

SURROGACY, HOPE TO HAVE FAMILY: AN INTERNATIONAL REGIME OF CONFLICTING LAWS.

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Abstract

The legal status of surrogacy agreements differs substantially from country to country. For example, surrogacy is completely banned in some countries yet allowed in others. In the countries that allow for surrogacy there is a further division between the ones who allow surrogacy entirely, meaning allowing for commercial surrogacy, and those who merely allow for surrogacy with no financial gain (altruistic) for the surrogate mother. Each of these countries has their own statutory provisions regulating the surrogacy process. In some countries surrogacy arrangements continue to take place due to the simple fact that there is a lack of proper regulation of the surrogacy process in that particular country. This paper is of paramount importance as it is relevant to understand the intention enshrined under Article 51(c) of the Constitution, which states that, “The State shall endeavour to— (c) foster respect for international law and treaty obligations in the dealings of organized peoples with one another; and.” This study will be limited to the countries that have regulations in place that legalise commercial surrogacy and the ones who due to the lack of proper regulation also allow for commercial surrogacy.

Key Words: *Surrogacy, International Commercial Surrogacy, Legal Status, vitro- fertilization, Human Rights, right to procreation, Reproductive Autonomy.*

Introduction

Earlier, it was inevitable for couples who lived in a country that banned any kind of surrogacy to seek hope for happiness. Fertility tourism was the only ray of hope that born. Couples with this new scientific techniques and with wish in their heart simply travel to countries where surrogacy is legal, start the surrogacy process and once complete pick the baby up and go home. As can be expected, this process is riddled with legal problems and procedural red tape. For example, there are many cases in various different countries that dealt specifically with the problem created where the commissioning parents home countries refused to recognise them as the legal parents of the baby born via a surrogate in another country.¹ Some of these cases will be briefly discussed below. Another common problem that exists in countries where there is a lack of proper regulation is that the surrogate mother sometimes refuses to give the baby to the commission parents once born,² meaning the surrogate mother refuses to adhere to the surrogacy agreement. The baby will be 100% unrelated to the surrogate mother and in some cases 100% genetically related to the commissioning parents. However, as a result of some of the laws not having been amended to effectively

¹*Jan Balaz v Anand Municipality* LPA 2151/2009 (High Court of Gujarat, India); *Re: L (A Minor)* [2010] EWHC 3146 (Fam).

²*Johnson v Calvert* 851 P. 2d 776 Cal Supreme Court 1993.

regulate surrogacy agreements, the surrogate mother will in some cases be considered the mother of the baby, leaving the commissioning parents with no rights in respect of the child. Other times the situation is reversed and the commissioning parents disappear and leave the surrogate mother with their baby.³ Some countries, such as New Zealand and the United Kingdom, allow for surrogacy agreements, but hold that they are unenforceable,⁴ which does not help with the problem at hand.

The different regulations cause different results and outcomes. One should, theoretically, be able to identify the main problems in the regulations of all the countries, isolate the common problems and address them. One should also be able to see if the solution a country attempted for a particular problem was successful or not and thereafter be able to determine the implications it could have if we decide to make use of the same solution in all nations. Of course, we could also learn lessons from other countries incorrectly addressing problems. One should be able to see which things worked and which didn't. In this way one should be able to recommend safe and fair regulations for all the parties involved in the surrogacy agreement.

INTERNATIONAL LEGISLATIONS LEADS FOR DEVELOPMENT OF SURROGACY LAWS AT DOMESTIC LEVEL

Human rights are vital to individual's existence. They are the fundamental and inalienable rights, prerequisite to life as human being.⁵ The international community has established several instruments detailing the inalienable human rights. The various means to achieve or avoid human reproduction are viewed as integral to concept of human dignity, personal identity and community. The significance of reproductive rights is evident in its entrenchment in international law under four health related categories:

- (1) The rights to found a family
- (2) The right to decide the number and spacing of children
- (3) The right to family planning information and services
- (4) The right to benefit from scientific advancement.⁶

The individual's right to receive the benefits of scientific progress or technology includes assisted reproductive technologies like In vitro- fertilization (IVF), Controlled ovaries hyper stimulation (COH), Intrauterine Insemination (IVI), Gamete intra fallopian transfer (GIFT) and Zygote intra fallopian transfer (ZIFT) and other scientific technologies. These technologies are the method that enable infertile person to reproduce biologically. The reproduction autonomy includes within its ambit all ideas relating to reproduction such as whether or not to have children, when to have children, where, how and with whom to

³ Howard —Taming the international commercial surrogacy industry|| 2014

⁴Henaghan 2013 *Australian Journal of Adoption* 14.

⁵Micheal J. Perry, "Toward a theory of Human Rights Religion, Law, Court", Cambridge University Press, U.K, 2006, p. 261

⁶Chantelle Washenfelder, "Regulating a revolution: The extent of Reproductive Rights in Canada", 44 *Virginia Law Review*, Vol. 12, No 24, 2004

have children. The right to use ART in fact is a part of reproductive autonomy which is essential for exercise of right to procreation.

These reproductive rights and use of scientific technology for procreation has enshrined in international human rights instruments, conventions and discussed in various international conferences.

1. UNIVERSAL DECLARATION OF HUMAN RIGHT, 1948⁷ (UDHR)

Article 16 of Universal Declaration of Human Right states that Men and women of full age without any limitation due to race, nationality or religion have the right to marry and to found a family.⁸ Family is the natural and fundamental group unit of society and is entitled to protection by society and the state. This right lays the foundation for the reproductive rights in UDHR. Further the right to benefit from advancements of science⁹ can be considered the repository for the use of modern scientific technologies for the enjoyment of reproductive rights.¹⁰

2. THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, 1966 (ICCPR)

This is first binding international human right document. Like UDHR, in ICCPR also there is no express provision regarding the right to reproduction. But the provision relating to right to family and privacy are considered as the foundation for reproductive rights.

Article 23 of ICCPR provides production for the right to found a family.¹¹ The human rights committee, the adjudicative body for the enforcement of ICCPR states that, Article 23 should be interpreted to include a codification of national obligations to enact non- discriminatory family planning policies. This is also a positive right to non-discriminatory access to reproductive technologies.

3. THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, 1966

This covenant recognizes the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.¹² This right includes the right to treatment for maternal and infant mortality and the promotion of children's health within the right to medical treatment for illness.¹³ This covenant also includes right to education and personal development. This right can be interpreted to include one of elements of reproductive right i.e. rights to information relating to family planning, access to technologies and other relevant information's related to reproduction. Thus, the covenant also confers a right to enjoy the benefits of scientific progress and its application to everyone.

⁷J.E.S Fawcett, "The law of Nations", Basic Books, Inc New York, 1969, p. 158

⁸Universal Declaration of Human Rights, 1948

⁹Article 27, UDHR which states that: "Everyone has the right freely to participate in the cultural life of the community to enjoy the arts and to share in scientific advancement and its benefits".

¹⁰Centre for Reproductive rights Women of the world, Law & Policies, www.reproductiveright.org

¹¹Laura Shanner, "The right to procreate: When rights claims have gone wrong", 40 Mc Gill Law Journal, 1995, p. 823

¹²Article 12 ICESCR

¹³Article 12(2) ICESCR

4. CONVENTION ON ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN, 1979 (CEDAW)

Article 12 of CEDAW states about the women's reproductive rights as follows:

- (1) State parties shall take all appropriate measure to eliminate discrimination against women in the field of health care in order to ensure on a basis of equality of men and women, access to health care services, including those related to family planning.
- (2) Notwithstanding the provisions of paragraph I of this Article, state parties shall ensure to women appropriate service in connection with pregnancy, confinement and the post natal period, granting free services where necessary as well as adequate nutrition during pregnancy and lactation.

5. THE CONVENTION ON THE RIGHTS OF PERSON WITH DISABILITIES, 2006

This convention is the first comprehensive International Human Rights, instruments that specially recognized the right to reproduction and sexual health as a human right. Article 23 declares that "States parties shall take effective and appropriate measures to eliminate discrimination against persons with disabilities in all matters to marriage family, parenthood and relationship, on equal basis with other, so as to ensure that

- (a) The rights of persons with disabilities to decide freely and responsibly on the number and spacing of their children and to have access to age- appropriate information, reproduction and family planning education are recognized and the means necessary to enable them to exercise these rights are provided.
- (b) Persons with disabilities including children retain their fertility on an equal basis with others."

6. INTERNATIONAL CONFERENCES

The reproductive rights were specially addressed in various international human rights conference. The first conference in which reproductive rights were recognized internationally as human right was the International Human Rights Conference in Teheran held in 1968. It associated quite exclusively, development and promotion of human rights with birth control in developing countries.¹⁴ It did not recognize on individual right to reproductive autonomy. Bucharest world population conference held in 1974 declared that, 'the right to decide freely and responsibly on the number and spacing of their children was extended to couples and individuals'. A position that is still endorsed today by most of the stakeholders involved in reproductive issues. In 1975 women's conference¹⁵ that officially launched the women's rights movement was clearly women oriented. It used the notion of bodily integrity and control as a reference point to interpret the right to decide on the number and spacing of children. An international conference in Mexico held in 1984 changed the circumstances on the previous conference on world population as U.S. made a complete U-turn from

¹⁴DrAneesh V. Pillai, "Surrogacy Mtherhood and the Law, International and National perspectives", Regal Publication, New Delhi, 2015, p. 34

¹⁵Centre for the study of global ethics, "Background report on women's Reproductive Rights", www.infro.worldbank.org, visited on 07/11/2018

their population growth control position following the appearance of a powerful 'right life movement'. In 1990's three international conference were held which were marked as milestones in the recognition of reproductive health rights.¹⁶ The first was International Conference on human rights held in Vienna, Austria in 1993. It pronounced that rights of women are an inalienable integral and visible part of human rights. The second conference in 1994 was international conference on population and development; it extended women's reproductive rights from merely serving the goals of population control to the respect for the rights of women as autonomous individuals with the capacity to decide on matters pertaining to their sexuality within their social, economic and political context. The 1995 fourth world conference of women held in Beijing, re-emphasized a holistic approach in defining reproductive rights. It underscored the point that issues of reproductive health should not be viewed in isolation from the under lying social, economic and other conditions.

7. HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW

Hague conference on Private International Law (HCCH) is the oldest international organization based in the, Hague. Since 1983 it is a melting pot of different legal traditions has developed and served conventions which respond to global needs in the areas of International protection of children, Family and Property relations, International legal co-operation and Litigation, International Commercial and Finance law being the world's leading Intergovernmental organization in the field of private international law. It has drawn up no less than International treaties or conventions to overcome legal obstacles faced by individuals and companies in cross-border relation and transactions.¹⁷

8. HAGUE CONVENTION ON INTER COUNTRY ADOPTION IN 1993

The Hague convention on protection of children and co-operation was formed in respect of inters country adoption, which came into force on May, 1995.¹⁸

The main objectives of the convention are:

To establish safeguards to ensure that inter-country adoptions take place in the best interest of the child and with respect for his or her fundamental rights as recognized in international law.

1. To establish a system of co-operation amongst contracting states to ensure that those safeguards are respected.
2. To establish formal international and inter government recognition of inter country adoption.
3. To secure the recognition in contracting states of adoptions made in accordance with the convention.

On of October, 2008, this convention has been rectified by 76 countries.

¹⁶Grace TikamberjiMalera, "Women Reproduction Rights and HIV/AIDS: The value of the African charter protocol", www.agenda.org visited on 05/03/2018

¹⁷www.hcch.net , visited on 20/05/2019

¹⁸www.adoptionindia.nic.in visited 01/06/2019

9. Legislative Trend of Surrogacy in US and UK

Various reports state that commercial surrogacy has increased tremendously in the recent past. Fee for commercial surrogacy in India as compared to other developed countries like USA, UK is very nominal.¹⁹

The English Legislatures were first to draft an Act which prohibited commercial surrogacy. In British Parliament in the year 1985 enacted the Surrogacy Arrangement Act which made commercial surrogacy a criminal offence. Section 2 of the Act clearly prohibits any person from entering into a commercial surrogacy agreement.²⁰

Under this Act “No person shall on a commercial basis do any of the following acts in the UK, that is:

- a) Initiate or take part in any negotiation with a view to the making of a surrogacy arrangement,
- b) Offer and agree to negotiate the making of a surrogacy arrangement, or
- c) Compile any information with a view to its use in making, or negotiating the making of, surrogacy arrangements;

The First Documented instance of Surrogacy is in 1986, Marry Whitehead gave birth to a child. She was 29 years of age and she born the child of an infertile couple. And no person shall in the UK knowingly cause another to any those acts on a commercial basis.”²¹The roots of surrogacy can be traced long back in Indian history.

In this case it was not artificial insemination and Whitehead was the biological mother of the child. Whitehead did not hand over the baby girl after birth but want the custody of the child. This led to legal tangle that went for two year. Eventually she happened to lose the custody battle but she was award with periodic visitation right.

10. Legislative trends of Surrogacy in Indian

It is relatively well-known that India is currently the main hub of commercial surrogacy in the world.²² With high quality health care, Western-trained doctors, low medical costs, no lack of willing surrogates, and absence of proper regulations governing the surrogacy process, it is no mystery why.²³ In fact, no laws regulate surrogacy in India, apart from the set of guidelines the Ministry of Health and Family Welfare established in 2005. These guidelines were drafted and published by a committee formed by the National Academy of Medical Sciences and Indian Council of Medical Research (ICMR). These guidelines are legally non-binding and are directed primarily towards promoting all the new technologies rather than regulating the said technologies.²⁴Commercial surrogacy was allowed in India for foreigners since 2002.

¹⁹ The Law Commission in India, Report 2008 , 2009, Delhi is realing, 28th March 2008.

²⁰The Surrogacy Arrangements Act 1985.

²¹*Supra*

²²Witzleb in Gerber & O’Byrne (eds)168.

²³Rimm —Booming baby business: Regulating commercial surrogacy in Indial 2009 *University of Pennsylvania Journal of International Law* 1430.

²⁴ Bailey —Reconceiving surrogacy: Toward a reproductive justice account of Indian surrogacy| 2011 *Hypatia* 736.

With provision in draft ART Bill, 2014²⁵ and notification from the Health Ministry of India²⁶ on November 3, 2015, surrogacy is banned for foreign nationals including OCIs and PIOs since then. The Cabinet Approved the Surrogacy (Regulation) Bill 2016, which is pending parliamentary approval, bans all other forms of commercial surrogacy in India. Furthermore, the proposed Bill allows surrogacy only for infertile Indian couples who are married for at least 5 years with medical indication for surrogacy. The Bill prohibits surrogacy arrangement for gay, live-in couples, single parents, OCIs, and PIOs along with foreigners. Furthermore, as per the Surrogacy Bill, intending couple must not have any surviving child biologically or through adoption or through surrogacy earlier. It also states that if any intending couple or any person who seeks the aid of any surrogacy clinic, laboratory, or of a registered medical practitioner, gynecologist, pediatrician, human embryologist, or any other person for commercial surrogacy or for conducting surrogacy procedures for commercial purposes shall be punishable with imprisonment for a term which shall not be <5 years and with fine which may extend to Rs. 500,000 for the first offence and for any subsequent offence with imprisonment which may extend to 10 years and with fine which may extend to Rs. 1,000,000. Multiple fallacies are being felt in the law, and recommendations for amendments are being made by various medical, social, and legal groups.²⁷

Journey from Draft Bill to Passed Bill 2018

In 2014 the Indian government introduced into parliament the Assisted Reproductive Technologies Regulation (ART) Bill. The Bill addresses most of the issues that are currently unregulated, such as the age and background of the surrogate mother and limits to how many babies a surrogate mother can have. It further provides some procedures which foreign commissioning parents will have to adhere to.²⁸ When this Bill is enacted the laws surrounding surrogacy agreements will at long last become enforceable.²⁹ Until then though, without any enforceable regulations, it is a free-for-all, and consequently the system is ripe for abuse. India has all the catalysts for exploitation, such as no enforceable regulations and an abundance of potential surrogates living under the poverty line willing to do anything to survive.³⁰ As a result of surrogacy being outlawed in most other countries potential surrogates have their pick of wealthy desperate individuals wishing to become parents at any cost.

It is interesting to note that the guidelines ban partial (traditional) surrogacy.³¹ Thus a surrogate mother cannot donate her own egg for the surrogacy process.³² Consequently, the surrogate mother can never be related to the baby. This is done to assure that the surrogate mother creates a detachment towards the baby, is most probably a method utilised to prevent the surrogate mother from terminating the surrogacy agreement

²⁵Draft Assisted Reproductive Technology (Regulation) Bill. New Delhi: Ministry of Health and Family Welfare, Government of India, Indian Council of Medical Research; 2014.

²⁶Notification on Surrogacy (Circular No.: 462). Ministry of Home Affairs (Foreign Division), India; 3 November. 2015. [Last accessed on 2018 Sep 20]. Available from: https://www.mha.gov.in/PDF_Other/surrogacy03112015.pdf .

²⁷Dr. Nayana Hitesh Patel “Insight into Different Aspects of Surrogacy Practices”; J Hum Reprod Sci. 2018 Jul-Sep; 11(3): 212–218. doi: 10.4103/jhrs.JHRS_138_17

²⁸Howard 2014 The BMJ 2.

²⁹ Assisted Reproductive Technology (Regulation) Bill 2014 s 60(1).

³⁰Panitch —Global surrogacy: Exploitation to empowerment| 2013 Journal of Global Ethics 323

³¹Assisted Reproductive Technology (Regulation) Bill 2014 s 60(17)(a).

³²Rimm 2009 University of Pennsylvania Journal of International Law 1438.

and keeping the resultant baby safe from her and do not create any moral or psychological fear in the mind of surrogate.

In the *Baby Manji* case³³ a surrogate mother in India was carrying a baby for commissioning parents from Japan.³⁴ The agreement was a simple one. The surrogate mother would carry the baby to term and after the birth relinquish the baby to the Japanese couple. However, the Japanese couple divorced one month before the birth. Even though the father still wanted the baby, it nevertheless caused a legal nightmare. Japan refused to issue a passport as they required the child to be born in Japan, and India did not recognise a single male as an adoptive parent. He eventually succeeded but only after lengthy court applications.

India, currently being the main surrogacy destination, is hard at work at attempting to regulate surrogacy. The main genetic link requirement, as will be discussed later, is quite an effective method of dealing with this issue. However, one should further note that the effectiveness is directly related to the support received from surrounding legislation. For example, in Thailand the woman who gives birth is automatically accepted as the mother of the child, regardless of any genetic link.³⁵ This is an obvious result of outdated legislation which has failed to adapt to a quick and ever-changing world. Nevertheless, it is my opinion that if properly regulated this guideline could serve to make the surrogacy process a little safer for the commissioning parents. We will, however, only see what India has managed to achieve after the enactment of the proposed Bill. Almost excessively strict regulations will be needed to combat the exploitation of the poor. Furthermore, the enactment of strict regulations is not where the issue ends. These regulations need to be aggressively enforced, at least initially, to terminate the syndicates that are already in place. For now though we can only wait and see as to its effectiveness. *International or cross-border surrogacy raises serious questions of law relating to citizenship, nationality, motherhood, parentage and the rights of a child to be raised by their parents.* It is for these reasons that it is important for intended parents to carefully assess the legal risks involved in surrogacy in the country the birth will occur and the country the child will be raised in.³⁶ **For clear understanding of International comparison of surrogacy laws is explained through Table 1.**³⁷ Table 1 compares the Bill with the laws in some other countries which regulate surrogacy. These countries have fewer restrictions with regard to eligibility criteria for the intending parents and the surrogate mother, amongst others.

Table 1

Country	India Surrogacy Bill, 2016	Netherlands	United Kingdom	South Africa	Greece	Russia
Type of surrogacy	Altruistic (Commercial)	Altruistic (Commercial)	Altruistic (Commercial)	Altruistic (Commercial)	Altruistic (Commercial)	Commercial surrogacy

³³Baby Manji Yamada v Union of India & ANR. [2008] INSC 1656 (29 September 2008).

³⁴Mohapatra — Stateless babies and adoption scams: A Bioethical analysis of international commercial surrogacy 2012 Berkeley Journal of International Law 3.

³⁵Howard 2014 The BMJ 1

³⁶ *Supra* note 25.

³⁷<https://www.prsindia.org/billtrack/surrogacy-regulation-bill-2016>

Country	India Surrogacy Bill, 2016	Netherlands	United Kingdom	South Africa	Greece	Russia
allowed	surrogacy prohibited).	surrogacy prohibited).	surrogacy prohibited).	surrogacy prohibited).	surrogacy prohibited).	allowed.
Payment to the surrogate	Medical expenses and insurance coverage.	Reasonable expenses, insurance and legal charges.	Reasonable expenses.	Medical expenses and insurance coverage (including any loss of earnings to the surrogate).	Expenses related to pregnancy and post-partum period (including any loss of earnings to the surrogate).	No limit.
Legal guardian of the surrogate child	Intending couple.	Surrogate (transfer of guardianship through adoption).	Surrogate (transfer of guardianship through adoption or order).	Intending parent(s).	Intending parent(s).	Surrogate, if it is her egg. Intending parent(s), otherwise.
Imprisonment for engaging in commercial surrogacy	10 years.	Maximum one year.	Maximum three months.	Maximum 10 years.	Minimum two years.	No provision.

International surrogacy tourism may be the only option or a more attractive option for some, but it can run into critical legal complications when the laws in the surrogate's country and laws in the intended parents' country reduce the intended parents' rights. A 2008 arrangement in India left a baby girl parentless – a “surrogacy orphan.” The intended parents were a couple from Japan who got divorced while the surrogate was still pregnant. As a result of the divorce, the intended mother no longer wanted any claim to the baby. The surrogate also did not want to claim the baby. While the intended father was willing to take custody of his biological daughter, Indian law does not allow single men to adopt girls, so he was denied custody rights. Also, the father could not adopt the girl under Japanese law since the baby was still considered an Indian citizen.³⁸ One way to prevent similar problems from arising is for nations to establish guidelines on how a couple can establish citizenship for a child born through an international surrogate. The Australian embassy in India, for example, has outlined specific steps Australian parents need to follow in order to establish citizenship for their child after he or she is born from a surrogate in India. On its website,

³⁸ Surrogacy Orphan Trapped in Red Tape After Mothers Abandon Her. The Times. 2008 <http://www.timesonline.co.uk/tol/news/world/asia/article4474231.ece>.

the embassy has the necessary forms available for download and lists recommended DNA testing labs in Australia to verify the genetic ties between the intended parents and the child.³⁹

Despite potential legal complications, the demand for surrogacy tourism continues to increase.

In India, commercial surrogacy is growing so rapidly that the Indian Council of Medical Research predicts that it will soon become a \$6 billion per year industry⁴⁰. Planet Hospital in California, just one of many medical tourism agencies, connected 25 US clients to Indian clinics in 2007⁴¹. As cancer treatment continues to improve and to save the lives of more women of reproductive age, we can expect the popularity of surrogacy to increase due to the potential reduction or elimination of their ability to gestate as a result of their cancer treatment. Indeed, surrogacy offers female cancer survivors who cannot gestate the opportunity to have biological children, as long as they are able to overcome the legal barriers found in various geographic locations.



³⁹ Children born through Surrogacy Arrangements applying for Australian Citizenship by Descent. [Accessed September 17, 2019.]; Australian High Commission: India. [http://www.india.embassy.gov.au/ndli/vm_surrogacy.html]

⁴⁰ Chang M. Harvard Int Rev. Spring; 2009. Womb for rent: India's commercial surrogacy; pp. 3111–2.

⁴¹ Gentleman A. India nurtures business of surrogate motherhood. New York Times; 2008.