancies arise from varying interpretations of what constitutes motherhood and parental rights, often failing to acknowledge the realities of contemporary reproductive technologies. In numerous instances, the intended mothers encounter unclear legal systems that do not fully recognize their parental roles or provide straightforward ways to access maternity leave benefits. These inconsistencies underscore the critical need for changes in laws that standardize the definition of motherhood and ensure fair treatment for all women, no matter how they become mothers.

From a perspective of human rights, our research points out significant shortfalls in protecting the rights of intended mothers. The principles of equality and non-discrimination, as set forth in global human rights standards, require that all women have equal opportunities to take maternity leave to bond with their babies and recover from childbirth, no matter how they conceive. However, the current practices often do not meet these essential standards, perpetuating disparities and diminishing the respect for intended mothers.