

Surrogacy Laws in India: Addressing Exploitation and the Threat of Human Trafficking

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ABSTRACT

The comprehensive examination within the article delves into the multifaceted risks and ethical complexities entwined with surrogacy, notably in its correlation with the abhorrent practice of human trafficking. It meticulously dissects how surrogacy, in certain contexts, metamorphoses into a semblance of reproductive prostitution and exploitation, drawing unsettling parallels with the illicit sale of children. Moreover, the article meticulously elucidates the inherent potential for the violation of fundamental human rights entrenched within surrogacy arrangements, shedding light on the precarious balance between reproductive autonomy and ethical imperatives.

Keywords: Surrogacy; Human Trafficking; Reproductive Prostitution; Sale of Children.

1.

INTRODUCTION

Surrogacy is a novel and arguably desirable opportunity for family formation for many individuals and couples, while simultaneously being a maelstrom for a range of ethical issues implicating numerous legal fields. In the past decade or so, these complexities have become exacerbated through reproductive tourism enabled by globalization. Governments have globally engaged in a form of “regulatory arbitrage”, whereby the prohibition of surrogacy (commercial or altruistic) in certain countries leads to more permissive legal regimes elsewhere. For feminists in particular, surrogacy presents a formidable challenge. On the one hand, it queers compulsory heteronormativity and the heteropatriarchal family- form while on the other, generating exploitative arrangements for surrogates in the global South as reproductive markets present favorable economic terms and bargaining power for intending parents from the global North. Correspondingly, the law has become a site for intense political, social and economic contestation over the status of women’s reproductive labour¹.

Advances in reproductive medical technology in the last fifty years have made surrogacy possible. In 1953, doctors carried out the first successful human pregnancy using frozen spermatozoa²

¹ C Hoskyns and S Rai, ‘Recasting the global political economy: Counting women’s unpaid work’ [2007] 12(3) New Political Economy 297–317, 300

² Willem Ombelet and Johan Van Robays, Artificial insemination history: hurdles and milestones, 7 FACTS VIEWS VIS OBGYN 1, 140 (2015).

which made traditional surrogacy possible. Traditional surrogacy³ involves implantation of the egg of a surrogate with the sperm of an intended or donor parent usually through the process of artificial insemination. Thus, children born through traditional surrogacy may or may not be genetically related to their intended parents but are always related to the surrogate.

2.

SURROGACY AS A FORM OF REPRODUCTIVE PROSTITUTION AND

EXPLOITATION

2.1. Surrogacy History and Marxist Views on Exploitation

Since the 1950s, the surrogacy process has advanced due to two key scientific developments. In 1978, the first

documented case of successful in vitro fertilization (IVF) was reported, a process by which an egg is fertilized in a laboratory and then implanted into a women's uterus⁴. Then, in 1986, the first frozen egg resulted in a viable pregnancy⁵. These two developments made another form of surrogacy possible: gestational surrogacy. Gestational surrogacy uses IVF to fertilize a third-party egg with the sperm of a third-party donor, or intended parent⁶. The embryo from a donated oocyte and sperm, or from the intended parent(s), is transferred to the surrogate's uterus, resulting in the development of a fetus, which may have no genetic relationship to the surrogate. Depending on whether the intended third-party is (1) an individual or couple, and (2) if a couple, whether both sperm and egg were donated by the intended parents, zero, fifty, or one hundred percent of the DNA of a child born through surrogacy may be genetic material from the intended parents. Today, gestational surrogacy is far more common than traditional surrogacy.

Surrogacy has long been a fraught domain for feminists. *Alison Bailey* notes that Western feminists theorized surrogacy in two phases: an intensely normative phase in the 1980s when they offered *liberal, Marxist and radical feminist* analyses of commercial surrogacy and since the mid-1990s, through a discernible biomedical ethnographic turn to understand how surrogacy work is lived,

³ Erica Davis, The rise of gestational surrogacy and the pressing need for international regulation, 21 MINN J INT L 1, 120, 121 (Spring 2012).

⁴ Wulf Utian et. al, Preliminary experience with in vitro fertilization-surrogate gestational pregnancy, 52 FERT AND STERIL 1, 633-638 (2001).

⁵ Christopher Chen, Pregnancy after human oocyte cryopreservation 327, 8486 THE LANCET 1, 884-886 (1986).

⁶ Viveca Söderström-Anttila, Ulla-Britt Wennerholm, Anne Loft, Anja Pinborg, Kristiina Aittomäki, Liv Bente Romundstad, and Christina Bergh, Surrogacy: outcomes for surrogate mothers, children and the resulting families –a systematic review, 22(2) HUMAN REPRODUCTION UPDATE 260, 261 (2015).

embodied and negotiated, thereby heralding a move from moral certainty to moral ambivalence⁷. Indian feminists similarly offer both normative and ethnographic theorizing on surrogacy, even if there is no temporal distinction between these enterprises. Liberal feminists support commercial surrogacy with adequate safeguards⁸, while radical feminists view reproductive tourism as being at the crossroads of reproductive, sexual and labour trafficking⁹ with commercial surrogacy being an exploitative trade in reproductive body parts¹⁰.

Marxist feminists similarly view commercial surrogacy as a form of reproductive trafficking¹¹. Kumkum Sangari maps how commercial surrogacy amounts to the appropriation of women's reproductive labour by 'biocapital'¹² and is organized in the form of a post-Fordist manufacturing model characterized by flexibility where the burden of uncertainty and repeat failure is on the women whose voices are lost through the triple discourse of "remediable poverty, calibrated entrepreneurialism and familial altruism".

Philosopher Stephen Wilkinson's study of 'exploitation' identifies two key factors of the term's definition:

- that the exploited person derives (or is at risk of deriving) an unfairly low level of benefit and/or suffers an unfairly high level of cost or harm;
- that the exploited person's consent to the arrangement is defective or invalid¹³.

⁷ A Bailey, 'Reconceiving Surrogacy: Toward a Reproductive Justice Account of Indian Surrogacy' [2011] 26(4) Hypatia 715–741.

⁸ G Aravamudan, Baby makers: The story of Indian surrogacy (Harper Collins 2014)

⁹ S Dasgupta and S Das Dasgupta, 'Business as Usual?: The Violence of Reproductive Trafficking in the Indian Context' in S Dasgupta and S Das Dasgupta (eds), Globalization and Transnational Surrogacy in India: Outsourcing Life (Lexington Books 2014) 194

¹⁰ J Agnihotri Gupta, 'Reproductive Biocrossings: Indian Egg Donors and Surrogates in the Globalized Fertility Market' [2012] 5(1) International Journal of Feminist Approaches to Bioethics 25–51.

¹¹ M Rao, 'Why All Non-Altruistic Surrogacy Should Be Banned' [2012] 47(21) Economic & Political Weekly 15–17.

¹² K Sangari, Solid:Liquid: A (Trans)National Reproductive Formation (Tulika Books 2015) 87

¹³ Stephen Wilkinson, 'Exploitation in International Paid Surrogacy Arrangements' 33, 2 Journal of Applied Philosophy

125-145 <<https://doi.org/10.1111/japp.12138>>.

2.2. Elements of Human Trafficking

‘Trafficking in persons’ is defined by the UN Protocol to Prevent Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (hereinafter ‘Palermo Protocol’) as follows:

‘Trafficking in persons’ shall mean the recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs¹⁴.

According to the above definition, the crime of human trafficking involves three elements, notably:

- 1) **Action:** recruitment, transportation, transfer, harbour or receipt of persons;
- 2) **Means:** threat or use of force or other means of coercion, abduction, fraud, deception, abuse of power, abuse of a position of vulnerability or the giving or receiving of payments to achieve the consent of having control over another person;
- 3) **Purpose:** exploitation including forced labour or services and practices similar to slavery¹⁵.

2.3. The Parallels between Human Trafficking and Surrogacy

- i. Advertisements offering large sums of money for women to sell their eggs or rent their wombs as part of the surrogacy process are a direct means of recruitment. There is evidence that fertility

¹⁴ United Nations Convention against Transnational Organized Crime ‘Protocol to Prevent Suppress and Punish Trafficking in Persons, Especially Women and Children’ (15 November 2000) 2237 UNTS 319 (Palermo Protocol) art 3(a).

¹⁵ United Nations Office on Drugs and Crime, ‘Issue Paper: The Concept of ‘Exploitation’ in the Trafficking in Persons Protocol’ (United Nations, 2015).

agencies concentrate efforts for egg donors and surrogate carriers on college campuses and military bases in the West in order to recruit women of higher economic vulnerability¹⁶.

- ii. In developing countries, midwives are recruited to entice women who have young children and have a high financial burden¹⁷. Additionally, under some transnational surrogacy arrangements, women are transferred from one country to another in order to circumvent prohibitive laws¹⁸.

- iii. Coercion, deception, and fraud are evident throughout the testimonials of ethnographic studies. Many women claim to have not been fully informed of the risks of entering into either an egg donation or surrogacy agreement¹⁹.

- iv. In Asian contexts, contracts have reportedly been provided in languages not understood by the surrogates. Even in ‘best case scenarios’ when full understanding of the risks is assured and consent is fully obtained, the surrogate arrangement cements an asymmetrical power dynamic in which a wealthier party uses either financial or emotional enticement to assert control over the body—an integral part of the person—of the party in greater socio-economic vulnerability. Such a situation amounts to the abuse of a position of vulnerability or the giving or receiving of payments to achieve the consent of having control over another person.

- v. There are distinct similarities between surrogacy and prostitution. Both the sex worker and the

gestational carrier are supposed to possess the ability to separate their personal identity from their physical form. Similar to how the prostitute's body is treated as a commodity for the advantage of someone else, disregarding her dignity and personal integrity, the same is true for the surrogate. Prostitution may be defined as the exchange of sexual services using a woman's

¹⁶ Elizabeth Ziff, “‘The Mommy Deployment’: Military Spouses and Surrogacy in the United States” (4 March 2017) 32,2 Sociological Forum 406-425; Annie M. Lowery, ‘Will You Be My Baby’s Mama?’ (29 April 2004) The Crimson <<https://www.thecrimson.com/article/2004/4/29/will-you-be-my-babys-mama/>>.

¹⁷ Pande 2010 (n7) 975

¹⁸ For example, in 2012 when India banned the use of surrogates for many groups including male homosexual couples, the commercial agencies in Delhi simply moved their pregnant contractees across the border to Nepal for delivery, where the practice was still legal. Following the decision of the Nepalese government to restrict surrogacy in 2015, Mumbai clinics began recruiting women from Kenya to be fertilized in India and kept under strict in a ‘hostel’; and then, flown back to Nairobi towards the end of their second trimester. Intended parents came from Western nations to pick up their children in Kenya, and the clinics maintained claims to legal adherence, having not interacted with the surrogate transaction within their borders but rather having provided a ‘healthcare’ service to those seeking ‘IVF’. See Sharmila Rudrappa, ‘India outlawed commercial surrogacy – clinics are finding loopholes’ The Conversation (23rd October 2017) <<https://theconversation.com/india-outlawed-commercial-surrogacy-clinics-are-finding-loopholes-81784>>.

¹⁹ See Sheela Saravanan, *A Transnational View of Surrogacy Biomarkets in India* (Springer, 2018); Jennifer Lahl and Justin Baird, ‘Eggsplotation’ (Film, Center for Bioethics and Culture, 2011).

body, without the associated responsibility for reproduction. Surrogacy is the exchange of a woman's body for the purpose of reproduction, without engaging in sexual intercourse²⁰. This process may be seen as the reverse of the traditional act of surrogacy. Consent does not justify the severe dehumanisation of a woman in any situation.

vi. The introduction to the Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others explicitly states that prostitution and the associated practice of trafficking individuals for the purpose of prostitution are inconsistent with the inherent value and respect owed to every human being²¹. Considering these similarities, surrogacy might be seen as a form of reproductive prostitution, perhaps causing harm to one's dignity.

3. SURROGACY- WHY PER SE VIOLATION OF HUMAN RIGHTS?

3.1. Sale of children

International experts, government officials, academics and advocates around the world have raised the concern that surrogacy may amount to the sale of children under international law. Under the Convention on the Rights of the Child, the sale of children consists of “any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration.”²² The sale of children is prohibited under Article 35 of the Convention as well as the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography. Prohibited actions include offering or accepting a child for exploitative purposes such as organ sale, sex work and forced labor, as well as improperly inducing consent as an intermediary for the adoption of a child²³. The prohibition on the sale of children is concerned with the taking of children for “commercial or sexual motive.”²⁴ Article 35 was meant to act as a “fail-safe protection”, to protect children “from being abducted or procured for financial gain, drug trafficking, sex trade, or other forms of exploitation.” The sale of children has long

²⁰ Kajsa Ekis Ekman, *Being and Being Bought: Prostitution, Surrogacy and the Split Self* (Spinifex, 2013).

²¹ Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others (adopted 2nd September 1949, entered into force 25 July 1951) 96 UNTS 271, pp1.

²² Convention on the Rights of the Child, Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, Article 2.

²³ Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, Article 3. See also Report of the Special Rapporteur of the Human Rights Council on the Sale of Children, Child Prostitution and Child Pornography, Sale of Children and Forced Labour, A/71/261, 1 Aug. 2016.

²⁴ UNICEF, Implementation Handbook for the Convention on the Rights of the Child 143, 531-39 (2007).

been a concern within the international community, especially in countries where economic desperation is prevalent, though evidence of the extent of this practice has been uneven²⁵.

In the context of surrogacy, some similar concerns that motivated the prohibition on the sale of children exist, including concerns that surrogates could be coerced and a child exploited. However, surrogacy does not by definition or in practice inherently involve the sale of children and evidence is absent to support the conclusion that sale of children concerns are more acute for surrogacy practices. First, as many commentators have noted, the surrogacy process does not itself amount to the sale of children in that it does not exchange a child for money as defined by international law²⁶. The elements that constitute the sale of a child are not present. In the context of altruistic surrogacy, the surrogate does not receive any payment²⁷ and in the context of commercial surrogacy, the surrogate does not receive a payment in exchange for the child, but rather for the service she provides by carrying the fetus in her womb. Legally, in jurisdictions that allow for commercial surrogacy, there is usually no transfer of parentage from one party to another, because the embryo is considered the intended parent(s)'s from the start. Medically, the gestational surrogate has no genetic link to the embryo and thus is not "selling" her own biological material or offspring. States can prevent abuse and exploitation of children born through surrogacy by ensuring that intended parent(s) are properly screened and even creating monitoring mechanisms to ensure the child's well-being after birth, as in the adoption context²⁸. As set forth in the section that follows, other risk factors for abuse or exploitation, such as imbalance of power between the surrogate and the intended parent(s) or intermediaries, can also be addressed without the sale-of-children concern framing the analysis. There are, of course, numerous policy interventions

²⁵ Commission on Human Rights, Rights of the Child. Sale of Children. Report submitted by Mr. Vitit Muntarbhorn. Special Rapporteur appointed in accordance with Commission resolution 1990/68, E/CN.4/1992/55 (1992). J.H.A. van Loon, Report on Intercountry Adoption, HAGUE CONF.ON PRIV.INT'L L.(Apr. 1, 1990) ¶ 80 [hereinafter van Loon], https://assets.hcch.net/upload/adoption_rpt1990vloon.pdf (The Report identified rumors of "trafficking in fetuses and the use of children for organ transplants" but was unable to verify any such cases.).

²⁶ Jason K.M. Hanna, Revisiting Child-Based Objections to Commercial Surrogacy, 24(7) BIOETHICS 341-47 (2010)

²⁷ In her report on surrogacy and the sale of children, the Special Rapporteur on the sale and sexual exploitation of children recognizes that truly altruistic surrogacy does not constitute sale of children. Human Rights Council, Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material, A/HRC/37/60 (2018) para. 69.

²⁸ The Special Rapporteur also makes this recommendation in her report. Human Rights Council, Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material, A/HRC/37/60 (2018) para. 73.

that can best ensure the process is implemented in a manner that serves the best interest of the resulting child.

3.2 Trafficking of children and human

Restrictions or bans on the practice of surrogacy are often justified as a means of protecting vulnerable women and children from the threat of human trafficking²⁹. Here, again, the practice of surrogacy does not inherently constitute human trafficking. Human trafficking involves the procurement of an individual for the purpose of forced labor and/or sexual exploitation and is prohibited by various human rights instruments, including CEDAW and the 2002 Protocol to Prevent, Suppress and Punish Trafficking Persons, Especially Women and Children³⁰. The Protocol defines human trafficking by three components: an action consisting in the recruitment, reception, transfer or harboring of persons; using improper means to achieve that action (such as coercion, force, fraud or abduction); with an improper purpose (sexual exploitation or forced labor)³¹. At its core, human trafficking prohibits forced or coerced labor of any kind, including sexual services.

In some cases, surrogacy, as any other service or labor, can certainly raise human trafficking concerns of surrogate women and, arguably, because surrogacy is currently performed in unregulated environments by women who are economically vulnerable, concerns may be heightened. In studies on surrogacy in India, where surrogacy was not regulated at the time, some women reported that they were lured by false monetary promises or pressured into engaging in or continuing the process³². For the children born through surrogacy arrangements, there is certainly a danger that they could be commissioned by individuals with the intention of exploitation.

In assessing the significance of concerns around human trafficking of women in the context of surrogacy, it is important to distinguish the elements of surrogacy that make it potentially exploitative. A woman may legitimately choose to serve as a surrogate to improve her livelihood, help

²⁹ David Smolin, Surrogacy as the Sale of Children: Applying Lessons Learned from Adoption to the Regulation of the Surrogacy Industry's Global Marketing of Children, 43(2) PEPPERDINE LAW REVIEW 265 (2016).

³⁰ CEDAW; 2002 Protocol to Prevent, Suppress and Punish Trafficking Persons, Especially Women and Children; ASEAN Convention Against Trafficking in Person, Especially Women and Children.

³¹ The Protocol to Prevent, Suppress, and Punish Trafficking in Persons, G.A. Res. 55/25, annex II, U.N. GAOR, 55th Sess., Supp. No. 49, art. 3(a), U.N. Doc. A/45/49 (Vol. I) (2001).

³² 4 Richard S. Ehrlich, Taiwan Company Accused of Trafficking Vietnamese Women to Breed, THE WASHINGTON TIMES (Mar. 6, 2011), <https://www.washingtontimes.com/news/2011/mar/6/thai-company-accused-traffick-vietnamwomen-breed/>.

another family, or both. Human trafficking of a surrogate may only exist if the ability of the surrogate to make her own decisions is undermined through coercion, force or certain forms of deception³³. Thus, where none of these conditions exist, by participating in surrogacy, a woman is simply exercising her right to make her own choices. To address concerns of the potential for human trafficking of women, states can establish protective measures to ensure that all women who engage in surrogacy do so freely and are fully informed of the implications of their decision³⁴. Under conditions where there is ensured monitoring and regulation of the process and proper surrogacy agreements are made, respected and enforced, there is no reason for surrogacy to pose human trafficking concerns any more than many other forms of labor.

Similarly, the trafficking of children through surrogacy would only occur where the purpose of the practice is to subject the child to exploitation or sexual services. Surrogacy practices can and have resulted in children being raised by loving parents with surrogate women providing a valuable service and being adequately compensated for it. In fact, available evidence indicates that this may be the norm. To address concerns of trafficking of children through surrogacy, states should put in place mechanisms aimed at ensuring all children born through surrogacy grow up in environments protecting their best interests. Such measures can include regulation of intermediary organizations as well as pre- and/or post-conception screening and monitoring mechanisms.

Moreover, banning surrogacy is likely to increase the risk of human trafficking for some, as a ban risks driving the industry underground and to less protective environments³⁵. In countries in which economic desperation is widespread and, in the absence of state regulation, unchecked intermediaries may create dangerous conditions for surrogacy. Human trafficking concerns are likely to be even worse if surrogates themselves are criminalized, as they will not dare come forward after suffering abuses in the black market for fear of being arrested and prosecuted. In such circumstances,

³³ Amrita Pande, Not an 'Angel', Not a 'Whore': Surrogates as 'Dirty' Workers in India, 16 INDIAN JOURNAL OF GENDER STUDIES 141 (2009); Stephen Wilkinson, Exploitation in International Paid Surrogacy Arrangements, 33 JOURNAL OF APPLIED PHILOSOPHY 125 (2016).

³⁴ Protective measures have for instance been put into place by several US states which allow surrogacy, such as Illinois, Washington, Texas and New Jersey. See R.C.W.A. § 26.26A.700 ff (Washington); 750 I.L.C.S. 47/ ff (Illinois); V.T.C.A., Family Code § 160.751 ff (Texas); N.J.S.A. 9:17-60 ff (New Jersey). South Africa has also put in place extensive and protective surrogacy regulations. See South Africa Children's Act 38 of 2005, §292

³⁵ I. Glenn Cohen, *Medical Tourism and the Creation of Life: A Study of Fertility Tourism in Patients with Passports: Medical Tourism, Law and Ethics* (2014); *Sex Workers at Risk: A Research Summary of Human Rights Abuses Against Sex Workers*, AMNESTY INTERNATIONAL (May 2016).

an international mechanism for ensuring adequate oversight and protection may be necessary to safeguard against human trafficking concerns.

3.3 Forced Labor

Similar to human trafficking, there is little evidence that surrogacy has been widely performed under conditions of forced labor³⁶. But as discussed in the previous section, vulnerable women could be coerced or pressured into surrogacy or forced to continue the process against their will. While this can and does happen with other forms of labor (including domestic work, restaurant work and garment labor), because a surrogate provides a service that requires dedication for a period of time and compromises her physical state through pregnancy, concerns of forced or compelled labor are arguably heightened and should be addressed by protective mechanisms to ensure a surrogate has the ability to make choices freely and engage in the process with proper consent.

Many international and human rights instruments prohibit forced labor³⁷. **The Forced Labor Convention** defines this practice as “all work or service which is exacted from any person under menace of penalty and for which the said person has not offered himself voluntarily.”³⁸ Cases in which an employer or recruiter makes certain false promises with serious consequences so that a worker takes a job she would not otherwise have accepted can constitute forced labor. Similarly, surrogacy arrangements could amount to forced labor where contract terms make it impossible for surrogates to break the agreement, perhaps by imposing extreme financial penalties for breach.

Forced labor raises the same concerns of coercion and lack of informed consent as were examined in the previous section on human trafficking. Proper guarantees must ensure that women engage in surrogacy willingly and are able to retain the necessary control throughout the process. States must ensure that women are not coerced, tricked, or forced into serving as surrogates, either by intermediaries or others, and that contractual terms are honored, including fair compensation and

³⁶ Amrita Pande, *Not an ‘Angel’, Not a ‘Whore’: Surrogates as ‘Dirty’ Workers in India*, 16 INDIAN JOURNAL OF GENDER STUDIES 141 (2009); Stephen Wilkinson, *Exploitation in International Paid Surrogacy Arrangements*, 33 JOURNAL OF APPLIED PHILOSOPHY 125 (2016).

³⁷ Article 8 ICCPR, the ILO Forced Labor Convention, and regional treaties such as Article 4 ECHR, Article 5 of the Charter of Fundamental Rights of the EU, Article 6 of the American Convention on Human Rights, Principle 13 of the ASEAN Human Rights Declaration.

³⁸ Int'l Labour Org. [ILO], *Forced Labour Convention*, 1930, art. 2(1), C29 (June 28, 1930) [hereinafter *Forced Labour Convention*].

protection from punitive penalties. Restrictions on women’s movement (travel restrictions), activities and other aspects of the process must be carefully analyzed to ensure the surrogate’s labor (including all elements of the preparation, fertilization, birth and pregnancy) is voluntary and not restricted in a manner that constitutes forced or compelled labor.

4. LEGISLATIVE FRAMEWORK IN INDIA NOT SUFFICIENT TO CONTROL CRIME ASSOCIATED WITH SURROGACY

In the case of *Baby Manji Yamada versus Union of India & Anr.* [2008], commonly referred to as the *Manji Case*, the Supreme Court of India ruled that Commercial Surrogacy is legal in the country. However, recent years have seen a significant rise in human trafficking globally, with the legalization of Commercialization of Surrogacy creating a new avenue for exploitation. This has led to the trafficking of illiterate women from impoverished backgrounds to fuel the reproductive industry of Surrogacy. While trafficking was previously associated with prostitution, the legalization of Commercial Surrogacy has prompted traffickers to exploit women and girls as raw materials for the reproductive industry. The Immoral Trafficking Prevention Act (ITPA), 1956, and Sections 366(A) and 372 of the Indian Penal Code, 1860, are the existing laws in India dealing with human trafficking. However, these laws lack provisions to address the trafficking of women and girls for Commercial Surrogacy. Existing laws require amendments to combat this new form of

exploitation and safeguard the rights and health of women.

4.1. Indian Surrogacy Laws for Addressing Crime

i. One possible approach would be to provide legal protection for human rights abuses, while another alternative would be to enact a legislation that specifically punishes those who violate the rights of women and children. **The Surrogacy (Regulation) Act, 2021** is a comprehensive legislation that establishes certain regulations for IVF clinics, intended parents, and surrogate mothers to adhere to. Clinics must be officially registered with the National Assisted Reproductive Technology and Surrogacy Registry (NARTSR). The NARTSR boards will be formed at both the national and state levels, with members from the medical profession, social scientists, women's welfare groups, and civil society.

ii. In accordance with the Pre-conception and Prenatal Diagnostic Techniques (PC-PNDT) Act of 1994, competent authorities (AAs) have been designated to oversee the enforcement of the Act. The AAs

have been entrusted with significant duties, such as the maintenance of records, as well as the power to conduct searches in any location or summon any individual who is in violation of the Act. They possess the authority to either temporarily or permanently halt or revoke registrations, conduct inquiries into grievances, initiate necessary legal proceedings, oversee the enforcement of the regulations, and propose necessary modifications to the Board.

iii. The 2021 Act has addressed several facets of exploitation. Abortion cannot be performed without the surrogate mother's written agreement, and it must comply with the Medical Termination of Pregnancy (MTP) Act of 1971, which was updated in 2021. Commercial surrogacy, the selling of a child, any associated prostitution, and any other type of exploitation are strictly illegal and can result in punishment. Nevertheless, the specific kinds of exploitation have not been delineated. Clinics are prohibited from engaging in advertising that seeks to encourage women to participate in surrogacy or promote the practice of commercial surrogacy. The recruitment of surrogate mothers by any form of racket, company, or group is strictly forbidden. The use of brokers or agents to facilitate the arrangement of surrogate mothers is prohibited, and clinics are prohibited from selling embryos or gametes for the purpose of surrogacy.

iv. Sex selective abortions are prohibited during the surrogacy process as an extension of the PC-PNDT Act. There is insurance cover for a period of 36 months to take care of post-partum health issues. Only women between the ages of 25 and 35 are eligible to involve themselves in altruistic surrogacy. Since the risk of obstetric complications increases with higher maternal age, this clause safeguards women from unnecessary danger. Surrogate mothers have to be informed about all the side effects of altruistic surrogacy and their written consent has to be obtained. Women are allowed to withdraw before the embryo transfer. Widows/divorcees between the ages of 35 and 45 years can avail themselves of altruistic surrogacy. It is unclear why this clause exists, but it gives room for single ever-married women to have genetically linked children.

v. Intended parents must not have previously conceived a child biologically, adopted a child, or had another child through surrogacy. However, an exception can be made if the kid has a disability. The minimum age requirement for prospective moms is 23, while the maximum age is 50. For intended dads, the minimum age is 26, and the maximum age is 55. The Act provides safeguards to prevent children from being abandoned or exploited.

vi. Non-Resident Indians (NRIs) are permitted to participate in altruistic surrogacy arrangements in India. The ongoing process of partially commodifying women's bodies persists through a stipulation

that mandates surrogate moms to possess emotional attachment and a desire to be involved in the lives of the child, even in cases of altruistic surrogacy.

vii. Altruistic surrogacy is a subject of ongoing dispute due to the prevalence of commercial practices. Women are often stereotyped into a position of caring and giving, while exploitation occurs behind the scenes.

viii. The penalty for eluding legal authorities is a sentence of 10 years of incarceration and a fine of Rs. 10 lakh for clinics, and a term of five years in prison and a fine of Rs. 5 lakh for prospective parents.

4.2. Inadequate Surrogacy Legislation: A Failure to Combat Crimes

1. Exclusion of Genetic Surrogacy

The Act's definition of surrogacy is narrow, excluding genetic surrogacy and focusing solely on gestational surrogacy.

Genetic surrogacy involves the surrogate bearing the child using her egg and the sperm of the donor or commissioning man. This definition aims to establish absolute biological ownership for the donor parent by separating the child from the surrogate mother. While gestational surrogacy reduces the surrogate's role to that of a carrier, genetic surrogacy offers advantages like lower cost and no impact on the surrogate's fertility, as fertility medication is unnecessary. Therefore, the authors advocate for permitting both forms of surrogacy.³⁹

2. Lack of Appropriate Insurance for Surrogates

The Act mandates commissioning couples to ensure appropriate insurance for both the surrogate and child until the surrogate is free from post-delivery health complications. However, it fails to specify the nature and extent of insurance coverage, neglecting issues related to post-delivery care for surrogate mothers. Clear guidelines are imperative to outline the standard of care, compensation for pregnancy-related expenses, including medical checkups, and provision for legal aid to address potential conflicts during surrogacy arrangements.⁴⁰

³⁹ Fiona MacCallum, Emma Lycett, Clare Murray, Vasanti Jadvia and Susan Golombok, Surrogacy : The Experience of Commissioning Couples, 18(6) Human Reproduction 1334, 1337 (2003).

⁴⁰ Olga van den Akker, The Importance of A Genetic Link In Mothers Commissioning A Surrogate Baby In The UK, 15(8) Human Reproduction 1849, 1851 (2000).

3. Lack of Clarity on Compensation

The Act's ambiguity regarding compensation for surrogate mothers raises concerns. While it allows financial compensation from assisted reproductive technology banks and commissioning couples, the transaction process lacks clarity, especially considering the surrogates' typically disadvantaged socioeconomic status. Clear regulations are necessary to ensure transparency and fairness in financial transactions.⁴¹

4. Need for Inclusion of Informed Consent

The Act requires consent from oocyte donors or surrogate mothers, but lacks provisions for informed consent, crucial for understanding the risks associated with assisted reproductive procedures. It should compel ART clinics or banks to provide comprehensive information on potential risks, ensuring informed decision-making.⁴²

5. Broadening Acceptable Identification Documents

The Act's reliance on Aadhar cards as the primary identification document excludes potential gamete donors and surrogates without Aadhar cards, disregarding alternate identity proofs. Amendments are necessary to broaden acceptable identification options in compliance with legal directives.⁴³

6. Identifying Rights of Surrogacy-born Children

The Act inadequately addresses the rights of children born through surrogacy, omitting provisions for instances like abandonment by the commissioning couple or custody disputes in cases of separation or divorce. Alignment with established legal precedents, such as the Manji Yamada case, and establishment of a regulatory authority to oversee commissioning couples' actions post-surrogacy are essential for safeguarding children's rights.

⁴¹ Id.

⁴² Durgesh Nandan Jha, New Law to Clip Wings of Rent-a-womb Biz, THE TIMES OF INDIA, <http://timesofindia.indiatimes.com/city/delhi/New-law-to-clip-wings-of-rentawombbiz/articleshow/49459639.cms?>

⁴³ Id.

7. Infringement of Women's Reproductive Rights due to insufficient laws

The concept of reproductive choice encompasses a woman's fundamental ability to make decisions regarding her reproductive health, including the choice to have children, terminate unintended pregnancies, and select preferred family planning and contraception methods. These rights extend to include access to contraception, the right to seek a legal and safe abortion, and the freedom to make reproductive decisions without facing discrimination, coercion, or violence. Moreover, women have the right to safeguard themselves against harmful practices such as coerced childbearing. In the case of *Suchita Srivastava v. Chandigarh Administration*, the Supreme Court underscored the significance of a woman's freedom to make reproductive choices as an integral component of her 'personal liberty' enshrined in Article 21 of the Indian Constitution. The court emphasized that recognizing the dual nature of reproductive decisions, encompassing both the choice to reproduce and the choice to refrain from procreation, is paramount. Similarly, in the case of *K. S. Puttaswamy (Retd.) and Others v. Union of India*, reaffirmed that women's reproductive choice is indeed a facet of personal liberty protected under Article 21 of the Constitution of India.⁴⁴

5.

SUGGESTIONS

1. The Case for a Transnational Surrogacy Mechanism

A transnational mechanism may offer the most viable solution to meet the increasing demand for surrogacy services, while simultaneously addressing concerns related to forum shopping, setting international standards, and safeguarding vulnerable surrogate women from exploitation.⁴⁵

2. Domestic Limitations and the Need for Transnational Solutions

While domestic arrangements may benefit from enhanced state oversight, they are unlikely to provide a sustainable long-term solution for surrogacy arrangements. However, implementing domestic limitations could be a prudent interim measure while a transnational mechanism is being developed.⁴⁶

⁴⁴ Arijeet Ghosh, Nitika Khaitan, A Womb of One's Own: Privacy and Reproductive Rights, 52 EPW 42 [Oct. 2017].

⁴⁵ Erica Davis, The rise of gestational surrogacy and the pressing need for international regulation, 21 MINN J INT L 1, 120, 121 (Spring 2012).

⁴⁶ Id.

3. Managing Transnational Surrogacy Arrangements

States that restrict surrogacy to domestic arrangements still face challenges associated with transnational surrogacy. It is imperative for these states to devise policies and agreements to protect the best interests of children born through surrogacy. This includes ensuring they are not rendered stateless or subjected to unrecognized parentage relationships.⁴⁷

4. Challenges of Altruistic Surrogacy Limitations

Imposing restrictions on altruistic surrogacy may inadvertently foster the development of "creative" agreements between surrogates and intended parents to determine compensation, complicating enforcement and undermining legal protections. Moreover, such limitations could be rooted in gender discrimination, perpetuating stereotypes about maternal labor and making paternalistic assumptions regarding the monetization of women's labor. Given the demanding nature of surrogacy services and their potential long-term physical consequences for surrogates, fairness suggests that compensation for such labor should be considered appropriate. Additionally, these limitations may place undue burdens on women, leaving surrogates susceptible to familial or societal pressures and inequalities, thereby diminishing the benefits derived from their service.⁴⁸

5. Regulation of Surrogacy Intermediary Organizations to reduce Human Trafficking

Surrogacy intermediary organizations necessitate regulation at both the state and international levels, encompassing stringent licensing prerequisites, clearly defined duties and responsibilities, and robust mechanisms for accountability and reporting. To mitigate risks, it may be prudent to restrict the involvement of private, for-profit surrogacy intermediaries solely to matching and facilitating arrangements, as their control over all aspects of the process could lead to inconsistencies in standards and practices, particularly jeopardizing the welfare of vulnerable surrogates within an

unregulated industry. Furthermore, states should contemplate establishing a governmental apparatus to either function as a surrogacy intermediary or gather data on surrogacy services while overseeing the operations of these private entities.⁴⁹

⁴⁷ Nishat Hyder, India Limits Surrogacy Visas to Married Couples, BIONEWS (Jan. 21, 2013), https://www.bionews.org.uk/page_93959.

⁴⁸ Sharmila Rudrappa, Why is India's Ban on Commercial Surrogacy Bad for Women?, 43 N. C. J. INT'L L. 70, 70-71 (2018).

⁴⁹ Id.

6. Ensuring Surrogate's Informed Consent to avoid sexual exploitation

The informed consent of the surrogate throughout every stage of the surrogacy process, encompassing all medical procedures and services, stands as a paramount requirement for any surrogacy practice. Regulations must specify the format and content of information disseminated to surrogates regarding the surrogacy process and its implications. Additionally, the surrogate should be afforded independent advice and counsel on the intricacies of the process and the terms outlined in any agreements.⁵⁰

7. Deterrent theory and Introduction of "Human Trafficking in case of Surrogacy" as separate crime in New Criminal Laws

Deterrent theory suggests that the severity, certainty, and swiftness of punishment influence individuals' decisions to engage in criminal behavior. Applied to surrogacy laws, this theory implies that strict regulations and enforcement mechanisms can deter potential offenders from exploiting women and girls within the surrogacy industry. By imposing severe penalties on those found guilty of trafficking for surrogacy purposes, such as hefty fines and lengthy prison sentences, lawmakers can send a clear message that such exploitation will not be tolerated. Moreover, ensuring the certainty of punishment through rigorous enforcement and swift legal proceedings can further reinforce the deterrent effect. Additionally, public awareness campaigns highlighting the legal consequences of engaging in trafficking for surrogacy can serve to deter both potential offenders and individuals considering entering into exploitative surrogacy arrangements. Overall, adopting a deterrent approach in surrogacy laws can help protect the rights and well-being of women and girls while upholding the integrity of the surrogacy process. The introduction of "Human Trafficking in case of Surrogacy" as a separate crime in new criminal laws is crucial to effectively address the specific challenges presented by the exploitation of women and girls within the surrogacy industry. Existing legislation, such as the Immoral Trafficking Prevention Act (ITPA), 1956, and relevant sections of the Indian Penal Code, 1860, lacks the specificity required to adequately combat trafficking for surrogacy purposes. This new criminal offense should encompass all aspects of trafficking for surrogacy, including recruitment, transportation, harboring, and exploitation, while also addressing coercion, deception, and abuse of power. Stringent penalties should be imposed on offenders, and provisions should be made for the protection and rehabilitation of victims, ensuring their access to necessary support services. By introducing this new crime, policymakers can

⁵⁰ Sital Kalantry, Regulating Markets for Gestational Care: Comparative Perspectives on Surrogacy in the United States and India, 27 Cornell L.J. & Pub. Pol'y 693, 685-715 (2018).

effectively deter exploitation in the surrogacy industry and uphold the rights and dignity of women and girls involved.

6.

CONCLUSION

Global society and State Governments must carefully consider the implications of this developing and rapidly expanding activity, since there is a significant amount at risk. Intended parents have the entitlement to form a family, which may be at risk or lost. Surrogate women have the opportunity to earn a fair income by providing a necessary service. Children born through surrogacy have the right to be safeguarded, obtain citizenship, and establish an identity. States have the capacity to ensure the safety and well-being of their citizens. Regulating surrogacy is necessary to prevent instances of

human rights violations that have been place, but it should not be outright prohibited. A strategy that aims to defend and promote human rights should focus on safeguarding the rights of all individuals. This may be achieved by implementing well-informed and carefully crafted laws and regulations that maintain a proper equilibrium.

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7. Protective measures have for instance been put into place by several US states which allow surrogacy, such as Illinois, Washington, Texas and New Jersey. See R.C.W.A. § 26.26A.700 ff (Washington); 750 I.L.C.S. 47/ ff (Illinois);
8. V.T.C.A., Family Code § 160.751 ff (Texas); N.J.S.A. 9:17-60 ff (New Jersey). South Africa has also put in place extensive and protective surrogacy regulations. See South Africa Children's Act 38 of 2005, §292
9. Glenn Cohen, Medical Tourism and the Creation of Life: A Study of Fertility Tourism in Patients with Passports: Medical Tourism, Law and Ethics (2014); Sex Workers at Risk: A Research Summary of Human Rights Abuses Against Sex Workers, AMNESTY INTERNATIONAL (May 2016).