
SURROGACY IN INDIA: HUMAN RIGHTS, LAW, AND REPRODUCTIVE JUSTICE

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ABSTRACT

Surrogacy in India has transitioned from a booming commercial industry to a tightly regulated selfless system under the Surrogacy (Regulation) Act, 2021. This legal shift highlights India's ongoing efforts to reconcile human rights, state control, and reproductive justice. Surrogacy raises multifaceted ethical, social, and legal dilemmas, particularly regarding women's autonomy, bodily integrity, and the commodification of motherhood. While the previous commercial model offered financial opportunities to marginalized women, it also left them vulnerable to exploitation and insufficient legal safeguards. The present framework seeks to protect surrogate mothers by outlawing commercial surrogacy and promoting ethical, voluntary participation. Commercial surrogacy, often referred to as "Womb for rent", is an expanding industry in India. In our swiftly globalizing world, the rise of reproductive tourism is a relatively new occurrence. The surrogacy industry is taking advantage of impoverished women in countries like India, which already faces a disturbingly high maternal mortality rate. This paper discusses paternity concerns and women's health rights in relation to surrogacy. The government needs to thoughtfully evaluate the implementation of a law to oversee surrogacy in India to shelter and support couples opting for this choice. In the absence of a reliable legal framework, patients will inevitably be deceived and the surrogates taken advantage.

INTRODUCTION

Surrogacy is a reproductive assistance method where a woman, referred to as the surrogate mother, consents to carry a child for someone or a couple who cannot conceive naturally. In India, surrogacy has been a topic of ethical discussions, societal issues, and legal changes for a long time. The nation previously became a worldwide centre for commercial surrogacy because of its comparatively low healthcare expenses and the presence of willing surrogates. Nonetheless, this commercialization resulted in cases of exploitation, absence of consent, and infringement of women's rights, leading the government to step in with legislative actions.

By 2015, India emerged as a leading global choice for commercial surrogacy, offering standardized in-vitro fertilization technology and English-speaking physicians at a lower cost, particularly for couples from overseas looking for surrogacy options. Surrogacy agents connecting foreign prospective parents with clinics in India have proliferated globally. During my fieldwork in 2009-10, it became clear to me that international intended parents were coming to India primarily because surrogate mothers had fewer rights concerning the child and their own bodies compared to Canada, the USA, and the UK, as well as due to the unregulated nature of surrogacy practices. Most women in my study were living on the brink of poverty, striving to support their children's education, pay for a dowry, marriage, or family illness, purchase a house, and avoid further descent into poverty, while others were acting as surrogate mothers to meet their family's immediate basic needs and ensure adequate food

The implementation of the Surrogacy (Regulation) Act, 2021 represented a significant change from commercial to altruistic surrogacy, permitting only Indian couples to pursue the process under stringent requirements. This action intended to guarantee ethical conduct and safeguard surrogate mothers against exploitation. However, it also brought up issues regarding reproductive freedom, gender equality, and the rights of single individuals and LGBTQ+ individuals to become parents within the new system.

Consequently, surrogacy in India exists at the crossroads of legal matters, human rights, and reproductive equity. It mirrors wider societal discussions regarding women's bodies, family dynamics, and the government's involvement in overseeing reproduction. Grasping this matter necessitates exploring not just the legal structure but also the ethical and human aspects that influence the surrogacy conversation in modern India.

ETHICAL CONCERNS ON ALTRUISTIC SURROGACY

Altruistic or selfless surrogacy, in which a woman consents to carry a child for someone else without monetary compensation, is frequently portrayed as a more ethically admirable choice compared to commercial surrogacy.¹ The concept of this model is to remove the chance of exploitation and to highlight empathy and connection. Nonetheless, despite its commendable purpose, altruistic surrogacy presents various ethical and human rights issues that must not be overlooked.

A major ethical concern is the issue of authentic consent. When surrogacy is restricted to family members or friends, as required by the Surrogacy (Regulation) Act, 2021 in India, the surrogate might feel obligated to engage due to emotional ties, familial pressure, or social expectations. These situations obscure the distinction between voluntary decision-making and subtle pressure, thereby questioning the ideals of autonomy and free will.

A different ethical issue emerges from the refusal to provide adequate compensation. Pregnancy is a physically strenuous and emotionally challenging journey that involves health risks. By limiting financial compensation, the law does not acknowledge the surrogate mother's reproductive labour as worthwhile work. This forms a contradiction: although the action is honoured as altruistic, it can also become exploitative by requiring women to give up their bodies and time without sufficient recognition or compensation.

Moreover, the psychological and emotional effects are frequently neglected. The experience of gestating a child, forming a connection during pregnancy, and then separating from the infant can result in emotional turmoil and lasting psychological impacts. The existing legal structure offers minimal emotional or mental health assistance for surrogate mothers.

Ultimately, limiting surrogacy to married heterosexual couples marginalizes single parents, widows, and same-sex couples, prompting concerns about equality and reproductive justice. This exclusion strengthens conventional family values and restricts reproductive rights for numerous individuals desiring to become parents. Essentially, although altruistic surrogacy aims to maintain ethical norms and safeguard women from exploitation, it also introduces new

¹ Report of the International Conference on Population and Development, Cairo, 5-13 September 1994 (1995)

ethical dilemmas. Genuine ethical surrogacy must thus harmonize empathy with independence, justice, and the acknowledgment of women's reproductive work and rights.

Surrogate motherhood is not a method by itself; rather, it is a practice that technology utilizes within the pre-existing hierarchies and dominant systems.² The technologies that were previously applied to oneself are now employed on another individual's body, breaching their freedom, dignity, and integrity. There is a strong possibility of exposing another woman (the surrogate mother) to societal stigma, mental health issues, infringement on her bodily autonomy, and furthermore jeopardizing the surrogate mother's health, freedom, rights, and even her life. Therefore, surrogacy should not be viewed as a socially acceptable practice and definitely must not be regarded as a constitutional entitlement. Reproductive justice seeks to diminish disparities and not exploit an individual's vulnerability to satisfy another's reproductive freedom.

HEALTH RISK ASSOCIATED WITH SURROGACY

In the United States, surrogates receive a maximum of two embryos for their well-being, while in India, surrogates may have as many as five embryos implanted to enhance the likelihood of conception. Utilizing a high quantity of embryos raises health risks for both the babies and the mother. The likelihood of post-partum depression in surrogates increases with the child that developed in the mother's womb. Pregnancy, childbirth, and the post-partum phase encompass issues like pre-eclampsia and eclampsia, urinary tract infections, stress incontinence, haemorrhoids, gestational diabetes, severe haemorrhage, and pulmonary embolism. Having multiple pregnancies raises the chances of needing a surgical delivery. An advanced maternal age surrogate host faces a higher risk of perinatal mortality, perinatal death, intrauterine fetal death, and neonatal death. The mother faces an increased risk of pregnancy-related hypertension, stroke, and placental abruption. When the surrogate is directed to take hormones or medications, all medications possess side effects. Numerous women receiving Artificial insemination also undergo fertility treatments, raising the chances of negative reactions and associated risks with the process.

² Committee on Ethics. ACOG committee opinion number 397, February 2008: Surrogate motherhood Obstet Gynecol. 2008

Concerns like early delivery, congenital defects, and infections that result in heightened hospitalization of newborns are crucial factors to address in a surrogacy agreement.

Numerous surrogate mothers nurse the infants in the initial hours after delivery. Nevertheless, parents encounter challenges in starting breastfeeding and forming the bond between mother and child during surrogacy.

A significant disadvantage of induced lactation in most surrogates or adoptive mothers is that they often do not produce the same amount of breast milk as a biological mother right after giving birth. This poses an issue regarding baby nutrition.

PSYCHOLOGICAL AND SOCIAL SITUATION OF SURROGACY

The commodification of surrogacy leads to various societal issues.³ Due to extreme vulnerability, one-third of Indian women face poverty, exclusion from labour markets, marginalization, patriarchal family structures, and low education levels, making the financial benefits of surrogacy a significant motivating factor. As most surrogate mothers come from less affluent backgrounds and their main motivation is financial, they are often easily taken advantage of by the agents representing commissioning parents. Concealment and lack of identification foster a harmful atmosphere that impacts interpersonal relationships both within and beyond families. Surrogacy faces social stigma as it is associated with prostitution, leading to arguments that it should be prohibited on ethical grounds. Surrogate mothers are isolated from their families and permitted to see them only on weekends, which violates human rights. Thus, numerous ethical, social, legal, and psychological concerns related to surrogacy demand an immediate necessity for establishing and enforcing legislation.

Evolving Family Dynamics and Social Acceptance

As definitions of family continue to change, surrogacy has emerged as an important social phenomenon. It questions conventional notions of motherhood and family by distinguishing between genetic, gestational, and social parenting roles. Nonetheless, social acceptance differs significantly:

³ Sharma R An International, Moral & Legal Perspective: The Call for Legalization of Surrogacy in India.

In liberal societies, surrogacy is viewed as a manifestation of reproductive autonomy.

In conventional societies, it might encounter disapproval for violating ethical or spiritual standards

Economic and Social Aspects

In numerous countries, especially in developing nations such as India (prior to strict regulations), surrogacy was significantly influenced by class.⁴ Low-income women frequently served as surrogates for affluent couples, sparking discussions about exploitation, personal choice, and economic disparity.

Gender and Power Dynamics

Surrogacy also emphasizes gendered power relations. Women's ability to reproduce can be commercialized, transforming motherhood into a business deal. Simultaneously, surrogacy can strengthen women by granting them financial autonomy and control over their own bodies.

Cultural and Ethical Factors

Various cultures view surrogacy within religious and ethical contexts. In certain cultures, it is viewed as a gesture of kindness or selflessness; in others, it prompts ethical concerns regarding the sacredness of giving birth and familial heritage.

Psychological Aspects of Surrogacy

Emotional Effects on Surrogate Mothers

Surrogate mothers frequently undergo a variety of feelings during and post-pregnancy.

Connection and separation: Forming a relationship with the fetus and managing the split after delivery.

Postpartum depression: Frequent as a result of hormonal shifts and emotional grief.

⁴ Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR) preamble.

Shame and social stigma: Especially in societies that perceive surrogacy unfavourably.

Consequently, appropriate psychological counselling is vital during the entire process.

Psychological Impact on Prospective Parents

Prospective parents might undergo. Nervousness and apprehension about failing throughout the surrogacy process.

Struggles with identity, particularly for mothers who are not the biological parents.

Emotional Factors for the Child

As the child develops, inquiries about identity and background may emerge. ⁵The social and psychological backdrop of surrogacy indicates that it transcends a purely biomedical procedure it represents a human experience influenced by emotions, cultural aspects, and social connections. Grasping these aspects aids in maintaining that surrogacy practices are ethical, compassionate, and supportive for all parties involved. Consequently, sustainable surrogacy models must equally incorporate medical, legal, social, and psychological support.

SURROGACY AND WOMEN'S RIGHT TO HEALTH

Surrogacy in India is not a recent concept. Commercial surrogacy, often referred to as "womb for rent," is an expanding industry in India. In India, the presence of English-speaking environments and affordable services draws in eager clients.

Future outlooks on surrogacy span from opportunity to exploitation—transforming rural Indian women from poverty to a dystopian reality of baby farming in developing nations

Critics of surrogacy contend that it resembles prostitution and, due to this comparison, it ought to be prohibited for ethical reasons. Surrogacy agreements are "dehumanizing and isolating as they invalidate the surrogate's viewpoint on her pregnancy. ⁶The surrogate mother attempts to prevent forming a unique connection with the child she carries and perceives the pregnancy

⁵ Surrogate Motherhood in India. Last accessed on 2012 Nov Available from <http://www.stanford.edu/group/womenscourage/Surrogacy/moralethical.html>

⁶ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976.

solely as a means to earn essential income. Compensation for bodily services objectifies the surrogate mother, exploiting her reproductive abilities for the financial benefit of the affluent.

Outsourcing surrogacy in India is, in reality, a form of exploitation. At present, there are no legal protections for the surrogate mother in situations involving birth complications, coerced abortions, etc.

Starting in 2002, commercial surrogacy has nearly been legalized in India, positioning the nation as a frontrunner in the field. This is why critics claim that the surrogacy industry is taking advantage of impoverished women in countries like India, which already faces a high maternal mortality rate. Estimates, which may be cautious, suggest that the surrogacy industry in India is currently approaching annually.

The Ministry of Women and Child Development is reviewing the matter of surrogate motherhood in India to formulate comprehensive legislation. A proposed law on surrogacy, developed by the **Indian Council of Medical Research (ICMR)**, suggests severe punishments for violators and stringent controls on **Assisted Reproductive Techniques (ART)**. The proposed legislation limits the number of embryos transfers a mother can undergo to three for the same couple if the first two attempts do not succeed, and it also stipulates that no woman may serve as a surrogate for over three live births throughout her lifetime. Actually, these represent the sole guidelines established by the ICMR and the Ministry of Health and Family Welfare in 2005. ICMR guidelines indicate, "A relative, an acquaintance, or an unfamiliar individual can serve as a surrogate mother for the couple." If a relative serves as a surrogate, they must be from the same generation as the woman wanting the surrogate. Experts argue that surrogacy pushes childless couples unnecessarily towards commercial surrogacy. Section 3.10.5 of the guidelines indicates that "a surrogate must be under 45 years," specifying the maximum age but not addressing the minimum age for a surrogate. Does this indicate that an 18-year-old or someone even younger can be a surrogate mother? Prior to approving a woman as a potential surrogate for a specific couple, the Clinic must verify (and document) that the woman meets all the necessary criteria to achieve a successful full-term pregnancy. These recommendations are biased and recklessly.

SURROGACY: ISSUES AND PERCEPTIVE

Surrogacy, as a form of assisted reproduction, entails a woman (the surrogate mother) gestating

and giving birth to a child for another individual or couple.⁷ Although it provides a remedy for infertility, it simultaneously brings forth ethical, legal, social, and psychological concerns. The discussion regarding surrogacy focuses on its ethical justification, the rights of women, the well-being of the child, and the risk of exploitation. Grasping the challenges and viewpoints related to surrogacy is vital for developing equitable and compassionate reproductive regulations.

Determining paternity can be straightforward with a simple genetic test, but the matter is complex and challenging for the courts. What occurs if a non-custodial father has been the "dad" to a child for 15 years and discovers he is not the biological parent? Will he receive a reimbursement for the child support he has paid? If a surrogate mother violates her agreement, can she seek financial assistance from the husband-and-wife clients for the child that results? These are challenging legal issues for judges and lawmakers.

The Indian system acknowledges only the biological mother. In the Indian legal framework, there is no notion of DNA testing to determine paternity; thus, the child's birth certificate must list the birth mother and her spouse. In 2008, the Supreme Court of India ruled in Manji's case (Japanese Baby) that commercial surrogacy is allowed in India, thereby boosting international trust in pursuing surrogacy in the country. The law commission of India has presented the 228th Report on "Necessity for Legislation to Control Assisted Reproductive Technology Clinics and the Rights and Obligations of Parties in Surrogacy." The primary findings noted by the law commission are: Surrogacy agreements will still be regulated by contracts among the involved parties, yet such arrangements should not serve commercial interests. A surrogacy agreement must ensure financial support for the surrogate child if the commissioning couple or individual passes away before the child is born. A surrogacy agreement must include provisions for life insurance coverage for the surrogate mother. Legislation should acknowledge a surrogate child as a legitimate child. The birth certificate for the surrogate child must list only the name of the commissioning parent. The privacy rights of both the donor and the surrogate mother must be safeguarded. The use of surrogacy based on sex selection ought to be banned. Abortions should only be regulated by the Medical Termination of Pregnancy Act of 1971.

Kimbrell (1988) states that the majority of women who become surrogates do so due to financial necessity. The surrogate mothers frequently lack awareness of their legal rights and,

⁷ Law commission of India. Report 228. 2009 Last accessed on 2012 Nov 19

because of their financial circumstances, cannot hire lawyers.

Foster (1987) notes that numerous surrogate mothers experience emotional difficulties after giving up the child. Nonetheless, research conducted by Jadvā et al. (2003) indicated that surrogate mothers seem not to encounter psychological issues due to the surrogacy agreements. While it's recognized that certain women face emotional difficulties when giving up the baby or due to the reactions of those around them, these emotions seemed to diminish in the weeks after giving birth.

CONCLUSION

In India, surrogacy is strictly a contractual agreement between the involved parties, necessitating careful drafting to ensure compliance with legal standards. Key considerations include the reasons intended parents choose surrogacy, details about the surrogate, the type of surrogacy, provisions related to paternity in the contract, the establishment of a registry for biological fathers in adoption scenarios, regulations regarding the timing and methodology of genetic testing for paternity, a compensation clause, provisions for unforeseen incidents affecting the surrogate mother, child custody arrangements, and the jurisdiction for resolving disputes arising from the agreement. Surrogacy in India has transitioned from a non-regulated commercial activity into a carefully overseen legal and ethical agreement. Previously recognized as a worldwide centre for commercial surrogacy, India drew intended parents globally because of its lower medical expenses and easy access. Nonetheless, increasing worries about the mistreatment of disadvantaged women, inadequate legal safeguards, and ethical issues resulted in the enactment of the Surrogacy (Regulation) Act, 2021.

The legislation seeks to safeguard women from exploitation by prohibiting commercial surrogacy and permitting only altruistic surrogacy—where no financial rewards are provided apart from medical costs and insurance.

Surrogacy in India, in a wider context, signifies the nation's continuous effort to reconcile reproductive autonomy, human rights, and social ethics. Genuine advancement exists in establishing a system that guarantees informed consent, medical safety, emotional support, and equal access—free from discrimination or exploitation.

Thus, the future of surrogacy in India should be based on a rights-driven, empathetic, and

inclusive framework that honours the dignity of surrogate mothers while supporting the aspirations of intended families. Surrogacy can genuinely represent hope instead of controversy solely through ethical regulations, social understanding, and compassion

The Indian government drafted legislation in 2008 and ultimately created an ART regulation draft bill in 2010. The legislation remains unresolved and has yet to be introduced in the parliament. The suggested legislation requires thorough discussion and debate regarding its legal, social, and medical dimensions. We conclude that the government should thoughtfully contemplate implementing legislation to oversee surrogacy in India to safeguard and assist couples exploring these possibilities.