

## Review Article

# Ethical and legal perspective of surrogacy in India

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### ABSTRACT

Surrogacy is an important alternative method of reproduction where traditional methods are not possible. However, several legal, ethical, medical and economic arguments have been made against this practice. Recent developments in the legal framework governing surrogacy aimed to answer these questions. Through the introduction of the surrogacy (regulation) bill 2019 provisions have been made to regulate centers providing surrogacy, preauthorization of surrogacy contracts and make a complete mental and physical evaluation of surrogates prior to entering the contract mandatory. However, the bill completely prohibits commercial and international surrogacy providing the vacuum for creation of other possible problems. Hence, there is still a need to find a balance between the ethical, legal, scientific and social aspects of surrogacy.

**Keywords:** Surrogacy, Medical ethics, Medical law, Reproductive techniques

### INTRODUCTION

Surrogacy is an important treatment for infertility. In this technique, an embryo is created in-vitro and implanted into the carrier's uterus, i.e. the surrogate mother.<sup>1</sup>

Infertility in India is associated with societal stigma causing psychological trauma. Many couples wish to have a genetic connection with their child, which is missing in traditional methods such as adoption. Given the recent advances in assisted reproductive techniques, surrogacy is a good option for such couples.<sup>2</sup>

Several legal, ethical, medical, economic, social, religious and moral arguments have been made against surrogacy, leading to the demand for its legal regulation.<sup>2</sup>

Legal regulations and ethical studies often lag behind the development of new biotechnologies. The principal legal

and ethical concerns associated with surrogacy arise from social and political problems. Commercialization of surrogacy, the ease of travel (prior to COVID-19 outbreak) permitted cross-border surrogacy and development of a multibillion-dollar surrogacy industry and the associated concerns regarding exploitation.<sup>3,4</sup>

This study aimed to analyze the legal and ethical perspective on surrogacy and critically examine how the recently proposed regulation in India addresses these perspectives.

### METHODS

The study reviewed 6 major landmark legal decisions in cases pertaining to surrogacy in India and the current and previous laws governing these. Further, CINAHL, Medline, health source, LLMC-digital, India law library and Indian kanoon using key terms: surrogacy law, Indian surrogacy laws, ethics surrogacy, social concerns

surrogacy, legal concerns surrogacy. To ensure all relevant data was reviewed, the authors also conducted hand searches in relevant text books and online learning resources such as EDX and Coursera were also perused. Out of the total 625 resources, 21 were found to be relevant and were critically reviewed.

## DISCUSSION

### *Ethical concerns*

There are several objections revolving around the ethical application of surrogacy. They include:

#### *Commercialization*

Commodification of procreation has led to the creation of surrogacy markets, specifically in countries with fewer existing regulations on surrogacy those with a substantial population of poor women looking for legal ways to earn money.<sup>2</sup> This has led to increasing fears regarding black-marketing, baby selling, baby-breeding farms and “selective breeding” for a price.<sup>5</sup>

#### *Corruption*

The ethical problem of corruption is related to the moral and philosophical value associated with procreation. The introduction of money stimulating a market for something valued socially and morally might denigrate it.<sup>6</sup> Several scholars have called surrogacy a practice of “womb renting”, which they say reduces its moral and sacred role.<sup>5</sup>

#### *Crowding out*

Corruption of the social meaning of procreation may further discourage altruistic giving and hence, crowd out morals.<sup>5</sup> This will decrease the total number and quality of altruistic surrogates available and may alter the attitude of altruistic/unpaid surrogates towards the arrangement.<sup>7</sup>

#### *Coercion*

Coercion of surrogates is often subtle and is concerned with the vulnerability of the women agreeing to become surrogates.<sup>6</sup>

#### *Exploitation*

Coercion of surrogates is related to their exploitation. The poor social and financial situation of surrogates often influences their decision to undertake surrogacy.<sup>8</sup>

#### *Undue inducement*

The incentive of financial gain may overrule the autonomy of the surrogates. Advertisements of surrogacy services amplify this.

### *Justified paternalism*

Ethicists and other thinkers desire to protect surrogates from making a wrong decision. They believe, in such cases, consent is invalid because it is uninformed.<sup>9</sup>

### *Unfair distribution*

With the increasing cost of surrogacy, the opportunity to avail this option becomes concentrated with the rich people.

### *Multiple order births*

Several embryos are usually placed during embryo transplantation to ensure that at least one of these survive and get implanted to avoid the high cost and poor feasibility of repeated procedures. However, this results in a risk of multiple births, which has a far-reaching social and financial impact on intended parents and the children born.<sup>10</sup>

### *Sex selection*

In societies with a religious and cultural preference for males over females, the other ethical problem of preferential selection of male embryos for implantation may arise. Surrogacy can be abused particularly in countries like India, where strict regulations exist against prenatal sex determination in the natural reproduction method.

### *Eugenics*

The discovery of CRISPR and CAS and reports from China regarding efforts to create “tailor-made” babies raise ethical questions regarding morality, discrimination, the dangers of “playing god” and the impact it might have on society in the long run.<sup>11,12</sup>

### *Parenthood and legitimacy*

Surrogacy deals with the relationship between legal and genetic parenthood. In gestational surrogacy, there is no genetic link between the surrogate and the child, and so, in these cases determining parenthood is not difficult. However, in cases where the surrogate is also the genetic parent, this becomes tricky.

Emotional bonding of the surrogate to her genetically related child might result in her ultimate refusal to relinquish them to the intended parents, resulting in ethically complicated litigations.<sup>2</sup>

There might also be questions regarding the legitimacy of a child born out of artificial insemination and his legal rights to inheritance and financial support. In such cases, consent of the husband regarding artificial insemination and surrogacy plays a prime role.<sup>13</sup>

### *Consent*

Consent of all the parties involved in the surrogacy process is important. Consent of both the intended parents is essential for the issues of parenthood, child welfare and custody to avoid future implications of adultery and use of gametes post-mortem, especially when artificial insemination is involved. Informed consent of the surrogate in a language understandable to her is essential to avoid any instances of coercion or exploitation. The consent of donors of gametes involved in IVF is also equally important to avoid future parenthood issues.<sup>2,14</sup>

### *Other problems*

Some other ethical problems associated with surrogacy are: administrability of surrogacy clinics, including maintenance of records and stored embryos and their associated rights; ensuring the welfare of and the rights of the child born out of surrogacy; the effects of bearing another person's child may have on the personal life of the surrogate and her partner; and the separation of children containing the same genetic material, i.e. arising out of the gametes of the same donor.

### *Legal problems*

Article 21 of the Indian constitution granting 'right to life' has conflicting interests in surrogacy.<sup>14</sup> Ensuring the right to reproduction for all - to provide dignified life is a constant concern. The right to privacy of one person versus the right to consent of another is an area of special delicate interest. The rights of intended parents, surrogates and the child born must all be protected and ensured.

Determining the validity of surrogacy contracts and enforcement thereof is critical. The purview of the right to practice any trade or profession, the legality of commercial surrogacy, and surrogates' rights are other problems.

Uniform compliance amongst the internal laws of the surrogate's country, the laws of the country of the intended parents, international law and human rights is imperative. It is specifically crucial in cases involving single parents, homosexual parents and parents with disabilities.

### *Social problems*

Problems related to societal acceptance of parenthood of homosexual couples and single, particularly unmarried individuals, involvement of a third member in the marital bond and the immorality of bearing a child that is not one's own are major social issues.

Religion plays a vital role in the societal acceptance of surrogacy. However, as most religions base their views on traditional surrogacy, this creates mental and societal tension for the people wanting to avail themselves of these services.

The increasing cost of ART, even in the presence of viable and less costly alternatives for parenthood and the quest for a child of "their own" is another source of societal tension.

### *Medical problems*

#### *Surrogate*

Repeated pregnancies in already poor and possibly malnourished women acting as commercial surrogates constitute a significant health problem. Anemia, miscarriage, postpartum hemorrhage, cardiac problems, eclampsia, preeclampsia, urinary tract infections, stress incontinence, gestational diabetes and long-term injuries to reproductive organs due to repeated childbearing are problems associated with pregnancy. In surrogacy where multiple births are common, there is a higher risk for these medical problems. The emotional trauma of having to give up the child may also affect their mental health.<sup>1</sup>

#### *Child*

The risk of acquiring genetic defects due to improper storage of gametes, gametes from older women and donors with unknown family history is present. Being unaware of their origins might impact them emotionally.

#### *Lack of family history*

Due to the anonymity of donors of gametes, the complete family history of diseases and predispositions may be unknown and can significantly impact early diagnosis of certain conditions with genetic predispositions such as breast cancers.

### *Legal perspective on ethics and legality of surrogacy in India*

Factors like skilled labor, specialized medical facilities, low cost of healthcare, and rampant poverty resulting in greater availability of willing surrogates have contributed to making India a preferred choice for surrogacy for couples worldwide. The initial absence of regulations on commercial and cross-border surrogacy coupled with the permissive and non-enforceable quality of the regulations imposed later has also helped its growth in India.<sup>15-17</sup>

The argument that article 21 of the Indian Constitution covers the right to procreate and the judicial backing provided to "reproductive rights" has questioned these rights' ethical and moral boundaries.

Several cases surrounding surrogacy has forced the legal system to ponder upon questions of the right to dignity, right to privacy, right to procreate, mental health, economic exploitation, informed consent, the enforceability of surrogacy contracts, the need for counselling of both intended parents and surrogates, transfer of parental rights and protecting the interests of the child.<sup>18</sup>

## **Regulations governing surrogacy**

### *ICMR guidelines*

Though not legally binding, the ICMR Guidelines provide an important framework for interpreting the provisions of other related laws. They detail the physical and technical requirements of ART clinics, the screening of people requiring ART, the possible complications of ART, the selection criteria to be adopted, format of consent forms to be used, the code of practice to be followed, the legal and ethical considerations to be made and the rights and duties of the three parties of a surrogacy contract. It states that in the presence of consent of both the intended parents within a wedlock, a child born out of surrogacy is considered legitimate. Gamete donors, however, will have no rights or duties to the child and their anonymity is to be protected.<sup>19</sup>

### *Indian contract Act, 1872*

As per the Indian contract act, 1872 a contract is an agreement enforceable by law. It must be mutually accepted by competent parties providing consent freely, have a lawful consideration, and must not be void in the eyes of the law. Consent must not have been obtained by coercion, undue influence, fraud or misrepresentation. In surrogacy, the surrogate agrees to carry a child to term and relinquish them to the genetic parents. This agreement is frequently in the form a legal contract.<sup>20</sup>

### *Surrogacy (regulation) bill, 2019*

The bill, which the Lok Sabha has passed, prohibits commercial surrogacy in all intent, form and purposes. No person, organization, surrogacy clinic, or medical provider (including laboratories, clinical establishment) should undertake, provide, promote, avail or advertise commercial surrogacy and its related components, procedures or services. Any person or couple who initiates commercial surrogacy or surrogacy procedure for commercial purpose shall be imprisoned for up to five years with a fine of INR 5,00,000 (five lakhs Indian rupees) for the first offense. A subsequent offence will be punished with ten years of imprisonment and a fine of INR 10,00,000 (ten lakhs Indian rupees).

The bill aims to regulate surrogacy centers by requiring their registration, allowing employment of only qualified professionals and preventing the promotion of its services, leading to undue inducement of women to become surrogates or regarding availability of such surrogates. It prohibits these clinics from causing abortion during the surrogacy period without the surrogate's written consent, from performing sex-selection or storing embryos or gametes for surrogacy. Surrogacy centers must maintain records for at least 25 years.

The intended couple must be Indian and should have been legally married for at least 5 years. They must have a certificate of infertility of either or both members from the

appropriate authority specified, an existing preauthorization by the magistrate (first class) regarding the parentage and custody of the child to be born out of surrogacy and should provide insurance coverage for the surrogate for 16 months. They must not have any surviving (adopted or biological) child. They are prohibited from abandoning the child born out of surrogacy either within or outside India for any reason (such as genetic defects, medical conditions, and the child's sex). The child born out of surrogacy, deemed as biological child, will be entitled to all the privileges and legal rights which are bestowed on a natural child.

A surrogate must have been married ever in her life, must be between 25 and 35 years of age, must be a close relative of the intending couple, i.e. a genetic relative, and must have a medical and psychological fitness certificate to undergo surrogacy. A woman can act as a surrogate only once in her lifetime and shall not provide her gametes for surrogacy. She must have provided valid written informed consent. The number of oocytes/embryos to be implanted will also be regulated.

National and state surrogacy boards must be instituted to review and advise on policy matters, implement the act, lay down codes of conduct and set minimum standards to be met by surrogacy centers. Central and state governments must also institute an "appropriate authority" for regulation of registration of surrogacy clinics, taking legal action against those in contravention of the act and granting certificates to intending couple and surrogates.<sup>21</sup>

### **How can law help?**

Law has a substantial role in addressing both legal and ethical dilemmas.<sup>1</sup>

Introduction of a mixed market with the government as the sole provider of these services (selling and buying), controlling price through price ceilings and price floors could deal with the ethical dilemmas of corruption, coercion, unfair distribution, undue inducement, exploitation, and even eugenics. Use of a system that mandates preauthorization of the surrogacy arrangement would also address the concerns of coercion and exploitation. This preauthorization would involve judicial clearance, complete evaluation of the suitability of intended parents, the medical and psychological status, and ensuring adequate legal and mental counseling for both parties.

Prohibition of monetary compensation and instead using a needs-based compensation may help reduce the industrial image of commercial surrogacy, address the problem of undue inducement and crowding out. Prohibition of advertisement also addresses undue inducement. Prohibiting enforcement of contracts and conducting quality checks of surrogacy centers may address the concerns of "justified paternalism".

Limiting access to donor information may also diminish the eugenic potential of surrogacy.<sup>6</sup>

### **Implications of the latest legal developments on surrogacy in India**

The Bill under consideration by the Indian parliament has completely removed the issues of inter-country citizenship, travel and adoption of children born out of surrogacy. This, in turn, has reduced the risk of exploitation of poor surrogates by wealthy foreigners. Further, with the prohibition of commercial surrogacy, regulation of centers providing surrogacy services and judicial preauthorization of all surrogacy arrangements, the problems of coercion, undue inducement, unfair distribution, eugenics, exploitation and crowding out have been addressed.

There is still an absence of sufficient legal and psychological counsel to the surrogate to protect her rights and rule out a possibility of coercion or abuse at the hands of her close relatives for surrogacy.

It is indeed tempting to think that banning commercial surrogacy might solve all the problems associated with surrogacy. However, similar to abortion where the desire to not have a child leads to desperate women seeking out unsafe and illegal measures, the desire for procreation and a child of “one’s own” might lead to rise of a black market in surrogacy.

The requirement of an infertility certificate and marriage affects the chances of single, widowed, divorced and homosexual couples from having children of “their own”. With decriminalization of homosexuality in several countries, including India, this problem may persist.

Further, the ease of availability of these services in nearby countries such as Cambodia might lead to the rise of issues of legality and legitimacy of cross-border surrogacy. This may also favor “the reproduction of rich people while depriving or outlawing the mother-work of others”.<sup>7</sup> Additionally, once the child is born and if laws are applied to such cases, the legal and ethical problem of “non-identity” and precedence may be encountered.<sup>6</sup>

The loss of an earning opportunity for many poor women might also push them towards illegal and criminal practices unless sufficient measures are taken to provide support and rehabilitation.

The fears of black marketing, baby-selling and exploitation of poor women (who might be unaware of the illegality of this arrangement and hence, easy to exploit due to the lack of regulations on under-the-table contracts) remained unaddressed.

### **CONCLUSION**

Over the past few decades, reproduction has undergone major changes and surrogacy has been one of its most

controversial aspects. By introducing the Bill, India appears to be taking a step in the right direction. However, it also completely prohibits commercial and international surrogacy which even though address legal problems arising out of them, leads to complete erasure of an economic prospect especially for poor women and marginalized communities discriminated against in their own country. Hence, India still has a long way to go to balance the ethical, legal, scientific and social aspects of surrogacy.

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