

## THE COMMERCIALIZATION OF SURROGACY IN INDIA: A LEGAL AND ETHICAL CRITIQUE

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### I. Introduction

Surrogacy, a method of assisted reproduction, has evolved into a contentious socio-legal issue in India. Initially practiced informally, India emerged as a global hub for commercial surrogacy, attracting commissioning parents from across the world. This proliferation raised significant concerns about the ethical and legal implications of treating reproduction as a market commodity. With India’s lack of regulation, surrogate mothers were often poor women coerced into renting their wombs under exploitative conditions. The enactment of the Surrogacy (Regulation) Act, 2021, aims to curb such commercialization by promoting altruistic surrogacy. However, critiques persist regarding its implementation, oversight, and ethical consistency.

#### Hypothesis:

Despite regulatory measures, surrogacy in India perpetuates commercialization and commodification of women’s reproductive abilities, leading to ethical and legal violations.

### II. Legal Framework: The Surrogacy (Regulation) Act, 2021

The Surrogacy (Regulation) Act, 2021, was enacted to prohibit commercial surrogacy while permitting altruistic surrogacy under strict conditions. Altruistic surrogacy is defined in Section 2(b) as surrogacy without any monetary compensation to the surrogate mother other than medical expenses and insurance. Section 3 is about the regulation of surrogacy clinics, while Section 4 provides eligibility criteria for intending couples and surrogate mothers.

Section 4(iii)(a) mandates that intending couples must be Indian citizens, legally married for at least five years, and within the age range prescribed (23-50 years for women and 26-55

years for men). Section 4(iii)(b) needs the couple to be childless or have a child with a physical or mental disability. Section 38 criminalizes commercial surrogacy, prescribing imprisonment up to 10 years and fines up to Rs. 10 lakhs.

Despite the law’s apparent strictness, ground-level realities indicate persistent covert practices that commodify surrogate motherhood under the shadow of altruism.

### III. Whether Surrogacy is a Breach of the Marriage Contract

The Indian legal system does not codify marriage as a contract. Under the Hindu Marriage Act, 1955, marriage is a sacrament rather than a contractual obligation. However,

the expectation of procreation is inherent within marital life.

In *Baby Manji Yamada v. Union of India* (2008) 13 SCC 518, the Supreme Court dealt with the legal parentage of a surrogate child born amidst a divorce between Japanese commissioning parents. The Court allowed the child's custody to the grandmother but did not consider whether surrogacy breached the institution of marriage.

Analysis: Surrogacy may not constitute a legal breach of the marriage contract under Indian law. However, it disrupts the traditional expectation of marital unity in reproductive decision-making. The procedure can seriously strain marriages and violate moral standards if it is performed unilaterally or against the wishes of one spouse.

#### **IV. Whether Surrogacy is Beneficial or Leads to Commercialization**

Commercial surrogacy was rampant in India until the 2015 ICMR guidelines and subsequent judicial interventions called for regulation. Reports from clinics in Gujarat and Maharashtra revealed that women from marginalized communities were frequently recruited as surrogates under unequal and exploitative contracts.

In *Jan Balaz v. Anand Municipality* AIR 2009 Guj 21, the Gujarat High Court addressed the issue of granting citizenship to twin children born through commercial surrogacy to a German couple. The case revealed the underlying commercial nature of surrogacy and the state's inability to regulate transnational surrogacy agreements effectively.

The 2021 Act has tried to eliminate monetary incentives, but in practice, covert payments continue to be reported. Altruistic surrogacy becomes a secret way for commercial gain, where family members are pressured into becoming surrogates without informed consent or adequate support.

Analysis: The socio-economic disparity between intending parents and surrogates maintaining a

system where the woman's body becomes a site of exploitation. The absence of a transparent and enforceable mechanism to track and regulate these surrogacies opens the door to black-market transactions and middlemen.

#### **V. Whether Surrogacy is Beneficial for Women's Health**

Surrogacy poses significant health risks for women, both physical and psychological. Medical procedures involve hormonal treatments, multiple embryo transfers, cesarean deliveries, and post-delivery complications. Psychological impacts include postpartum depression, emotional distress brought on by giving up the child and long-term health consequences.

Section 4(ii)(a) mandates a medical and psychological fitness certificate for surrogates. However, implementation remains inconsistent. Women often undergo procedures without understanding the risks involved.

A study published in the *Indian Journal of Medical Ethics* (2018) highlighted cases where surrogate mothers experienced severe postpartum complications and were denied postnatal care once the child was handed over. Many women reported feelings of abandonment and loss, with little to no counseling or follow-up care provided.

Analysis: While the Act prescribes safeguards, enforcement remains weak. Surrogacy in practice continues to endanger women's health, especially when financial incentives override ethical considerations.

#### **VI. Whether Surrogacy Affects the Right to Life (Article 21)**

Article 21 of the Constitution guarantees the right to life and personal liberty, encompassing reproductive autonomy, privacy, and dignity.

In *Suchita Srivastava v. Chandigarh Administration* (2009) 9 SCC 1, the Supreme Court recognized a woman's right to make

reproductive choices as a component of personal liberty.

However, surrogate mothers often lack autonomy in making informed decisions. Contracts, if any, are skewed in favor of commissioning parents, and surrogates, especially those from underprivileged backgrounds, are often misinformed or coerced.

Moreover, the child born through surrogacy also faces legal ambiguities, particularly in citizenship and parentage, thereby impacting their right to identity and dignity.

**Analysis:** When surrogacy agreements compromise physical integrity and consent, they constitute a violation of Article 21. The dignity of surrogate mothers is compromised, and the child's fundamental rights are jeopardized in the absence of clear legal recognition.

## VII. Conclusion and Suggestions

Surrogacy in India, is still fraught with commercialization and moral dilemmas even though it is regulated. The law attempts to protect the dignity of women by outlawing commercial surrogacy, but covert operations persist due to systemic weaknesses and socio-economic disparities. Surrogacy, as it stands today, endangers women's health, commodifies reproduction, and creates complex legal dilemmas.

### Suggestions:

1. **Independent Oversight:** Establish an autonomous Surrogacy Regulatory Authority with monitoring and enforcement powers.
2. **Informed Consent Mechanisms:** Ensure mandatory psychological counseling and a standardized informed consent process.
3. **Legal Aid and Representation:** Provide surrogate mothers with legal assistance to negotiate contracts.

4. **Postnatal Healthcare:** Guarantee post-delivery care, both medical and emotional, through government and private partnerships.

5. **Transparent Record-Keeping:** Maintain a national registry of surrogacy arrangements to trace illegal practices.

6. **Periodic Review:** Conduct impact assessments and public reporting of surrogacy practices to guide policy changes.

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