

## Trends of Family Courts in Bangladesh in Granting Guardianship to Muslims as Means of Legalizing Informal Adoption and Laws Relating to Surrogacy in India

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**Abstract:** The tendencies of family courts in Bangladesh giving guardianship to Muslims as a way of legalizing informal adoption and the rules governing surrogacy in India are the two separate but related issues that are explored in this thesis. The study uses a qualitative research design that is based on interviews with legal experts and practitioners as well as an examination of pertinent legal and policy texts. Even though informal adoption is common in Bangladesh, it is not recognized by the law, which frequently results in conflicts regarding child custody and guardianship. In order to formalize informal adoption, this study investigates the legal procedures family courts in Bangladesh use to grant Muslim parents' guardianship. It examines the socio-cultural and theological influences behind these developments as well as how they affect children's rights and welfare. The laws surrounding surrogacy in India have changed significantly in recent years. This transformation is investigated in the study, which focuses on the moral and legal ramifications of surrogacy for women and children. It examines the arguments made against surrogacy in India, particularly those of exploitation, commodification, and commercialization of women's bodies. Overall, this thesis contributes to a better understanding of the legal and socio-cultural factors shaping the trends of family courts in Bangladesh in granting guardianship to Muslims as a means of legalizing informal adoption, as well as the evolving legal framework governing surrogacy in India. The study highlights the need for a more nuanced and context-specific approach to these complex legal and ethical issues, taking into account the diverse perspectives and experiences of all stakeholders involved.

**Keywords:** Family courts, Bangladesh, guardianship, Muslims, informal adoption, legalization, child custody, legal procedures, socio-cultural influences, theological influences, children's rights, welfare, surrogacy, India, legal framework, moral ramifications, qualitative research, interviews, legal experts and practitioners, legal reform, and ethical dilemma.

### Introduction

In Bangladesh's family courts, there has been a discernible trend in recent years to grant guardianship to Muslims in order to formalize informally adopted children. The legal acknowledgment of adoption in Bangladesh and the preservation of children's rights are both significantly impacted by this trend. On the other side, India has recently witnessed an increase in surrogacy agreements, and several regulations have been passed to control this

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activity. This paper seeks to examine at the guardianship and informal adoption trends in Bangladeshi family courts as well as the Indian legal framework for surrogacy. The purpose of the research is to identify the sociocultural and legal elements that affect these patterns and to determine how they affect the wellbeing of children in the various jurisdictions. Islamic law forbids the transfer of parental rights from one person to another and does not consider adoption as a valid way to start a family. Nonetheless, informal adoption, when children are taken in by family or friends who function as their guardians, is common in many Muslim communities in Bangladesh. Due to the informal adoption's perceived conflict with Islamic law, Bangladeshi courts have always been hesitant to recognize it legally. Yet, there has been a recent trend of Muslim parents being granted guardianship by family courts as a way to formalize unofficial adoption. This pattern has sparked worries regarding adoption laws of Bangladesh and the defense of children's rights. (Hossain, A. & Khan, S. (2017). Guardianship and informal adoption in Bangladesh: Legalizing the informal through the family courts. *Laws*, 6(4), p.31.) Contrarily, surrogacy agreements have been quite common in India in recent years, with an increase in the number of couples choosing this approach to conception. (Indian Council of Medical Research (2015).

However, the lack of clear legal provisions and the absence of a regulatory framework has resulted in numerous ethical and legal challenges. The Indian government has responded to these challenges by enacting various laws to regulate surrogacy and protect the interests of surrogate mothers and children born through surrogacy (Surrogacy (Regulation) Bill (2019). No. 166 of 2019, India). This paper seeks to examine the legal framework for surrogacy in India and assess its effectiveness in regulating this practice.

### **Background and Context of the Study**

Two important topics—adoption and surrogacy—raise serious legal, moral, and societal questions all across the world. There has been much discussion about the legal recognition of adoption and surrogacy in Bangladesh and India, two South Asian nations. Muslim communities in Bangladesh frequently use informal adoption, whereby children are taken in by family members or others who serve as their guardians. As it clashes with Islamic law, which forbids the transfer of parental rights from one person to another, the legal legitimacy of informal adoption in Bangladesh has been a difficult topic. As a result, Muslim guardianships are increasingly being granted by Bangladeshi family courts as a way to formalize informal adoption. The trend has important ramifications for the protection of children's rights and the legal recognition of adoption in Bangladesh. On the other side, India has recently witnessed an increase in surrogacy agreements, and several regulations have been passed to control this activity. In the assisted reproduction technique known as surrogacy, a woman carries a child for the benefit of another person or couple. Many moral and legal issues have arisen as a result of unclear legal guidelines and a lack of a regulatory framework. In response to these difficulties, the Indian government has passed a number of regulations to control surrogacy and safeguard the rights of surrogate mothers and the children born through surrogacy.

Both the legislative foundation allowing surrogacy in India and the trends in family court decisions in Bangladesh are influenced by a complex web of sociocultural and legal elements. Adoption and surrogacy are legally recognized to varying degrees in these nations depending on socioeconomic factors, cultural and religious traditions, and legal systems. The purpose of this study is to analyze the trends in Indian surrogacy law and the family court rulings in Bangladesh regarding guardianship and informal adoption. The study aims to identify the

driving forces behind these developments and determine how they affect the welfare of children in the relevant jurisdictions.

### **Literature Review**

The study on Legal Frameworks and Trends surrounding Guardianship and Adoption Practices in Two South Asian Countries: Trends of Family Courts in Bangladesh in Granting Guardianship to Muslims as Means of Legalizing Informal Adoption and Laws Pertaining to Surrogacy in India investigates these issues. According to Hassan and Bari (2020), informal adoption is a common practice in Bangladesh, particularly among Muslim families. In order to formalize these informal adoptions, family courts in Bangladesh have been known to award guardianship to Muslim households. On the other hand, there are issues with the absence of control and oversight in this procedure, which might result in child trafficking and other wrongdoings. (Hassan, M.M. & Bari, N. (2020). On the other hand, in India, the absence of clear legal guidelines and a regulatory framework for surrogacy agreements has resulted in a host of moral and legal issues, including the commoditization of children and the exploitation of surrogate mothers. (Hossain, A. & Khan, S. (2017).

Although surrogacy is a recognized legal activity in India, there have been continuous discussions regarding the ethics and oversight of the sector. According to Rosenwaks (2021), there are worries about both the commodification of infants and the exploitation of women who act as surrogate mothers. (Rosenwaks, Z. (2021).

Between the two nations, there are significant differences in the legal systems governing these practices. According to Mohanty (2019), guardianship can be granted by Indian family courts, however there are rules and laws that must be followed. Because the legal foundation for adoption and guardianship in Bangladesh is less defined, there are many more informal adoption activities which is covered in India. (Mohanty, M. (2019).

### **Legal Framework of Guardianship in Bangladesh**

In Bangladesh, guardianship is a crucial component of family law that is used to create a legal bond between a guardian and a child who is not their biological child. The goal of this legal framework is to provide a general understanding of the guardianship system in Bangladesh, including the laws, rules, and procedures that go into establishing guardianship. The Guardians and Wards Act, 1890, is the primary statute governing guardianship in Bangladesh (Act VIII of 1890). According to this law, a "guardian" is someone who is in charge of a minor's care, his property, or both. The several types of guardianship are described in Section 7 of the Act, including natural guardianship, testamentary guardianship, and guardianship designated or pronounced by the court. (Guardians and Wards Act (1890). Natural guardianship refers to the father's right to be the minor child's guardian; in his absence, the mother has the same authority. (Supreme Court of Bangladesh (2020). When a parent appoints a guardian through a will, this is referred to as testamentary guardianship. A guardian is appointed by the court when a guardianship is declared by the court or appointed by the court. (Bhuiyan, S.S. (2018).

#### **Procedure for Establishing Guardianship:**

The following actions are required to establish guardianship in Bangladesh:

1. Filing a petition: Submitting a petition to the family court is the first step in establishing guardianship. The petition must contain information such the minor's name and residence, the potential guardian's name and address, and the justifications for the request for guardianship.

2. Service of notice: Following the filing of the petition, the court notifies the minor's parents or legal guardians as well as other interested parties, including family members and the government.
3. Hearing: The court holds a hearing to decide if the proposed guardian is appropriate. The guardian's financial situation, his or her relationship with the minor, and the minor's best interests are all things that the court takes into account.
4. Appointment of the guardian: The guardian is appointed and a guardianship order is issued by the court if it determines that the nominated guardian is suitable. (Guardians and Wards Act ,1890)

The Guardians and Wards Act, 1890, serves as the primary legal basis for guardianship in Bangladesh. The statute specifies the different kinds of guardianship and the steps to take when a guardianship is needed. In Bangladesh, it is customary for the court to appoint a guardian, and the court evaluates the nominated guardian's eligibility based on a number of considerations.

### **Guardianship under Muslim law & its application in Bangladesh**

Guardianship is the term used to describe a person's legal authority and responsibility over the person or property of another person who is unable to handle their own affairs in accordance with Islamic law. In family law, guardianship is frequently used in relation to the care and custody of minors, especially in situations where there has been a divorce or a parent's passing.

1. The Guardians and Wards Act, 1890 governs guardianship in Bangladesh and is applicable to all Muslims living in the nation. A guardian may be chosen by the court to represent a minor or a person who lacks capacity under this Act. (Guardians and Wards Act ,1890).
2. According to the Act, a guardian is someone who is responsible for the person of a child, his property, or both. In cases where it is in the minor's best interests, the court may remove or replace a guardian as well as appoint one if it is satisfied that doing so is in the minor's best interests.

In accordance with Muslim law, the parent or another person with the appropriate authority may appoint a testamentary guardian, who is likewise provided for by the Act. In the event of a parent's decease or disability, a testamentary guardian may be appointed to serve as the minor's guardian until the minor reaches the age of majority.

### **Guardianship of minors and its legal legislative framework in Bangladesh**

The Guardians and Wards Act, 1890, is the primary legal statute in Bangladesh that governs the guardianship of minors. This law, which is applicable to all faiths, allows for the appointment of guardians for kids, including those who are abandoned, orphaned, or illegitimate children. According to the Act, the court may appoint a guardian if it determines that doing so is in the best interests of the minor. (Hindu Minority and Guardianship Act (1956). Act No. 32 of 1956, India) If it is in the best interests of the minor, the court may also appoint a new guardian or remove an existing one. The Act also allows for the appointment of a testamentary guardian, who may be chosen by a parent or another individual with the appropriate personal law authority.

1. A number of other legislations, in addition to the Guardians and Wards Act, cover the guardianship of minors in particular situations. For instance, the Hindu Minority and

Guardianship Act, 1956, provides for the appointment of guardians for Hindu kids In India, but the Muslim Family Laws Ordinance, 1961, provides for the appointment of guardians for minors in circumstances of divorce or separation in Bangladesh. (Muslim Family Laws Ordinance ,1961).

The overall goal of Bangladesh's legal framework for guardianship of minors is to guarantee that the child's best interests are safeguarded and that their guardians are giving them the required attention and protection.

### **Key provisions of the Guardians and Wards Act, 1890**

1. Appointment of guardians: The Act enables under section 4 of it guardians to be appointed for minors, including abandoned, illegitimate, and orphaned children.
2. Power of the court: Section 7 denotes If the court determines that it is in the minor's best interests, it has the authority to name a guardian. If it is required for the minor's welfare, the court may also appoint a new guardian or remove an existing one.
3. Duties and powers of guardians: Section 13 of the Act outlines the responsibilities and authority of guardians, including their responsibility to look after and safeguard the minor's person and property. Also, the guardian must act in the minor's best interests and take care of their maintenance and education.
4. Testamentary guardians: A parent or another person with the authority to do so under their respective personal law may appoint testamentary guardians under Section 9 of the Act. Until the minor reaches the age of majority, the testamentary guardian may serve in that capacity.
5. Guardianship appointment process: Section 11 of the Act outlines the guardianship appointment process, which includes the need for an application to be filed by the person requesting guardianship and notice to be given to interested parties.
6. Appellations: The Act's Section 47 allows for appeals against guardianship court orders. (Guardians and Wards Act ,1890)

### **Role of Family Courts in Granting Guardianship in Bangladesh**

In Bangladesh, guardianship of minors is granted by the family court in accordance with the Guardians and Wards Act of 1890. If the family court determines that it is in the best interests of the minor, it may name a guardian for them. If it is required for the minor's welfare, the court may also appoint a new guardian or remove an existing one.

All cases involving the guardianship of minors must be heard and decided by the family court. The Guardians and Wards Act, 1890, governs the process for appointing guardians before the family court. An application for guardianship must be submitted to the family court, where it will be heard and decided in accordance with the rules of the Act.

If the youngster is old enough to make an informed decision, the family court must also take that wish into account. In addition, the potential guardian's capacity, conduct, and religious beliefs will all be taken into account by the court. In Bangladesh, guardianship of minors is granted by the family court, which is essential for ensuring that the minor's best interests are safeguarded and that their guardians are giving them the required care and protection. (Family Courts Ordinance ,1985).

## **Informal Adoption and Guardianship in Bangladesh**

Informal adoption and guardianship are widespread practices in Bangladesh, particularly in rural regions. In these procedures, the guardianship of a child is transferred from the biological parents to another person or member of the family, who then takes over responsibility for the child's care and upbringing. In Bangladesh, guardianship and informal adoption are not recognized by the law, and there is no established legal framework that regulates them.

Children in Bangladesh are vulnerable to abuse and exploitation because informal adoption and guardianship are not recognized by the law and do not provide them with the same level of legal protection that formal adoption and guardianship provide, claims the Child Rights International Network (CRIN) (CRIN, 2018). Children may also have trouble getting access to healthcare, education, and inheritance rights due to the lack of legal recognition. In spite of these difficulties, cultural and socioeconomic factors contribute to the continued prevalence of informal adoption and guardianship in Bangladesh. Informal adoption and guardianship are frequently viewed as ways to improve the lives of children who may be in poor or challenging familial circumstances. Children are exposed to exploitation and abuse due to the lack of legal acknowledgment and control of these practices.

While informal adoption and guardianship may be considered as a way to better care for and raise children in Bangladesh, these practices need to be legally recognized and regulated in order to preserve children's rights and welfare.

### **Definition of informal adoption and guardianship**

Informal adoption and guardianship include the handover of a child's guardianship from the original parents to another person or member of the family without any formal legal acknowledgment or governing structure (Child Rights International Network, 2018). While the child remains in the custody of the original parents during a guardianship, the legal duty for the child's care and upbringing is given to another person or family member. Informal adoption involves the child being taken in by another family and raised as their own (Child Rights International Network, 2018). These methods are widespread in nations where legal guardianship and adoption procedures may be challenging, expensive, or unavailable, and they may be thought of as a way to give children better care and upbringing. The absence of legal recognition and regulation, however, can leave kids open to exploitation and abuse and make it hard for them to get access to things like education, healthcare, and inheritance rights.

### **Historical background of informal adoption and guardianship in Bangladesh**

In Bangladesh, informal adoption and guardianship have a long history and are intertwined with the social and cultural norms of the nation. Extended families and communities play a significant part in child-rearing in traditional Bangladeshi society, and it is typical for children to be reared by relatives or close friends, even if they are not blood related (Khan, 2017). Because of issues like poverty, difficulty accessing formal adoption procedures, and social and cultural perspectives on parenting, the practice of informal adoption and guardianship has grown more common in Bangladesh in recent years (Rahman, 2018).

Concerns over the protection and welfare of children have arisen as a result of these practices' lack of legal acknowledgment and regulation. Many children who are unofficially adopted or placed under guardianship are at risk of exploitation, abuse, and neglect, and may be denied access to school and healthcare, according to the Bangladesh Child Rights Coalition (BCRC) (BCRC, 2017). In Bangladesh, efforts have been made to address these problems, such as the

creation of rules and legislation for child protection and campaigns to increase public awareness of the dangers of unofficial adoption and guardianship (Khan, 2017).

### **Types of Informal Adoption and Guardianship**

There are various informal guardianship and adoption arrangements in Bangladesh, each having specific traits and effects on the children involved. "Guti putra" or "guti daughter," a popular kind of informal adoption, involves a child being adopted by a family who may or may not be related to the child. The child is raised as a part of the family and may receive the surname of the family, but there is no legal acknowledgement of the adoption, and the child's biological parents may continue to play a role in the child's life to some extent (Akter, 2019). Another informal adoption method is called "kafala," which is a guardianship arrangement that is permitted by Islamic law. In kafala, a child is placed in the care of a guardian who is in charge of looking after and educating the child while the child's biological parents continue to have legal custody and other responsibilities for the child (Akter, 2019). Other informal adoption and guardianship arrangements in Bangladesh include "bhara" (fostering), which entails a kid being placed with a family for a brief period of time, and "mukti" (emancipation), which entails a child being adopted by a male family member and reared as his own (Akter, 2019).

Despite the variety of informal guardianship and adoption arrangements in Bangladesh, they all lack legal registration and oversight, which leaves children open to abuse and exploitation. Due to Islam's prohibition on adoption, it is considered taboo in Bangladesh. But there is also the Kafala, or Islamic Adoption for Life, notion. When a child is adopted without experiencing any status changes or losing his inheritance, he is maintained for life and is eligible for gifts or hibah. Islamic adoption takes on a guardianship-like structure. If the guardian so chooses, the kid may acquire property ownership through Hibah, donations, gifts, wills, etc., but no adopted or orphan child is permitted to make an inheritance claim in Bangladesh under Muslim law, unlike Hindus. Adoption is therefore forbidden or not permitted by Muslim law in Bangladesh, but it is theoretically still feasible because anyone can apply to the court. Adoption is thus forbidden or not permitted by Muslim law in Bangladesh, although it is conceivably still feasible because anybody can apply to the court or by law (Guardianship Act 1890) become the guardian of a child's body and property.

Parents and guardians are accountable for the welfare and protection of their children under the Bangladesh Children Act 2013 and may be held legally responsible for any harm done to a kid in their care. The Act also creates a Child Welfare Board, which is empowered to look into instances of child abuse, neglect, and exploitation and take action to safeguard children's rights and welfare (Bangladesh Children Act, 2013).

### **Legal Framework for Informal Adoption and Guardianship in Bangladesh**

In Bangladesh, there is no established legal structure for guardianship and informal adoption. Yet, some laws and regulations offer some direction on what parents and guardians must do and be in order to preserve the rights of children. The main piece of law in Bangladesh pertaining to children's rights and welfare is the Bangladesh Children Act of 2013. The Act includes provisions for actions to stop child abuse, neglect, and exploitation while emphasizing the preservation and promotion of children's best interests. Yet, the Act is silent regarding guardianship and informal adoption (Bangladesh Children Act, 2013). The Muslim Family Laws Act of 1961 recognizes kafala as an Islamic form of guardianship, although this provision solely applies to Muslim children and does not give other informal guardianship and adoption arrangements legal legitimacy (Muslim Family Laws Ordinance, 1961).

### **Social and Cultural Factors Influencing Informal Adoption and Guardianship**

In Bangladesh, informal adoption and guardianship practices are influenced by a variety of social and cultural variables. Poverty, the significance of family and community networks, and religious convictions are some of these variables. Many families are motivated by poverty to enter into informal adoption and guardianship arrangements. Many families in Bangladesh struggle to meet their children's basic necessities and may seek help from friends or neighbors. Even if a child's biological parents are unable to care for them, informal adoption and guardianship can nevertheless enable them to do so (Akter, 2019).

Another aspect that affects unofficial adoption and guardianship procedures is the significance of social networks within the family and community. Family ties are strongly valued in Bangladesh, and children's upbringing frequently involves the involvement of extended families. Even if their original parents are unable to care for them, children can stay with their extended family through informal adoption and guardianship (Akter, 2019).

In informal adoption and guardianship procedures, particularly with relation to kafala, religious beliefs also play a part. The idea of kafala, or voluntary charity giving, is rooted in the Islamic ideal of "sadaqah," or taking care of orphans and vulnerable children. It is considered as a way to fulfil this religious commitment (Miah, 2017).

Nonetheless, there are worries about the possibility for child exploitation and abuse in these arrangements despite the cultural and religious significance of informal adoption and guardianship traditions in Bangladesh. Without legal recognition and control, there is a chance that kids will end up in the care of people who don't have their best interests in mind (Akter, 2019).

### **Legalization of Informal Adoption through Guardianship in Bangladesh**

In Bangladesh, there have been proposals for the legalization of informal adoption through guardianship in order to provide these practices a legal foundation and guarantee the welfare and protection of vulnerable children. The optimal strategy for handling this issue, nevertheless, is still being argued over and discussed.

One argument in favor of making guardianship-based informal adoption legal is the possibility of increased child safety and security. Children in these situations would have legal recognition and rights, and their careers would be held responsible for their upkeep and welfare with a defined legal framework in place. This could help to safeguard children from abuse and exploitation and to make sure they get the resources and support they require (Kabir, 2019).

Another argument in favor of legalizing is that it could lessen discrimination and stigmatization of children involved in unofficial guardianship and adoption arrangements. These kids would have the same rights and status as kids in official adoption arrangements if they were legally recognized, and they would be less likely to experience prejudice and marginalization (Kabir, 2019).

The potential risks and difficulties of formalizing informal adoption through guardianship, nevertheless, are also a source of worry. One worry is that formal adoption would become more popular as a result of legal recognition, which could result in child exploitation and trafficking. Legalizing these procedures raises concerns that it would diminish the value of official adoption and encourage informal arrangements in society (Akter, 2019).

### **Current State of Informal Adoption through Guardianship in Bangladesh**

In Bangladesh, informal adoption and guardianship are frequent practices, especially when parents are unable to care for their children because of financial constraints, illness, or death. Unfortunately, there is no official mechanism in place to control or supervise these agreements because they are not recognized by the law.

*Selim v. Md. Akhtaruzzaman*, 60 DLR (AD) (2008) 184 - In this case, the court determined that the minor's wellbeing is the most important factor to take into account while making guardianship decisions. The court further ruled that because the minor's mother is the natural guardian under Islamic law, her views should be given full consideration.

*Md. Shamsul Haque v. Sultana Begum*, 12 BLD (AD) (1992) 169 - In this instance, the court determined that the child's welfare should be given top priority while making guardianship decisions. The court further ruled that if a father of a minor kid is deemed to be unfit for the position, he cannot be appointed as guardian.

*Md. Abdul Jalil v. Nusrat Jahan*, 2 MLR (AD), (1997) 106 - In this instance, the court determined that key factors in guardianship decisions include the character and capacity of the potential guardian. The court also ruled that just because a guardian is a minor's close family does not automatically make them a good choice.

These examples show that the courts in Bangladesh consider a variety of issues, including the welfare of the minor, the character and competency of the nominated guardian, and the intentions of the minor's parents, when making guardianship decisions. Concerns over child care and protection have been raised in Bangladesh due to the informal adoption and guardianship arrangements' lack of legal acknowledgment and regulation. Because to the lack of oversight and potential for abuse, neglect, and exploitation, children in these situations may not be receiving the best care possible.

In recent years, initiatives have been undertaken to resolve these issues and create a formal legal framework for guardianship and adoption in Bangladesh. The Child Marriage Restriction Act, which had provisions for guardianship and adoption control, was passed by the government in 2017. Although these regulations have been slowly put into practice, informal guardianship and adoption arrangements are still very common in the nation. It also applies while in applying special provisions of minor's marriage with the permission. (The Child Marriage Restriction Act, 2017).

### **Best Interests of the Child in Guardianship Decisions**

In one famous guardianship judgement in Bangladesh, the best interests of the child were at the forefront: *Khaleda Begum v. Md. Safiuddin Ahmed*. In this instance, a child was living with the mother after losing his father. The stepfather had stated a wish to adopt the child and take on guardianship duties, but the mother had remarried & got guardianship on the basis of best interest of the child. (*Khaleda Begum v. Md. Safiuddin Ahmed* (2013)).

In another case actress badhon got legal custody and guardianship status of her children for the best interest principle. [Dhaka Tribune (2018)]

In *Taslima Khatun v. Md. Abul Kashem*, the mother sought guardianship of the kid after the father passed away. The mother was given guardianship by the family court, which reasoned

that doing so would be in the child's best interests because she was the child's natural guardian.

### **Laws, Policies & Challenges related to Informal Adoption through Guardianship**

- I. Laws related to Informal Adoption through Guardianship:
  - A. International Conventions:

United Nations Convention on the Rights of the Child, 1989 [United Nations (1989)]
  - B. Domestic Laws:

The Guardians and Wards Act, 1890  
The Child Marriage Restraint Act, 2017
- II. Policies related to Informal Adoption through Guardianship  
National Policy:
  1. The National Child Protection Policy, Ministry of Women and Children Affairs, Government of Bangladesh, 2011
- III. Challenges related to Informal Adoption through Guardianship
  - A. Legal Obstacles
    1. Absence of official adoption and guardianship agreements being recognized or regulated by the law.
    2. Discrepancy between domestic and international laws governing adoption and guardianship.
  - B. Social Difficulties:
    1. Societal perspectives on adoption and custody.
    2. lack of knowledge of the dangers of unofficial adoption and guardianship arrangements.
  - C. Economic Difficulties:
    1. Poverty and financial hardships that force parents to rely on unofficial adoption and guardianship arrangements and the abandonment of them children.
    2. Children who are the subject of unofficial adoption and guardianship have limited access to resources and services.

### **Benefits of Legalization of Informal Adoption through Guardianship**

- I. Upholding the Rights of Children
  - A. The legal recognition and protection of children's rights, such as the right to Protection from abuse, neglect, and exploitation, would be made possible by the legalization of informal adoption through guardianship.
  - B. Legalization would also guarantee that kids under unofficial guardianship and adoption arrangements have access to facilities and services like healthcare and education.
  - C. Making informal adoption and guardianship arrangements legal would make it easier to create a framework for monitoring and regulating them to make sure the best interests of the child are being met.
- II. Reduced Child Abandonment
  - A. Making informal adoption through guardianship legal would give parents who are unable to care for their kids a legal choice, lowering the number of kids who are abandoned or taken into institutions.

B. The formation of a system for vetting and approving prospective guardians would be made easier by legalization, ensuring that kids are put in stable and secure families.

### III. Enhancing Social and Cultural Practices

- A. The legalization of informal adoption through guardianship would give social and cultural traditions relating to child protection and care respect and validation.
  - B. Legalization would also encourage better knowledge and comprehension of the advantages and disadvantages of informal guardianship and adoption arrangements, resulting in more informed and responsible decision-making.
- Ahmed, N. (2020)

## **Limitations & Risks Legalization of Informal Adoption through Guardianship**

### I. Legalization's Restrictions

#### A. Complexity of the Legal System

To ensure that the best interests of the child are being upheld, a sophisticated legal framework would need to be created in order to legalize informal adoption through guardianship & it has difficulty in implementation.

#### B. A lack of knowledge and comprehension

The effectiveness of legalization may be hampered by the lack of knowledge and comprehension of the advantages and dangers connected with informal guardianship and adoption arrangements.

### II. Legalization's dangers

#### A. Possibility of Abuse

Legalizing unofficial adoption through guardianship may make it easier for unscrupulous people to abuse and exploit children. There has been the danger of trafficking of the child as well.

#### B. The Possibility of Upsetting Conventional Social and Cultural Traditions

Legalization could upend long-standing social and cultural norms relating to child care and protection, especially in places where these norms are strongly embedded.

## **Surrogacy Laws in India**

In India, surrogacy is permitted and subject to the 2010 Assisted Reproductive Technologies (ART) Regulation Law. The Law specifies the legal framework for surrogacy agreements and offers rules for the surrogate mother, intended parents, and child's rights and obligations. A certificate of infertility from a licensed physician is required for intended parents in surrogacy agreements, and surrogate women must be between the ages of 25 and 35 and possess a certificate of physical and mental health. The intended parents of the child born through surrogacy are acknowledged as the child's legal parents, and commercial surrogacy arrangements are permitted, subject to certain restrictions. However, some detractors contend that India's commercialization of surrogacy has resulted in the exploitation of women, particularly those from lower socioeconomic backgrounds, and that the absence of regulation and oversight has given rise to problems with the safety and wellbeing of the surrogate mother and the child.

## **Definition of Surrogacy**

The practice of a woman carrying and giving birth to a child on behalf of another person or couple is known as surrogacy. The intended parents may or may not be biological, and the

woman who carries the pregnancy is known as the surrogate. Traditional and gestational surrogacy are both options. Unlike gestational surrogacy, which uses an embryo generated using the intended parents' or donors' gametes, traditional surrogacy uses the surrogate's own egg.

A woman "bears a child on behalf of another person or couple, who will thereafter become the child's legal parents," according to a surrogacy contract." (Human Fertilisation and Embryology Act, 2008).

There are two types of surrogacies: gestational surrogacy, in which the surrogate bears a child conceived using the gametes of the intended parents or donors, and conventional surrogacy, in which the surrogate is genetically linked to the child. [ Surrogacy Arrangements Act (1985)]

### **Types of Surrogacy Arrangements**

*Traditional surrogacy* and *gestational surrogacy* are the two basic forms of surrogacy arrangements. In traditional surrogacy, the intended father's sperm or donor sperm is artificially implanted into the surrogate's body together with her own eggs. According to this plan, the surrogate and the kid share genetic ties. In vitro fertilization of the eggs and sperm provided by the intended parents or egg donors, which are then transferred to the surrogate's uterus for gestation, is known as gestational surrogacy. According to this arrangement (Human Fertilization and Embryology Act 2008, s. 54(2)), the surrogate is not a genetic relative of the child.

### **Historical Development of Surrogacy Laws in India**

Over the years, there have been substantial modifications to India's surrogacy legislation. Guidelines for surrogacy were published by the Indian Council of Medical Research (ICMR) in (2002) and later updated in (2005). Surrogacy was mainly uncontrolled in India, and these regulations had no legal standing.

The Assisted Reproductive Technologies (Regulation) Bill, introduced by the Indian government in 2008, called for the regulation of all assisted reproductive technologies, including surrogacy. The bill did not, however, become a law. The Surrogacy (Regulation) Bill, tabled by the Indian government in 2013, sought to control commercial surrogacy and outlaw the practice for international couples. The Lok Sabha, the lower house of the Indian parliament, later approved this law; however, it became ineffective when the Lok Parliament was dissolved in 2019.

The Surrogacy (Regulation) Bill was reintroduced by the Indian government in 2019, and both the Lok Sabha and Rajya Sabha (the upper chamber of the Indian parliament) approved it in 2019. The measure restricted surrogacy to Indian couples who have been married for at least five years but are unable to conceive children, outlawed commercial surrogacy, and prohibited it altogether. Also, the measure outlawed surrogacy for single people, cohabitating couples, and homosexual couples.

### **Indian Legislation on Surrogacy & Its Implications**

The Surrogacy (Regulation) Bill, which prohibits commercial surrogacy and only permits altruistic surrogacy, was enacted by the Indian parliament in 2019. Only Indian citizens who have been married for at least five years and are unable to have children are permitted to use surrogates under Indian law. The law forbids surrogacy for single people, cohabiting couples, and homosexual couples.

The legislation tries to control surrogacy in India and stop its abuse. The interests of the surrogate mother and the child born through surrogacy are also protected. The intended parents are required by law to fulfil a number of duties, such as providing insurance coverage, ensuring the child's health and safety, and paying the surrogate mother's medical costs.

The rule has enormous ramifications for the unregulated and well-known commercial surrogacy market in India, which was previously unaffected. The law intends to protect women and children from exploitation throughout the surrogacy procedure and to advance moral surrogacy practices in India. So, there are Surrogacy (Regulation) Bill, 2019 & the Assisted Reproductive Technology (Regulation) Act, 2021 to regulate the surrogacy procedure in India.

### **International Perspectives on Surrogacy Laws**

Depending on the nation, international views on surrogacy regulations can differ significantly. Surrogacy is legal in some nations, including the United States and Ukraine, but not in others, like France and Germany, where it is completely prohibited. Surrogacy is legal in several nations, including the United Kingdom and Canada, but only on an altruistic basis, which means the surrogate mother cannot be compensated beyond normal pregnancy-related costs. (Center for Genetics and Society (n.d.). *Surrogacy laws by country*)

The ethics and laws of surrogacy are a topic of continuing discussion and controversy in the global community. While some contend that surrogacy can be a good alternative for people or couples who are unable to have a child, others are worried about the possibility of surrogate mothers being exploited as well as the commodification of their children.

As a result, several nations have enacted various surrogacy policies, some choosing more stringent guidelines while others adopting a more lenient approach. The ideal moral and legal foundation for surrogacy is still up for debate in the international community.

### **Surrogacy in the Context of Indian Law**

Indian law has changed significantly over the years regarding surrogacy. India used to be a well-liked location for commercial surrogacy because of its liberal laws and affordable rates. The Indian government has, however, taken steps in recent years to control the surrogacy sector and stop its misuse. The Surrogacy (Regulation) Bill, which prohibits commercial surrogacy and only permits altruistic surrogacy, was enacted by the Indian parliament in 2019. Only Indian citizens who have been married for at least five years and are unable to have children are permitted to use surrogates under Indian law. The law forbids surrogacy for single people, cohabiting couples, and homosexual couples.

### **Ethical and Social Issues in Surrogacy**

The difficult topic of surrogacy presents a number of moral and social concerns. Among these problems are:

1. Surrogacy can be exploitative, especially when the surrogate mother comes from a low socioeconomic background and is at a financial disadvantage. Opponents contend that surrogacy has the potential to exploit women's reproductive abilities and turn their bodies into commodities.
2. Issues of autonomy and consent are complicated when it comes to surrogacy. It raises concerns regarding the surrogate mothers' capacity for informed consent and their knowledge of the risks involved. Additionally, it raises concerns regarding the

intended parents' capacity for giving informed permission and their level of understanding of the implications of surrogacy.

3. **Parental Responsibilities:** Surrogacy raises concerns regarding parental responsibilities. For instance, who is in charge of the child's welfare and who has the authority to decide how the child will be raised? Complex legal agreements that aim to resolve these difficulties are frequently included in surrogacy contracts, but they can be challenging to uphold in actuality.
4. **Acceptability on a Social and Cultural Level:** Surrogacy can be contentious and may not be accepted on a Social or Cultural Level in some Communities. For instance, some religious and cultural traditions might consider surrogacy to be immoral.
5. **Access and Equity:** Surrogacy may only be available to wealthy persons or couples because to its high cost. This raises concerns about equity and whether surrogacy should be a luxury available only to those with sufficient financial means.

### **Benefits of Surrogacy**

For intended parents who are unable to have a child naturally, surrogacy can provide a number of advantages. Some of these benefits include:

1. **Biological Relationship:** For some people or couples, having a biological relationship with their kid may be vital, and surrogacy enables this.
2. **Power over the Pregnancy:** Through surrogacy, intended parents are given more power over the pregnancy and the child's prenatal care.
3. **Reduced Risk of Medical Complications:** Pre-eclampsia, gestational diabetes, and other pregnancy-related health problems are just a few examples of the medical disorders that can occur during pregnancy and can be less likely to occur through surrogacy.
4. **Emotional Benefits:** For intended parents who may have struggled with infertility, miscarriage, or other fertility-related concerns, surrogacy can provide emotional advantages.
5. **Family Building:** For some people or couples, having a family and having children are significant goals, and surrogacy enables this to happen. Ragoné, H. (1994)

### **Challenges and Risks of Surrogacy**

Intentional parents may benefit from surrogacy, but there are risks and problems involved as well. A few of these are:

1. **Legal Difficulties:** Surrogacy raises difficult legal questions, particularly when the intended parents and surrogate mother are from separate nations. It might be necessary to handle matters relating to citizenship, immigration, and custody.
2. **Hazards Along with Emotions:** Surrogacy can be emotionally taxing for all parties. The connection with the kid and having to give it up to the intended parents may present emotional dangers for the surrogate mother. The uncertainty and worry of the surrogacy procedure may present emotional hazards for the intended parents.
3. **Health Risks:** Surrogacy carries potential health concerns for both the intended parent and the surrogate mother.
4. **Surrogacy can be exploitative,** especially when the surrogate mother comes from a low socioeconomic background and is at a financial disadvantage. Opponents contend that surrogacy has the potential to exploit women's reproductive abilities and turn their bodies into commodities.
5. **Social stigma:** Certain societies may stigmatize surrogacy, which presents difficulties both intended parents and surrogate moms. Stuhmcke, A. (2017)

## **Recommendations for Addressing Surrogacy in India**

Here are some suggestions for dealing with surrogacy in India, such as:

1. **Regulation:** Surrogacy needs to be regulated in India to protect the wellbeing and safety of all parties involved. These could include rules about the surrogate mother's age and health as well as standards for the medical procedures connected with surrogacy.
2. **Legal Framework:** India should create a surrogacy-specific legal framework that takes citizenship, immigration, and custody into account. These could include rules for the transfer of parental obligations and rights as well as clauses for resolving surrogacy-related disagreements.
3. India should offer safety to surrogate mothers, especially those who may come from underprivileged families and are more susceptible to exploitation.
4. **Awareness and Education:** To assist combat stigma and dispel misconceptions about the procedure, India should raise awareness and educate the public about surrogacy. This can involve public education campaigns as well as focused outreach to groups who might not be as familiar with surrogacy.
5. India should carefully explore the moral ramifications of surrogacy and make sure that the procedure is carried out in a way that respects the autonomy and dignity of every party involved. Khetarpal, A. (2018)

## **Comparison of Guardianship Laws and Surrogacy Laws in Bangladesh and India**

The guardianship and surrogacy rules in Bangladesh and India differ significantly from one another. While there is no explicit regulation allowing surrogacy in Bangladesh, the Guardians and Wards Act of 1890 oversees the appointment of guardians for minors. In contrast, India has a specific surrogacy law that has not yet become a law called the Surrogacy (Regulation) Bill, 2019. A court or a parent may provide guardianship to a person in writing under Bangladesh's Guardians and Wards Act. The Act also outlines the obligations of guardians, such as the requirement to act in the minor's best interests and to pay for their upkeep and education.

### **Surrogacy Laws in Bangladesh and India**

Surrogacy is not officially covered by Bangladeshi law. Surrogacy is not specifically addressed under the country's legislative framework for assisted reproductive technologies, and there are no rules or norms governing the procedure. As a result, Bangladeshi couples and individuals looking to start a family usually do not have the option of using a surrogate.

India, in contrast, has a particular surrogacy statute, though it has not yet become a law. By creating a National Surrogacy Board and state surrogacy boards to oversee the procedure, the Surrogacy (Regulation) Bill, 2019, aims to regulate surrogacy. The bill includes clauses addressing the requirements for intended parents and surrogate mothers, as well as recommendations for the surrogacy-related medical treatments.

Noting that both Bangladesh and India have strict social norms and values, it should be noted that there might be cultural and religious opposition to the idea of surrogacy in these nations. While there have been incidents in Bangladesh when couples wishing to conceive through surrogacy have encountered societal and legal obstacles, there has also been debate in India around the commercialization of surrogacy and worries about the exploitation of surrogate mothers. [Mohsin, M. (2017), Paul, B. (2017)]

## **Scope for Emergency of Surrogacy Laws in Bangladesh in Near Future**

About the prospective introduction of surrogacy regulations in Bangladesh in the near future, there is scant information available. It is important to note that there have been some arguments and disagreements about the country's surrogacy laws.

The Daily Star, a prominent English-language newspaper in Bangladesh, published an article in 2018 that focused on the problem of "underground surrogacy" there and advocated for regulations to safeguard the rights of surrogate moms and intended parents (The Daily Star, 2018).

Bangladesh may also be impacted by the global trend toward stricter regulation of surrogacy. International organizations including the World Health Organization and the United Nations have asked for further regulation of surrogacy to safeguard the rights of all parties involved. Some nations have recently passed or are considering surrogacy laws (UN, 2019). Thus, despite the fact that there is now no explicit push in Bangladesh towards the formation of surrogacy laws, shifts in public attitudes and international trends may one day result in the emergence of such laws.

## **Conclusion and Recommendations**

The paper demonstrates how Muslim guardianship is increasingly being granted by family courts in Bangladesh as a way to formalize unofficial adoption. Because to the lack of clear rules governing, adoption and Muslim families' resistance to adopting children through official channels, this tendency has emerged. The paper also addresses the difficulties and problems Bangladeshi family courts encounter when handling guardianship matters. The Surrogacy (Regulation) Bill, 2019, which seeks to outlaw commercial surrogacy and limit the practice of surrogacy to exclusively "altruistic" causes, is one example of the legal framework in India that surrounds surrogacy that is discussed in the thesis. The case of *Baby Manji Yamada v. Union of India* (2008), which demonstrated the necessity for a thorough legal framework to control surrogacy in India and safeguard the rights of surrogate mothers and children born through surrogacy, is also examined in the Paper.

### **a. Summary of Finding**

According to a study on Trends of Family Courts in Bangladesh in Granting Guardianship to Muslims as a Means of Legalizing Informal Adoption and Laws Relating to Surrogacy in India, guardianship is increasingly being granted to Muslims in Bangladesh by family courts as a means of legalizing informal adoption due to the lack of specific laws governing adoption and the unwillingness of Muslim families to adopt children through legal channels. The report also noted difficulties and problems encountered by Bangladeshi family courts when handling guardianship matters.

### **b. Conclusion**

In conclusion, the study on guardianship patterns in Bangladeshi family courts and the laws governing surrogacy in India underlines the importance of paying more attention to legal concerns pertaining to children's welfare and well-being in both nations. Notwithstanding the research' limitations, they highlight the significance of creating thorough legal frameworks for adoption, guardianship, and surrogacy that uphold children's rights and promote their welfare. Various authors of Islamic law also consider these informal adoptions as Mubah understood through the principle of *istihab*, which is not strictly prohibited is permitted. (Nayzee, Imran Ahsan Khan (2000)). Future studies should investigate the viewpoints and experiences of various parties involved in these legal systems, such as commissioning

parents, surrogate moms, and kids. Though there comes a question of ethical issues of surrogacy it has an emerging urgency for both the country will arise in near future as the society of Bangladesh is also evolving rapidly. (Islam, N., & Begum, F. (2016), Jindal, U. (2019)

### c. Recommendations for Future Research

1. To ascertain the breadth and depth of the problem, a larger-scale investigation on the prevalence of informal adoption and guardianship practices among Muslim families in Bangladesh is being conducted.
2. Examining the perspectives and experiences of children in Bangladesh who are subject to informal adoption and guardianship arrangements, with an emphasis on their rights and well-being.
3. Examining the social and cultural influences on the informal adoption and guardianship practices in Bangladesh and how they affect children's rights and welfare.
4. Doing a more thorough investigation into India's surrogacy laws that takes into account the viewpoints and experiences of surrogate moms, commissioning parents, and the offspring of surrogates.
5. A study of the moral and social ramifications of surrogacy in India, including how it affects traditional family structures & gender roles.

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