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Ethical and Legal Controversies in Surrogacy

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Abstract:

Surrogacy has emerged as a complex and highly debated practice, raising numerous ethical and legal concerns. This paper explores the ethical and legal controversies surrounding surrogacy, focusing on issues such as the commodification of women's bodies, exploitation of surrogate mothers, and the potential violation of human rights. Furthermore, it highlights the legal challenges posed by cross-border surrogacy arrangements, including conflicts over citizenship, parentage, and contractual disputes. A comparative analysis of surrogacy regulations across different countries emphasizes the lack of a uniform global legal framework, leading to varied and inconsistent practices. Ethical dilemmas arise when the rights of the surrogate mother, intended parents, and child conflict, making the creation of robust, ethical, and legally sound surrogacy frameworks essential. This study underscores the need for balancing ethical considerations with legal safeguards to protect all parties involved in surrogacy, ensuring that reproductive rights are respected while preventing exploitation.

Keywords: surrogacy, ethical controversies, legal challenges, commodification, reproductive rights, cross-border surrogacy, human rights.

Introduction-

Surrogacy, the arrangement where a woman agrees to carry and deliver a child for another person or couple, has become a significant topic of legal and ethical debate across the globe. This process provides an opportunity for individuals or couples who are unable to conceive naturally to have a biological child. However, surrogacy raises several critical questions related to the rights of the surrogate mother, the intended parents, and the child. The legal landscape governing surrogacy varies significantly from country to country, which has led to a complex web of regulations and ethical dilemmas.¹

Surrogacy can be classified into two main types: commercial and altruistic. The distinction between these two forms is significant because it addresses the core ethical and legal issues surrounding the practice.

Commercial Surrogacy involves a financial transaction where the surrogate is compensated beyond covering medical and pregnancy-related expenses. In commercial surrogacy, the surrogate receives payment for carrying the child, which many argue leads to the commodification of a woman's reproductive capabilities. Critics assert that commercial surrogacy exploits vulnerable women, particularly those from lower socioeconomic backgrounds, who may enter surrogacy agreements purely for financial reasons. These concerns often prompt debates about the morality of "renting a womb" and the potential for the exploitation of women in economically disadvantaged positions.²

However, proponents of commercial surrogacy argue that it provides an opportunity for women to earn a substantial income and that, if conducted ethically with full informed consent, it is a legitimate and empowering choice for women. In countries where commercial surrogacy is legal, there are usually strict guidelines to ensure that both the surrogate and intended parents are protected, and that the arrangement is ethical and transparent.

Altruistic Surrogacy, on the other hand, involves no financial compensation beyond medical expenses for the surrogate. The surrogate agrees to carry the child out of compassion or a sense of altruism, often for close friends or family members. This type of surrogacy is generally viewed more favorably from an ethical standpoint because it avoids the concerns associated with the commodification of reproductive labor. Altruistic surrogacy is often seen as more ethically acceptable because it is rooted in the desire to help others without financial incentive.³

However, even in altruistic surrogacy, ethical questions remain. The surrogate may face emotional and psychological challenges during and after the pregnancy, particularly if the child is handed over to the intended parents immediately after birth. Additionally, the lack of financial compensation can sometimes lead to the surrogate feeling undervalued for her significant contribution.

The legal framework for surrogacy varies widely across the world, with some countries embracing it under strict regulations and others banning it entirely. The differences in laws have led to a phenomenon known as "reproductive tourism," where individuals or couples travel to countries with more permissive surrogacy laws to find a surrogate. The global legal landscape for surrogacy is complex and ever-evolving, with countries constantly adjusting their laws in response to ethical concerns and social pressures.

In many Western countries, surrogacy laws tend to be restrictive. For example, in much of Europe, commercial surrogacy is banned, with only altruistic surrogacy permitted under stringent conditions. Countries such as France, Germany, and Italy outlaw all forms of surrogacy, viewing it as contrary to public order and potentially exploitative. In contrast,

countries like the United States and Canada have varied legal frameworks depending on the state or province. Some U.S. states allow both commercial and altruistic surrogacy, while others ban one or both forms.⁴

India has historically been a hub for commercial surrogacy due to its relatively permissive laws and lower medical costs. Until recently, India was one of the few countries where commercial surrogacy was legal and widely practiced, attracting intended parents from across the globe. However, growing concerns about exploitation, particularly of poor and uneducated women, led the Indian government to impose significant restrictions.

In 2015, India banned commercial surrogacy for foreign couples, citing ethical concerns about the exploitation of surrogate mothers and the lack of protections for both the surrogates and the children born from these arrangements. In 2019, the Indian Parliament passed the Surrogacy (Regulation) Bill, which banned commercial surrogacy altogether and allowed only altruistic surrogacy for Indian couples with strict regulations. The bill mandates that surrogacy can only be undertaken by a close relative of the intended parents, and no monetary compensation is allowed beyond medical expenses.⁵

While this new law aims to prevent exploitation and protect surrogate mothers, it has also sparked criticism from those who argue that it limits women's autonomy and restricts options for childless couples. Critics also point out that the ban on commercial surrogacy has led to an increase in reproductive tourism to other countries with less stringent regulations. In conclusion, the legal and ethical landscape of surrogacy is multifaceted and continues to evolve. Both globally and in India, the challenge remains to balance the rights and welfare of all parties involved while addressing the ethical dilemmas that surrogacy presents.

Need of Study-

The topic of "Ethical and Legal Controversies in Surrogacy" requires in-depth study due to the increasing complexity surrounding surrogacy practices worldwide. As surrogacy provides a solution for individuals and couples unable to conceive, it simultaneously raises significant ethical and legal concerns, such as exploitation, commodification of women's bodies, and the rights of the child. The global variation in surrogacy laws, particularly between countries that allow commercial surrogacy and those that ban it, adds further complications, leading to reproductive tourism and legal disputes. This study aims to explore the ethical dilemmas and legal challenges involved, highlighting the need for balanced and clear regulations that protect the interests of all parties involved, including surrogates, intended parents, and children. By examining these controversies, the study will contribute to the development of more ethical and legally sound surrogacy frameworks globally.

Ethical Dilemmas in Commercial Surrogacy-

Commercial surrogacy, where a surrogate mother is compensated beyond medical expenses, has sparked significant ethical controversies. While it offers a solution for couples or individuals unable to conceive, it raises profound ethical concerns related to the exploitation of vulnerable women, the commodification of their bodies, and the moral implications of financial transactions in reproductive labor. These dilemmas necessitate critical reflection on the nature of surrogacy agreements and their broader social implications. One of the primary ethical concerns in commercial surrogacy is the potential exploitation of surrogate mothers, especially those from economically disadvantaged backgrounds. Surrogates, often in need of financial assistance, may feel coerced into the arrangement due to poverty or lack of opportunities, rather than a genuine choice to help infertile couples. This power dynamic, where wealthier intended parents can afford to “rent” the reproductive capabilities of poorer women, raises serious ethical issues of autonomy and informed consent.⁶

Many surrogates may not fully understand the medical, emotional, and psychological risks associated with surrogacy. In some cases, the contracts are drafted to benefit the intended parents, leaving surrogates with limited rights and protections. The ethical dilemma arises when these women, lacking other viable options, are compelled to enter into agreements that exploit their vulnerabilities without fair compensation or adequate safeguards.

Commercial surrogacy also raises concerns about the commodification of women’s bodies and their reproductive labor. In this arrangement, a woman’s body is essentially treated as a service or product, where her womb is rented, and her reproductive capabilities are commercialized. This transactional nature of surrogacy leads to ethical concerns about the dehumanization of the surrogate, reducing her body to a mere vessel for childbearing. Feminist scholars argue that this commodification undermines the dignity and integrity of women, transforming a deeply personal and intimate process into a commercial transaction. Moreover, surrogacy contracts often place extensive control over the surrogate’s body, dictating her lifestyle, diet, and medical treatments throughout the pregnancy.⁷ This lack of autonomy raises ethical questions about bodily integrity and individual rights.

The financial transactions inherent in commercial surrogacy arrangements further complicate the ethical landscape. On the one hand, some argue that fair compensation for surrogates is justified, as it recognizes the significant physical and emotional labor involved in pregnancy. However, critics point out that when monetary compensation is involved, it can turn surrogacy into a purely transactional relationship, where the surrogate is seen as a means to an end, rather than a fully autonomous individual with rights and dignity.

The ethical dilemma lies in balancing the financial needs of surrogates with the risk of turning reproduction into a marketable commodity. Many

surrogacy agreements create a power imbalance, where the surrogate's financial compensation is insufficient in comparison to the emotional and physical toll of carrying a child for nine months. This imbalance raises concerns about fairness, exploitation, and the commodification of life itself.⁸

Legal Rights of the Child in Surrogacy Agreements-

The legal rights of the child born through surrogacy are a critical area of concern, as surrogacy arrangements often focus on the contractual obligations between the surrogate and the intended parents, leaving the child's rights in a gray zone. Various ethical and legal issues arise regarding the child's citizenship, parentage, identity, and overall welfare. Surrogacy agreements frequently confront these dilemmas, especially in cases where legal frameworks may be inadequate or ambiguous.

One of the most complex legal dilemmas for children born through surrogacy is the question of citizenship, parentage, and identity. In international surrogacy cases, where the surrogate and intended parents reside in different countries, determining the child's citizenship can be challenging. Some countries may refuse to recognize the child as a citizen due to unclear legal definitions of parentage in surrogacy cases. Legal battles over the child's nationality and travel documents often leave children stateless or stranded. Additionally, parentage issues arise in cases where the biological relationship between the child and the intended parents is in question. If the intended parents are not genetically related to the child, establishing legal parentage becomes difficult, especially in jurisdictions where surrogacy is not clearly regulated. These legal uncertainties can also affect the child's identity, as they may face complications in acquiring inheritance rights, family status, and legal recognition of their relationships with the intended parents.⁹

The tension between child welfare and the contractual obligations in surrogacy agreements is another significant legal issue. Surrogacy contracts often emphasize the rights and obligations of the intended parents and the surrogate, potentially overlooking the best interests of the child. In cases where the contractual terms conflict with the child's welfare, courts are often called upon to determine whether the contract should take precedence over the child's well-being. For example, if the intended parents refuse to take custody of the child due to unexpected health issues, or if the surrogate decides to keep the child, legal conflicts arise. Courts may need to intervene to ensure that the child's welfare is prioritized, even if it means deviating from the terms of the contract. Such situations highlight the need for legal frameworks that consider the child's rights as paramount in surrogacy arrangements.¹⁰

International surrogacy often creates legal challenges that cross national borders, making it essential to consider international legal frameworks on child rights. The Hague Conference on Private International Law has recognized the need for global consensus on surrogacy regulations to protect the rights of children born through

surrogacy arrangements. However, there is currently no international treaty that uniformly governs surrogacy. Different countries have vastly different legal stances on surrogacy, making international agreements challenging. In countries where surrogacy is illegal, children born through surrogacy may face difficulties in gaining legal recognition of their rights.¹¹ On the other hand, countries that permit surrogacy often lack sufficient protections for children's rights, especially in terms of their citizenship and parentage. The absence of a unified international legal framework leaves children vulnerable to legal limbo, necessitating coordinated efforts to establish global guidelines.

Parental Rights and Disputes in Surrogacy-

The legal landscape of surrogacy brings forward numerous complexities regarding parental rights, particularly in determining custody and resolving disputes. Surrogacy contracts aim to establish the roles and obligations of both the surrogate and the intended parents. However, these agreements are often subject to legal challenges, especially when conflicts arise regarding parentage, custody, or breach of contract.

One of the most challenging aspects of surrogacy is determining legal parentage. In traditional family structures, parentage is typically straightforward; however, in surrogacy, various complications emerge. For instance, in cases where the surrogate provides the egg (traditional surrogacy), she may have a biological connection to the child, complicating custody decisions. On the other hand, in gestational surrogacy, where the surrogate is not genetically related to the child, the intended parents may face difficulties in establishing their legal rights to the child. In many legal systems, the birth mother is presumed to be the legal mother, which can create significant complications for intended parents, especially in countries with inadequate surrogacy regulations.¹² In cases where surrogacy arrangements break down, courts may need to intervene to determine custody, often focusing on the best interests of the child rather than the terms of the surrogacy agreement itself.

Surrogacy contracts are designed to clearly define the roles and expectations of the surrogate and the intended parents. However, disputes frequently arise when one party breaches the contract. Common issues include intended parents refusing to take custody of the child, surrogates changing their mind about relinquishing the child, or disagreements over medical decisions during the pregnancy. Such breaches can lead to complex legal battles, with both parties seeking judicial intervention to enforce their rights. Courts may face challenges in deciding whether to prioritize the surrogacy contract or the welfare of the child, especially in cases where the intended parents breach the contract due to unforeseen circumstances, such as a child born with disabilities.

Surrogacy and adoption, while distinct legal processes, can sometimes overlap, leading to legal conflicts. In some jurisdictions, surrogacy may

be treated similarly to adoption, requiring the intended parents to go through adoption procedures to gain legal rights to the child. This creates confusion, as surrogacy is fundamentally a contractual agreement between the surrogate and the intended parents, while adoption involves the transfer of parental rights from biological parents to adoptive parents.¹³

Human Rights Violations in Surrogacy Practices-

Surrogacy, while offering reproductive solutions for those unable to conceive, also raises significant human rights concerns. These concerns are especially pronounced in cases where surrogates, often from economically disadvantaged backgrounds, may not fully comprehend or consent to the implications of surrogacy agreements. Issues such as reproductive autonomy, cross-border surrogacy, and trafficking further complicate the landscape, leading to potential human rights violations.

One of the central human rights issues in surrogacy is the reproductive rights of women, particularly the balance between their autonomy and external regulation. Surrogacy arrangements often limit a surrogate's ability to make independent decisions regarding her body during pregnancy. Contracts typically specify medical treatments, dietary restrictions, and lifestyle choices, thereby restricting the surrogate's autonomy. This clash between autonomy and regulation poses ethical dilemmas, especially when surrogates are from vulnerable populations with limited financial resources. These women may feel compelled to sign contracts that heavily regulate their bodies without fully understanding the consequences, raising concerns about coercion and exploitation. Women's reproductive rights, including their autonomy to make decisions about their bodies, must be safeguarded in surrogacy practices to prevent human rights violations.¹⁴

Cross-border surrogacy has become increasingly popular due to the varying legal frameworks and lower costs in some countries. However, this practice raises significant concerns about human trafficking and exploitation. In countries where regulations are lax or non-existent, women may be coerced or manipulated into surrogacy arrangements that exploit their reproductive capabilities. Trafficking concerns arise when surrogates are treated as commodities in a transnational reproductive industry, where intermediaries profit from their vulnerability. The lack of uniform international regulations further exacerbates this problem, making it difficult to protect surrogate mothers and the children born from these arrangements.¹⁵ Additionally, children born through cross-border surrogacy often face legal battles over citizenship and parentage, creating further human rights complications.

For instance, in India, judicial interventions have been crucial in shaping the legal framework around surrogacy, especially with the passing of the Surrogacy (Regulation) Bill, 2019, which prohibits commercial surrogacy and restricts surrogacy to altruistic forms. The bill was introduced as a measure to prevent the exploitation of poor women in the commercial surrogacy industry, thus addressing

significant human rights concerns. However, the effectiveness of these judicial interventions depends on the enforcement of laws and the protection of surrogates' rights within a robust legal framework.

Conclusion-

The practice of surrogacy, while offering hope to individuals and couples unable to conceive naturally, presents significant ethical and legal challenges that require careful consideration. Ethical concerns such as the potential exploitation of surrogate mothers, the commodification of women's bodies, and the rights of the child are central to the debate. These issues often arise due to socio-economic disparities, where vulnerable women may be pressured into surrogacy agreements, raising concerns about autonomy and informed consent.

On the legal front, surrogacy laws vary significantly across the globe, leading to inconsistencies that result in cross-border surrogacy complications. The lack of uniform international regulations creates further challenges, particularly around citizenship, parentage, and the legal status of children born through surrogacy. Additionally, surrogacy contracts often prioritize the interests of intended parents, which can conflict with the welfare of the child or surrogate.

The need for a balanced and ethical framework is clear, one that prioritizes the protection of all parties involved, especially the surrogate mother and the child. Legal systems must evolve to address these challenges, ensuring that surrogacy practices are transparent, fair, and aligned with human rights standards. Future global efforts toward harmonizing surrogacy laws and addressing ethical concerns are crucial to resolving the existing controversies and ensuring that surrogacy remains a compassionate and just practice for all involved.

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