



HUMAN RIGHTS PERTINENT TO SURROGACY & CONFIDENTIALITY

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ABSTRACT

The topic of surrogacy has become a multifaceted matter that lies at the crossroads of reproductive technologies and human rights. The present study analyses the intricate equilibrium between the ethical considerations of human rights in surrogacy agreements, with a specific emphasis on the entitlement to privacy and confidentiality. The article undertakes a critical analysis of the tensions that exist between the rights of the surrogate mother, intended parents, and the child, while acknowledging the diverse perspectives surrounding surrogacy.

The initial section of the article explores the framework of human rights, placing particular emphasis on the principles of autonomy, dignity, and non-discrimination. The present study delves into the legal entitlement to privacy, scrutinising its extent in the milieu of surrogacy and the complexities it presents to the secrecy of genetic lineage and surrogacy contracts. The article draws upon legal frameworks at both international and regional levels, as well as jurisprudence from diverse jurisdictions, to highlight the necessity of enacting comprehensive legislation and ethical guidelines. The statement underscores the significance of achieving a nuanced equilibrium between upholding the entitlements and welfare of all stakeholders implicated in surrogacy, while also ensuring the preservation of confidentiality. The final remarks underscore the importance of continuous communication and developing legal structures that prioritise a human rights-oriented perspective towards surrogacy, which prioritises the preservation of dignity, autonomy, and reverence for all parties implicated.

Keywords: Surrogacy, Law, Human Rights, Constitution, Public Policy etc.

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REPRODUCTION AUTONOMY

Reproduction has been seen as a woman's principal duty in both cultural and political circumstances. According to Aristotle, women not only create citizens by caring and rearing them but also by giving birth to them. Reproduction encompasses more than just procreation; another component is nurturing and caring for a growing child. The care of the family and house, the spread of culture, and the preservation of social bonds and community result in further social reproduction. They are limited to household tasks under capitalism's rule as a result of their involvement, and other people do not see their employment as sacred.

SURROGACY AGREEMENT AND ITS LEGAL ENFORCEABILITY IN INDIA

A Surrogacy Agreement refers to a “legally binding document entered into by individuals utilising assisted reproductive technology and a surrogate mother. Prior to engaging in surrogacy, meeting this requirement is necessary.” Individuals who engage in surrogacy arrangements include both commissioning parents and surrogate mothers. Surrogacy agreements' conditions and limitations are created by the concerned parties.

According to Section 60(1) of the Assisted Reproductive Technology (Regulation) Bill 2014¹, it is required to enter into a surrogate agreement that holds legal enforceability. The provisions outlined in the ART Bill indicate that a surrogate agreement that is legally binding is a requirement for entering into a surrogate arrangement. A contract is considered an enforceable agreement by law. Contracts are considered agreements if they are entered into by parties who possess the capacity to enter into contracts that have a legal consideration, a legal purpose, and free consent and are not expressly deemed void by law. Subsequently, a surrogate agreement is established stating that perhaps the surrogate would give up all parental rights to the child between the licensing parents and indeed the surrogate mother. Given that the parties involved are legally capable of entering into a contract and have provided their consent without coercion, there is no ambiguity regarding the enforceability of the agreement. According to Section 9 of the Civil Procedure Code of 1908, the surrogacy agreement may be brought in front of a civil court for the resolution of any matter and the issuance of a declaration or injunction regarding the requested remedies.² The aforementioned agreements are not explicitly invalidated by any Indian legislation, and it is required by the ART Bill to engage in such agreements in order to establish a legally binding surrogacy arrangement. The Indian Contract Act necessitates a comprehensive examination of the

¹ The Assisted Reproductive Technology (Regulation) Bill, 2014, § 60(1).

² The Code of Civil Procedure, 1908, § 9, No. 5, Acts of Parliament, 1908 (India).

principles of lawful consideration and lawful objects. According to the Act's Section 10, the presence of lawful consideration is imperative to confer enforceability upon an agreement. Sections 23 and 24 pertain to situations in which the consideration may be deemed illegal. To determine whether a surrogacy agreement is legitimate in light of Sections 23 and 24 of the Indian Contract Act, it is compulsory to examine the court's interpretation of what constitutes immorality or contravention of public policy.³

SURROGACY ARRANGEMENTS V. PUBLIC POLICY

One of the foremost obstacles in dealing with surrogate motherhood arrangements pertains to their deviation from established norms of conduct, and the lack of legal jargon to express the human and social relationships they generate. It is not recommended to classify surrogate agreements as commercial contracts. The aforementioned agreements are not applicable to the vending or repairing of goods. This document represents a legally binding agreement that serves to relinquish both parental responsibilities and rights. The aforementioned agreement pertains to the domain of affective experiences in human beings. The crucial element of surrogate arrangements concerns the intention of the involved parties. Other noteworthy areas of inquiry in this particular discipline encompass the contextual factors surrounding surrogacy and parturition, the renunciation of parental privileges subsequent to the offspring's delivery, and the pecuniary remuneration furnished by the biological progenitors, among sundry others.⁴ The phenomenon of commercial surrogacy is often portrayed as a mutually advantageous agreement, whereby it serves as a resolution for individuals experiencing infertility and desiring parenthood, while also providing financial remuneration to surrogate women who require economic support. The practise of surrogacy may be perceived as a mechanism for sustaining life rather than a simple and pleasurable entitlement. The aforementioned arrangements have been a subject of extensive academic discussion as well.

INTERNATIONAL SURROGACY ARRANGEMENTS- REAL HAZARDS

An international surrogacy arrangement refers to a situation where multiple countries are involved in terms of the country of origin, residence, or practise of the commissioning parents, donors, and gestational carriers. Currently, there is a dearth of global legal structures that tackle the issue of parental rights in relation to commissioning parents, gestational mothers, and, significantly, the progeny. At present, there exists an absence of a mechanism that enables the recognition of

³ The Indian Contract Act, 1872, No. 9, Acts of Parliament, 1872 (India).

⁴ TM Mady, *Surrogate Mothers: the legal issues*, 7(3) Am J Law Med. 323-352 (1981).

international surrogacy arrangements in a foreign jurisdiction, following an official or legal process in a jurisdiction where such agreements are considered legitimate. In recent years, there has been a notable rise in the frequency of global surrogacy agreements. Recent advancements in the field of information technology have underscored the importance of implementing regulatory measures in these domains. Although surrogacy regulation may not be the foremost concern, it does reveal certain insufficiencies that necessitate consideration within the domain of international private law.

The practise of international surrogacy arrangements has been subject to significant criticism due to the emergence of stateless children. The paramount consideration should be directed towards situations where there exists ambiguity regarding the legal paternity, citizenship, and immigration status of a child born through international surrogacy due to varying regulations across different countries pertaining to these matters. It is crucial to take into account the scrutiny of the exploitation of individuals who participate in the process. The establishment of a regulatory framework tailored to address conflicts arising from international surrogacy arrangements is crucial for evaluating potential resolutions. An industry regulation can be interpreted as a form of convention related to surrogacy that delineates rules that are specifically relevant to individuals from foreign countries. The practise of international surrogacy arrangements presents complex legal challenges, such as controversies surrounding legal parentage and citizenship. The enforcement of regulations related to cross-border surrogacy arrangements has the capacity to alleviate apprehensions regarding human trafficking and exploitation.

In light of the present circumstances, it is recommended to establish a malleable structure that enables transparent dialogue between nations regarding disputes pertaining to global surrogacy. Providing greater autonomy to nations in terms of establishing their own legal frameworks or engaging in bilateral negotiations with other nations could potentially result in favourable outcomes and serve as a viable initial step. It is crucial to recognise that in situations where legal conflicts arise, increased scrutiny and global cooperation are essential to attain the most favourable results.

The Hague Conference on Private International Law in 2011 centred particular focus on the issue of global surrogacy partnerships.⁵ Specifically, the conference addressed the legal standing of such agreements within private international law, in addition to the legal standing of kids born via international surrogacy agreements. The topic under consideration pertains to the formulation of

⁵ Rutuja Pol, *Proposing an international instrument to address issues arising out of International Surrogacy Arrangements*, 48 *George. Journ. Of Int. Law* 1311 (2017).

a protocol concerning the practise of International Surrogacy. This represents a positive development. Surrogacy would have been the topic of a global convention has the potential to address certain challenges associated with international surrogacy. The Hague Conference has outlined the fundamental requirements for an agreement in its extensive note titled “Private International Law Issues Surrounding The Status of Children, Including Issues Arising from International Surrogacy Arrangements 2011.”⁶ These requirements include the establishment of uniform regulations concerning the legal parentage issues that are within the purview of courts or even other authorities, the laws that apply to surrogacy agreements, the acceptance and execution of parental decisions about legal paternity, and the applicable laws for establishing legal parentage through the principles of recognition concerns the determination of paternity through voluntary acceptance, the application of law or agreement,(i.e. birth certificates).

The Permanent Bureau has put forth a recommendation that any international instrument pertaining to surrogacy arrangements must be accompanied by safeguards to ensure the protection of children born through such arrangements. At a minimum, the evaluation process would encompass the appraisal of commissioning parents and gestational mothers. The establishment of a regulatory framework for licencing and monitoring agencies and authorities offering surrogacy services would be necessary.

The Convention on Protection of Children and Co-operation in respect of Intercountry Adoption 1993⁷ might initially appear to be a suitable framework for surrogacy. Following the Hague Conference's certain issues that render the 1993 Convention unsuitable for facilitating international surrogacy agreements. As per the Convention in question, Article 4(c)(3) expressly forbids commercial adoptions, while Article 4(c)(4) mandates that the mother's assent must be obtained subsequent to the child's birth. In cases of surrogacy, it is common for the surrogate mother to provide her assent prior to the conception of the child, which may result in the inability to fulfil the requirement outlined in Article 4(c)(4).⁸ Additional provisional conflicts in surrogacy may arise, as outlined below.

The principle of subsidiarity, as stated in Article 4(b), it is necessary that the possibility of placing the child in their country of origin be taken into account. However, it is significant to remember that this rule may not be applicable in numerous surrogacy cases, particularly those that involve

⁶ K S Rotabi et al., *Regulating Commercial Global Surrogacy: The Best Interests of the Child*, 2 JHRSW 64,73 (2017).

⁷ The Convention on Protection of Children and Co-operation in respect of Intercountry Adoption, 1993, <https://www.hcch.net/en/instruments/conventions/full-text/?cid=69> .

⁸ The Convention on Protection of Children and Co-operation in respect of Intercountry Adoption, 1993, Art. 29, <https://www.hcch.net/en/instruments/conventions/full-text/?cid=69> .

international arrangements. The general rule stipulated in Article 29 prohibits any communication between potential adopters and the biological parents of a child. However, this regulation may not be feasible in surrogacy cases since communication is necessary during the initiation of the surrogacy agreement and any reproductive procedures or treatments.

It is recognised that utilising direct ruling of international surrogacy arrangements as a substitute for addressing concerns within the international private law realm may result in unforeseen outcomes. In order to mitigate the risks of coercion and exploitation within a given region, it is imperative that each nation adopts a protective approach towards all parties involved. The implementation of a global regulatory framework has the potential to enhance the effectiveness of domestic regulatory mechanisms, thereby yielding favourable results. The New Draft Assisted Reproductive Technology (Regulation) Bill 2014 has been proposed to limit the practise of surrogacy to Indian infertile couples, Overseas Citizens of India (OCIs), People of Indian Origin (PIOs), and foreign individuals married to Indian citizens.⁹ This legislation has the potential to significantly curb unethical international surrogacy arrangements and promote legitimate international surrogacy arrangements.

CONCLUSION

Surrogacy or surrogate arrangements are not prohibited by law in India, rendering them legally permissible. Apart from adoption, surrogacy plans are the only remedy for sterility given the status of biological technology today. The fact that these agreements entail large monetary exchanges and support the expansion of Living Laboratories is concerning. Equally concerning is the possibility that in the near future surrogacy contracts—basically through the market—would replace other options as the primary, if not the only, way to have children. The implementation of more rigorous standards via a pre-approval process, including regulations pertaining to the eligibility of surrogates and intended parents, could potentially mitigate the commercial appearance of surrogacy agreements and prevent instances of exploitation of surrogates by intended parents. In order to ensure the protection of the interests of intended parents, surrogates, and children, it is imperative that states establish unambiguous regulations governing the practise of surrogacy. A regulatory approach that is characterised by well-defined rules and guidelines is a more desirable alternative to an absolute prohibition of surrogate agreements.¹⁰

⁹ The New Draft Assisted Reproductive Technology (Regulation) Bill, (2014), <https://prsindia.org/billtrack/the-assisted-reproductive-technology-regulation-bill-2020>.

¹⁰ Dr. P M Arathi, *A Study to Understand the Legal Rights and Challenges of Surrogates from Mumbai and Delhi*, National Human Rights Commission (2018), https://nhrc.nic.in/sites/default/files/Report_NHRC_Surrogacy_24122018.pdf.