

Surrogacy: A Multidisciplinary Perspective

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Abstract

Often, what is unaccustomed to the eyes of human beings, is considered menacing in any way possible. With every reason justifying its threat, we limit the concept's scope while we put as much effort as we could to fit it into our definition of normal and right. Surrogacy, in the disguise of knowledge, has been immolated to a similar acceptable explanation as a phenomenon worldwide. The morality and legality of any nation consist of a pool of resources to present such arguments. I, through this article, intend to address the concerns so far shared by those lawmakers, citizens, highly educated professionals, and feminists working in the ranks of the state deciding the fate of surrogacy and its practitioners through their sound enforcement. Once created, I believe that this article would leave each and every reader free and empowered to accept surrogacy for the potential it entails in breaking certain barriers of legal restrictions. I question the morality attached to the legal framework with respect to surrogacy and explore the intrinsic value that surrogacy carries. This article explores how surrogacy instead of a breach of sentiments, strengthening socio-economic disparity and harm to legal frameworks of rights, especially in the realm of exploitation, is integrative and the most unlike possibility in each of these contexts. It, instead is, in fact, an act that is acceptable universally, beyond the structures that human beings have created in viewing surrogacy. Rather, it could be viewed as an act where both, the surrogate mother and the commissioned parents rather than experiencing being befuddled, powerless and incomplete could experience fulfillment, power, happiness, and completion.

Keywords- Surrogacy, Morality, Rights, Feminism, Law, Medical, Socio-Economic, Intrinsic Value, Bio-Ethics, Altruism

Introduction

The world's second and India's first In Vitro Fertilization (IVF)¹ baby, Kanupriya alias Durga was born on October 3, 1978, in Kolkata² followed by America in 1981³. The first scientifically documented IVF baby was Harsha, born in Mumbai in August 1986⁴. Since then, surrogacy has come to be seen as a viable method to conceive a baby for those couples who cannot procreate a child through natural reproduction. Therefore, it has been in practice worldwide in various ways with varied norms and structures. Surrogacy is a process of reproduction involving an impotent couple and a fertile woman where they both come to an agreement such that the couple asks the woman to develop their child within her body for them and the woman, on the delivery of the baby, hands them over to their original parents. However diverse may it be as a practice in different places, what binds all the nations together is the notion attached to and the context in which surrogacy is perceived and hence, accepted legal across the world. There are similar views regarding the practice of surrogacy despite diverse ethnic, educational, cultural, circumstantial, and demographic grounds among countries, states, and cities. But before we dig in deep, let's get familiar with certain basic terms associated with surrogacy.

Surrogacy as a concept

Surrogate mother refers to a woman who carries a child in her womb for a period of 9 months and upon their birth, gives the child to the commissioned parents.⁵ Commissioned parents are the couples who opt for surrogacy as a means to conceive a baby when they are unable to reproduce naturally⁶. Traditional surrogacy is the process in which the commissioned father contributes his sperm either through sex with the surrogate mother or through Intra Uterine Insemination (IUI)⁷ and the baby is born naturally carrying the genes of the commissioned father through his sperm or and the surrogate mother through her egg or

¹ In Vitro Fertilization (IVF), Mayo Clinic. Available at [https://www.mayoclinic.org/tests-procedures/in-vitro-fertilization/about/pac-20384716#:~:text=In%20vitro%20fertilization%20\(IVF\)%20is,by%20sperm%20in%20a%20lab.](https://www.mayoclinic.org/tests-procedures/in-vitro-fertilization/about/pac-20384716#:~:text=In%20vitro%20fertilization%20(IVF)%20is,by%20sperm%20in%20a%20lab.)

² Chandra, Smith, *Surrogacy and India* (February 16, 2011). Available at <https://ssrn.com/abstract=1762401> or <http://dx.doi.org/10.2139/ssrn.1762401>

³ Reich, J. Brad and Swink, Dawn, "Outsourcing Human Reproduction: Embryo And Surrogacy Services In The Cyber Procreation Era", 2011, Article 2, Volume 14, Issue 2, p.249.

⁴ Future Woman, Available at http://www.futuremedicineonline.com/detail_news.php?id=447

⁵ National Cancer Institute, The United States Government. Available at <https://www.cancer.gov/publications/dictionaries/cancer-terms/def/surrogate-pregnancy>

⁶ Commissioning Parents Definition, *Law Insider*. Available at <https://www.lawinsider.com/dictionary/commissioning-parent>

⁷ Intra Uterine Insemination: IUI, *American Pregnancy Association*. Available at <https://americanpregnancy.org/getting-pregnant/intrauterine-insemination/>

ovum⁸. The famous Indian movie titled ‘Chori Chori Chupke Chupke’⁹ was based on the concept of traditional surrogacy. Gestational surrogacy involves infusing the sperm and egg of commissioned parents to create an embryo which is then implanted in the uterus of the surrogate through IVF and she simply carries the child for them¹⁰. Indian cinema depicted this concept aptly in one of its recent movies titled ‘Mimi’¹¹. There were certain concerns addressed in this picture which I would address later in this article. Altruistic surrogacy is the process in which the surrogate mother is not compensated monetarily by the commissioned parents for bearing their child¹² while commercial surrogacy involves compensation to the surrogate beyond medical expenses¹³.

Surrogacy in India

Surrogacy has been in practice for the longest time. It has faced certain difficulties. Therefore, there are several laws that are created for the regulation of this act and to prevent as much damage caused as possible to any human being. There are laws that clarify the eligibility to be a surrogate and an intending couple. Not everyone is allowed to opt for surrogacy as a way to have a child. An intending couple is eligible for a certificate issue if they fulfill the following conditions:

1. The couple is registered as Indian citizens and are married for 5 years.
2. The wife ranges between 23-50 years and the husband, between 26-55 years of age.
3. They do not have any adopted, surrogate or biologically surviving child.

NOTE- it does not include a child who suffers from a fatal illness or a life-threatening disorder or is physically or mentally challenged.

4. Other conditions that regulations may specify.
5. A divorced or widowed intending Indian woman whose age ranges between 35-45 years.

Similarly, not all uteri are eligible to be entitled as surrogates. The criteria and guidelines to act as a surrogate are as follows-

1. Only a married woman with at least one child of her own could become a surrogate.

⁸ What is Traditional Surrogacy? *American Surrogacy*.

<https://www.americansurrogacy.com/surrogacy/traditional-surrogacy>

⁹ Abbas and Mastan (Director), *Chori Chori Chupke Chupke*, 2001. Available at

<https://www.youtube.com/watch?v=K-WvWHTYJVQ>

¹⁰ Gestational Surrogacy, Cleveland Clinic. Available at <https://my.clevelandclinic.org/health/articles/23186-gestational-surrogacy>

¹¹ Laxman Utekar (Director), *Mimi*, 2021. Available at Netflix.

¹² The Surrogacy (Regulation) Bill, 2019, *Ministry: Health and Family Welfare*. Available at

<https://prsindia.org/billtrack/the-surrogacy-regulation-bill-2019>

¹³ What is Commercial Surrogacy? *About Surrogacy*. Available at <https://surrogate.com/about-surrogacy/types-of-surrogacy/what-is-commercial-surrogacy/#:~:text=Commercial%20surrogacy%20refers%20to%20any,surrogacy%20journeys%20you%20can%20take>.

2. On the day of implantation, the woman is between 25-35 years of age.
3. The woman is genetically related to either of the intending parents.
4. The woman would not provide her own gametes.
5. The woman could not be a surrogate more than once in her lifetime.

A set of laws also define surrogacy that could be practiced legally in India. According to the Gazette of India, surrogacy procedures could be availed for selective following purposes-

1. When an intending Indian couple has a certified medical indication necessitating the adoption of Surrogacy.
2. The woman is willing to be a surrogate mother for altruistic purposes only.
3. When surrogacy is not used as a means of commercialization or for commercial purposes.
4. When children are not produced for any exploitation practices.¹⁴

What I may now present might hurt and be in conflict with a certain significant section of the society. I request you dear readers, to continue reading in case you are ready to accept certain challenging thoughts. It is worth noting that these laws do not reflect the true needs, desires, and expression of people's voices but are a manipulative legal means to justify the stereotypical thoughts and beliefs that the society carries toward a large section of those who reside in this society but don't seem to deem fit or qualify according to the "standards" of society. Or worst; don't deserve to even exist as equals with others in the eyes of society. Technology has evolved to develop techniques including surrogacy just to travel back. It is only available to normal people.

Through this article, I present the false morality that governs the perception of surrogacy and each aspect of the laws that limit what surrogacy could, in reality, achieve.

The falsehood behind the good- Altruism

Before we discuss the notion of surrogacy, let's understand the structure of altruism. Altruism is an act of caring about the needs of others even if it means sacrificing self¹⁵. Often, a person engages in altruistic actions because it brings happiness and satisfaction. We prepare a meal for the needy, serve them and feel contented because you did something selfless. We did something out of our way that made us feel that we understand the pain of those needy people. And we liked it because doing anything without an ulterior motive is good. However, we cannot deny the fact that because we want to experience that happiness, that contentment time and again, we engage in such altruistic acts. Whether we accept it or

¹⁴ The Surrogacy (Regulation) Act, *The Gazette of India*, December 25, 2021, (chapter III, pg. 5-7). Available at <https://egazette.nic.in/WriteReadData/2021/232118.pdf>

¹⁵ Altruism, Cambridge Dictionary. Available at <https://dictionary.cambridge.org/dictionary/english/altruism>

not, everything we do in altruism is in reality an egocentric move too. The real concern is not being egocentric or selfish in one's actions but how these principles are perceived as. A popular thought it is that, to connect with people, understand them and maintain a fair balance sheet of sins and holiness in life, one's acts need to be embedded in selflessness. Being selfless is a way to repent for the guilt one incorporates. And thus, being selfless, being altruistic is satiating. Anything that is selfish, then, becomes bad. In fact, anything that is not selfless by default becomes a mockery. Henceforth, being selfish is condemned, becomes unacceptable. Furthermore, with the notions attached to money, a money driven being is all the more considered selfish. And so, if, a person is selfish, it is believed, they can never be engaged in a noble, pure deed as it would be impure, grimy. Selfish people are a disgrace to empathy since it is impossible for them to go way out of their league, they would not walk on fiery, burning charcoal to help those who are in pain.

Having delved into the frames in which we generally operate, I would like you to mirror on certain questions. Does one really need to hurt themselves or be in pain to create possibilities for those who are in pain? Why making money such that it does not harm anyone and in fact, promotes the well-being of others along with self is not believable simply because a person is making their life out of that work? If this is the parameter to compare anyone's intention, then surely no teacher should be paid for educating people, no doctor should be paid for healing people, no builder should be paid for providing shelter to people, and no chef should be paid for feeding the hungry people, no cloth manufacturer should be paid for protecting people from weather, and so on.

As Plato put it, "necessity is the mother of invention"¹⁶, right from the inception of human birth, till the present, everything has developed because it had been the need of the hour across the time period. Anything that has its roots in necessity should not be commercialized, right? Seldom is this true. Doctors are often compared to God and yet they are entitled and accepted for the entitlement to earn from their skills, though they are doing a noble deed. And not just otherwise, but in surrogacy as well. Then why, in the name of altruism, a surrogate mother has to bear the brunt of selflessness to prove her motherhood, her love, her intentions? Why does it have to be a sacrifice of personal life for a surrogate mother? There have been laws to protect surrogate mothers and prevent them from exploitation and at the same time declare it as an altruistic act thereby limiting the compensation to cover medical costs and insurance in case of damage which amounts to exploitation indeed.

¹⁶ In the Socratic dialogue 'Republic', Plato wrote: "Our need will be the real creator" (Wikipedia.Org, 2020), molded over time into the English proverb: 'Necessity is the mother of Invention. Available at <https://www.open.ac.uk/blogs/design/necessity-is-the-mother-of-invention/>

The not-so-possible danger to the lives of people

Now some might argue that the main reason to define it as an altruistic act and not commercialize it is that it is considered against human rights for women to sell a part of their body just for their money or procreating a child in exchange for money amounts to the selling of child, like human trafficking. I may first present to you the definition of human trafficking. According to United Nations Office on Drugs and Crime (UNODC), Human trafficking shall mean the transportation, receipt, recruitment, harboring, or transfer of a person by the use of force, threat, abduction, coercion, fraud, deception, abuse of power, vulnerability or payment of money to receive consent or control over another person, for the purpose of exploitation.¹⁷ According to National Criminal Records Bureau, India (NCRB), Human trafficking involves the sexual exploitation of men, women, and children for financial gains or exploiting the trafficked person through luring, abduction, or forced labor in various establishments and forms such as indulge in prostitution or subjected to various types of indignities and even killed or incapacitated for the purposes of begging and trade in human organs.¹⁸

Neither of these definitions convey that surrogacy as a means to make livelihood involves human trafficking. The purpose is not to exploit here, but to have a child, both by the intending parents and the surrogate mother. The money would become the outcome or result in the process of procreating a baby and is not the purpose. Neither is using a part of the body amounting to selling against human rights since the surrogate makes a choice to engage in this process despite being aware of everything. What would we achieve in protecting the human rights of a person by snatching them off their other sets of rights? In both circumstances, it is the choice and freedom of the surrogate that is compromised.

Let us understand the perspective of human rights and human trafficking through the realities in the world. Is organ donation not legal in India? Are organ donors not paid a hefty amount for the part they are willing to forgo to the potential receiver? Donating an organ involves the mutual consent of the receiver as well as the donor. It is the donor's choice to give away a part of their body and they can receive compensation for their future needs, complications, health maintenance, etc. So, is the case in surrogacy. A body part is used for the welfare of the other and she has the right to receive the amount of money they deem fit for her services which is mutually agreed upon, keeping in mind what they go through. Sperm donation is monetarily compensated with huge prices which are agreed for the procreation of a child. It is legal as well. All a person needs to do is ejaculate their semen samples in a

¹⁷ Human Trafficking, "United Nations" Office of Drugs and Crime, accessed October 10, 2022. Available at <https://www.unodc.org/unodc/en/human-Trafficking/Human-Trafficking.html>

¹⁸ Human Trafficking, *National Crime Records Bureau*, (chapter 6A, pg. 103), accessed October 10, 2022. Available at https://ncrb.gov.in/sites/default/files/crime_in_india_table_additional_table_chapter_reports/Chapter%206A-15.11.16_2015.pdf

cup. A surrogate, on the other hand, is subjected to a number of painful and invasive procedures that disturbs their hormonal balances, their menstrual cycle and upon implantation of the embryo, their body parts as well. They nurture an embryo for nine months in their womb which would be morally wrong to be commercially paid for it would amount to selling. Why, when the end result in both is the birth of a child and giving them up to the prospective couple, one amounts to selling up the child for money while the other does not? In addition, these procedures not only impact their physical well-being but also their mental health, social life, personal life, emotional self, and other areas of life.

Clearly, some may argue that procedural costs and insurance payments are covered in a contract of altruistic surrogacy which keeps in mind the health aspect of the surrogate. In reality, though, is this notion of health in surrogacy all-inclusive? Health as defined by World Health Organization (WHO) is “a complete state of physical, mental and social well-being and not just the absence of a disease or infirmity.”¹⁹ Surrogacy, on the contrary, is sensitive to the mere physical domain of health. The surrogate sacrifices their energy and body to make it possible for the receiver to have a new beginning in life and as a matter of fact contributes to their nine months. In addition to it, painful procedures and check-ups she is subjected to not only affect her body which includes the cost covered but it affects her mentally. A significant amount of research in medical sciences has established the impact of imbalances of chemicals and patterns of the menstrual cycle in female anatomy on the mental well-being of an individual.

Seldom is it considered that a surrogate has a family, irrespective of their economic status, and in those nine months, she experiences familial concerns, discords, and distance. There might be surrogates, who do not have families and thus, are devoid of any social support in those crucial nine months. However, neither of these mental and social domains of health have been taken into consideration while deciding the future of surrogates and surrogacy. In addition, there also exists an economic aspect to the well-being, which though, may not extensively and explicitly inhibit a surrogate’s health, but their life at large and in general. If a surrogate is a person who works professionally, they would have to take a break from her work life during the course of pregnancy. She would be on maternity leave. Is it possible that since it is not her child, she is giving birth to, her organizations may not have the provision for surrogate mothers requesting paid leaves? In such circumstances, not only would a surrogate have lost her means to her livelihood which would create a ruckus for her financially, she would be affected by her loss in terms of her mental health, her feelings of inabilities and futilities for she would sit idle for months.

¹⁹ Health, *Constitution*, World Health Organization. Available at <https://www.who.int/about/governance/constitution>

A popular conception, there is, that commercial surrogacy might exploit the surrogate and it would compel her, especially the poor women to earn money through such means, which is reasonable and fair yet strongly debatable. According to Kembrell, as a practice, surrogacy exploits a women physically, emotionally and economically. A dominant factor is that most surrogates do so because they yearn for money to maintain their family's livelihood. A third party's involvement heightens the chances of preparing contracts with questionable legality. Such intransigent contracts detest women to the rigors of childbearing devoid any fruits as she gives away the child.²⁰ Surrogates, often unaware of and gullible to their legal rights, could not avail a lawyer or an attorney bound by their financial conditions. Thus, in any breach of contracts, they are the ones who bear the brunt of improper legal systems, lack of awareness, poverty, and shortage of opportunities. Although surrogates recognize that they have no genetic connection to the baby, which should make it easier for them to give the child away, they still are bound to lay some kind of claim to the baby. Is it easy for a kid to give up their toys or for an adult to give up their pets neither of who are genetically related to their caregivers? In Pande's study, some surrogates note surrogacy to be emasculating for men since it requires mere contribution from and by them.²¹ I would expand the horizon of structural deficiencies in the country regarding surrogacy regulation at length at some point in this article. It is argued, henceforth, that surrogacy is restricted to an altruistic form to avoid such exploitation from both sides. On the part of intending parents to refrain them from extorting the surrogates and avoid child abandonment which devastates the lives of the surrogates, and on the part of surrogates, to prevent them from claiming the child to be hers.

Attachment is natural. Instead of accusing the surrogate and holding her wrong, is it not possible to listen to her concerns and resolve what makes her feel attached to the child? This way neither the commissioning parents would feel incomplete while receiving their child nor the surrogate mother while letting them go. The two sides of the coin, equally important and complex could be looked at from a paradigm angle too where transactions are actually used to ensure that both the parties involved maintain their ends of the bargain. Exactly, to avoid such situations, surrogacy needs to be commercialized and be added as a clause in a surrogacy contract legally which would not only discourage the intending parents from engaging in breach of contracts easily or committing fraud that would hold them accountable but allow the surrogates to afford legal services as well in case such situations arise. On the other hand, to refrain from adding to her saddling monetary legal liabilities, the surrogate would be discouraged to break the contract of delivering the child to the intending parents. Through the

²⁰ Dr. Manpreet Kaur Rajpal, *A Critical Evaluation of Legal & Social Aspects of Surrogacy in India: With Special Reference to Gujarat, Maharashtra, Rajasthan & Madhya Pradesh*, (pg. 24)

²¹ Dr. Manpreet Kaur Rajpal, *A Critical Evaluation of Legal & Social Aspects of Surrogacy in India: With Special Reference to Gujarat, Maharashtra, Rajasthan & Madhya Pradesh*, (pg. 23)

commercialization of surrogacy, henceforth, I intend to empower the surrogates such that they are aware of what they do and own up to their choices and responsibilities.

More than anything, a woman's body during pregnancy and post-pregnancy jolts up physically, mentally, and emotionally. She may even experience some health concerns in the long run. In India, As recorded by the Sample Registration System (SRS) reported by the Registrar General of India (RGI), the Indian Maternal Mortality Ratio (MMR) was 97 per 100,000 live births between 2018-20.²² Therefore, to prevent such conditions and discourage surrogacy among the majority of women, these laws are imposed to protect their lives, and surrogacy is restricted to altruism rather than being commercialized. I would elaborate on this perspective in the later section of this article.

Let us have a look at the final and one of the strong arguments questioning the practice of surrogacy. Surrogacy, if commercialized would reflect that the surrogate child has been commodified which would again result in the child's human trafficking and violation of human rights. It is though, not the complete truth. When people see a surrogate child, they do not simply look at them as a child but as someone different. Commercial surrogates are viewed as doing something new, off the course, complex, and controversial. Hence, they are looked at as 'bearers' of a different kind of baby, the conduits of making reproduction commercial and profitable. Thus, surrogate children are looked at as commodities being exchanged between the consumer (intended parents) and the producer (surrogate mother). Naturally born children raised by their birth mother and living with their birth parents are also a financial investment. It is difficult to digest but it is true. Having had your child do you not expect anything from them? Do you not wish to secure their future by educating them and seeing them achieve success in their lives? Would it be completely unbothersome to you if your child doesn't want to earn money in their life? Would you submit in to all their decisions, each one of them, and not have the urge to guide them towards the direction you consider right? Next to the impossible right? Maybe achievable up to an extent, but absolutely not possible. Of course, whatever you would want for them would purely be out of your love and concern for your child. Would you not aspire to have at least some basic support from your child once they grow up to be old emotionally and financially, out of your love for them? Do you not decide what is in your child's best interest when they are incapable of it as babies and toddlers? Though it is sheer human love and connection between a parent and child, still, do you not rear your child as a form of investment expecting future returns from them? Such assurance and transaction might not be visible moment by moment, but exist in years of raising the child. Just because payment in

²² Maternal Mortality Rate, *Ministry of Health and Family Welfare*, accessed November 30, 2022. Available at <https://pib.gov.in/PressReleaselframePage.aspx?PRID=1879912#:~:text=As%20per%20the%20Special%20Bulletin,at%2097%2F%20lakh%20live%20births>

surrogacy is visible in the present, it brings shame. It leads us to think that child is robbed of their basic rights and dignity. If, people accept the truth which is not shameful or disoriented at all, merely human reality, it is possible to realize and recognize that commercial surrogacy and natural births are not really that separate from each other monetarily and then articulate freely that involving money in surrogacy is not a criterion to consider it as a form of violation of human rights of the child, of a surrogate mother or of commissioning parents.

I do not deny the fact that no model, process, technique, method, action, or opportunity is perfect. Any choice and decision have its own benefits and limitations. Although, it is extremely important to consider that either an individual or a group of individuals could use the limitations as an excuse to not put efforts to reform and evolve a completely effective technology and limit its possibility and power of impact or accept the limitations, and work towards making a development beneficial for the larger set of society until. I would discuss it at length in the last section of this article. It is not easy to accept what I have presented after years of learning about how things are. Though, if you have begun to ponder upon the existing surrogacy as it is at present in some way, to some extent, you may proceed to read this article. If you still stand firmly with your thoughts as they were in the beginning, I would ask you not to anguish yourself further into reading the article. If you want to, you may proceed at your peril.

Having challenged the stigmas attached to the concept of money and noble deeds, establishing commercial surrogacy as a viable option in any country, I shall now attempt to present how conveniently are laws used to limit access to surrogacy and women who are eligible to become surrogate mothers.

Fundamental Rights and gap of access with respect to surrogacy

Exclusion from accessing surrogacy for security

According to the ART, 2022 only those who are married for 5 years where the woman is between 23-50 years of age and the man between 26-55 years with either or both of them having medical evidence that they cannot conceive a child naturally could opt for surrogacy.²³ There is no room for couples married for less than 5 years, unmarried individuals (single male or single female), homosexuals, and live-in couples for surrogacy. In addition, if a woman needs to be a surrogate, she should be a woman who is genetically related to either of the commissioning parents, is married, has her own child and ranges between 25-35 years of age.²⁴ Even here, a woman who is not genetically related, not married,

²³ Surrogacy Rules, *Gazette of India*, Ministry of Health and Family Welfare, March 2022. Available on https://www.wbhealth.gov.in/other_files/All_Forms_of_Surrogacy_DRAFT_Rules_March,_2022.pdf

²⁴ See reference 23 above

and/or does not have a child of her own does not qualify to become a surrogate. However, how sound is it morally?

The strongest reason to restrict a certain section of the society from applying for surrogacy, who though, are human beings, but still, a perceived threat in the world is to protect the surrogate child and promote their healthy upbringing in a safe environment. Homosexuality is in itself a concept where people are viewed with a lot of stigmas, a lot of hatred, and unacceptance in current times as well. When homosexuals are not considered normal living beings like others, irrespective of surrogacy, which is completely against law, now that they are legally accepted, how justified it is that the only reason that they are not allowed legally to opt for surrogacy is that they would not provide a suitable environment, that this section of society would be a threat to the child they would raise? This reflects nothing but the social prejudices and intolerance that still prevails among a large section of society against the individuals of same-sex. For the same reasons, a single unmarried male is refrained from opting for surrogacy to have a child. The kid has a potential threat from the father, especially if the baby born is a female. There are chances that the child may be abused sexually by the male.

In the past five years, 15 corrective rape incidences have been documented in Andhra Pradesh and Telangana against which no laws are in place at the present. About 10% of rape victims are men. According to the National Violence Against Women Survey, US, 71% of male victims were first raped before their 18 years of age, 16.6% were 18-24 years old, and 12.3% were 25 or older. Human Rights Watch Report suggests that 22% of male inmates have been raped at least once during their incarceration; i.e., around 420,000 prisoners each year.²⁵ When the criminal law prohibiting sexual abuse of children acknowledges that abuse could be perpetrated by both men as well as women, what are the odds that a child might not be abused by the single mother or would not be exploited or harmed by the intending “heterosexual” couple? They are not a threat but an imagined threat based on what society has been taught, has been teaching and has witnessed over the years. Another possible explanation that I have witnessed over the years with people at large in the Indian society is that homosexuals may not be healthy mentally to provide a conducive enough environment for the child to grow and develop. According to the National Survey on Drug Use and Health (NSDUH) conducted by the Substance Abuse and Mental Health Services Administration (SAMHSA) in USA, 25.8% females and 15.8% males suffered from any mental illness (AMI) while 7% females and 4.2% males suffer from Serious Mental

²⁵ Legal Drift, *Male Rapes – Some Myths, Statistics, True Incidents and Legal Insight*, May 13, 2010. Available at [Male Rapes – Some Myths, Statistics, True Incidents and Legal Insight - Experts & Views - Legally India](#)

Illness (SMI).²⁶ As opposed to this, according to the report published by the National Alliance on Mental Illness (NAMI), in the same year, in USA, presented the prevalence of mental illness annually among 47.4% lesbians, gays and bisexuals.²⁷ In 2014, Mental Health Foundation mentioned that 1 in every 8 men and 1 in every 5 women suffer from a mental health concern in England.²⁸ A few years later, it reported that in UK, approximately 57% men and 68% women with mental health concerns are parents.²⁹ Would parents with mental health issues not be a threat to child? Are they denied right to life like homosexuals? The statistics mentioned thus entails an almost equal amount of risk that a child is exposed to an unsound environment hampering their development irrespective of the gender of the parents. In no way is it fair to limit a choice based on a health issue that any individual might experience at any point of time. It just is an evident in itself, that no person is perfect, every person is flawed and no one could be restricted from living a life they want based on their imperfections.

The fundamental right to equality under articles 14-18 prohibits discrimination against any individual of any kind on the grounds of sex, race, caste, gender, sexual orientation, cultural background, and marital status³⁰. Is surrogacy not a realm to be included in fundamental rights? Why are single men and homosexuals, in fact, single homosexuals being discriminated against based on the compartmentalized understanding and unreal assumptions of the people at large? The highly educated and highly aware officials and people of ranks and powers including the administrators, law developers, and enforcers are sensitive to the fear of the worst-case scenarios and so, they decided the fate of these innocent people that they should be robbed of their basic fundamental rights.

Orinam, a Chennai based collective of LGBTQIA+ community and allies archived their response digitally to the recommendations sent in written by a group of queer-feminist activists which included Chayanika Shah, Maya Sharma, Deepti Sharma, Minakshi Sanyal, Rituparna Bohra, Jaya Sharma, and Rumi Harish to Justice Dr. B.S. Chauhan once the Law Commission of India (LCI) had prepared a report in 2018 on the Uniform Civil Code. The document, with the intricate value it holds, need to be revisited, for it provides voice to the rights of the people identifying as being non-binary. Furthermore, it serves

²⁶ Transforming the understanding and treatment of mental illnesses, *National Institute of Mental Health*. Available at <https://www.nimh.nih.gov/health/statistics/mental-illness>

²⁷ Mental Health by the Numbers, *National Alliance on Mental Illness*, accessed January 10, 2023. Available at <https://www.nami.org/mhstats>

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²⁹ Family and Parenting: Statistics, *Mental Health Foundation*, United Kingdom, accessed January 10, 2023. Available at <https://www.mentalhealth.org.uk/explore-mental-health/statistics/family-parenting-statistics>

³⁰ M. Laxmikanth, "Fundamental Rights", *Indian Polity*, (McGraw Hills Pvt. Ltd., 5th edition, 2017), (Pg 159, 164-165)

as a reminder of ‘the right to found a family’ which is well articulated within the Yogyakarta Principles on Application of International Human Rights Law in relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics. A digital resource was published in 2019 at the Vidhi Centre for Legal Policy by Akshat Agarwal, Diksha Sanyal, and Namrata Mukherjee that was called Queering the Law. It stated, “The body of family law governs institutions which regulate our most intimate personal choices. Family Law governs significant personal relationships which have a bearing on the ways in which caretaking responsibilities, entitlements, benefits and obligations are distributed. Yet, like most laws, the body of family law privileges opposite gender, monogamous, conjugal relationships.”³¹ The fundamental right to freedom under articles 19-22 provides for each citizen’s freedom of speech and expression. The fundamental rights of the Indian Constitution allow each and every citizen of the Indian country to lead a complete and dignified life under article 21 of the right to life, which is often referred to as the heart of fundamental rights of the Indian constitution³². Based on how we as a society define an ideal, acceptable life here clearly influences and restricts this section of people from fully experiencing their fundamental rights with all the reasons one could state justifying why they are not allowed to enjoy these rights. Assuming a person’s character by their personal choices is definitely not a moral reason enough to not entitle them to surrogacy.

As far as the singularity of parenthood from a financial perspective is concerned, surrogacy is a procedure requiring high monetary investment. So, if a single parent beyond the marital status or gender could afford to pay for the procedures, they could certainly provide for the child. Even if they are not so well to do, their socio-economic status is again a ground where the person/couple is subject to discrimination. If this argument is well enough to bar such people from availing surrogate children, then why no law is enforced barring those with poor socioeconomic status from giving birth to a child naturally since they too might be incapable to provide for their child’s good development? If so would be case, there as well might be no poor population in the country. Neither a person’s ability can be judged by their marital status or sexual orientation or socioeconomic status nor exists a parent who is perfect. On what basis then, are these people denied this entitlement?

The law requires the intending couple to be married for at least 5 years of period. It is believed that a couple takes this bare minimum time to bond with each other and those who survive the first five years are less likely to get separated or divorced. Thus, they would provide a sound and healthy environment for a child to be nourished and grow in a family knitted with strong healthy relationships. It may be

³¹ Chintan Girish Modi, *Beyond Same Sex Marriage: The Right To Parent*, 16 October 2020. Available at <https://www.deccanherald.com/opinion/beyond-same-sex-marriage-the-right-to-parent-902587.html>

³² M. Laxmikanth, “Fundamental Rights”, *Indian Polity*, (McGraw Hills Pvt. Ltd., 5th edition, 2017), (Pg 159, 175)

noticed though; this is just a belief. Globally, for every 6.1% of couples who get married, 2.7% end up taking a divorce.³³ Based on several estimates, it has been found that today, the average length of a marriage that ends in divorce is eight years.³⁴ Given the current divorce rates which are likely to increase in the years to come, there is no surety that a couple would not divorce each other after 5 years of their marriage. There is no guaranteed security that the surrogate child might not end up torn between their father and mother in case they wish to part ways years after their marriage. Moreover, in natural situations, especially in Indian cultures, a couple is often expected and pressurized by the majority of society to plan a baby within one or two years of their marriage. On what grounds could then, a married time period of 5 years be a necessity to apply for a surrogate child?

The inability to make the right choice

A section of people is not just barred from availing of the services of surrogacy, but a part of them is barred from becoming surrogates themselves as well. Let us consider certain professions like police, firefighters, glass manufacturers, lifeguards, photojournalists, stunt persons, miners, lawyers, rubber manufacturers, war correspondents, morticians, wildlife rehabilitators, defense (navy or air force or army) among many others, all of these professions are high health or life risk professions which various people are engaged in completely by their choice and are being paid for. Does this mean that simply because their lives are at risk, these professions are violating human rights or exploiting individuals? Are these people denied their right to choose despite their knowledge of hazards they would experience in short term as well as long term? Free choice and autonomy is valued and put forth through the liberal argument for surrogacy, in addition. Until one's choice or action inflicts harm on others, one is free to do what one wants. According to Christine Sistare, "the fundamental moral issue in the debate of surrogacy is the nature and extent of women's freedom, their freedom to control their bodies, their lives, their reproductive powers, and to determine the social use of those reproductive capacities". Thus, she argues that the question really is: "Is there sufficient justification for society to deny to adult women the disposition of their reproductive capacities according to their own desires,"³⁵ If she has the power to opt for surrogacy out of the free will and freedom to choose, who are we to limit her choice, to decide if her

³³ Terry, Divorce Rate Statistics and Trends for 2022, *Divorce Rates for USA*, 23 February 2022. Available at [Divorce Rates Statistics and Trends for 2022 \(serveddivorcepapers.com\)](https://www.serveddivorcepapers.com)

³⁴ Laura Vinopal, *A Year-by-Year Guide to Your Risk of Divorce*, 7 May 2022. Available at [What The Average Marriage Length In US Says About Your Divorce Risk \(fatherly.com\)](https://www.fatherly.com)

³⁵ Aishwarya Vemula, *Birthing: A Market- A study on Commercial Surrogacy*, Sama- Resource Group for Women and Health. Available at [Aishwarya Vemula - Academia.edu](https://www.academia.edu)

capabilities are worth paying or not; if her abilities are worth risk or not; if she is making a wrong choice or not. In the philosophy of morality, remains a long controversial debate about parent's right to decide for their children, compromising their autonomy, for children are autonomous beings. And they are entitled to make a free choice, though it may sometimes be a mistake or worse, a disaster. Parents cannot always protect their children from getting hurt and they would eventually learn from their experiences and decisions and mistakes no matter what. The same applies to surrogates as well. Are we not denying her the fundamental right of freedom of choice?

Article 19 of the Indian Constitution guarantees every Indian right to practice any profession, occupation, or business till it is in the interest of the general public³⁶. After having proposed at length, the real concerns behind preventing surrogacy to be used as a means of livelihood, and in context to the other risky yet legal professions, I believe that this article of basic fundamental rights supports the idea that surrogates have freedom and right to practice surrogacy as a profession, though there need to be advancements in the regulatory practices.

According to the laws, it is necessary that the surrogate is related to either of the future parents to avoid the exploitation of surrogates otherwise. The reality is that a blood relative could easily be convinced to act as a surrogate without demanding monetary payments and asked to help the parents in good faith. There are chances that the poor might be harmed, but there is also the possibility that the poor assert their rights as surrogates and demand money. The sole purpose to restrict the surrogate eligibility to the relative is to trick women through an emotional appeal into submitting to the most convenient situations that the intending parents and the parties involved deem fit. Another possible causal explanation for this clause might be looked at the emphasis the society and an individual places on the importance child being blood related to either one or both the parents. The need and feeling of 'one's own' or 'other's' drive people to manipulate themselves, their loved ones and those related to them by blood in some way or the other relentlessly in the fear of their doubt of their parenthood towards the other child and society's invalidation.

In her study of Gestational Surrogacy in Anand and Ahmedabad, both in Gujarat, Saravanan has argued that one of the most important criteria for choosing gestational or surrogate mothers is their submissiveness to the demands of doctors and intended parents. Women who are expressive or vocal and who display aggressive characteristics are rejected politely on medical grounds and replaced by clinics with other surrogates. Once selected, surrogates have to submit to several rules. Some clinics make it mandatory for women to stay at surrogate homes, while others provide them with separate family accommodation away from their permanent residences. Saravanan terms this as a 'Denial of

³⁶ M. Laxmikanth, "Fundamental Rights", *Indian Polity*, (McGraw Hills Pvt. Ltd., 5th edition, 2017), (Pg 159, 170)

Subjectivity’, because women have little to no say in decisions, including decisions about their own bodies.³⁷ Why an assertive woman is not a suit to be surrogate? Why a well-to-do woman cannot be a surrogate? Why a woman has to submit to be a surrogate and suppress her expression in order to be a surrogate, all in the name of altruism? And, even when it is mostly women from lower socioeconomic status who are chosen as surrogates in the first place because they would not be expected to speak up much, how could she be expected then, to not demand any monetary compensation?

The last argument that I present is in reference to the law requiring a surrogate to be married and possess a child of her own. Allow me to throw some light on the grounds of this criterion. A woman who is young, unmarried, and does not have a child of her own is not entitled to be a surrogate owing to three possible reasons. The first one is that pregnancies are certainly not easy procedures and a woman experiences changes in her body for her entire life postpartum. As indicated by maternal mortality rates, there are chances that the woman dies while delivering the baby. If the woman does not have a child and is not married, it would ruin her entire life, in short. She would not have lived her potential life. The second reason is that a woman who is unmarried but has a history of getting pregnant and giving birth to a child would not be readily accepted in society, and definitely, not be accepted as a wife by any men. This would again ruin her social life. A third reason is that an unmarried woman who does not have her child might not be considered mature enough to make such complex decisions so, she apparently does not know the sense of right and wrong. We would now explore all three reasons and the relevance or accuracy they hold. The first argument raises a question of the health of the woman. Let me remind you when it is reasoned as a logical justification that puts a curfew on the unmarried woman to pass the eligibility criteria, everyone has a say as to what is best for her and her health, except for her. Moreover, if death a possible outcome, is equally a devastating result for unmarried and married women or married with children, both. In fact, it is more gruesome of a situation for the latter as a married woman with a child has responsibilities as wife and mother and if not a wife (widow or divorced), at least as a mother, and her death would leave her child orphaned. The second reason has an attached social stigma where a woman is subjected and expected into following the standardized norms of the society in order to be considered normal and a person of character because giving birth to a child, before marriage, and that too for someone else is certainly a licensed bar to question a woman’s character. The third reason for labelling women as immature and naive before marriage is because she is not conventional enough to adhere to the rules of society and succumb to obeying the familial structures and sequence of appropriate

³⁷ Sheela Saravanan, *Transnational surrogacy and objectification of gestational mothers*, April 2010. Available at [\(PDF\) Transnational surrogacy and objectification of gestational mothers \(researchgate.net\)](#)

age, then marriage, and then kid. People are so accustomed to this sequence of life that anything that is a chain breaker and falls beyond this line of life is simply perceived as illogical, unacceptable and person, with wide eyes. Maturity is definitely not a matter of age and a social checklist is certainly not a criterion to certify a woman to be unaware and gullible. Neither of these justifications are strong enough to deny an unmarried childless woman the right from becoming a surrogate mother if she wishes and consents to.

Limitations in the Regulation Body Limiting the scope of Surrogacy

Have you ever seen a child who scores low marks or fails an exam giving reasons or what we call excuses as to why they failed such as exam paper was difficult, everyone has performed rubbish, the teacher checked the answer sheet very strictly so that they could protect themselves from admitting their mistakes, getting scolded, judged, and of all, in the need to be accepted or shall I say validated? Have you ever been a part of discussions and debates that take around the world about use and misuse, effectivity and ineffectivity of moots of the concepts or viewpoints like internet, nuclear weapons, IQ vs EQ, AI vs human race, urbanization, determinism vs possibilism and many more. None of us remains unaware of the atrocities one could cause in the name of the availability of these facilities. Each of them have their own drawbacks, hazards, consequences and complications, yet neither concept or idea is completely refuted or limited. Had it been the scenario, there would have remained little scope of advancement among homo sapiens. When these bodies could be looked at as viable options no matter how drastic their results might be while putting all one's sweat and blood to make it happen, why surrogacy is in interrogation? Over the course of this article, there were many concerns addressed, argued, debated, accepted, and resolved. And the biggest concern still remains that the child, the intending parents, and the surrogate, all three entities are at risk of being exploited, harmed, tricked, and influenced creating trouble for themselves, especially in the case of commercial surrogacy and surrogacy with an unrelated surrogate mother. I nowhere disregard this threat that it is not there. I completely agree that these are real dangers that exist as the consequences of implementing surrogacy with modified laws and relaxations that I presented. What is not acceptable, however, is using these dangers as a shield to not take responsibility to expand the future of surrogacy when specific platforms and bodies are saddled with power and authority to implement tools to make the practice of surrogacy more inclusive and well-being promoting for the general public at large. If there is a pitfall in the system, it should not be covered with continuous law enforcement as a defense against folding its hands. It could simply be compared to putting yourself on house arrest because there are chances that if you go out you may die. The first and the most important thing is that a child is in danger of getting exploited by the intending parents or

sexual abuse in case they are living with a single mother or father or even with a couple. Also, to keep a check on the relationship between husband and wife and marital discords if any that may affect or hamper the child's growth. It is possible to set up tracking systems and pay regular surprise visits at the guardian's home to ensure that the child is being nurtured in a safe, healthy and development-promoting environment. Ensuring that the entire process of surrogacy between the receiving and delivering party does not involve the role of middle persons who often create communication differences between both the parties and modify a contract such that it could be questioned legally. The surrogate could be enrolled in a screening process where she is extensively elaborated on the entire process and the details of the process along with the contract clauses that she is legally binding to so that she moves forward with a complete disclosure and could be held accountable for her future actions. In addition, along with her routine physical follow-up check-ups, she could be accompanied by a mental health practitioner to monitor her mental and emotional well-being throughout the pregnancy period. In the case of commercial surrogacy, there could be a legal clause that enforces a financial liability on the part of the surrogate where, if she fails or refuses to deliver the child to the intending parents upon the live birth of the baby, she would have to return the medical and insurance costs incurred by the future parents as well as the amount which was agreed to her would not be transferred to her and she might be penalized, subjected to heavy fines and/ or imprisonment as well. On May 18, 2022, a couple sought to resolve their issue of surrogacy in Mumbai High Court owing to the new laws enforced by ART in December 2021, though they have begun their procedure before the new laws were implemented. The hospitals refused to transplant the frozen embryo to the surrogate's womb which was illegal according to the new laws and keeping in mind the lifespan of the embryo, they approached the high court. The hospitals, however, argued that such grievances need to be addressed to the state and national board which was supposed to be set up within 90 days of law enforcement. The couple pointed out that there was no such board in existence to which they could take their issue.³⁸ This is just one of the recent instances where laws have been implemented, the organization is not in place and delay and failure in setting up infrastructure has led to inefficient grievance addressal on forums causing a lot of trouble for the people who wish to adopt surrogacy but have a ticking clock on their heads and have limited time. There needs to be an efficient system to keep the surrogacy processes in check, that provides for several gateways for surrogate mothers and commissioning parents to approach these portals with ease, comfort and accessibility.

³⁸ Suchitra Karthikeyan, *Explained: The new laws relating to surrogacy and assisted reproduction, and related challenges*, 29 May, 2022. Available at [Explained: Surrogacy & Assisted Reproduction in India - laws, offence & problems - The Hindu](#)

With the discussions presented above, I would like to reiterate, in no way I deny that surrogacy does not come with serious, complex and devastating repercussions in what I propose, but it is not a means to limit the view of surrogacy. With joined efforts, on the part of the institutions to bring about stringent, structural and executive reforms and on the part of human kind to view motherhood and humanity bereft of any sublimations, is it possible gradually to accept surrogacy for what it is and what it could be rather than what it should be.

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