
SURROGACY IN INDIA: LEGAL FRAMEWORK AND MENTAL HEALTH IMPLICATIONS

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ABSTRACT

Surrogacy has emerged as a significant advancement in assisted reproductive technology, offering a pathway to parenthood for individuals and couples unable to conceive naturally. It involves a legal arrangement whereby a woman agrees to carry and deliver a child for another person or couple, often raising complicated legal, ethical, and psychological questions. This research paper begins by exploring the conceptual aspects of surrogacy, distinguishing between its various forms—altruistic and commercial, traditional and gestational. It then critically examines the evolution of surrogacy laws in India, with a particular focus on the *Surrogacy (Regulation) Act, 2021*. A major area of concern addressed in this paper is the inadequate attention given to the mental health dimensions of surrogacy. Despite growing evidence that surrogate mothers, intended parents, and children born through surrogacy face unique psychological challenges, including attachment issues, identity struggles, anxiety, and emotional distress, the current legal framework in India fails to mandate psychological screening or sustained mental health support.

Keywords: Surrogacy Laws, Mental Health, Assisted Reproductive Technology, Commercial Surrogacy, Surrogate Mother, Law Reform.

Understanding Surrogacy

Assisted Reproductive Technology (ART) embodies a wide range of medical procedures which aims at addressing infertility by manipulating various reproductive cells- sperm, eggs, or embryos- to facilitate conception. ART techniques are particularly significant for individuals and couples facing infertility due to factors such as genetic disorders, hormonal imbalances, or reproductive health complications [1]. When another woman, known as a surrogate, consensually carries and delivers a baby on behalf of an individual or couple, i.e. the intended parents, is known as surrogacy. The surrogate may carry an embryo created from the intended parents' or donors' gametes [2]. Surrogacy has allowed those who cannot carry a pregnancy themselves due to health conditions, uterine abnormalities, or age to biologically conceive. Surrogacy arrangements vary widely worldwide, governed by legal, ethical, and social regulations. Many countries have established specific legal frameworks to protect all parties involved and ensure ethical practices in surrogacy.

Surrogacy can be categorized into four main types, each with unique considerations: Traditional Surrogacy, Gestational Surrogacy, Altruistic Surrogacy, and Commercial Surrogacy.

- a. **Traditional Surrogacy** - In traditional surrogacy, the surrogate uses her own eggs, and is artificially inseminated with the sperm from the intended father or the sperm donor. And as a result of this process, the surrogates become the biological mother of the child, and has a genetic connection to the child. This connection can lead to potential emotional and legal complexities, as in some jurisdictions, the surrogate may have legal rights as the genetic mother. Due to these concerns, the traditional surrogacy is less common and is sometimes legally restricted [3].
- b. **Gestational Surrogacy** - Gestational surrogacy involves the surrogate's womb being implanted with an embryo created using IVF from the egg and sperm of the intended parents (or donors). Here, the surrogate has no genetic link to the child, as both the sperm and egg come from the intended parents or donors. This is the most common form of surrogacy today specially in India [4].
- c. **Altruistic Surrogacy** - The non-commercial arrangement, where the surrogate is only compensated for medical and related expenses needed for the care during pregnancy, is

known as altruistic surrogacy. This type of surrogacy aims to prevent the potential exploitation of surrogates by removing financial incentives. However, critics argue that it can place an emotional and financial burden on the surrogate without adequate compensation, raising questions about fairness and support for surrogates [5].

- d. Commercial Surrogacy - Commercial surrogacy, as the name suggests, is the method where the surrogate is paid a fixed fee beyond her medical costs, was prevalent in India prior to the 2021, Act, which now has banned this practice. This type has been widely debated for ethical and economic reasons, with proponents arguing that it provides a source of income and financial security for surrogates [4].

Legal Status of Surrogacy Across Various Jurisdictions

The legal status of surrogacy varies considerably across different jurisdictions, influenced by cultural, ethical, and societal factors. Some countries have established regulations that allow for surrogacy, while others have outlawed it entirely. There is no uniform federal law in the US governing or regulating surrogacy, and legal approaches differ across states. Surrogacy can be categorized as permitted, restricted, or prohibited, depending on individual state laws. States such as Nevada, California, and Illinois have progressive surrogacy laws that legally recognize both commercial and altruistic surrogacy and hence permit it. In these states, comprehensive legislation exists to protect the rights of the surrogate, intended parents, and the child [6]. States like Washington and New York have implemented regulations that allow altruistic surrogacy but place restrictions on commercial arrangements to prevent the exploitation of surrogates [7]. In Canada, the Assisted Human Reproduction Act (AHRA), regulates surrogacy federally, which prohibits commercial surrogacy but allows altruistic one. The surrogacy arrangements in Canada must be non-commercial, i.e. surrogates can only be reimbursed expenses directly related to pregnancy and then birth. Any form of payment beyond this is prohibited under AHRA [8]. The intended parents must apply for legal parentage after the birth of the child. This process varies across provinces, with some requiring a court order, while others accept a statutory declaration from the surrogate mother [9]. In the UK, surrogacy, although heavily regulated, is legal under the Surrogacy Arrangements Act 1985 and the Human Fertilisation and Embryology Act 2008. Only altruistic surrogacy is permitted, with intended parents allowed to compensate the surrogate only for any reasonable expenses. Commercial surrogacy is completely banned there [10]. In order to gain parentage, the intended parents

must apply for a parental order post-birth. The surrogate mother remains the legal mother till the order is granted, which raises potential legal complexities [11]. France strictly bans surrogacy, considering it contrary to the French public policy. Both altruistic and commercial surrogacy are illegal under French law. All kinds of surrogacy agreements are considered null and void in France. Individuals entering into surrogacy agreements abroad often face challenges in obtaining parental recognition for the child upon returning to France [12]. Germany also prohibits all forms of surrogacy under the Embryo Protection Act, which criminalizes both altruistic and commercial surrogacy arrangements and imposes legal sanctions, citing moral and ethical concerns related to the exploitation of women and the commodification of children [13].

Surrogacy Laws in India

Surrogacy in India, once a booming commercial industry attracting both domestic and international clients, has transitioned under the Surrogacy (Regulation) Act, 2021 [14] into a strictly regulated altruistic model. The Act, enacted alongside the Assisted Reproductive Technology (ART) Regulation Act, 2021 [15], aims to address issues surrounding the commercialization of surrogacy, ensuring ethical practices and safeguarding the welfare of surrogates and children. This part provides an in-depth analysis of these Acts, outlining the eligibility criteria, procedural requirements, enforceability, penalties, and challenges associated with the current surrogacy framework in India. The *Surrogacy (Regulation) Act, 2021* marks a milestone moment in India's legal landscape by introducing a comprehensive framework to regulate surrogacy, a practice that had, for a long time, operated in a largely unregulated environment. India had been a global hub for commercial surrogacy since the early 2000s, with thousands of couples from around the world seeking cost-effective reproductive assistance. However, this popular practice was accompanied by growing concerns over exploitation, ethical ambiguity, and the commodification of women's bodies.

As its centre, the Act prohibits commercial surrogacy and legalizes only altruistic surrogacy, a provision that highlights a significant policy shift. Commercial surrogacy, which involves offering financial compensation beyond reasonable medical expenses and insurance, is criminalized under the Act. This ban is a direct answer to years of documented abuse and exploitation of impoverished women, often coerced into surrogacy by economic intimidation. By contrast, altruistic surrogacy is permitted under strict conditions, wherein the surrogate

receives no remuneration apart from medical expenses and insurance coverage during the pregnancy and post-partum period [14].

The Act, under Section 4(ii), outlines stringent eligibility requirements for couples and individuals seeking to engage in surrogacy. Only legally married Indian heterosexual couples are eligible. The husband must be between 26-55 years, and the wife between 23-50 years. Also, the couples must be married for at least five years, demonstrating a stable relationship. And, a medical certificate from a qualified physician certifying infertility is required. Also, there is a limitation, couples are eligible only if they have no surviving biological or adopted children. However, an exception is made if the child is mentally or physically challenged or suffers from a life-threatening disorder. This restrictive eligibility provision has been justified on the basis of prioritizing the needs of infertile couples and preserving the sanctity of family structures, although it has been critiqued for excluding single parents, LGBTQ+ individuals, and live-in partners, thereby raising concerns of discriminatory exclusion and violation of reproductive autonomy [16].

Then Section 4(iii)(b), lays down the eligibility conditions for the Surrogate Mother. Firstly, the surrogate mother must be between 25-35 years of age. She must be a close relative, though the Act leaves some ambiguity in defining the extent of “close relative.” Also, only women who are married and have at least one biological child are eligible. A woman can act as a surrogate only once in her lifetime, and importantly, she must not contribute her own gametes to the pregnancy. This ensures that only gestational surrogacy, where the surrogate has no genetic link to the child, is permitted. The possible surrogate must undergo thorough health checks to determine suitability for the surrogacy process. These provisions aim to prevent exploitation, reduce emotional complexities, and preserve the surrogate’s psychological well-being [17].

There is also an extensive approval process set up under this act. The intending couple must obtain a Certificate of Essentiality, which serves as a prerequisite for surrogacy. This certificate is issued by the District Medical Board after reviewing the couple's eligibility and the medical certificate of infertility. Both the surrogate mother and the intending couple need a Certificate of Eligibility. An essential element of the process is the Surrogacy Agreement, a legally binding contract between the intending couple and the surrogate mother. This agreement details the terms, rights, and obligations of both parties and must explicitly state that the surrogate will

not receive compensation beyond reasonable expenses and medical insurance. The surrogate's informed consent is required, and the Act allows her to receive psychological counselling before consenting to the arrangement [14].

The regulatory system under the Act is robust, comprising the National Surrogacy Board (NSB) and State Surrogacy Boards (SSBs). These bodies are given a wide range of responsibilities, including advising the government on policy matters, ensuring compliance with the law, issuing ethical guidelines for surrogacy clinics, and maintaining a registry of authorized clinics and procedures. The establishment of these boards is meant to create uniformity in the implementation of the Act across the nation and to provide a forum for redressal of grievances, monitoring, and policy formulation. Additionally, all surrogacy clinics must be registered and adhere to strict conditions regarding consent, medical protocols, and documentation to avoid malpractice [18]

One of the more forward provisions of the Act is the requirement that the surrogate mother be provided with adequate insurance coverage, covering complications during pregnancy, delivery, and the post-partum period. Also, under Section 10 of the Act, though the surrogate consents to medical treatments related to surrogacy, she retains control over her body; also, she is entitled to medical expenses and insurance coverage for 36 months post-birth to safeguard her health and wellbeing. The Act mandates that her health and rights must be prioritized over any contractual obligations. These provisions reflect a growing recognition of the physical and psychological risks involved in surrogate pregnancies [17].

Key Legal Issues in Surrogacy

Surrogacy has raised various complex legal issues involving the rights of intended parents, surrogates, and children born out of surrogacy. These issues range from citizenship to parentage. Determining the legal parentage of a child born via surrogacy is often a complicated issue, as it involves multiple parties- the surrogate, the intended parents, and potentially a donor. Different jurisdictions have various rules and regulations on who will hold parental rights, whether it is the genetic parents, the surrogate, or the intended parents. In *Johnson v. Calvert* (California, 1993) the California Supreme Court held that the intended parents, who had genetic connection to the child, were considered the legal parents. This case established the "intent doctrine," which gives legal parentage to those who intended to bring the child into the world and take responsibility [19]. The enforceability of surrogacy contracts vary based on

jurisdictions, with some deeming them void as they are considered against public policy. This lack of contracts may create challenges if the surrogate mother changes her mind about relinquishing custody or when the intended parents refuse to take custody. In *Baby M Case* (New Jersey, USA, 1988) the New Jersey Supreme Court ruled that the surrogacy contract was unenforceable due to public policy concerns, awarding custody to the intended parents but granting the surrogate visitation rights. This case underscores the potential for unenforceable contracts in surrogacy and the importance of public policy considerations [20]. Children born out of surrogacy, especially in cross-border arrangements, often face issues with nationality and citizenship. In case the birth country or the parents' country of nationality grants citizenship, the child risks being stateless. This problem often arises in countries with restrictive or non-existent surrogacy laws. In the *Manji Yamada Case* (Japan/India, 2008), Baby Manji, born to an Indian surrogate for a Japanese couple, was left in legal limbo due to citizenship issues. India allowed her an exit visa, while Japan did not recognize surrogacy, which created obstacles in obtaining nationality [21]. Commercial surrogacy, where the surrogate is financially compensated, is permitted in some jurisdictions and banned in others, which only allow altruistic surrogacy where compensation is limited to medical and pregnancy-related expenses. Critics argue that commercial surrogacy can lead to exploitation, particularly in low-income countries, while supporters claim it provides a fair economic opportunity. The debate around commercial surrogacy versus altruistic models is never-ending. Jurisdictions allowing commercial surrogacy often have regulations to protect surrogate rights, while altruistic models aim to balance ethical concerns with reproductive autonomy. The *Baby Gammy Case* (Thailand, 2014) involved a surrogate in Thailand who gave birth to twins, one with Down syndrome (Baby Gammy). The intended parents took only the healthy child, leading to ethical concerns around selective acceptance. In response, Thailand banned commercial surrogacy for foreigners, aiming to protect surrogate mothers and prevent similar cases [22].

Mental Health Implication of Surrogacy on Various Parties

Surrogacy, as an assisted reproductive technique, offers hope to individuals and couples unable to conceive naturally, yet it also presents a complicated array of psychological and emotional challenges for all parties involved. For surrogate mothers, the process requires not just physical commitment, but also significant emotional labour. Several studies indicate that surrogate mothers may experience uncertainty, attachment issues, and post-partum psychological stress,

particularly if adequate counselling is not provided [23]. Although many surrogates enter the process with selfless intent and claim emotional preparedness, research shows that some experience grief, loss, or identity conflicts after giving up the child, especially in cases where psychological support is lacking [24]. Cultural and familial stigmatization can further blend these challenges, especially in contexts where surrogacy is viewed with moral suspicion, such as in parts of India and Southeast Asia [25].

Intended parents, particularly those dealing with infertility, often face their own psychological challenges. The surrogacy journey can induce anxiety, guilt, or helplessness because of the lack of control over the pregnancy process and fear of legal or emotional complications. These feelings are particularly enhanced among intended mothers, who may struggle with societal expectations and internalized feelings of inadequacy [26]. Moreover, international surrogacy arrangements can add a layer of stress due to legal uncertainties, cultural differences, and delays in acquiring custody or citizenship for the child. Research conducted in cross-national surrogacy conditions reveal that the psychological well-being of intended parents improves significantly only after the birth and safe handover of the child, underlining the prolonged emotional stress they endure during the process [27].

Children born vis surrogacy may also face long-term psychological reflections, although studies suggest outcomes are generally positive when children are raised in supportive environments. According to longitudinal research in the UK, children born via surrogacy show comparable levels of emotional and psychological well-being to those born via traditional conception, especially when parents are open about the child's origin [28]. However, secrecy or delayed disclosure about the birth can lead to identity confusion, trust issues, and emotional anguish during adolescence. The availability of psychological resources, early disclosure, and supportive parenting are thus essential in shaping a positive mental health path for these children [29].

A big critique of surrogacy arrangements, particularly in low- and middle-income countries, is the lack of mandatory psychological screening and continuous mental health support for all parties. The Surrogacy (Regulation) Act, 2021 in India, while commendable in its efforts to protect the physical rights of surrogate mothers, remains inadequate in terms of ensuring psychological safeguards. The Act lacks detailed provisions for pre- and post-natal counselling, despite recommendations from international reproductive health bodies which advocate for

comprehensive mental health support throughout the surrogacy lifecycle [30]. As a result, unaddressed psychological vulnerabilities may manifest in the form of depression, anxiety, or post-traumatic stress disorder among surrogates, and emotional exhaustion among intended parents.

Critical Gap in Indian Surrogacy Law Framework

The Indian legislation focuses predominantly on the eligibility of parties, medical prerequisites, and prohibition of commercial surrogacy, but fails to instruct psychological evaluation, pre-surrogacy counselling, or post-partum mental health support for surrogate mothers [14]. This oversight is especially concerning given that various studies highlight the vulnerability of surrogate women to emotional distress, identity conflicts, and post-partum grief, particularly in situations where counselling and follow-up support are not provided [31].

Unlike jurisdictions such as the United Kingdom, where the *Human Fertilisation and Embryology Authority (HFEA)* mandates psychosocial assessments for all parties entering surrogacy agreements, Indian law offers no structured guidelines for mental health screening or therapeutic intervention [32]. The Indian Council of Medical Research (ICMR) Guidelines of 2005, although earlier advisory, recommended psychological counselling for all parties involved in Assisted Reproductive Technology (ART) procedures [33]. However, these recommendations have not been successfully integrated into the law through the 2021 Act or the Assisted Reproductive Technology (Regulation) Act, 2021. This regulatory gap leaves surrogates, many of whom come from vulnerable socio-economic backgrounds, without institutional mental health support during or after the complete procedure. Also, the Act does not prescribe counselling or support mechanisms for intended parents who may feel psychological stress, anxiety over legal uncertainties, or emotional strain due to infertility, a gap which runs against the global best practices [34].

Another critical lapse is the complete lack of legislative provisions concerning the long-term mental health of children born through surrogacy. While research from jurisdictions such as the Netherlands and the UK propose that early disclosure and psychological support contribute to positive identity formation and emotional well-being in such children, Indian law remains silent on such aspects [35]. In the absence of state-supported counselling services, the load of emotional management is often left entirely to the individuals involved, many of whom lack the resources or awareness to look for psychological help independently.

Moreover, while the Act supports informed consent, it does not ensure that such consent is psychologically informed or emotionally sound. Surrogate mothers are required to sign affidavits and agreements, but without a psychological evaluation, there is little assurance that they fully understand the emotional consequences of surrogacy, including attachment issues or potential regret [36].

Conclusion

Surrogacy, as a complex blend of medical science, legal regulation, and human emotion, demands a multidimensional approach. While the *Surrogacy (Regulation) Act, 2021* marks an essential legislative step in India by removing commercial exploitation and promoting ethical practices, it is insufficient in addressing the essential mental health concerns of surrogate mothers, intended parents, and children born through surrogacy. The absence of mandatory psychological counselling, mental health evaluations, and long-term emotional support in the legal framework highlights a significant gap in the current regulatory structure. For surrogacy to be truly ethical and humane, the law must evolve to integrate psychosocial safeguards and promote emotional well-being alongside legal and medical considerations.

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