



# The Price Of Parenthood: Ethical And Legal Dilemmas In Surrogacy

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## ABSTRACT

Surrogacy represents a complex intersection of law, ethics, and human desire. As advancements in assisted reproductive technologies (ART) expand the possibilities of family creation, the practice of surrogacy continues to provoke profound questions about autonomy, consent, commodification, and trans-national justice.

This paper explores the evolving legal landscapes and ethical controversies surrounding surrogacy, drawing on comparative perspectives from jurisdictions such as the United States, United Kingdom, India, and Ukraine. It examines the tension between commercial and altruistic models, the role of consent and economically asymmetrical arrangements, and the implications of cross-border surrogacy on citizenship, parentage, and regulation. Emphasising the need for coherent and rights based legal framework.

The paper argues that ethical surrogacy must prioritise the dignity and agency of all parties involved - specially the surrogate and the child -while recognising the legitimacy of diverse family building aspirations.

This paper delves into the various ethical and legal challenges surrounding surrogacy, with a focus on international and domestic perspective. It examines regulation of surrogacy, the ethical concerns it raises, the legal rights of all the parties involved, and the complexities in managing cross-border arrangements. Additionally, the research delves into the issue of exploitation, the commodification of reproduction and the need for international legal consistency that regulate surrogacy procedures.

This paper has tried to examine surrogacy through a dual lens: a mechanism for reproductive empowerment and as a practice vulnerable to exploitation. It interrogates the normative framework that governments across different legal systems, evaluate the ethical implications of divergent regulatory models and considers the rights and interest of all stakeholders, including the surrogate intended parents and children.

Thus, this paper seeks to illuminate the necessity for legal harmonisation and ethical clarity in the governance of surrogacy, specially in an era, defined by globalisation and technological advancements.

The research ultimately advocates for internationally harmonised legal standards, grounded in reproductive justice, human rights, and informed consent. The study concludes with recommendations for reform in both ethical and legal frameworks that will make it safe and secure for the parties involved.

**Key Words:** ‘Surrogacy’, ‘Legal’, ‘Ethical’, ‘Cross-Border’, ‘Altruistic’, ‘Surrogate’,

## **INTRODUCTION**

Surrogacy, the arrangement wherein a woman agrees to carry and deliver a child for another individual or couple, has emerged as both a vital solution to infertility and deeply contested bio-ethical and legal frontier. Once considered a fringe phenomenon, surrogacy is now increasingly mainstream, driven by the growing accessibility of assisted reproductive technologies (ART), evolving family structures, and the global proliferation of fertility markets.

While it offers a lifeline to individuals and couples were unable to gestate a child, it simultaneously raises critical questions about bodily autonomy, the commercialisation of reproduction, gender, inequality, and the legal recognition of parentage.

The global landscape of surrogacy is notably fragmented. Some jurisdictions embrace it as a legitimate reproductive option, while others restrict it or prohibit it entirely. This legal pluralism- coupled with uneven access, enforcement challenges, and significant ethical concerns-creates a landscape rife with ambiguity and inconsistency.

Cross-border surrogacy, in particular, has exacerbated these complexities, often resulting in legal battles over citizenship, custody, and contractual validity. This practice has raised numerous ethical and legal concerns due to its complex nature, which involves several parties with wearing interests, including the intended parents, the surrogate, mother, and the child.

Ethical issues surrounding surrogacy include the potential exploitation of women, particularly in lower income countries, as well as the commodification of reproduction. While the legal challenges are related to parental rights of intended parents, legal status of surrogate mother and international legal inconsistencies, specially in cross-border surrogacy arrangements.

## Overview of Surrogacy Practices:

Surrogacy can be divided into two primary types:

- Traditional surrogacy; and
- Gestational surrogacy;

In traditional surrogacy, the surrogate mother uses her own eggs, making her both the genetic and the gestational mother; whereas in gestational surrogacy, the surrogate mother carries an embryo created using the eggs and sperm of the intended parents or donors, with no genetic link to the child.

Each type presents unique, ethical and legal concerns, with gestational surrogacy often considered the less controversial of the two, although both have significant legal ramifications.<sup>1</sup>

### ETHICAL ISSUES IN SURROGACY

Surrogacy has been at the forefront of ethical debates in reproductive technologies, due to the complex, interplay of personal autonomy, economic disparities, and questions about the commodification of human life. This part of the paper explores key ethical issues focusing on exploitation, commodification, informed consent, and the rights of the child.

#### **1. Exploitation and Coercion:**

The concern that surrogacy arrangements may exploit vulnerable women is one of the most significant ethical criticisms of this practice. Particularly in commercial surrogacy, critiques argue that the surrogate's autonomy can be undermined by financial need, leading her to enter into contracts without fully appreciating the physical and emotional consequences.<sup>2</sup> This coercion is especially pronounced in cross-border surrogacy, where women from economically disadvantaged countries are recruited to serve foreign clients, often under conditions that lack robust legal and medical protection.

For example, in India before its 2021 legislation that banned commercial surrogacy, there was a booming industry developed in cities where impoverished women were offered hundreds of thousands of rupees or dollars to bear children for foreign clients. While such compensation might have helped in lifting them out of poverty temporarily, many surrogates reported they felt being coerced, with limited agency during pregnancy and little to no say during medical decisions.<sup>3</sup>

Thus, there are two sets of critiques, where one argues that such arrangements have created a global 'reproductive under class', that uses the bodies of poor women to serve the reproductive needs of

<sup>1</sup> Eric Blythe, 2017: 'Children's welfare, Surrogacy and Social work'

<sup>2</sup> Mary Warnock, 1985: 'A question of Life' 'the Warnock Report on Human Fertilisation and Embryology'

<sup>3</sup> Pande Amrita, 2010: commercial surrogacy in India: manufacturing a perfect mother-worker

wealthier individuals.<sup>4</sup> And another set argues that if commercial surrogacy is banned on the grounds of potential exploitation, then it can be paternalistic, saying that women should have the right to choose to be surrogates and to benefit financially if they wish so provided that the arrangements between the surrogate mother and the intended parents are consensual and informed.<sup>5</sup>

## 2. Commodification of Reproduction:

Another major ethical issue is the commodification of the female body and the process of childbirth. Critics of commercial surrogacy argue that it reduces both the surrogate and the child to commodities in a transactional relationship.

In 1990, philosopher Elizabeth Anderson was of the opinion that if children are treated as objects that can be bought and sold, then such transaction undermines the intrinsic moral value of parenthood and human relationships. Surrogacy, particularly when conducted on commercial scale, risks creating a “market baby scenario” where children’s worth directly depends upon their cost.

Furthermore, the commodification critique extends up to the surrogate’s womb. It says that when a woman’s reproductive capacity is rented, her body in a sense is segmented and instrumentalized leading to objectification where her role is defined solely by her biological utility and not as a full moral agent.<sup>6</sup>

In response to such critiques, the supporters of surrogacy have argued that modification is not inherently unethical if it respects the dignity and autonomy of the surrogate, they argue that like in any other labour sector, reproductive labour can be performed ethically when fair compensation, informed consent and health precautions are put strictly in place.

## 3. Informed Consent and Autonomy:

Getting informed consent is central to ethical surrogacy arrangements. It requires that the surrogate understands the medical risks, emotional implications, and legal consequences of the agreement that she enters into. However, it is highly challenging to ensure whether the consent was taken after truly informing surrogate of the risks involved, particularly in context where educational, linguistic or cultural barriers exist.

Critiques are of the opinion that a surrogate may not always be made aware of all the potential complications like risk of multiple births, postpartum depression, or the possibility of relinquishing the child they become attached. Which in some cases is done by intermediaries or clinics in the form of coercive tactics to maintain control over the process of surrogacy and maximise their own profit.<sup>7</sup>

The surrogate's ability to make decisions during the pregnancy, particularly in commercial surrogacy is what amounts to ‘autonomy’. This freedom of autonomy is undermined, particularly

<sup>4</sup> Anderson, 1990: is woman’s labour a commodity?

<sup>5</sup> Shalev, 2014: rights-based approaches to surrogacy.

<sup>6</sup> Radon, 1996

<sup>7</sup> Pande, Amrita 2010

in commercial arrangements where the surrogate is required to follow history guidelines regarding diet, behaviour, and even medical decisions like cesarean delivery or abortion, thus, reflecting a contractual imbalance of power.<sup>8</sup>

Such issues highlight a need for robust ethical framework that will ensure that surrogates have access to independent legal counsel, psychological support, and the freedom to make informed choices about their own body throughout the pregnancy.

#### 4. Rights and Welfare of the Child:

An often-underrepresented voice in the surrogacy debate is that of the child born Via this process. Ethically, any reproductive arrangement is supposed to consider the long-term welfare of the child, but the lack of which often leads to the critiques questioning the psychological implications of being born as a result of a contractual agreement, specially when surrogacy involves donor gametes or multiple parents.<sup>9</sup>

Legal parenthood in surrogacy can be complicated, especially interdiction without care laws. Thus, in most cases where the parentage of the intended parents is disputed or there are international legal conflicts, the child is left in the black hole of a statelessness, parent-less, with no access to any citizenship rights i.e the child born out of surrogacy does not have citizenship of the country where she/he was born and neither of the country whether the intended parents are from.

Such situations raise ethical issues like the violation of the child's right to a stable legal identity and a secure family structure. Moreover, there is new debate in the field, that questions, whether the child born should have a right to know the identity of his/her surrogate mother and genetic parents or not.

These ethical issues are only a few out of a vast range that haunt surrogacy, although these have been and are being discussed, but clear outcome or resolution is yet to be found.

### **LEGAL FRAMEWORKS AND REGULATIONS ON SURROGACY**

Surrogacy presents substantial legal complexities due to its multifaceted nature. Unlike traditional parenting arrangements, surrogacy involves contractual relationships, creation of parental rights and often cross-border agreements. The vast global inconsistencies in the legal treatment of surrogacy reflect different cultural, moral, and political perspective that make regulation of this type of ART a significant challenge.

This part of the paper, outlines how surrogacy is regulated across different jurisdictions and examines their implications.

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<sup>8</sup> Murray, 2007

<sup>9</sup> Stanley, 2001

## 1. A comparative perspective of domestic laws of various nations:

### a. United States:

in the United States, there is no federal surrogacy law; thus, regulations are handled at the state level, resulting in a medley of laws where surrogacy may be fully legal and enforceable in some states, while being restricted in others and being completely prohibited or criminalised in the remaining.

Often viewed as a surrogacy friendly jurisdiction, California has a legal system that upholds surrogacy contracts, granting pre-birth parentage rights to the intended parents through court orders.<sup>10</sup> These court orders work as legal precedents offering security and clarity for all parties involved, making California, a hub for both domestic and international intended parents to opt for surrogacy in the United States of America.

Unlike California, Michigan has criminalised commercial surrogacy under the Michigan Surrogate Parenting Act 1988, declaring surrogacy contracts, void and unenforceable. The state of Michigan, USA does not stop at that, but also penalises the parties involved in surrogacy with fines or imprisonment.

This stark contrast in the U.S. legal system regarding surrogacy highlights the challenges for intended parents.

### b. United Kingdom:

United Kingdom permits only altruistic surrogacy under the “*Human Fertilisation and Embryology Act, 2008 (amended)*”, compensation that is limited only to reasonable expenses. With surrogacy agreements not being legally enforceable, gives the surrogate a chance to choose to keep the baby with her after birth, regardless of what was stated in the terms of agreement, which becomes a huge problem for intended parents as they have to fight a legal battle to get their own child.<sup>11</sup>

The laws enforced in USA regarding surrogacy prioritise the autonomy of a surrogate mother attempting to reduce commercialisation, but critiques argue that due to the lack of complex legal process and enforceability of contracts, after birth process creates uncertainty and psychological stress for intended parents.

### c. India:

There was a time when India was a global surrogacy destination due to its low cost and relatively relaxed regulations, however, a surge in reports of exploitation, abandonment of children and legal disputes urged reforms in the field of surrogacy laws. As a result, India passed the “*Surrogacy (Regulation) Act, 2021*”, that prohibited commercial surrogacy while permitting only altruistic surrogacy for Indian citizens. According to this act, a surrogate

<sup>10</sup> Holliday, C. 2018: surrogacy in the United States

<sup>11</sup> Horsey, K. 2016: surrogacy Laura form in the UK: from altruism to autonomy?

has to be a close relative of the intended parents, and that she must be married and have at least one biological child of her own.

Although, this legislation's main aim is to protect vulnerable women along with upholding ethical standards, it has been argued by critiques that this act severely restricts reproductive autonomy of a surrogate and the access to surrogacy for many Indians, particularly single individuals, people of the LGBTQ+ community and foreigners.<sup>12</sup>

**d. Ukraine:**

Ukraine has become a popular international surrogacy destination due to its 'permissive commercial surrogacy laws', especially for heterosexual foreign couples. Ukrainian law allows for legally binding surrogacy contracts and recognises intended parents as the legal parents at birth, given that at least one of them is genetically related to the child being born. Such an advance and inclusive law of Ukraine has also faced significant backlash and ethical scrutiny, particularly during the COVID-19 pandemic. When more than hundred babies born out of surrogacy were left stranded in Ukrainian clinics because of the border closures, raising concerns and rightful questions about the commodification of children and lack of stringent legal recourse in event of emergencies, such as this one.<sup>13</sup>

**e. Australia:**

Much like the USA, surrogacy in Australia is also regulated at the state and territory level. And just like India, only altruistic surrogacy is legal in most part of the nation while commercial surrogacy is completely banned and prohibited nationwide. The intended parents have to apply for parentage rights after the birth of the child.

Australian law on surrogacy, does not just stop with that, in some jurisdictions such as Queensland and New South Wales, it has been made illegal for residents to even engage in commercial surrogacy abroad placing extra-territorial penalties on those who are found guilty of violating this law.

To say that this step by Australian government is harsh, will not be a stretch. Although put in place with the aim to uphold ethical standards and avoid exploitation, it limits options for individual, so cannot find a willing altruistic surrogate locally in their own nation.

<sup>12</sup> Sama Resource Group, 2021

<sup>13</sup> Trimmings and Beaumont, 2021: surrogacy, human rights, and the hag conference.

## CHALLENGES IN REGULATING SURROGACY

While surrogacy offers a pathway, parenthood for many who are otherwise, unable to conceive, regulating it presents a host of practice and philosopher challenges of its own. Legal framework often lack behind technological and social developments, and even where laws exist enforcement may be inconsistent or even ineffective.

This part of the paper explores the difficulties in designing and enforcing surrogacy laws, the influence of cultural and religious values on such laws and regulations, and the need of the hour for a dynamic legal reform that reflects the evolving social realities of the present time and might even be relevant in the upcoming times.

### **1. Inconsistent Enforcement and Legal Ambiguities:**

One of the most significant challenges in regulating surrogacy, lies with the inconsistent application and enforcement of the laws that are made. Even in jurisdictions that have clear legal framework enforcement is one of the most problematic parts due to the vague statutes, lack of judicial precedents or bureaucratic in-efficiency.

In South East Asian countries like India and Thailand surrogacy is initially unregulated. It was a reaction approach to legislation, that emerged often in response to international agendas or pressure from advocacy groups, resulting in rapid and unregulated introduction of restrictive laws that may not reflect the nuanced realities of reproductive healthcare.

For example, the ban placed on commercial surrogacy by India's '*Surrogacy (Regulation) Act, 2021*', while only allowing altruistic arrangement, that only lets you engage a close relative as a surrogate, has become a great source of confusion among professionals (*medical legal alike*) as well as surrogates and intended parents driving surrogacy services to become a sought-after commodity in the black market or the underground market.<sup>14</sup>

The gaps and inconsistency in laws and the current need of make it difficult to protect the rights of surrogates and children. All the while undermining public trust in the law-making process.

### **2. Cultural, Religious and Moral Dissonance:**

Another grave challenge to surrogacy regulations, stems from cultural and religious perspectives, shaping public opinion and legislative agendas. In numerous societies, surrogacy is seen as a destruction of traditional family norms or even as morally unacceptable, particularly such countries that are predominantly Catholic where surrogacy is considered contrary to religious doctrine and therefore has been banned.

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<sup>14</sup> Sama Resource Group for Women and Health, 2021: analysis of the surrogacy (regulation) act 2021

Surrogacy has been opposed by the Catholic Church, mainly on the ground that it separates procreation from marital act, thus, treating children as objects of desire rather than gifts of marriage.<sup>15</sup>

Surrogacy is generally prohibited in Islamic nations under the Islamic law that is the sharia law as it regards, lineage and inheritance rights as '*sacrosanct*', treating a child born through surrogacy as illegitimate, especially if donor are involved. But this cannot be said to be the only interpretation, Muslim religious texts have been interpreted differently.

For example, under the Shia jurisprudence, Iran has permitted certain forms of surrogacy, allowing for regulated domestic surrogacy industry.<sup>16</sup>

Surrogacy is such a sensitive topic that even within some secular societies, ethical oppositions persist, making global consensus difficult and complicating efforts put in, to properly regulate surrogacy in multicultural societies.

### 3. Regulating Intermediaries and Medical Institutions:

Often overlooked but critical aspect of surrogacy regulation is the role of intermediaries, clinics, and the agencies facilitating surrogacy arrangements. These entities operate with minimal to negligent oversight, increasing the risk of abuse, fraud and unethical practices in many countries.

The surrogacy facilitating agencies charge exorbitant fees, they misinform surrogates, and the intended parents about the medical risks involved and the legal complications that might occur in the entire process. All the while failing to provide post birth care and support.

Thus, when strict laws and legislations are absent, such organisations profit at the expense of vulnerable parties. Several such instances have been reported from India and Ukraine where the surrogate mothers were kept under constant surveillance, limiting their autonomy and coercing them into medical procedures without even taking their consent.<sup>17</sup>

Such instances raise the need of effective regulation to include proper licensing requirements that will help in monitoring the mechanisms, ethical standards of advertising, and in delivering strict penalties for their violations. If such measures are not taken, then the surrogacy industry will be at a risk of becoming more exploitative and profit driven all the while ignoring needs of the patient and the child.

### 4. Technological Advances and Legal Lag:

With ever growing technological advancements, ART has also developed, faster than the legal systems can respond. The new scientific advancements like, '*mitochondrial, replacement therapy, embryo gene editing, and embryo cryo-preservation*', have resulted in the addition of complex layers to surrogacy arrangements that need to be understood while making the regulations and rules that govern these procedures.

<sup>15</sup> Catechism of the Catholic Church, (1994), part three: life in Christ-section 2: the 10 commandments, article 6

<sup>16</sup> Inhorn, M.C. 2012: 'the new Arab man'

<sup>17</sup> Pande Amrita, 2010: commercial surrogacy in India: manufacturing a perfect mother-worker.

Thus, it is highly important that when technology pushes boundaries, it is the duty of law to clarify issues such as:

- Who has the right to use the embryo or destroy the interview?
- What happens in case the intended parents die or divorce, even before the birth of the child through surrogacy?
- Is it possible that a child born through surrogacy can inherit from both parents i.e biological as well as intended?
- Etc;

Without clear legislations, such questions often result in lengthy and emotionally taxing legal battles.

### **PROPOSED LEGAL REFORMS AND RECOMMENDATIONS**

There have been many scholars, human rights activists, and legal practitioners who have argued that current surrogacy laws are either too restrictive or too lenient never being able to achieve a balance. As a result, they support the demand for regulated, rights-based approach that protects all the parties involved, while allowing for ethical surrogacy practises.

This part of the paper gives some recommendations that can be included to reform the legislation as per requirement of current times.

#### **1. Recommend Legal Reforms Include:**

- a. To create surrogacy contracts that are legally binding and contain enforceable parental rights and medical guidelines.
- b. To ensure that surrogates have access to independent legal, physiological and psychological counselling, so that they can be well informed before giving their consent, maintaining freedom of autonomy.
- c. To implement licensing and oversight of surrogacy agencies, clinics and intermediaries to prevent exploitation.
- d. To protect rights of the children, allowing them to know their origins and obtain citizenship and legal parentage without delay.
- e. To get international coordination, preferably through a '*Hague*' convention that will help in resolving cross-border disputes and ensure mutual recognition of parentage and contracts.

Such reforms must be introduced based on by empirical data, ethical principles, and adaptability to local cultural contexts.

## CONCLUSION

Surrogacy represents both a medical advancement and deeply contested, ethical and legal frontier. This form of ART holds a profound significance for individuals and couples struggling with infertility, same sex partners, and those with medical conditions that preclude pregnancy. although a boon, this practice raises some fundamental concerns about human dignity, exploitation, and the commodification of reproduction.

This paper has examined the ethical dimensions of surrogacy, including the potential for it, becoming a tool for exploitation, commodification of women's bodies and children, misinformed or coerced consent. It also explored the comparative legal landscape, highlighting variations between permissive and restrictive models of regulations.

The lack of global consensus and cohesive national regulations continue to result in inconsistent protections and legal uncertainties. Some countries like California in the USA and Ukraine offer a permissive environment with clear contractual enforcement, while other countries like India and the UK impose stringent restrictions that prioritises ethics over access. Ethical and legal issues coupled with cultural and religious values, further complicate the legal environment making international coordination, a dream of the horizon.

Moving forward, the need for a balanced, rights-based approach to surrogacy is highly evident. Legal systems must develop comprehensive and enforceable frameworks that uphold the autonomy of all parties, ensures protection against exploitation and safeguards the well-being of children. Such a system does not only include robust national laws, but also international cooperation to address the growing challenges of transnational surrogacy.

Finally, ethical surrogacy is not about choosing between prohibition and deregulation, rather, it is about designing an inclusive legal model that respects human dignity, promotes reproductive justice, and adapts to the realities of a globalised world.

## REFERENCES

- 1) . [Anderson, E. \(1990\). is woman's labour a commodity?](#)
- 2) [Catechism of the Catholic Church. \(1994\). Part III: life in Christ-Section 2: The 10 commandments, Article 6.](#)
- 3) [Horse, K. \(2016\). surrogacy in the UK: myth busting and reform.](#)