

Commodification, Exploitation, And Human Rights: A Critical Analysis Of Cross-Border Surrogacy Practices

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Abstract

This paper argues that cross-border surrogacy practices present critical legal, ethical, and human rights challenges, ranging from the exploitation of surrogates and commodification of human reproduction to the complex diplomatic and legal issues surrounding parenthood and citizenship. To address these concerns effectively, there is an urgent need for both national regulations that safeguard the rights and welfare of all parties involved and a robust international framework to ensure consistency, equity, and accountability in cross-border surrogacy arrangements.

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I. Introduction

Overview of Surrogacy

Surrogacy refers to a reproductive arrangement where a woman, referred to as the surrogate mother, agrees to carry and deliver a child on behalf of another individual or couple, known as the intended parents.¹ This practice has become increasingly prevalent in recent decades due to advancements in in-vitro fertilization (IVF) and other assisted reproductive technologies (ART).² The rise of cross-border surrogacy, where individuals or couples engage surrogates in foreign countries, is driven by various factors, including differences in legal regulations, reduced costs, and shorter waiting periods in some jurisdictions. Countries with permissive surrogacy laws and lower healthcare costs, such as India (prior to recent restrictions), Ukraine, and Georgia, have emerged as popular destinations for this practice, creating a transnational surrogacy industry that caters to a global clientele.³

Ethical and Legal Context

The expansion of cross-border surrogacy has raised profound ethical and legal challenges. One of the primary concerns is the commodification of women's reproductive labour, where surrogates in economically disadvantaged countries may feel compelled to undertake surrogacy arrangements out of financial desperation, raising questions about consent and autonomy. Similarly, the practice often risks exploiting women, particularly in countries where legal protections for surrogates are minimal or absent.

From a legal perspective, cross-border surrogacy complicates traditional notions of parenthood, citizenship, and the rights of the child. Disparities in international laws can leave children born via surrogacy in precarious legal situations, such as statelessness or uncertainty regarding parentage. Ethical questions also arise concerning the welfare of children born through surrogacy, including concerns about their rights to know their genetic origins and the psychological implications of commodifying their existence.

II. Surrogacy In Medical Law

Medical Ethics and Surrogacy

The practice of surrogacy raises significant ethical concerns within the context of medical law. A primary issue is the medical risks posed to surrogate mothers, including physical complications such as ovarian hyperstimulation syndrome (OHSS) from hormone treatments, pregnancy-related risks, and potential long-term health impacts. Additionally, the psychological toll on surrogates—particularly in cases of relinquishing the child post-birth—poses ethical questions about informed consent and emotional well-being.

The welfare of children born through surrogacy also remains a critical concern. Ethical debates revolve around the potential commodification of children, treating them as objects of contractual arrangements rather than

¹ Handbook of Gestational Surrogacy: International Clinical Practice and Policy Issues. (2016). United Kingdom: Cambridge University Press.

² Horsey, K. (2023). The future of surrogacy: a review of current global trends and national landscapes. Reproductive biomedicine online, 103764.

³ Horsey, K. (2023). The future of surrogacy: a review of current global trends and national landscapes. Reproductive biomedicine online, 103764.

autonomous individuals with rights. Issues such as the rights of children to access information about their genetic origins further complicate the ethical landscape. Finally, surrogacy raises broader concerns about the commodification of reproduction, particularly in cross-border arrangements where financial incentives may exploit vulnerable women in socio-economically disadvantaged regions.⁴

Medical Regulation

Medical regulations governing IVF and surrogacy vary widely across jurisdictions, reflecting diverse cultural, ethical, and legal perspectives. These regulations aim to balance the interests of intended parents, surrogates, and children while mitigating risks and preventing exploitation.

United Kingdom:

The UK regulates surrogacy under the **Human Fertilisation and Embryology Act 2008**. Surrogacy agreements are legally unenforceable, ensuring that surrogates retain the right to change their minds until parenthood is transferred through a court-issued parental order. The Act imposes strict guidelines on fertility clinics, including ethical protocols for IVF and embryo transfer, ensuring that all parties provide informed consent. Commercial surrogacy is prohibited, and only reasonable expenses may be reimbursed, limiting the risk of commodification.

European Union:

Regulation within the EU is highly fragmented. Countries like **Greece** and **Ukraine** have permissive surrogacy laws, allowing both domestic and international intended parents to enter into legally binding agreements. In Ukraine, surrogacy services are often marketed to foreign clients, with minimal restrictions on the financial compensation provided to surrogates. Conversely, countries such as **Germany** and **France** ban all forms of surrogacy, citing ethical objections to the commodification of reproduction and the risks to women's autonomy. The absence of uniform EU-wide regulation has led to "reproductive tourism," where intended parents travel to countries with more permissive laws.

United States:

In the USA, regulation is highly state-dependent. States like **California** are surrogacy-friendly, with robust legal frameworks that protect both intended parents and surrogates, allowing for enforceable contracts and pre-birth parentage orders. In contrast, states like **Michigan** ban surrogacy outright, imposing penalties for entering into surrogacy arrangements. The inconsistency across states creates legal challenges, particularly for cross-border surrogacy arrangements involving foreign nationals.

Australia:

Australian surrogacy laws are restrictive, with commercial surrogacy prohibited nationwide. Altruistic surrogacy is permitted in some states, such as **New South Wales (NSW)** and **Queensland**, under stringent conditions. Intended parents must meet eligibility criteria, and surrogates are required to undergo comprehensive medical and psychological screening. The regulatory framework emphasizes the health and safety of surrogates, ensuring informed consent and post-birth support.

Comparative Analysis

The comparative approach to medical law on surrogacy highlights significant disparities in how jurisdictions address the ethical and medical challenges of surrogacy.

Countries like the **UK** and **Australia** emphasize the surrogate's health and autonomy, restricting commercial surrogacy to prevent exploitation. These regulations align with ethical principles but can limit accessibility for intended parents, leading to cross-border arrangements in less regulated jurisdictions. Conversely, permissive countries such as **Ukraine** and **Greece** facilitate surrogacy as a commercial service but face criticism for inadequate safeguards for surrogate mothers and potential exploitation of economically vulnerable women.

In the **USA**, the patchwork legal landscape allows for a balance between permissive and restrictive approaches, with surrogacy-friendly states offering robust protections. However, the lack of federal oversight complicates cross-border surrogacy cases, particularly regarding citizenship and parental rights. In contrast, countries like **Germany** and **France**, which prohibit surrogacy altogether, adopt a more conservative ethical stance, prioritizing societal concerns over reproductive autonomy.

The global variability in medical regulations underscores the need for a unified international framework that addresses the health and safety of surrogate mothers, the ethical treatment of children born through surrogacy,

⁴ Gelashvili, I. (2011). Legal and Ethical Problems of Surrogacy. *J. Law*, 77.

and the prevention of exploitation, while respecting cultural and legal differences. This would mitigate the risks associated with cross-border surrogacy and promote equitable and ethical reproductive practices worldwide.

III. Commodification And Exploitation

Commodification of Women's Bodies

Cross-border surrogacy has sparked significant ethical concerns about the commodification of women's bodies. By treating a woman's reproductive capacity as a service for financial gain, surrogacy risks reducing women to instruments of reproduction. In commercial surrogacy markets, particularly in less regulated jurisdictions, the process often emphasizes the production of a healthy baby for intended parents, sometimes at the expense of the surrogate's physical and emotional well-being. This commodification undermines the dignity and autonomy of surrogate mothers, framing their contributions as transactions rather than deeply personal acts involving profound medical and emotional risks.⁵

Economic Exploitation

Financial incentives play a major role in cross-border surrogacy, often drawing impoverished women in economically disadvantaged countries into the surrogacy market. While these arrangements can provide income for surrogates, the lack of robust legal protections creates significant potential for exploitation. In countries where surrogacy is poorly regulated or unregulated, women may be coerced into surrogacy due to financial necessity, without full understanding or consent regarding the medical and emotional consequences involved.

Case Studies:

In **India**, prior to the regulation of surrogacy in 2015, a booming surrogacy industry often exploited poor women who were paid fractions of the fees charged to international clients. Many surrogates reported inadequate healthcare, poor living conditions, and coercive practices by surrogacy agencies.⁶

In **Nepal**, following the 2015 earthquake, numerous reports emerged of surrogate mothers being abandoned without compensation when international intended parents faced logistical challenges, leaving these women without financial or legal recourse.

These examples illustrate the urgent need for regulatory frameworks to ensure fair treatment and prevent exploitative practices.⁷

Impact on Surrogates

The impact of surrogacy on surrogate mothers is profound, encompassing physical, psychological, and social dimensions:

Physical Health Risks: Hormonal treatments, multiple pregnancies, and complications during childbirth can have lasting impacts on a surrogate's health. In regions with limited medical oversight, these risks are often exacerbated.⁸

Psychological Toll: Many surrogates experience emotional distress when relinquishing the child post-birth, especially in cases where they lack psychological support or have not fully understood the emotional consequences of surrogacy.⁹

International Advocacy

In response to these concerns, international advocacy has increasingly called for stronger regulation to prevent the exploitation of surrogate mothers and promote ethical surrogacy practices. Key recommendations include:

⁵ Wilkinson, S. (2003). The exploitation argument against commercial surrogacy. *Bioethics*, 17(2), 169-187.

⁶ Schanbacher, K. (2014). India's gestational surrogacy market: An exploitation of poor, Uneducated Women. *UC Law SF Journal on Gender and Justice*, 25(2), 201.

⁷ Subedi, M. (2015). Contractual transaction: How renting a uterus makes the human body a commodity in Nepal. *Dhaulagiri Journal of Sociology and Anthropology*, 9, 1-25.

⁸ Söderström-Anttila, V., Wennerholm, U. B., Loft, A., Pinborg, A., Aittomäki, K., Romundstad, L. B., & Bergh, C. (2016). Surrogacy: outcomes for surrogate mothers, children and the resulting families—a systematic review. *Human reproduction update*, 22(2), 260-276.

⁹ Tashi, S., Mehran, N., Eskandari, N., & Tehrani, T. D. (2014). Emotional experiences in surrogate mothers: A qualitative study. *Iranian journal of reproductive medicine*, 12(7), 471.

Fair Compensation: Ensuring that surrogates are adequately and transparently compensated for their contributions, beyond mere subsistence, reflecting the medical and emotional risks they undertake.

Informed Consent: Establishing robust protocols to ensure that surrogates fully understand the medical, legal, and emotional implications of surrogacy arrangements.

Legal Protections: Implementing legal safeguards to protect surrogate mothers from coercion, abandonment, and inadequate medical care, including recourse to justice in cases of abuse or exploitation.

Regulated Agencies: Requiring surrogacy agencies to adhere to ethical standards, including the provision of medical and psychological care for surrogates throughout and after the surrogacy process.

Advocates also emphasize the need for an **international convention on surrogacy regulation** to address disparities between countries and ensure uniform standards for surrogacy practices worldwide. Such a convention would aim to balance the rights and interests of surrogate mothers, intended parents, and children, promoting ethical and equitable reproductive services.

IV. Surrogacy And Religious Law

Judaism

Jewish law (Halakha) provides nuanced perspectives on surrogacy, focusing on the roles and rights of intended parents, the surrogate mother, and the child.

Halakhic Principles:

Halakha emphasizes the importance of fulfilling the mitzvah (commandment) of procreation, which can make surrogacy an acceptable option for couples facing infertility. However, there is ongoing debate about who is considered the child's halakhic mother—the genetic mother (egg donor) or the gestational mother (surrogate).

Parental Rights:

Many rabbinical authorities suggest that both the genetic and gestational mothers may hold maternal claims, complicating questions of parental rights. For this reason, some Jewish authorities recommend that Jewish surrogates be used in cases involving Jewish intended parents to avoid disputes regarding the child's Jewish identity.

Rabbinical Interpretation:

Views on surrogacy vary among Orthodox, Conservative, and Reform Jewish communities:

Orthodox Judaism: Often cautious, allowing surrogacy only under strict rabbinical supervision to ensure compliance with Halakha.

Conservative Judaism: More open to surrogacy, provided ethical guidelines are followed.

Reform Judaism: Generally supportive, focusing on the autonomy of intended parents and the surrogate.¹⁰

Christianity

Christian perspectives on surrogacy vary across denominations, reflecting differing theological principles about reproduction, the sanctity of life, and the commodification of human life.

Catholicism:

The Catholic Church opposes surrogacy, viewing it as morally unacceptable. The Church's teachings emphasize the sanctity of marriage and procreation, arguing that surrogacy undermines the unity of marriage by involving a third party.

The **Vatican's Donum Vitae** (1987) explicitly condemns surrogacy, likening it to the commodification of human life and a violation of human dignity.

Concerns about the child's rights and potential exploitation of women further strengthen Catholic opposition to surrogacy.¹¹

¹⁰ Dorff, E. N. (2024). Jewish Perspectives on Gamete Use, Donation, and Surrogacy. *The Oxford Handbook of Religious Perspectives on Reproductive Ethics*, 320.

¹¹ McCormick, R. A. (1991). Surrogacy: a Catholic perspective. *Creighton L. Rev.*, 25, 1617.

Protestantism:

Protestant denominations have more varied views, reflecting the diversity of their theological interpretations.

Some denominations, particularly more liberal ones, are open to surrogacy if it is seen as a compassionate response to infertility. Ethical concerns often center on ensuring informed consent and fair treatment of surrogates.

Evangelical groups are generally more critical, aligning with Catholic concerns about commodification and the sanctity of traditional procreation.

Eastern Orthodoxy:

The Orthodox Church typically opposes surrogacy, citing similar concerns as Catholicism about the sanctity of marriage and the commodification of reproduction.

Orthodox theology also emphasizes the natural order of procreation and often views surrogacy as a violation of this principle.¹²

Islam

Islamic perspectives on surrogacy are largely shaped by Sharia law and differ significantly across schools of thought and regional practices.

Prohibition of Third-Party Surrogacy:

Islamic jurisprudence (fiqh) generally prohibits surrogacy involving a third party, as this is viewed as analogous to **zina** (adultery) and disrupts the lineage (nasab) established by marriage.

Permissibility in Certain Contexts:

Surrogacy is permissible in some interpretations if it involves the wife's egg and the husband's sperm, gestated by the wife herself. However, using another woman as a surrogate is widely forbidden.

Fiqh Debates:

Sunni scholars, particularly in the **Hanafi, Maliki, and Shafi'i schools**, tend to prohibit surrogacy outright, citing the sanctity of lineage.

Some **Shia authorities** are more lenient, allowing for specific cases under strict conditions, provided there is no violation of marriage laws or familial ties.

Regional Practices:

In countries like **Iran**, where Shia Islam predominates, surrogacy is regulated and permissible under state law. Conversely, in **Saudi Arabia** and many other Sunni-majority countries, surrogacy is outright banned.¹³

Comparative Analysis

The divergent religious views on surrogacy significantly influence national laws and cultural attitudes:

Judaism: In Israel, surrogacy is permitted under the **Embryo Carrying Agreement Law** (1996) for heterosexual couples, reflecting Halakhic principles.

Christianity: Many predominantly Christian countries, such as Germany and France, prohibit surrogacy due to ethical concerns aligned with Catholic or Orthodox teachings. In contrast, some Protestant-majority nations, like the USA and UK, allow regulated surrogacy arrangements.

Islam: Islamic countries vary widely; nations like **Iran** permit surrogacy within specific parameters, while others, such as **Saudi Arabia**, ban the practice outright based on conservative interpretations of Sharia.

The interaction between religious doctrines and legal frameworks often creates challenges for cross-border surrogacy arrangements, particularly regarding **parenthood, citizenship**, and the rights of all parties involved. As surrogacy becomes increasingly international, reconciling these divergent perspectives requires careful consideration of both religious values and global human rights standards.

¹² Deonandan, R. (2020). Thoughts on the ethics of gestational surrogacy: perspectives from religions, Western liberalism, and comparisons with adoption. *Journal of assisted reproduction and genetics*, 37, 269-279.

¹³ Al-Mubarak, T. (2014). Surrogacy and Islam: between permissibility and prohibition. *Islam and Civilisational Renewal*, 274(1711), 1-5.

V. Surrogacy And Parenthood

Parental Rights

Cross-border surrogacy arrangements often create legal uncertainties about the recognition of parental rights, particularly in cases involving conflicting national laws or international disputes.

Surrogate's Rights: In many jurisdictions, the surrogate is presumed to be the legal mother at birth, regardless of genetic ties.

Intended Parents' Rights: Legal parenthood for the intended parents—either biological or through an agreement—often requires formal legal processes, such as parental orders or adoption.

Legal Recognition of Parenthood

Determining the legal parentage of a child born through surrogacy is one of the most contentious issues, as different jurisdictions prioritize biological, gestational, or intentional parenthood.

United Kingdom:

Under the **Human Fertilisation and Embryology Act 2008**, the surrogate is recognized as the legal mother at birth, regardless of genetic connection.

Intended parents must apply for a **Parental Order**, transferring legal parenthood to them. This process requires the surrogate's consent and is limited to certain applicants (e.g., couples or single individuals in specific circumstances).

European Union:

Legal approaches vary widely:

Belgium and Spain: Allow the determination of parentage post-birth, often recognizing intended parents, especially in altruistic surrogacy cases.

Germany and France: Prohibit surrogacy altogether, creating significant challenges for intended parents seeking recognition of parentage.¹⁴

The lack of EU-wide legislation leads to inconsistencies in cross-border surrogacy cases, often requiring intervention by the **European Court of Human Rights (ECHR)**.¹⁵

United States:

Parentage laws vary by state:

California: Recognizes intended parents as legal parents from the outset, regardless of biological connection, provided there is a valid surrogacy agreement.

Michigan: Criminalizes surrogacy agreements and does not recognize intended parents' rights, making legal parenthood nearly impossible without adoption.¹⁶

Australia:

States regulate surrogacy, requiring intended parents to apply for a **Parenting Order** after birth to gain legal recognition.

Strict criteria often limit eligibility, with commercial surrogacy banned in most jurisdictions.¹⁷

¹⁴ Brunet, L., King, D., Davaki, K., McCandless, J., Marzo, C., & Carruthers, J. (2012). Comparative study on the regime of surrogacy in the EU member states.

¹⁵ Tryfonidou, A. (2024). Surrogacy in the ECtHR and the European institutions. In *Research Handbook on Surrogacy and the Law* (pp. 151-168). Edward Elgar Publishing.

¹⁶ Guzman, V. R. (2016). A comparison of surrogacy laws of the US to other countries: should there be a uniform federal law permitting commercial surrogacy. *Hous. J. Int'l L.*, 38, 619.

¹⁷ Millbank, J. (2011). The new surrogacy parentage laws in Australia: cautious regulation or '25 brick walls'?. *Melbourne University Law Review*, 35(1), 165-207.

International Conflicts

Cross-border surrogacy often results in disputes between countries with differing laws on surrogacy and parenthood.

Citizenship Challenges:

Children born through international surrogacy may face difficulties obtaining citizenship due to discrepancies in legal recognition of parentage.

For example, if a child's birth country recognizes the surrogate as the legal mother while the intended parents' country requires a biological link, the child may become stateless.

Case Study: Baby Gammy (Thailand):

In 2014, an Australian couple entered into a surrogacy agreement in Thailand. The surrogate gave birth to twins, one of whom (Baby Gammy) had Down syndrome. The intended parents took the healthy twin and left Baby Gammy with the surrogate, sparking international outrage.

The case highlighted issues of child welfare, exploitation of surrogates, and conflicting parentage laws, ultimately leading Thailand to ban commercial surrogacy for foreigners.

Human Rights Considerations:

In cases like **Mennesson v. France** (2014), the ECHR ruled that states must respect the rights of children born through surrogacy, including their right to legal parentage and citizenship, even if the surrogacy arrangement violates national laws.¹⁸¹⁹

Comparative Observations

In **permissive jurisdictions** like California, intended parents' rights are prioritized, reducing disputes over legal parenthood. In **restrictive jurisdictions** like Germany or Australia, strict surrogacy laws complicate recognition of intended parents' rights, creating legal and practical challenges. Islamic countries often refuse recognition of parenthood in surrogacy cases altogether, viewing such arrangements as religiously impermissible.

VI. International Regulation And Reform

Current Legal Landscape

Cross-border surrogacy operates within a fragmented legal framework, with significant variations in national laws and no binding international standards.

National Efforts:

Some countries (e.g., **India, Thailand**) have banned commercial surrogacy for foreign couples due to concerns about exploitation and statelessness. Others (e.g., **Ukraine, Georgia**) have become surrogacy hubs due to permissive laws but face criticism for inadequate protections for surrogate mothers. Countries like **the UK** and **Australia** permit altruistic surrogacy but impose strict restrictions on commercial arrangements.

International Efforts:

The **Hague Conference on Private International Law** initiated discussions on parentage and surrogacy in 2015, but no binding agreements have been reached. Regional frameworks, such as within the **EU**, remain inconsistent, with no unified approach to cross-border surrogacy.

Need for an International Convention

Cross-border surrogacy highlights complex ethical, legal, and human rights issues that demand a unified global response.

Human Rights Concerns:

Stateless children and unresolved parentage disputes contravene children's rights under the **UN Convention on the Rights of the Child**. Exploitation of impoverished women in unregulated markets violates principles of dignity and equality enshrined in international human rights law.

¹⁸ Brugger, K. (2011). International law in the gestational surrogacy debate. *Fordham Int'l LJ*, 35, 665.

¹⁹ Fenton-Glynn, C. (2014). Human rights and private international law: regulating international surrogacy. *Journal of Private International Law*, 10(1), 157-169.

Ethical Issues:

Inconsistent protections for surrogate mothers and children create ethical dilemmas about fair treatment and informed consent. The commodification of reproduction exacerbates social and gender inequalities, demanding global attention.

VII. Conclusion

The absence of global standards for surrogacy regulation has perpetuated legal ambiguities, ethical challenges, and human rights violations. A binding UN Convention on Surrogacy could address these gaps, offering a framework that ensures the dignity, safety, and rights of surrogate mothers, children, and intended parents worldwide. International cooperation is not merely desirable but essential to uphold justice and equity in surrogacy practices.

Call to Action

The global nature of cross-border surrogacy necessitates a unified international regulatory framework.

Safeguarding Human Rights, Protecting surrogate mothers from exploitation and ensuring the welfare of children born through surrogacy. Harmonizing Legal Standards, establishing clear, consistent guidelines for parentage, citizenship, and ethical practices to resolve international disputes effectively. Promoting Ethical Practices, Encouraging transparency, informed consent, and equitable treatment for all parties involved in surrogacy arrangements.

Future Outlook

The road to establishing universally accepted standards for surrogacy is fraught with challenges, Cultural and Religious Differences: Overcoming diverse beliefs and practices that shape national approaches to surrogacy. Economic Disparities: Addressing the power imbalances that drive the exploitation of women in developing countries. Global Cooperation: Facilitating dialogue among governments, medical professionals, legal experts, and religious leaders to create inclusive policies.

By fostering international dialogue and collaboration, the global community can work towards a balanced and equitable framework for surrogacy. This will ensure that ethical considerations, legal clarity, and human rights protections remain at the forefront of surrogacy practices, providing justice and dignity for all involved.

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