

Legality And Enforceability of Surrogacy Contracts: Challenges to Face

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Abstract

Surrogacy is a procedure in which intended parents enlist the assistance of a surrogate woman to conceive a child in exchange for the surrogate woman agreeing to carry the child to term, relinquish her parental rights to the child after birth, and pass the child over to the intended parents. A surrogacy agreement between an intended parent or parents and the surrogate mother requires both parties to be aware of their respective rights and responsibilities. The surrogacy contract typically outlines the rights and responsibilities of the surrogate mothers and intended parents, as well as clauses pertaining to the child's welfare, such as custody, parentage, and so on. The legitimacy and enforceability of such a surrogacy contract, however, is questionable because every surrogacy contract raises a number of legal and human rights issues, such as whether the contract is a form of prostitution, slavery, or commodification of motherhood. Commercial surrogacy is frequently criticised as a form of baby selling that promotes positive eugenics. Surrogacy contracts may raise questions about the appropriate remedies in the event of a breach. Different approaches to the validity and enforceability of surrogacy contracts have emerged as a result of this diversity. The authors discuss the legality of surrogacy contracts and how they can be enforced in accordance with Human Dignity.

Keywords: Surrogacy, Pregnancy, Surrogacy Contracts, Legality of Surrogacy Contracts.

Introduction

The Latin word "surrogatus" means "a substitute" or "someone designated to act in the place of another," and this is where the English word "surrogate" gets its meaning. The act of carrying and giving birth to a child on behalf of another is defined as "surrogacy" in Black's Law Dictionary. Simply put, a surrogate pregnancy is an IVF procedure in which a woman (the surrogate mother) carries a child for another couple in exchange for financial compensation and the promise that she will give legal custody of the child to the intended parents after birth. The gametes used to create the embryo may come from one or both of the intended parents, or from an anonymous donor. In addition to the

common definition, surrogacy has a number of legal definitions under domestic and international laws. For example, "surrogacy" is defined as "an arrangement in which a woman agrees to a pregnancy achieved through assisted reproductive technology, in which neither of the gametes belong to her or her husband, with the intention of carrying the child and handing it over to the person or persons for whom she is acting as a surrogate" unqualified. According to the Surrogacy (Regulations) Bill 2016, "surrogacy" is defined as "a procedure wherein one woman bears and gives birth to a child for an intending couple with the intention of giving over such child to the intending couple after the delivery."

Surrogacy is defined as "an agreement is a surrogacy arrangement if, were a woman to whom the arrangement pertains to carry a child in furtherance of it, she would be a surrogate mother" by international legislation such as the UK's Surrogacy Arrangements Act 1985. Surrogacy is defined as "surrogacy agreements providing for the implantation of fertilised ova for the purpose of conception by a surrogate mother in order to transfer the child that will be born to the designated parents" in Israel under the Embryo Carrying Agreement Act (Authorization Agreement and Status of the Newborn Child) Act of 1996. Following the key terms employed in these definitions, it can be deduced that the meaning of surrogacy differs significantly. Surrogacy as a "ART treatment" for infertility, or as a medical intervention facilitating the birth of a child with their genetic contribution, secondly, Surrogacy as a "social arrangement" involving the concerned couples, third parties in the capacity of gamete donors, surrogate mothers, fertility clinics, and doctors, and thirdly, Surrogacy as a "agreement" among the stakeholders on significant aspects of surrogacy as a medical proclivity, As a result, there is no standardised legal definition of surrogacy.

Background

Surrogacy involves a woman becoming pregnant and giving birth to a kid for a third party. Ten countries allow surrogacy, ten don't, and the remainder are uncontrolled. In recent decades, more people and couples who were unable to conceive have explored surrogacy to have biological children. Because governments don't differentiate

surrogate births from other births, worldwide surrogate birth statistics are unreliable. Reproductive medicine has made surrogacy possible in the past 50 years. In 1953, doctors achieved the first successful human pregnancy with frozen spermatozoa, enabling conventional surrogacy. Traditional surrogacy involves artificially inseminating a surrogate's egg with a parent's sperm. Traditional surrogacy offspring may or may not be genetically related to their intended parent(s), but they are always related to the surrogate. Two technological developments in the 1950s advanced surrogacy. In 1978, the first successful in vitro fertilisation (IVF) was recorded. First frozen egg pregnancy occurred in 1986. These two breakthroughs enabled gestational surrogacy. In gestational surrogacy, IVF fertilises a donor egg with an intended parent's sperm. A donor oocyte and sperm or the intended parent(s)' embryo is transferred to the surrogate's uterus to create a genetically unrelated foetus.

Depending on whether the intended third-party is

- (1) an individual or a couple, and
- (2) if a couple, if both sperm and egg were provided by the intended parent(s), a child born through surrogacy may have zero, fifty, or one hundred percent of the DNA of the intended parent(s). Traditional surrogacy is significantly less prevalent today than gestational surrogacy.

The Same Sex or Lesbian Gay Bisexual Transgender (LGBT) Surrogacy is commissioned by these stakeholders, notably Same Sex or Lesbian Gay, Bisexual, Transgender, as a first and last choice to have a child using their own genetic material. Considering the prohibition and then

decriminalisation of same sex relations surrogacy in India, Same Sex or Lesbian Gay Bisexual Transgender (LGBT) surrogacy is not currently legal. In India, social surrogacy is not used. Surrogacy by a single parent is not permitted in India for Indian citizens. The process of surrogacy is essentially a medicolegal process involving hormonal treatment, gamete donation, storage, preservation, and handling of gametes, in vitro fertilisation, embryo formulation in test tube, and implantation on gestational carrier or surrogate mother leading to the birth of a child through surrogacy. This process of surrogacy involves multiple stakeholders as the Intending or Commissioning couples, Surrogate mother, Gamete Donors as Egg donor, Sperm donor, and embryo. This surrogacy process is written down and recorded under an agreement to that effect signed by the primary and secondary stakeholders as a signing of agreement prior to the start of surrogacy among the intending couples, surrogate mothers, gamete donors, and doctors, leading to the birth of a child through surrogacy.

In light of this explanation of surrogacy, the most important component of surrogacy is that, unlike any other means of conception, it is the only way for an infertile couple or any couple suffering from reproductive health issues to have a child through either or both of their genetic material. This assures that a family's blood line and ancestral lineage remain the same, which is impossible to achieve by any other means of conception except natural conception. Surrogacy, on the other hand, is fraught with medical risks for both the surrogate mother and the gamete donor, as well as legal complications relating

to the agreement, terms and conditions, enforceability, binding of the agreement, and lack of societal acceptance due to a lack of knowledge about the scientific aspects of the procedure. Furthermore, the process of surrogacy by its very nature involves conflicts of rights and interests among stakeholders, such as reproductive rights and freedom, including the legal right to choose whether or not to terminate a pregnancy, which conflicts with the right to life, survival, and procreative autonomy of a couple to have multiple children, such as twins or triplets, which may not be consistent with the right to a safe and healthy pregnancy of the surrogate mother. The concerns surrounding surrogacy agreements, such as the contractual obligations imposed on surrogate mother couples and gamete donors, as well as the agreement's enforceability or binding effect, remain debatable, given the medical process of gestation, gamete donation, and childbirth. Surrogacy, by definition, includes third parties in the process of reproduction or procreation; gametes, gestation, and fertilisation may not be carried out by the concerned couple; instead, fertilisation takes place in a laboratory rather than inside the human body. Surrogacy pregnancy is thus, by definition, distinct from pregnancy in the natural course and the subsequent accomplishment of motherhood. As a result, there are disparities in the determination of motherhood and parentage that are incompatible with the Indian legal framework's current regulations on birth validity, motherhood, and parentage. This creates a tangle of unresolved legal issues, such as determining motherhood among competing women, such as the intending

mother who commissions surrogacy, the surrogate mother who carries the child, the gamete donor or egg donor, sperm donor in some cases, and their spouses, and, as a result, determining legal parenthood for the child born through surrogacy among these multiple stakeholders.

Surrogacy Contracts

The parties to a surrogacy agreement—the intended parent(s), or parents, and the surrogate mother—must each understand their respective roles and obligations. A deal of this sort might or might not be put in writing. When the terms of an agreement between parties are formalised in writing, a contract has been created. It is the purpose of every contract to ensure that the terms agreed upon by the parties to a transaction are carried out. Yet, whether or not a surrogacy arrangement's agreement between the parties constitutes a contract is a matter of debate. Thus, it is crucial to ascertain whether or not a surrogacy relationship is legitimate under the law. In this situation, knowing what a contract is and what it entails according to legal terminology in general and in India is crucial. A valid contract requires the free and informed consent of both parties and must be in writing. A contract is formed when an offer is made, accepted, and a valid (legal and valued) consideration is exchanged. "Every enforceable at law agreement and commitment constitutes a contract," according to Sir Frederick Pollock. A contract, according to Sir William Anson, is a "enforceable at law agreement established between two or more persons, by which one or more persons gain rights to acts or forbearances on the part of the other or

others." Each contracting party obtains rights and responsibilities that are proportional to the other parties' rights and responsibilities. While all parties may expect a fair benefit from the contract (or the deal may be deemed inequitable by the courts), this does not imply that all parties will benefit equally. Contracts are usually enforceable whether they are written or not, but a written contract protects all parties involved. The goal of contract law is to deal with situations in which parties break their promises or are unable to carry them out due to unforeseen events, thus violating the contract.

The 1872 Indian Contract Act codifies the legal principles that govern contracts in India. This Act defines a contract as "a legally binding arrangement." A contract is made up of the two parties' mutual commitments. As a result, both a proposal and acceptance are required to create contractual obligations. The most common way for a contract to be formed is for one party to make a proposal and the other party to accept it. A contract defines the rights and responsibilities of the parties involved. When one party to a contract refuses to fulfil a contractual obligation, the other party has the right to sue. It should be mentioned that in every surrogacy relationship, the intended parents/parents and the surrogate mother come to an agreement or understanding. The surrogate mum accepted an offer from the intended parents/parents. As a result, the agreements reached between the intended parents/parents and the surrogate woman may qualify as contracts under the Indian Contract Act of 1872.

A surrogacy contract is a private agreement between a woman (single or married) and the

biological or intended parents of her unborn child in which the woman agrees to become pregnant through assisted reproductive technology, carry the pregnancy to term, give birth, and then relinquish all parental rights to the child (s). A surrogacy contract is an agreement between a couple who plan to have a child, a woman who is willing to carry that child for them, and, in some cases, the surrogate woman's husband. Most infertility clinics require a signed contract between the prospective parents and the surrogate. A surrogacy agreement is made to avoid any potential conflicts between the surrogate mother and the intended parents. Disputes may arise over who is the biological parent, who has parental rights after the child turns 18, who will have custody of the child, who will pay for the surrogate's medical care, who will pay for the surrogate's compensation, who will be responsible for any harm that may befall the surrogate, who will be responsible for any failure on the surrogate's part to fulfil her obligations, and so on. A standard surrogacy agreement will eliminate any room for interpretation and give definitive language in the event of a dispute. Thus, a legally binding contract or agreement between the surrogate mother and the intended parent(s) is standard practise in every surrogacy. Surrogacy contracts can be formed between close relatives or between unrelated people. It can be motivated by pure altruism, like love or affection, or by monetary incentives. Based on the nature of the financial compensation exchanged, surrogacy agreements can be categorised as either "commercial" or "non-commercial" (altruistic). In a commercial surrogacy arrangement, the intended parents agree to

compensate the surrogate financially for her services. Surrogacy agreements with financial compensation are another name for these agreements. When a surrogate is involved in an altruistic or non-commercial surrogacy arrangement, she does so without the expectation of financial compensation. Conversely, the surrogate and the intended parents may come to an agreement about who would pay for the surrogate's medical care. This type of agreement is also known as a "contract for uncompensated surrogacy."

In most cases, a surrogacy agreement will spell out the roles and obligations of both the intended parents and the surrogate mother. Artificial insemination is performed on the surrogate, and once the baby is born, she gives up all parental rights to the intended parents. Surrogates may be required by their contracts to undergo medical and psychological screenings prior to embryo transfer. In some cases, the surrogate's contract may stipulate that she not drink, use drugs, or smoke for the duration of the pregnancy. Also, certain contracts may require an amniocentesis test, and if the results show that there are problems with the pregnancy, the parents may be able to terminate the pregnancy according to the terms of the agreement. Most surrogacy agreements forbid the surrogate mother from terminating the pregnancy unless doing so is absolutely necessary to protect the surrogate's life. In exchange for carrying their child, the intended parents will pay for all of the surrogate's medical and health expenses. The surrogate's contract may also require that the parents-to-be pay all of her medical and living expenses. The prospective parents may also agree to cover the cost of prenatal care.

In exchange for her services, the surrogate may be compensated according to the terms of the contract.

Perspectives On Altruistic and Commercial Surrogacy

Altruistic surrogacy is a surrogacy arrangement in which the surrogate mother agrees to be a gestational carrier or surrogate mother for charitable or altruistic reasons to help infertile couples have children. Religious and legendary stories feature altruistic surrogacy.

Commercial surrogacy is an arrangement in which the surrogate mother is paid for implantation, gestation, delivery, and handing over custody of the child to the couple. India was one of the first countries to legalise commercial, international surrogacy in 2002 as part of a medical tourism policy to generate foreign cash and revenues by enabling foreign citizens to obtain infertility treatment at Indian clinics using an Indian surrogate mother. India's supreme court legalised commercial surrogacy in the landmark Baby Manji Yamnda Vs Union of India & Anr case. The Gujarat High Court upheld commercial surrogacy's legality in Jan Balaz's case. The ART Bill 2008 legalises commercial surrogacy by paying surrogate mothers and covering their medical costs and insurance. India, Israel, California, and Russia offer commercial surrogacy. In Matter of Baby M, N.J., the New Jersey Supreme Court ruled that commercial surrogacy was a baby-selling pact and therefore unenforceable against public policy. In this case, Mary Beth Whitehead, the gestational surrogate mother, entered into a surrogacy agreement with Sterns in which she was

artificially inseminated with her own eggs using Mr. Stern's donated sperm in exchange for a \$10,000 payment and the pregnancy's medical costs. Surrogacy for profit violates public policy, infant sale, human dignity, and bodily integrity.

Compensated surrogacy, like commercial surrogacy, pays the surrogate mother, but the nature, amount, and purpose of the payment differ. Last is compensated surrogacy. Compensated surrogacy often involves paying the surrogate mother a suitable amount to cover the cost of the pregnancy and incidental medical expenses, but not more, to reimburse or put her in the same physical condition as before. Compensated surrogacy differs from commercial surrogacy in that the surrogate mother receives a certain amount of money, with the maximum and minimum restrictions set by the law. Commercial surrogacy has no set payment amount or limit. Compensated surrogacy pays the true cost of the process. With commercial surrogacy, however, extravagant compensation may vary. The payment does not match surrogate pregnancy expenses. Based on rules and regulations, a court or government committee may set compensated surrogacy compensation. Surrogate under a surrogacy agreement, although in commercial surrogacy, couples negotiate payment. Paid surrogacy lists allowable monetary remuneration or surrogate pregnancy expenses. Yet, commercial surrogacy does not list or recognise monetary income or expenditure. Commercial surrogacy does not split the payment. Compensated surrogacy aims to heal the surrogate mother. Commercial surrogacy involves paying the surrogate mother a lump fee for her consent,

for carrying through the pregnancy, and for relinquishing custody of the child. In compensated surrogacy, the surrogate mother cannot be paid for consenting or any other reason.

Altruistic and commercial surrogacy has sparked debate. Critics say surrogacy's benefits are vital for intended parents and surrogates. Surrogacy can help infertile couples start families, and low-income women can make a lot of money as surrogates. Some oppose surrogacy, usually for philosophical or religious reasons. Surrogacy allegedly turns women and children into commodities that can be bought and sold. Some believe that only conventional reproduction is ethical. Assisted reproduction with embryos is opposed by some.

Even if scholars, analysts, and policymakers do not believe surrogacy is intrinsically bad, they have highlighted reservations about it in practise. Some people are concerned that surrogacy exposes children to too many hazards, such as child trafficking or exploitation. Surrogacy, according to some, exploits women due to power asymmetries between surrogates and other parties. Some say that the decision to employ a surrogate is never fully voluntary because people desperate for money will do anything if they are provided enough money. Others are concerned that, even if women choose to become surrogates voluntarily, other parties may exploit them by drafting unfair agreements or failing to fulfil their duties. Some of these complaints are limited to certain situations. Altruistic surrogacy, for example, may be supported by people who oppose commodification or believe that pay leads to exploitation. Those who are

concerned about exploitation may favour domestic surrogacy or surrogacy in nations where there are strong legal protections.

Many of these concerns have been addressed by surrogacy advocates. Academics have questioned whether surrogacy commodifies women and children inherently. In response to accusations that surrogacy involves the sale of a child, proponents of the procedure argue that the surrogate is providing a service by carrying a child who is the intended parents' and has always been theirs (s). Another point of view, popularised by economist Richard Epstein, questions the core premises of the commodification argument. According to Epstein, allowing something to be swapped on the market does not necessarily devalue or degrade the thing being sold; in fact, it may ensure that the thing being sold is sold to the person who values it the most.⁸⁶ This means that charging surrogates for their services does not diminish the value of their labour or the value of the children born as a result.

Object and Purpose of Surrogacy Contracts

Every surrogacy contract protects the rights and interests of the intended parents/parents, surrogate woman, and surrogate child. Hence, surrogacy contracts must specify all parties' rights and duties. It must also consider the surrogate child's welfare. As a result, each surrogacy contract may contain the following goals:

- (i) To confirm that the intended parents/parents and surrogate mother have agreed to ART and full-term pregnancy. Every surrogacy agreement is based on

- the parties' desire to have children.
- (ii) Identify the surrogate child's parents. The intended parents sign a surrogacy agreement to have and raise a child. The surrogate and her husband don't want children. Anonymous sperm or egg donors don't want parenting either. Surrogacy contracts can prove the child's paternity and maternity. The intending parents frequently sign a contract to conceive a child and assume parenting obligations. Pre-birth declarations help resolve future concerns.
 - (iii) The surrogate relinquishes her parental rights and gives the child to the intending parents after birth. The surrogacy arrangement would be void if the surrogate mother changes her mind after the child is born and refuses to give it to the intended parents. In order to place the surrogate child with the intended parents, surrogacy contracts explicitly terminate the surrogate woman's parental rights.
 - (iv) The surrogacy contract compensates the surrogate mother for her services and medical expenses. Yet, commercial surrogacy contracts pay surrogates for their time and medical expenses. Altruistic surrogacy contracts cover just medical costs.

Every surrogacy contract imposes responsibility to supervise the surrogate's behaviour during pregnancy. This ensures normal foetal growth and prevents the surrogate woman from doing anything that could endanger the child.

Finally, every surrogacy contract addresses unanticipated concerns. Because every pregnancy has risks, such unreasonable situations may arise. So, the surrogacy contract holds intended parents accountable for surrogate damage or birth defects. So, the surrogacy contract addresses divorce, dispute, death, or reluctance to accept the kid.

Enforceability of Surrogacy Contracts

This issue of whether or not surrogacy contracts should be upheld has become one of the most divisive in recent history. Surrogacy opponents argue that making contracts legally binding will promote surrogate exploitation, the objectification of women and children, and positive eugenics. Yet, supporters argue that women should have the right to freely bargain for the use of their bodies, and that rendering surrogacy contracts unenforceable would violate this right. Contrary to what its critics claim, making surrogacy contracts enforceable would not lead to exploitation, slavery, the sale of infants, or the commodification of human life; rather, it would serve to protect the rights and interests of the parties to such arrangements by allowing them to enforce their responsibilities.

The legality of surrogacy contracts has also been debated in courts around the world. The first landmark surrogacy case, Baby M, for example, raised concerns about the legitimacy of surrogacy contracts. Following

it, this question was debated in a number of instances in a variety of nations. However, judicial judgements on the legitimacy of such contracts have not reached an agreement. Courts in certain nations have ruled that such contracts are lawful, while courts in others have ruled that they are invalid. Although commercial surrogacy agreements have been upheld in some jurisdictions, in others only altruistic surrogacy arrangements have been upheld. The legality of surrogacy agreements is treated very differently depending on the country you look at. India's legal framework does not address surrogacy contracts. Without a specific statute, contracts of this nature are subject to the general rules governing commercial transactions, such as the Indian Contract Act of 1872. According to the Indian Contract Act, any agreement that has the necessary elements to be considered a genuine contract is legitimate and enforceable. A surrogacy agreement, as we have shown, satisfies all the requisites for a legal agreement. Yet, as many scholars have noted, even if all the formalities for a lawful contract are met, a surrogacy contract is still illegal and should not be enforced. Legal, ethical, and moral issues account for the vast bulk of the pushback against surrogacy agreements. Some of the criticisms are aimed squarely at the practise of commercial surrogacy. So, in order to safeguard the interests of all parties concerned, it is crucial to determine if surrogacy arrangements are legal or not.

Commodification of Motherhood

Critics say surrogacy contracts sell motherhood. This criticism assumes contracting resources commodifies them.

The surrogate mother must consent to reproduce and provide the child to the intending parents. Hence, it is a contract that starts, continues, and ends procreation by delivering the child to the intended parents. Hence, surrogacy arrangements commodify women's fertility. This issue is often limited to commercial surrogacy because the surrogate woman is paid for her services.

Opponents say infertile couples and individuals use surrogate mothers to procreate, creating a market for gestational and genetic services. So, surrogate motherhood values reproduction. It "commodifies" motherhood by emphasising surrogate mother services. Monetizing reproduction may harm women's dignity. Critics call surrogates "incubators," "breeder robots," or "rented wombs." Surrogacy may also institutionalise the female body as property. Detractors say this violates human body inalienability.

All types of surrogacy have been criminalised in France on the grounds that they violate the inalienability of the human body. No one has the right to use another person's corpse for profit or charity.

When it is medically necessary, people are allowed to have their bodies worked on. Therefore, both paid and unpaid surrogacy arrangements are illegal. So, a person has the right to the privacy of their own body, but it is unethical to profit from the sale of that body or its parts. It is feared that the use of technology, money, and other arrangements between different people for begetting a child in surrogacy contracts may commodify and devalue parenthood.

It is also argued that women should not openly trade their reproductive abilities

because they are an inalienable part of who they are. It increases the possibility that feminine traits like height, eye colour, race, athleticism, beauty, and intelligence will be used for profit. Surrogates with more desirable characteristics will command higher compensation. If people can be bought and sold, then they have value in the marketplace and can be seen as simply objects. According to Kant, it is always wrong to treat people as though they are nothing more than things. Although things can be treated as commodities and given market values, people cannot and should not be treated the same way.

Humans are priceless. Human commercialization devalues human dignity and worth, making it evil. Surrogacy supporters argue that exploiting one person for another's advantage does not always mean that the person is treated as a commodity or that their dignity and worth are degraded. Every country allows abortion if it saves the mother's life. Hence, abortion does not degrade the foetus. In other cases, a person may sign a contract and relinquish some autonomy. Athletes are often drug-tested, and employees sign contracts to work a certain number of hours under certain conditions. According on this rationale, surrogacy contracts do not devalue a woman's reproductive capabilities or dignity. The intended parents pay a surrogate to bear a child. "A woman's body is hers and hers alone unless she consents to some particular use of it," the law states, making surrogacy legal. Blood, bone marrow, gametes, organs between living persons, and medical research on humans would be forbidden under the principle of inalienability of the human body.

However, these are legal with acceptable constraints.

It is also argued that a surrogacy contract does not sell motherhood illegally or morally. Because many people use their skills to benefit themselves and others. A surrogate mother uses her womb, a model her face and body, a construction worker his strength, and a professional his intelligence, character, and motivations. As long as it doesn't violate others' rights, everyone has the right to use their body as they like. A woman's womb bears a child for another in a surrogacy agreement without violating anyone's rights. Nonetheless, every surrogacy contract fulfils an individual's basic human right to have a child.

Commodification-based restrictions on surrogacy contracts would violate the rights of surrogates and intended parents. The right to be a surrogate comes from the rights to life, personal liberty, and procreation; privacy, including the right to determine whether to bear or beget a child; body autonomy; and technological development. As stated before in this paper, everyone has the right to be an intended parent and procreate with help. Surrogacy commodifies parenthood, hence it cannot be abolished. But, legislation can prevent surrogacy contract abuse.

The International Human Rights Framework

A. Surrogacy as per se Violation of Human Rights

1. Sale of Children

Surrogacy poses the same concerns that led to the restriction on selling children, such as surrogates being pushed and children being exploited. Therefore, surrogacy does not

involve the sale of children, either by definition or in practise, and there is no evidence that surrogacy processes raise increased worries about child sales. Secondly, as many commentators have noted, surrogacy does not involve the trade of a child for money, as defined by international law. Child sales are missing. Altruistic surrogacy is unpaid. Commercial surrogates are paid for carrying the pregnancy, not the child. Commercial surrogacy jurisdictions don't transfer parenthood since the embryo is regarded the intended parent(s) from the start. Medically, the gestational surrogate is not "selling" her biological material or offspring. Surrogacy is not affected by the policy issues that led to the ban on selling children. As children are not sold, "commodification" does not hurt them or society. As previously stated, studies have found no harmful psychological effects on children born through surrogacy, and while they may hypothetically be used or abused, surrogacy processes provide no greater risk than any other parenting technique. Surrogacy's impact on children's dignity is inconclusive. Surrogacy is wrongly and unnecessarily portrayed as selling children, which complicates policy. Every evidence suggests surrogacy is used to start and develop a family. Failure to recognise intended parent(s)' part in the child's formation jeopardises non-traditional families and protected family choices. Same-sex couples and infertile people are also discriminated against. States' ability to tackle human trafficking and exploitation is unaffected by surrogacy's non-sale status (discussed below). Similar to adoption, states can protect surrogate-born children from abuse and

exploitation by screening intended parents and monitoring their well-being after delivery.

2. Trafficking of Women and Children

Surrogacy bans are sometimes used to protect vulnerable women and children from human trafficking. Surrogacy is not human trafficking. The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the 2002 Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children prohibit human trafficking, which is the acquisition of a person for forced labour or sexual exploitation. The Protocol defines human trafficking as recruiting, receiving, transferring, or harbouring individuals using coercion, force, fraud, or abduction for an illicit purpose (sexual exploitation or forced labor). Human trafficking includes forced labour, including sexual services.

Surrogacy, like any other service or labour, can raise human trafficking concerns among surrogate women. Uncontrolled surrogacy by economically poor women may increase these issues. In studies on surrogacy in India, where it was unregulated at the time, several women reported being pressured or lured into surrogacy by false financial promises. Surrogacy babies may be commissioned by exploiters. However, the writers found no such cases.

When analysing the seriousness of worries regarding women's human trafficking in surrogacy, it's important to distinguish the exploitative components of surrogacy. Surrogacy might help a lady financially or help another family. Coercion, force, or

deception must impair the surrogate's decision-making to constitute surrogate human trafficking. Surrogacy is a woman's right to choose in the absence of these circumstances. To address concerns about human trafficking, states can take precautionary measures to guarantee that all women who choose surrogacy do so freely and are aware of the consequences. In the next sections, we cover the surrogate's entitlement to independent counsel to protect her rights and interests¹⁶⁸ and the creation of an administrative or judicial system to evaluate and approve the surrogacy agreement and its observance. If properly monitored and regulated and acceptable surrogacy agreements are made, respected, and enforced, surrogacy does not pose human trafficking concerns like many other forms of labour. Surrogacy is only child trafficking if it's used to exploit or sexualize the child. Surrogacy has helped loving parents raise children, and surrogates are compensated. Evidence suggests this may be the norm. To address concerns regarding surrogacy-related child trafficking, states should establish mechanisms to ensure that all surrogate-born children grow up in safe environments. Intermediate entity regulation, pre- and post-conception screening, and monitoring are examples. Prohibiting surrogacy can also lead to human trafficking by driving the practise underground.

In countries with economic desperation and insufficient state regulation, middlemen may make surrogacy dangerous. Surrogates will fear arrest and prosecution if they report being abused in the illicit market if surrogacy is criminalised. Human trafficking may

require an international structure for regulation and protection.

3. Forced Labor

Surrogacy has not been forced labour like human trafficking. As indicated above, vulnerable women may be pushed into surrogacy or forced to continue. While this can and does happen in other sorts of labour, such as domestic work, restaurant work, and textile labour, surrogacy raises issues about forced or compelled labour because it demands dedication and physical compromise. Protection measures should ensure a surrogate can freely consent and make decisions. International human rights accords ban forced labour. "Any work or service which is exacted from any individual under threat of penalty and for which the said person has not given himself voluntarily," the Forced Labor Convention states. An employer or recruiter can force a worker to work by making false promises with serious consequences. If contract terms make it difficult for surrogates to depart, they may be forced labour. Human trafficking and forced labour share compulsion and lack of informed consent. To guarantee women actively participate in surrogacy and keep control, protections must be in place. In some nations, surrogates cannot be penalised for altering their minds before becoming pregnant. One US state prevents surrogates from being punished if the surrogacy agreement is terminated. Governments must ensure that intermediaries and others do not bully, deceive, or compel women into surrogacy and that contractual responsibilities, such as equitable pay and protection from punitive fines, are honoured. To ensure that the surrogate's labour

(including preparation, fertilisation, birth, and pregnancy) is voluntary, travel limitations, activities, and other procedures must be thoroughly scrutinised.

Conclusion

Both parties involved in a surrogacy agreement, the childless couple who want to have a child and the surrogate mother who makes it possible for such childless couples or individuals to have their own kid, can experience delight as a result of the relationship. Yet, due to the one-of-a-kind character of surrogacy agreements, which involve a wide range of medical procedures, a protracted amount of time, in addition to the duties of the parties involved, such agreements require a full assessment of the multiple factors that are involved. The parties who enter into such agreements are required to evaluate a number of factors, some of which include the surrogate's and intended parents' rights and responsibilities, the consequences of any breach of such responsibilities, and the parties' liabilities in the event of any unwanted situations, amongst other considerations. For this purpose, the process of drafting a legal contract to act as a surrogate mother might be utilised.

Contracts for surrogacy are written agreements between the surrogate and the intended parents that detail the conditions and circumstances of the surrogacy arrangement. The surrogate and the intended parents each have a copy of the contract. These kinds of contracts are required in order to safeguard the legal interests of both parties involved in the surrogacy arrangement. This is due to the fact that no one can predict the

conflicts that may arise between the surrogate and the intended parents, or the complications that may arise prior to the start of AI or IE, during pregnancy, or after the delivery of the child, which would defeat the purpose of such an arrangement regarding surrogacy. Hence, if all goes according to plan with the surrogacy deal, the couple will be rewarded with the healthy child that they have been praying for, and the surrogate mother will be given financial compensation. But, if the parties involved are unable to come to an agreement, they will be forced to fight their differences in court. Regrettably, there is no clear law in India that regulates the terms and conditions of surrogacy arrangements. In the absence of specific legislation, resolving any such issue that is based on a surrogacy contract becomes exceedingly complicated and may put the interests and rights of the parties involved in question. The Indian Contract Act of 1872, which is the general legislation that is relevant to contracts in India, can be applied to assist ease some of these concerns. Even though the surrogacy contract fulfils all of the Act's fundamental requirements for a legitimate contract, it has been criticised for a number of unethical practises, including the violation of individual dignity, the commodification of motherhood and child, slavery, prostitution, the selling of babies, positive eugenics, and trafficking in women and children. There is a widespread consensus that surrogacy contracts violate both morality and public policy. But, despite all of these issues, it is not possible to see them as sufficient grounds for cancelling a surrogacy contract in the manner that is outlined in this chapter. In addition, any

attempt to invalidate a surrogacy contract based on these grounds constitutes a violation of an individual's right to contract freedom, in addition to the fundamental human right to conceive a child with the assistance of another person and a woman's right to act as a surrogate. Furthermore, any attempt to invalidate a surrogacy contract based on these grounds constitutes a violation of an individual's right to contract freedom. On the other hand, given the one-of-a-kind character of surrogacy contracts, more complex issues concerning their violation and the application of appropriate remedies may emerge. It is possible for there to be a breach of a surrogacy contract at any one of the three stages of a surrogacy arrangement: before artificial insemination or in vitro fertilisation (AI or IE), during the surrogacy pregnancy, or after the child has been delivered. Depending on the type of breach that has occurred, the parties may pursue different types of remedies, such as monetary compensation or specific performance. It is possible that a specialised piece of legislation will eliminate all of the uncertainties that are associated with surrogacy contracts and provide a suitable legal framework for addressing the bulk of the challenges that are faced by the parties. It should be noted that surrogacy arrangements serve to realise a couple's or an individual's long-held ambition to have a child through the use of a surrogate. As a consequence, if they face difficulties in achieving their goal due to the absence of a law, it may be regarded as a failure on the part of the state to defend these individuals' rights and interests. As a consequence of this, the state ought to design legislation that are unique to the practise of surrogacy in order to

raise the probability that the end result of the surrogacy will be a content new family rather than an ongoing legal battle.

Findings & Suggestions

In the same way that commercial in vitro fertilisation (IVF) or compensated gamete provision is available to those whose infertility can be addressed through commercial IVF or compensated gamete provision, commercial surrogacy should be available to Indian (or other) citizens who are unable to bear biologically related children. This should be done in the same way that commercial IVF is available to those whose infertility can be addressed through commercial IVF or compensated gamete provision. A consistent legal framework is necessary for all assisted reproductive treatments, including surrogacy, which is simply one of many such operations. It is possible that women who are unable to support themselves financially will be forced to turn to surrogacy as a source of revenue; however, this line of labour does not have to be exploitative. The key factor that contributes to exploitation is the absence of regulatory oversight and legal protections for commercial surrogates in the current system. As a consequence of this, we are of the opinion that it is nonsensical to separate the regulation of surrogacy from the pre-existing ART (Regulation) Bill, which has been lingering without official ratification for a number of years. If commonsense regulations are reinstated, a revised version of the ART Bill might make it possible for a select group of approved medical facilities to provide paid surrogacy services while remaining subject to the stringent control and regulation of an

organisation analogous to the Human Fertilization and Embryology Authority in the United Kingdom.

It is possible that this will result in a legislative solution that is multifaceted, robust, and most importantly, nondiscriminatory. This is something that all parties involved desire and need.

As a consequence of this, we are of the opinion that it is nonsensical to separate the regulation of surrogacy from the pre-existing ART (Regulation) Bill, which has been lingering without official ratification for a number of years. If commonsense regulations are reinstated, a revised version of the ART Bill might make it possible for a select group of approved medical facilities to provide paid surrogacy services while remaining subject to the stringent control and regulation of an organisation analogous to the Human Fertilization and Embryology Authority in the United Kingdom.

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