



A UNIT OF
LAW LABORATORY

FEBRUARY 2022

Law Laboratory

Research Journal of Law & Socio-Economic Issues

ISSN: 2583-0783

VOLUME 1 | ISSUE 2

WWW.LAWLABJOURNAL.IN



APPLICABLE LAW FOR INTERNATIONAL SURROGACY AGREEMENT

- Debayan Samanta¹

INTRODUCTION

Surrogacy is not a fresh principle in the modern age of needing a child, but the method of surrogacy has been used since old period. The technique of the assisted reproduction is nevertheless restricted to the marriages that are infertile and not ready to get a child with no healthcare abnormality, but the fertility treatment is also actually practiced by everyone who wishes to get a kid. As the frequency of surrogacy procedures increases, it has an impact on the nation or the world, sparking arguments on legal, ethical, spiritual, and ethical grounds all over the globe. Increases in the procedure of commercial surrogacy result in violations of human rights, but commercial surrogacy protects infertile women's reproductive rights.

SURROGACY & ITS DEFINITION

Surrogacy has strengthened a new degree of progression in the field of scientific growth in which a mother of another womb assists another mother in becoming a mother who is unable to have a kid for whatever reason. Surrogate comes from the Latin term surrogates, which means "to substitute." Black's Law Dictionary defines, "*Surrogacy is an agreement where a woman agrees to be artificially inseminated to carry with the semen of another woman's husband.*"²

As per the New Encyclopaedia Britannica, surrogacy is defined as – "*Surrogate motherhood as the practise in which a woman bears a child for the other couple to produce children in the usual way.*"³

TYPES OF INTERNATIONAL SURROGACY ARRANGEMENTS

¹ B.Sc. LL.B., KIIT Law School, Bhubaneswar

² Surrogacy, available at <https://www.sciencedirect.com/topics/medicine-and-dentistry/surrogacy#:~:text=The%20concept%20of%20E%80%9Csurrogacy%E2%80%9D%20involves.as%20he%20commissioning%20or%20intended> (Last visited on February 08, 2022).

³ R.S Sharma, *Social, Ethical, Medical & Legal aspects of surrogacy: an Indian Scenario*, IJMR (February 09, 2022), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4345743/>.

A surrogacy agreement including a surrogate mother who resides in another country is known as international surrogacy. Surrogacy agreements might be charitable or commercial in nature.

1. Surrogacy agreements that are altruistic are those in which the surrogate mother somehow doesn't profit. Nevertheless, the contracting parents may reimburse her for appropriate medico legal fees.
2. Surrogacy that is corporate is one in which the surrogate mother generates a gain – that is, she is compensated more than the price of health care and legal fees.

CONCERN ABOUT SURROGACY AGREEMENTS

Pregnancy and childbirth are deep, intimate, and complicated identity-related events that have profound physical and psychological consequences for the woman who goes through them. Surrogacy is a complicated connection that can lead to abuse and exploitation, and this must be recognized, especially when private entities with financial interests are allowed to participate. Paid surrogacy has been surrounded with controversy since its inception.⁴ Some feminist thinkers opposed paid surrogacy, claiming that it was commoditization of the body. Others have claimed that such surrogacy is legal, but only if the woman retains the right to terminate the pregnancy and the ability to terminate the relationship at any time.⁵

APPROACHES TO SURROGACY IN NATIONAL LAWS AND POLICIES

The State's endeavors to firm up the legislation and rules to safeguard the lives of both the surrogate mother and the intended parents have really been tedious and cumbersome in contrast to the predominance and pervasiveness of surrogacy. The Indian Council of Medical Research (ICMR) published the first set of surrogacy legislation in the nation. Moreover, in 2008, an attempt was made to generate centralized regulations governing all ART remedies, with a surrogacy-specific version following in 2016, neither of which has been completed to date.

⁴ Nayana Hitesh Patel, Yuvray Jadeja et.al., *Insights into different aspects of surrogacy practices*, J HUM REPROD SCI (February 06, 2022), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6262674/>.

⁵ Virginie Rozee, Sayeed Unisa, et.al., *The social paradoxes of commercial surrogacy in developing countries: India before the new law of 2018*, BMC WOMEN'S HEALTH (February 03, 2022), <https://bmcwomenshealth.biomedcentral.com/articles/10.1186/s12905-020-01087-2>.

There have been several gaps in bills that never made it to the Rajya Sabha's tables, as well as continuous refurbishments being requested for those that did. There is a lot of disinformation and scepticism because there aren't any well-defined and exhaustive laws.⁶

The Indian Council of Medical Research Guidelines on ART Clinics, 2005, was the initial arrangement of surrogacy guidelines issued by the authorities. While it wasn't created expressly for surrogacy, it did establish important guidelines for ART clinics when performing all surrogacy operations.⁷ The Law Commission resolved to take Suo Moto measures and treated with surrogacy in its 228th report after recognizing the necessity for legislation to govern clinics performing ART treatments and to define the rights and obligations of the couples.

The Assisted Reproductive Technology Bill, 2020, is yet another planned rule that was first developed in 2008 but never presented to Parliament. A year later, in 2010, a new law was drafted in response to the 228th Law Commission Report.⁸

INTERNATIONAL APPROACHES

Law differs widely from one country to another:

USA - Surrogacy and the legal concerns surrounding it are governed by state laws, which vary from state to state. Surrogacy and surrogacy contracts are made easier in certain states, while others simply refuse to enforce them, and commercial surrogacy is penalised in others. Only altruistic surrogacy is permitted in Canada under the Assisted Human Reproduction Act; surrogate mothers may be compensated for authorized expenditures, but any other consideration or price is prohibited.⁹

UK - Commercial surrogacy agencies are prohibited, but not voluntary-altruistic surrogacy services, and marketing for and regarding surrogacy is prohibited in the United Kingdom, as it is in Canada. Surrogacy arrangements can only be initiated, negotiated, or compiled by the contracting families and the hosting surrogate. Surrogacy contracts aren't legally binding.

⁶ Zulfiqar Memon, Muddassar Bagadia & Drishti Singh, *Surrogacy Regulations in India*, MONDAQ (February 06, 2022), https://www.mondaq.com/india/constitutional-administrative-law/1126150/surrogacy-regulations-in-india#_ftn17.

⁷ Chapter 3, ICMR Guidelines on ART Clinics, 2005.

⁸ Chinmoy Pradip Sharma, *Surrogacy Laws in India – Past Experiences and Emerging Facets*, BAR & BENCH (February 07, 2022), <https://www.barandbench.com/columns/surrogacy-laws-in-india-past-experiences-and-emerging-facets>

⁹ Surrogacy Countries, available at: <https://intraius.com/en/countries-2/> (Last visited February 08, 2022).

Although the law governing surrogacy parentage in the United Kingdom is far simpler and more universal than in Canada, the laws governing legal parenting can differ.¹⁰

Australia - Surrogacy for profit is illegal in Australia. Even altruistic surrogacy was previously prohibited in a number of jurisdictions; nevertheless, it is now legal in the majority of states. Many Australians have pursued surrogacy solutions in other nations since it is hard to find females prepared to enter into surrogate agreements without payment (and because advertising linked to surrogacy is sometimes illegal). Surrogacy agreements are not effective in Australia, while certain states have laws requiring the surrogate mother to pay surrogacy-related expenses.¹¹

Russia - Surrogacy is lawful in Russia under the rules of the Federal Law. Surrogacy is only permissible for heterosexual couples and single females, despite the fact that it is permitted for foreign nationals and unmarried couples. Surrogacy arrangements for gestational purposes are the only ones that are legal. Single women must use their egg cells to create the embryo that will be implanted into the womb of a gestational surrogate. The intending parents' identities are on the birth certificate, and they are the legal parents of the kid.¹²

Recent Developments

- In the case of **Baby Manji Yamada**¹³, a Japanese couple got into a contract with an Indian woman to be the surrogate mother for their child. After that, the Indian surrogate mother gave birth to Baby Manji Yamada. Furthermore, the commissioning father, Mr. Yamada, seeks to bring his child to Japan, for which he asks for a visa to Japan, which the Japanese embassy in India denies because the surrogate child is not permitted under the Japanese civil code. After that, Mr. Yamada attempted to apply for an Indian visa, which necessitates a birth certificate, which involves the names of the child's genetic father and mother; however, in this case, Mr. Yamada was the genetic father of the baby Manji, but there is uncertainty in the particular instance of the mother's name because there are three mothers for that child: the contracting mother, the egg donor, and the surrogate; as a result, officials refuse to grant visa

¹⁰ *Ibid.*

¹¹ Sam G Everingham, Martyn A Stafford et.al., *Australians' use of surrogacy*, MJA (February 05, 2022), <https://www.mja.com.au/journal/2014/201/5/australians-use-surrogacy>.

¹² Valeria Piersanti, Francesca Consalvo et.al, *Surrogacy and 'Procreative Tourism'. What does the future hold from the ethical and legal perspectives?* MEDICINA (February 07, 2022), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7827900/>.

¹³ (2018) 13 SCC 518.

to child Manji. Finally, the Indian Supreme Court intervened, and Manji was permitted to move out of the nation with her grandma.

Following this above case, the Apex Court of India ruled in 2008 that surrogacy is legal in India, boosting worldwide faith in surrogacy in India.

- The **German Couple Case**: With the help of Anand Infertility Clinic Gujarat, a childless German couple has twins through a surrogate mother. Because German laws do not recognise surrogacy as a means of parenthood, twins are not treated as German citizens, so the German commissioning parents approach the Gujarat High Court for authorising their surrogate twin with an Indian passport in order to avoid the foreseeable hurdle of the Immigration laws. According to the Gujarat High Court, “a child born through a surrogate mother will bear the surrogate mother's name, not the genetic mother's, and the child must be authorised with an Indian passport, which confirms him as an Indian citizen, and the surrogate mother must then give a child to German couples for adoption.”¹⁴
- In another case, Yonatan and Omer Gher, an Israeli gay couple, in 2008, they could become parents in India with the support of a Mumbai surrogacy arrangement at a clinic. After that, because Israel's laws forbid same-sex marriage and surrogacy, the homosexual couple agreed to have a child and travelled to India to do it. In the year 2008, after the birth of their child, the homosexual couple moved to Israel.¹⁵

CRITICAL ANALYSIS

Surrogacy is a blessing for infertile families, but it has also led to its marketing, which has created a slew of issues. Commercial surrogacy preserves infertile women's reproductive rights, but criminalising it breaches their human rights. Developing countries that allow commercial surrogacy may be able to better defend female citizens' adverse reproductive rights. A crucial aim is to regulate surrogacy in order to achieve mutually advantageous outcomes. Leading to a shortage of effective legislation, an international black market for surrogacy arrangements will continue to exist, posing significant hazards to females and exposing them to human trafficking,

¹⁴ Dhananjay Mahapatra, *German or Indian? Surrogate twins in legal no-man's land*, THE TIMES OF INDIA (February 08, 2022), <https://timesofindia.indiatimes.com/india/german-or-indian-surrogate-twins-in-legal-no-mans-land/articleshow/5286325.cms>.

¹⁵ Divyansh Singh, *Surrogacy under framework of the Indian Constitution*, IPLEADER (February 07, 2022), <https://blog.ipleaders.in/surrogacy-under-framework-of-the-indian-constitution/>.

abuse, and intimidation. Surrogacy contracts must adapt to defend the concerns of surrogate mothers, keeping in mind the unavoidable fact that surrogacy agreements are made in the context of specific individual situation that may evolve over time.

CONCLUSIONS AND SOLUTIONS

In a surrogacy arrangement, the provider is the one who bears the risk. Surrogacy certainly appears to be extending to even more nations around the world as a result of rising demand from couples who are unable to grasp the concept on their own, along with technological advancements in IVF, as well as acknowledgement and preparedness of women to participate in the process of surrogacy as surrogate mothers. Nevertheless, both the gestational component and the intentional parent must be protected by strict protections and regulatory requirements. As a consequence, the government in which surrogacy is conducted owes it to all relevant parties to establish strongly outlined standards that enable for the development of a fair collaboration. It also has a responsibility to guarantee that these rules are followed in practise and to undertake long-term follow-up on all process respondents to verify that no party experiences long-term damage.