



Legal and Ethical Aspects of Surrogacy in India - A Critical Analysis

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Abstract

Surrogacy has been the subject of heated discussions across the world that have centred on its complex ethical and legal ramifications. This research thoroughly analyses the effects of the 2021's Act of Surrogacy, beginning with a thorough dive into the core ideas that support surrogacy. This paper analyses the requirements and restrictions of surrogacy and outlines the ethical, moral, and legal conundrums that surround it, revealing the challenges that all parties involved must deal with. The comparative examination of surrogacy legislation in various nations is another feature of this article, which reveals the disparate worldwide perspectives. Examining the judicial viewpoints on surrogacy helps to clarify the changing legal environment and to highlight important rulings that have had a big impact on surrogacy practices. This study offers a nuanced view on the complex ethical and legal issues surrounding surrogacy in India by combining various approaches. These observations provide a thorough grasp of the difficulties and potential present in the field of surrogacy.

Keywords: *Surrogacy, Reproductive Technology, Reproductive Rights, Commercial Surrogacy*

Introduction

Even the most private facets of life, like fatherhood, have not been spared in the globalized world of today, when services like computer assistance and hotel reservations may be easily outsourced. Parenthood, especially motherhood, which has historically been viewed as a very private and intimate experience, has experienced a significant transition in light of contemporary reproductive technology and their accessibility worldwide.

The fundamental idea of childbirth and parenthood has been changed by assisted reproductive technologies. Prior to the development of advanced reproductive technology, the only ways to conceive were through sexual activity, pregnancy, or adoption. A growing number of married infertile couples now engage in the practice of ‘surrogate parenting’, in which they hire a woman to carry their child to term and then give up parental control once the child is born. Contract pregnancy, as this arrangement is often called, questions conventional ideas of motherhood.

Surprisingly, the concept of surrogate motherhood is not fresh; it has roots in old myths. Figures like Yashoda and Gandhari, who played important surrogate mother roles in Indian mythology, highlight the pervasiveness of this idea throughout many civilizations. Surrogacy has become more popular in the current period and is now accepted even by famous people. For instance, Indian actor Aamir Khan and Kiran Rao used surrogacy in conjunction with in-vitro fertilization to grow their family, as did British pop singer Elton John and his partner David Furnish, who welcomed their son through surrogacy in California.

A burgeoning reproductive business has been created as a result of this paradigm change, and surrogacy has become a key element. The development of surrogacy, from ancient mythology to modern celebrity sponsorships, is a reflection of how motherhood has changed in our more globalized society.

The first legal surrogacy contract was established in the United States in 1976 thanks to the work of American attorney Noel Keane. Globally, surrogacy has expanded significantly since that game-changing moment. Although the idea of surrogacy may appear modern, its origins are deeply rooted in the past. The development of assisted reproductive technologies and artificial insemination, however, gave it a significant boost. With the birth of Kanupriya, the world’s second IVF child and India’s first, in Kolkata in 1978, India rose to prominence in the surrogacy scene. The official start of surrogacy in India was celebrated by this occasion.¹

Surrogacy (Regulation) Act, 2021

The Surrogacy (Regulation) Act of 2021, which was approved by the president on December 25, 2021, went into force on January 25, 2022. This statute defines surrogacy as the act of a woman carrying and giving birth to a child for intended parents with the aim of giving the child to the intended parents after delivery. The practice of commercial surrogacy, which entails the purchase and sale of human embryos, is expressly forbidden by law. In its place, it only allows altruistic surrogacy, in which the surrogate mother is not paid.

The definition of a family has changed beyond its traditional definition in the twenty-first century. Single-parent families and same-sex couples who want to have genetically related children now have a vital alternative in surrogacy. Despite popular belief, recent legislative changes in India, such as the

legalization of live-in partnerships and the decriminalization of homosexuality in instances like *Navtej Singh Johar v. Union of India*, show a positive turn toward the protection of human rights.²

The Surrogacy (Regulation) Act of 2021 places limitations on specific populations, nevertheless. Altruistic surrogacy is not permitted for same-sex couples, those in live-in partnerships, or single people (save for single women who are widows or divorcees aged 35-45). This restriction is justifiable on the grounds that a mother and a father should always be present when raising a child. Other issues include possible legal complexity involving third-party donors and eventual custody conflicts, which are particularly problematic for gays and unmarried people.

In accordance with this Act, only married heterosexual couples are permitted to use surrogacy, and the surrogate mother must be a heterosexual woman who is married to a man and is willing to do so. By limiting reproductive options for non-conventional families, this legislation upholds the heteronormative conception of a family.

Transgender people were given formal recognition as the “third gender” in the ground-breaking decision of *National Legal Services Authority v. Union of India*, despite this accomplishment, the law as it now does not provide them with equal surrogate reproductive rights.³ The Act’s arguments are too onerous, creating substantial barriers in a time when constitutional ideals, universal human rights, equality, and liberty have all advanced.

The Act also places restrictions on who can act as a surrogate mother. Only married women between the ages of mid-twenties and early thirties are qualified to serve as surrogates or donate eggs. While these laws are intended to safeguard surrogates from exploitation, they unintentionally uphold heteropatriarchal standards. This limits a woman’s physical autonomy by making her capacity to bear a child dependent on her marital status. The Act also limits a woman’s participation in a surrogacy to only once throughout her lifetime, thus restricting her ability to choose how she wants to have children.

The law as it stands recognizes that women may be forced into commercial surrogacy for financial or other reasons. It imposes sanctions for infractions and expressly forbids spouses and other family members from pressuring women into this behaviour. However, it is still uncertain if a woman has legal recourse if she is forced into an altruistic surrogacy, which raises concerns about her legal safety.

The existing legal system essentially falls short of guaranteeing universal reproductive freedoms and preserving the values of equality and autonomy while making progress toward recognizing transgender rights. Comprehensive surrogacy changes are urgently needed to remove these obstacles and defend the rights of every person, regardless of gender identity or marital status. A society where each person’s rights and preferences are recognized and safeguarded would be supported by such

changes, which would bring the legal system into line with the progressive values of equality and the protection of all human rights.

Facets as to Ethical, Moral, and Legal Issues

Ethical Considerations

Although surrogacy agreements may appear to be advantageous for both parties, there are important ethical issues that need careful consideration through well drafted laws to protect the rights of both the surrogate and the intended parents. Since commercial surrogacy entails the monetization of a woman's body, some claim it is ethically wrong and creates significant ethical dilemmas. The difficulty surrogates experience, especially poor women who are forced into such relationships, highlights how serious the problem is. The emotional devastation suffered by surrogate mothers when they must part with the child they carried, a reality that cannot be overlooked, presents one fundamental ethical challenge. Surrogacy is unnatural and ethically dubious since it forcibly severs the strong emotional attachment that naturally exists between a biological mother and her child.

The process of surrogacy is based on the fundamental idea of informed consent, needing a thorough comprehension of the extensive ramifications involved by both surrogate moms and intending parents. However, ethical issues surface when socio-economic factors improperly affect surrogates, raising questions about the veracity of their consent.

The commercialization of surrogacy is one of the most controversial problems surrounding it, and it has serious ethical implications. Critics claim that this commercial component turns women's bodies into commodities and thus reduces delivery to a transaction, diminishing its holy nature. Concerns are then raised regarding the possible exploitation of economically marginalized women who are forced into these arrangements as a result of this commercialization.⁴

When the surrogate is a biological relative of the child, the ethical challenges of surrogacy are heightened. With regard to the child's sense of identity, the surrogate's emotional attachment to the child, and the rights of all parties concerned, this scenario raises difficult concerns.

Moral Implications

Surrogacy typically runs afoul of strongly ingrained traditional and cultural standards, particularly in cultures where family structures are defined by blood connections and ancestry. Surrogacy challenges these long-standing norms, which gives rise to moral concerns based on the idea that it departs from what is viewed as natural and traditional. For both individuals and groups, this conflict between cutting-edge reproductive technology and ingrained cultural norms poses a moral conundrum.

The ideals of mom and parenting are interwoven and at the centre of the moral debate around surrogacy. Traditional conceptions of motherhood have a strong emotional and physiological

connection to the biological act of birthing. By separating the biological and gestational facets of motherhood, surrogacy challenges traditional conventions and raises concerns about people's parental rights outside of biological relationships. Particularly for surrogate mothers who are subject to criticism and social isolation, this monitoring frequently causes emotional pain and societal stigmatization.

The welfare and best interests of the child born via surrogacy are also at the centre of the moral discussion. The child's right to know about their surrogate origins raises concerns. Some support openness, highlighting the right of the child to know their genetic and gestational history. Others, however, worry that such information might result in identity problems and societal condemnation. This poses moral dilemmas over when and how to tell children about their surrogate birth, necessitating a careful balancing act between the child's right to know and their mental wellbeing.

Economic inequalities have a big influence on how surrogacy is morally viewed. Serious moral questions are raised by the exploitation of financially vulnerable women who frequently turn to surrogacy out of need. The moral foundation of society is weakened when surrogacy is used as a source of income rather than as an option. It becomes morally necessary to address these economic inequalities and guarantee that surrogacy agreements are not exploitative. As a result, surrogacy is carried out morally and in the interests of all individuals involved, reflecting a society's dedication to social justice and fairness.

Legal Challenges

The absence of a thorough and consistent legal framework is one of the main legal issues surrounding surrogacy. Surrogacy regulations with regulatory loopholes and ambiguities may cause a variety of issues. Laws that are unclear can give rise to conflicting interpretations, which can be exploited. A strong legal framework that covers the rights and duties of all parties involved is essential since the absence of clear standards leaves surrogates and intending parents in a vulnerable situation.

Determining parental rights in surrogacy situations may be extremely difficult, particularly in circumstances involving international surrogacy agreements.⁵ It is common to have concerns regarding a child's citizenship rights and legal status. Laws that differ between nations or governments make things more difficult. It may be difficult for intending parents to get citizenship for the child, which might result in red tape and legal wrangling. To prevent the child from becoming stateless and to guarantee their access to fundamental rights and services, it is vital to define parental rights and citizenship clearly.

Legal issues are made more difficult by the advent of reproductive tourism, in which individuals or couples travel to other nations for surrogacy services. Cross-border surrogacy agreements are sometimes complicated by contradictory regulations caused by different legal systems in different

nations. To resolve these differences, it is crucial to harmonize international surrogacy regulations and promote international collaboration. A foundation for uniform legal procedures might be established through the creation of international treaties or accords, assuring the protection of the rights of surrogates, intended parents, and children.⁶

Judiciary Approaches in lieu of the Surrogacy

Baby Manji Yamada v. Union of India and Ors.

In this particular instance, a Japanese couple tried to produce a child in India via a surrogate. They hired an Indian surrogate mother from Gujarat, where the procedure is common. However, the couple divorced as a result of their marital issues, which resulted in a custody battle for their daughter. The child's father, a single parent, desired custody but was unable to adopt a girl according to Indian legislation. The Supreme Court got involved in this issue and decided that the grandmother of the child should be given custody. This ruling made clear that India lacks comprehensive surrogacy legislation. It emphasized the requirement for laws governing surrogacy agreements in order to safeguard the rights and welfare of all parties concerned.

The Commissions for Protection of Child Rights Act, passed in 2005 to protect children's rights and quicken trials for crimes against them, was also mentioned by the court.⁷ The order for Baby Manji's attendance was illegal, according to the court, because the precise complaint was not presented to them. In order to ensure that the correct legal processes are followed, it was highlighted that any complaints about any infringement of children's rights should be addressed to the created commission. This case highlighted the urgent need for strong legal frameworks and unambiguous instructions to preserve the welfare of children and all parties involved, shedding light on the importance of addressing many critical elements within surrogacy agreements.

Kaushal Kadam v. Union of India

A policy detailing standard for surrogacy services provided to foreign nationals was issued by the Indian Ministry of Home Affairs. In accordance with this guideline, couples looking for surrogacy services in India had to file a notarized contract naming the Indian surrogate mother as the recipient. According to the court, surrogacy is not illegal in India, nor is there any particular legislation in place to control surrogacy contracts at this time.

Mr. Ebert Trujillo Duthil v. Marjina Khatun

The suggestions made by the Law Commission of India in Report No. 228 were a key factor in the court's ruling. According to the standards outlined in the Indian Contract Act and other laws, this report contends that surrogacy agreements should be handled similarly to other contracts. One

extremely crucial piece of advice underlined that the parents commissioning the adoption of a child must legally consent to assume possession, regardless of whatever potential abnormalities the kid may have. If this wasn't done, a crime would have been committed. The results also backed the surrogate mother's decision to relinquish all parental rights. It also recommended that the biological parents' names be listed on the birth certificate for children born through surrogacy. The court's ultimate decision regarding surrogacy agreements was greatly influenced by these proposals.

Rama Pandey v. Union of India

The commissioning mother is recognized by the legal system as the child's legal mother both during and after the pregnancy in the context of surrogacy agreements. For instance, the commissioning parents have the legal right to stop any actions that might harm the interests of the child if there is a dispute between the surrogate mother and the commissioning parents and the surrogate mother decides to end the pregnancy within the legal timeframe.

According to the aforementioned viewpoint, the court's evaluation of such circumstances is based on the commissioning mother's legal standing as the child's parent. This and other factors are taken into consideration. The legality of surrogacy contracts in this country supports the court's decision in such situations. The petitioner's decision to have a child through surrogacy is not seen as immoral or unethical by the court as a result. The best interests of the child are always prioritized both throughout and after the surrogacy procedure according to this legal framework.

Conclusion

A complex tapestry of human experience is created by the confluence of technological discoveries, social conventions, necessary services, and the individuals involved in surrogacy. Implementing well worded and thorough laws is essential instead of an outright prohibition. The introduction of such laws can stop future exploitation and the growth of black marketplaces. In addition to respecting people's fundamental rights, these laws have to adopt a feminist viewpoint and recognize the autonomy and agency of women. It is crucial to take the living conditions of surrogates and other pertinent factors into account while debating a general ban on commercial surrogacy. It seems impossible to advocate for altruistic surrogacy, in which surrogates' shoulder financial and emotional responsibilities only out of compassion. Today, much as how men get paid for sperm donations, surrogacy may be a way for women to gain economic emancipation. The complex difficulty of surrogacy involves social, ethical, technical, and legal factors. Beyond the legal implications, society must seriously reflect on the social implications of this conduct. These reflections ought to be conducted in a way that upholds our moral principles and seizes the opportunities presented by developing technology. Navigating the complications of surrogacy in the modern world requires a sophisticated strategy that takes into account the rights, dignity, and well-being of all individuals involved. In addition, it is critical to amend current regulations to make them more welcoming and

supportive to gay couples and single parents who want to consider surrogacy as a family-building choice. These legislative changes should be created to accommodate various family configurations and personal preferences. In addition to legislative changes, it is critical to set up strict rules that put the welfare of the child, the surrogate mother, and the home environment first. These rules should include thorough health management requirements, assuring the mental and physical well-being of all parties. When properly controlled, surrogacy presents tremendous opportunities for people and couples who want to become parents. The ability for people with varied backgrounds and situations to fulfil their ambitions of having children is a wonderful blessing.

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