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BBA. LL.B. (Hons.) (Amity University, Rajasthan); LL. M. (UPES, Dehradun) (Nottingham Trent University, UK); Ph.D. Candidate (G.D. Goenka University)

Subhrajit did his LL.M. in Sports Law, from Nottingham Trent University of United Kingdoms, with international scholarship provided by university; he has also completed another LL.M. in Energy Law from University of Petroleum and Energy Studies, India. He did his B.B.A.LL.B. (Hons.) focussing on International Trade Law.

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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provided dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

# **SURROGACY: A TRANSNATIONAL SETTLEMENT**

AUTHORED BY - ADV. SHORYA RAWAT & DR. ARVIND P. BHANU

## **ABSTRACT:**

As one navigates the intricate web of international legal situations pertaining to surrogacy, a number of legal, moral, and cultural factors become apparent. The practice of surrogacy, in which a woman bears and gives birth to a child on behalf of another person or couple, has become more popular worldwide, resulting in a variety of legal frameworks and difficulties.

Surrogacy laws differ greatly between countries, from complete prohibition to extensive regulation. Legal systems in countries where surrogacy is allowed frequently seek to prevent exploitation and ensure moral behaviour while defending the rights of all parties—intended parents, surrogates, and the child. On the other hand, issues with the commercialization of reproduction, human trafficking, and the commodification of women's bodies are frequently raised in nations with restrictive laws or prohibitions.

Cross-border surrogacy agreements, in which intended parents from one nation use a surrogate from another, are a common international legal scenario. These situations draw attention to jurisdictional difficulties because the intended parents' home country and the host country where the surrogacy occurs may have different laws regarding surrogacy, parentage, and citizenship. Divergences in legal systems may give rise to doubts about paternity, nationality, and the enforcement of surrogacy contracts, which may result in children being without a legal identity or state.

Conflicts may also occur when intended parents, surrogates, or children pursue international legal action. Conflicts pertaining to parental rights, financial responsibilities, or health issues highlight the necessity of unified international legal norms and conflict settlement procedures.

International surrogacy raises several ethical issues as well, such as those pertaining to child rights, exploitation, and autonomy. Global contexts necessitate careful consideration of

issues including informed consent, equitable compensation for surrogates, and the welfare of children born through surrogacy.

International institutions like the United Nations and the Hague Conference on Private International Law have looked into ways to protect the rights of all parties engaged in surrogacy and harmonize surrogacy laws in response to these difficulties. Still, reaching an agreement is difficult given the various cultural, legal, and ethical viewpoints on surrogacy that exist throughout the world.

In summary, managing global legal situations pertaining to surrogacy necessitates a sophisticated comprehension of various legal systems, moral dilemmas, and cross-border intricacies. In order to protect the rights and welfare of all parties involved in surrogacy agreements, cooperation between states, international organizations, and stakeholders is required to develop fair and long-lasting solutions.

## **WORLDWIDE DEVELOPMENTS**

The Hammurabi Code, a legendary legal code dating back to 1800 BC, includes provisions that feature the earliest reference to traditional surrogacy. The Hebrew Bible contains multiple instances of its occurrence. The Bible serves as an example of traditional reproductive treatment, as it depicts the story of Hagar, the servant of Sarah, who bore a child for her husband Abraham due to Sarah's infertility.

While conventional surrogacy has been in use for decades, gestational surrogacy represents a more recent trend. The first instance of in-vitro fertilisation (IVF) resulted in the birth of a baby in 1979. In 1985, the innovative technique of gestational surgery emerged as a result of the combination of two pioneering methods. The first of these methods involved egg donation, which led to the discovery of a newborn infant a mere five years prior. Subsequently, its popularity and demand have witnessed a steady rise.<sup>1</sup>

In 1986, Present Scenario Substitutes encountered their initial significant legal dispute when the traditional surrogate refused to relinquish custody of the child. Following a prolonged and laborious legal battle spanning two years, it was ultimately determined that the prospective families were granted custody and fulfilled the requirements for adopting the

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<sup>1</sup> R. S.Sharma Social, ethical, medical & legal aspects of surrogacy: an Indian scenario. || The Indian journal of medical





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infant. The advancement of surgical techniques has led to a surge in legal and ethical considerations, resulting in a contentious issue on a global scale.

In Germany, substitution agreements are deemed impermissible. Furthermore, while the legitimacy of surrogate parenthood has been established, activities such as egg donation, embryo donation, and artificial insemination are subject to legal sanctions. In England, a comparable scenario exists whereby, despite the legality of the substitution scheme, advertisements and other commercial components are prohibited under the Surrogacy Agreement Act of 1985.

The aforementioned procedures are deemed unlawful in Italy, Sweden, and Norway. However, Belgium and the Netherlands have adopted a comparatively more permissive approach that permits altruistic substitution while prohibiting profitable substitutions.<sup>2</sup>

The current state of affairs. In 1986, Substitutes encountered their initial significant legal dispute when the traditional surrogate refused to relinquish custody of the child. Following a prolonged and laborious legal battle spanning two years, it was ultimately determined that the designated families were granted custody and fulfilled the requirements for establishing guardianship of the infant. The advancement of surgical procedures has given rise to a growing number of legal and ethical issues, resulting in a global controversy surrounding the matter.<sup>3</sup>

In Germany, substitution agreements are deemed impermissible. Furthermore, while the legitimacy of surrogate parenthood has been established, practises such as egg donation, embryo donation, and artificial insemination are subject to legal sanctions. In England, a comparable scenario exists wherein the substitution scheme is deemed lawful; however, advertisements and other commercial components are proscribed under the Surrogacy Agreement Act of 1985.

The aforementioned procedures are deemed illegal in Italy, Sweden, and Norway. However, Belgium and the Netherlands have adopted a comparatively more permissive approach towards consenting to altruistic organ donation while prohibiting commercial organ transactions.

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<sup>2</sup> *Ibid*

<sup>3</sup> Swami M. et al., Surrogate Mother: A Legal Aspectl, *A. J. P. T. R. vol. 2(3), page no.137, (2012).*

The presence of the aforementioned item is also discernible in various passages of the Hebrew Bible. The Bible provides an account of Hagar, who served as a handmaid to Sarah, bearing a child for her husband Abraham, in the context of infertility, thereby exemplifying conventional methods of reproductive intervention.

While conventional surrogacy has been in use for decades, gestational surrogacy is a relatively new trend. The first instance of in-vitro fertilisation (IVF) resulted in the birth of a baby in 1979. In 1985, the innovative technique of gestational surgery emerged as a result of the combination of two pioneering methods. The first method involved egg donation, which led to the discovery of a baby after a short period of five years. Subsequently, its popularity and demand have witnessed a steady rise.<sup>4</sup>

The current state of affairs. In 1986, Substitutes encountered their initial significant legal dispute when the traditional surrogate refused to relinquish custody of the child. Following a prolonged and arduous legal battle spanning two years, it was ultimately determined that the biological families were granted custody and met the necessary requirements for the adoption of the infant. The advancement of surgical procedures has led to a growing number of ethical and legal considerations, resulting in a contentious issue with worldwide implications.<sup>5</sup>

In Germany, substitution agreements are deemed impermissible. Additionally, although the legitimacy of surrogate parenthood has been established, practises such as egg donation, embryo donation, and artificial insemination are subject to legal sanctions. In England, a comparable scenario exists wherein the substitution scheme is deemed lawful, however, advertisements and other commercial components are proscribed under the Surrogacy Agreement Act of 1985.

The aforementioned procedures are deemed illegal in Italy, Sweden, and Norway, whereas Belgium and the Netherlands have implemented a comparatively more permissive approach that permits altruistic substitution while prohibiting profitable substitutions.

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<sup>4</sup> Seema Mohapatra, "Stateless Babies & Adoption Scams: A Bioethical Analysis of International Commercial Surrogacy," 30 *BERKELEY J. INT'L L.* 412, page no.445-46 (2012).

<sup>5</sup> Sharmila Rudrappa, "Reproducing Dystopia: The Politics of Transnational Surrogacy in India," 2002-2015, 44 *CRITICAL SOC.* 1087, 1097 (2017).

# Overview of Different Surrogacy Policies in The United States of America

The legal frameworks governing surrogacy across the 50 states of the United States exhibit significant variation, encompassing both stringent prohibitions and some of the most permissive regulations globally. Approximately 50% of the United States have enacted specific legislation pertaining to surrogacy. Certain states have established legal principles that pertain exclusively to substitute contracts, while others do not adhere to any prescribed regulatory framework. The proposed legislation aimed at achieving legal uniformity across the country has not made significant progress.<sup>6</sup>

This section presents examples of scenarios in which surrogacy is unambiguously prohibited, explicitly sanctioned, or where the legal classification remains uncertain.

## U.S. States where Surrogacy is explicitly banned

New York, New Jersey, Indiana, and Michigan are the states that have adopted specific bans on replacement at the present time. In the states of New York, Indiana, and Michigan, the surrogacy agreements are considered invalid and are thus not enforceable.

## Surrogacy is expressly permitted in the following state

Fourteen states have laws that control and authorise certain kinds of replacements for certain vehicles. However, even within these countries, there is very little consistency in the method that they take. For instance, some jurisdictions permit the use of compensation as a replacement, while others outright prohibit its use. There are certain jurisdictions where there are no restrictions on who may become a parent, while other governments only permit it for married couples who live in the state and have a shown medical need to do so. In a similar vein, some nations do not impose any limitations on the use of a replacement, but others set severe controls on this.<sup>7</sup>

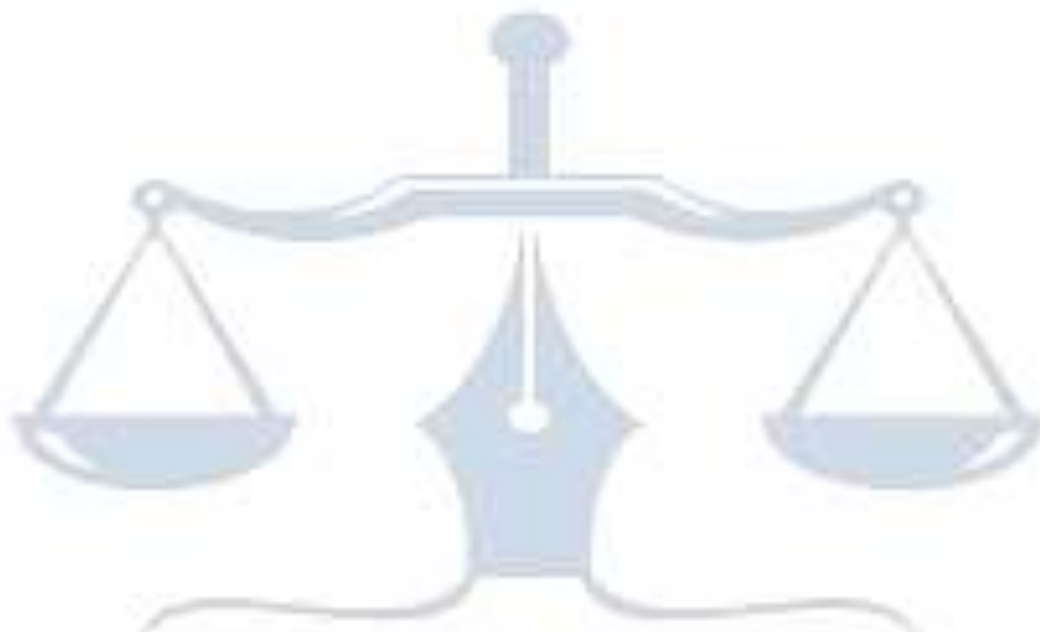
In addition, the law of certain states solely addresses entire substitution, whereas the laws of others address both full and partial replacement. In addition, the procedure for proving legal parenthood is somewhat distinct from one another. The following examples are provided with the intention of illustrating this distinction between the states that allow surrogacy. In

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<sup>6</sup> John Seymour and Ms Sonia Magri, A.R.T., Surrogacy and Legal Parentage: A Comparative Legislative Review, Victorian Law Reform Commission, *Australia*, page no.44-46 (2014).

<sup>7</sup> Dave Snow & Rainer Knopff, “Assisted Reproduction Policy in Federal States: What Canada Should Learn From Australia,” *5(12) SPP Research Papers* (2012).



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the state of California, the law specifically permits and regulates only complete substitution contracts. In addition, California offers alternative payments, despite the fact that the legislation does not make it abundantly apparent if the amount of money that may be charged is appropriately capped. The proposed law does not include a provision that requires the intended parents or substitutes to live in the state. The state of California has very little influence on who could be a prospective parent or a replacement parent. The state also allows for parentage orders to be issued for children who have not yet been born. These orders stipulate that the intended parents be granted legal parental statuses prior to the birth of the kid. However, these orders do not take effect until the child is born.<sup>8</sup>

Complete and partial substitution agreements are both legal in Florida, but the statutes governing them are distinct from one another. Both laws allow replacements to be reimbursed for reasonable expenses, and in both kinds of contracts, the prospective parents undertake to care for the child and claim full parental rights and responsibilities as soon as the child is born.

To sign a comprehensive substitution contract, follow these steps:

- (1) Proposed parents must be married and over the age of eighteen.
- (2) A certified doctor must verify that the intended mother is physically incapable of carrying a pregnancy or that carrying a pregnancy will endanger her or the foetus's health.

Partial replacement contracts are exempt from the aforementioned limitations. Preborn parenting orders are not permitted because of the legal difference between full and partial surrogacy. A complete substitution contract requires the intended parents to submit a plea with the court no later than three days after the birth of the child in order to have the birth certificate updated. If partial surrogacy was used and the child is related to the surrogate, the surrogate has the right to end the relationship within forty-eight hours after the child's birth. If the kid has a biological relationship with the stand-in, the youngster has this right.

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<sup>8</sup> *Ibid*

Therefore, the parents-to-be must wait for at least forty-eight hours after the birth of their kid before making a choice.<sup>9</sup>

A brand new legislation regarding full replacements will go effective in the state of Maine in July of 2016. This piece of legislation would make it possible to get alternative compensation as long as it was equitable and effectively linked. A medical evaluation is required of the surrogate, who must also be at least 21 years old. It is necessary for the intending parents to get a health evaluation as well as a mental health consultation. The legal system must be impartial and reflect various perspectives. According to the statute, one of the parties must establish residency in Maine within a year of the signing of the agreement, and the surrogate must at least explore the possibility of becoming pregnant. In Spain, agreements to replace a mother for another are void, and the woman who steps in is considered the child's legitimate mother. Despite this, in 2010 there was a difficult case in the state of California involving two Spaniards who were married and had a baby through a substitution arrangement. The case included a child swap. In retaliation, a division of the Ministry of Justice issued an Instruction that said that Spain would honour substitutions brought in from other countries. The Instruction, on the other hand, limits recognition to situations in which a foreign authority has handed down a court ruling. The Spanish courts have not been able to come to an agreement with the administrative authorities over the practicability of international surrogacy recognition. Additionally, all forms of surrogacy are illegal in the Alpine nation of Switzerland. In a ground-breaking judgement in 2015, the Federal Court of Switzerland refused to recognise the parental claim of a Swiss gay couple who produced a baby in California through a surrogate. Despite this, the couple was not prohibited from retaining the child. The ruling was a watershed in the history of Swiss law.<sup>10</sup>

In Australia, the various states and territory each have their own laws regarding substitution. However, altruistic substitution and the reimbursement of certain surrogate expenses are permitted in all states and the Australian Capital Territory. Substitution for the purpose of receiving remuneration is prohibited in all states and the Australian Capital Territory. The prohibition against paid replacement has extraterritorial implications in a number of jurisdictions located in Australia. Unbelievably, a federal body in Australia is now

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<sup>9</sup> Shabeer Ali. H, Dr.Asha Sundaram, “Commercialization of Surrogacy in India & Its Legal Context: A Critical Study with Regard to Baby Manji Yamada's Case”, *International Journal of Pure and Applied Mathematics*, Vol. 120 (5), page no. 4137-4154, (2018).

<sup>10</sup> Ryznar, Margaret, *International Commercial Surrogacy and its Parties* III, *The John Marshal Law Review*, vol. 43, page no.1009-1039, (2010).

conducting a study on updating and standardising the surrogacy provision in the country's laws.

According to federal legislation in Canada, engaging in commercial replacement is considered illegal activity. In all other ways, substitution is within the jurisdiction of the individual provinces. On the other side, most aspects of altruistic surrogacy are not subject to regulation.

Both full and partial altruistic substitution are legal in South Africa. On the other hand, reimbursement for “reasonable expenses” is the only kind of payment that is acceptable. One of the legal requirements for surrogates is that they already have at least one biological child of their own. In addition, they must be citizens of South Africa. At least one of the intended parents must be legally able to live and work in South Africa permanently.<sup>11</sup>

In the United Kingdom, altruistic replacement is permitted, and the reasonable expenses incurred by a substitute may sometimes be recouped. On the other hand, in the United Kingdom, substitution contracts are not enforceable, which means that neither party is obligated to abide by the terms of the agreement.

## Status of Surrogacy in New Zealand

As a result of the ethical council's refusal to sanction the practise of IVF substitution in New Zealand, which included the transfer of an embryo for altruistic purposes to a relative or friend, clinics banned surrogacy in 1994. The Ministerial Committee raised concerns about this decision, which ultimately led to the passage of the Human Assisted Reproductive Technology Act in the year 2004. According to Section 14 of the Act of 2004, a surrogacy agreement in and of itself is not illegal; however, the act of anyone who is a party to the substitution process, including the substitute mother, proposed parents, and a mediator arranging a surrogacy, offering or accepting valuable consideration will be considered illegal. In addition, it states that it is not against the law to receive or provide any reasonable or essential expenditure in exchange for professional services.

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<sup>11</sup> Akhila B.G. “Critical analysis of surrogacy from the Human Rights Perspective”, *Karnataka Law Journal*, vol. 4, page no. 53 (2011).



Therefore, the practise of surrogacy is legal in New Zealand, but only for charitable purposes. Only those surrogacy agreements are lawful in New Zealand that do not include any monetary transactions for the purpose of profit, as stated in the country's legislation.

## Status of Surrogacy in Japan

There is not yet a statute in place in Japan to control the use of assisted reproductive technologies. As a result of the absence of legislation, Japanese residents must turn to the courts in order to find answers to the numerous questions that occur as a result of the practise of surrogacy, which further contributes to the proliferation of doubts over their legal standing. There is a school of thought that contends surrogate mothers and their offspring both run the danger of developing health problems as a direct consequence of the act of giving birth via surrogacy. If a Japanese couple is interested in having a child via surrogacy, they would most likely look for surrogate moms in a different country, most often India. And if they are acquiring the kid via surrogacy from a surrogate mother of another nation, they need to keep it a secret since there is a lot of stigma associated with surrogacy in Japan.

## Status of Surrogacy in Israel

Israel is the first country in the world to have clear laws restricting the practise of replacement. In 1996, Israel enacted the law that regulates surrogate motherhood agreements. As a direct consequence of this, Israel has been a leader among nations in terms of managing and facilitating partnerships for commercial substitution. Only gestational surrogacy is allowed under the Surrogate Motherhood Agreements, which indicates that traditional replacement is not permitted. Additionally, according to the Substitution Motherhood Agreements Law, the use of the intended father's sperm is required. In addition, under the Surrogate Motherhood Agreements Law, the biological mother will have no legal standing after the delivery of the child. The nominated parents are almost immediately granted legal parental responsibility for the child. The child has to be in the care of the prospective parents from the time it is born, and they have to take on all of the responsibilities and obligations that a parent has towards his or her child in accordance with the law. As quickly as feasible, the birth mother is required to give birth to the child while in the care of the prospective parents and in the presence of a Welfare Officer.<sup>12</sup>

<sup>12</sup> Sonali Kusum, “Commercial Surrogacy & Feministic Perspective”, Karnataka Law Journal, Vol. 4, page no. 1- 15, (2013).

# **SURROGACY AND THE SALE OF CHILDREN**

Surrogacy enables individuals or couples to conceive a biological offspring without assuming the physical burden of gestation. Commercial surrogacy, also referred to as substitution, is the act of a woman consenting to carry a child for another individual in exchange for monetary compensation or recompense. In 2002, India granted global authorization for commercial substitution, leading to the country's rapid emergence as a centre for such agreements. A significant proportion of surrogate mothers belonged to the low-income group, and surrogacy agreements offered them a means to assist and sustain their household. Surrogacy can provide a source of income for women who lack formal education or technical skills, enabling them to acquire necessary resources for a comfortable standard of living. According to international law, the majority of current surrogacy agreements are classified as “infant sales” and therefore should not be subject to legalisation.

The practise of substitution is a rapidly expanding global enterprise that, if not effectively regulated, has the potential to result in significant violations of the rights of those affected, particularly minors.

The report presented to the Human Rights Council by the Special Rapporteur on the Sale and Sexual Exploitation of Children documented the prevalence of unregulated or regulated instances of abuse and provided an examination of potential measures to implement a prohibition on the sale of children as a form of substitution.

Mr. Ricardo González Arenas, Uruguay's Ambassador and Permanent Representative to the United Nations in Geneva, expressed commendation for the report submitted by the Special Rapporteur on surrogacy and the trafficking of children. The individual conveyed apprehension regarding the protection of the fundamental rights of surrogate mothers and their offspring who are conceived as a consequence of such arrangements. The speaker expressed concern regarding the practise of affluent individuals from developed nations engaging surrogate mothers from emerging economies. This practise may result in a power imbalance, potentially placing both the surrogate child and surrogate mother at risk of exploitation.

## **The Report's Key Recommendations for Member States**

- The Convention on the Rights of the Child has established a well-defined and comprehensive legal framework that prohibits the trade, which involves substitution, of child pornography and prostitution.
- It is imperative to establish safeguards to prevent the trafficking of minors for commercial substitution purposes. This should entail implementing controlled mechanisms prior to lifting the ban on commercial substitution, and enforcing the prohibition on the sale of minors.
- Implement measures to prevent the commercialization of infants in the altruistic substitution framework, such as enacting robust regulations governing altruistic surrogacy.
- It is imperative to prioritise the best interests of the child when making decisions regarding paternity and parental responsibility in a surrogacy arrangement.
- The determination of the paramount interests of a child post-birth is typically made by a court or authorised governing body, with a primary emphasis on prioritising the child's well-being above all other factors.
- It is imperative to implement stringent regulations and monitoring mechanisms to govern the financial aspects of surrogacy arrangements. Additionally, there should be a mandate for full disclosure of the financial particulars of all surrogacy agreements to the court or any competent body responsible for assessing such agreements.
- It is recommended to establish regulations for all substitution mediators that encompass financial considerations, requisite competencies, utilisation of contractual agreements, and adherence to ethical standards.
- The subject matter encompasses both private and public international law, with a particular emphasis on safeguarding the rights of minors, surrogate mothers, and prospective parents.
- Advocate for increased engagement among human rights mechanisms in conducting research and facilitating discussions regarding the impact of substitution on the human rights of women and other relevant stakeholders.
- Advance the implementation of human rights principles and practises, while simultaneously mitigating the occurrence of abuses and violations.

# **SURROGACY PROFITABLE FOR EVERYONE**

Upon initial examination, Gita Aravamudan posits that substitution may seem like an alluring alternative, as it provides financial compensation to the surrogate mother, fulfils the biological desires of a childless couple, and generates foreign revenue for a nation. However, a closer analysis reveals the harsh reality of this practise. Due to the lack of sufficient regulation, mothers and prospective parents are subject to manipulation, resulting in intermediaries and commercial agencies profiting from the situation. The lack of lucidity in the aforementioned programme, coupled with the potential for unforeseeable replacement regulations in India, poses a potential hazard for those with a vested interest in legal affairs.

Despite the fact that the Indian Council of Medical Research (ICMR) issued guidelines in 2005 for the accreditation, supervision, and regulation of assisted reproductive technology (ART) clinics in India, these guidelines were frequently contravened. Childless couples who live across borders may encounter language barriers and may be required to engage in a lengthy legal process to prevent the birth of their child. In the event of a seamless process, it will be necessary for them to allocate financial resources for a period of two to three months in India to fulfil the requisite procedures subsequent to the birth of their child. The issue of cross-border replacement raises inquiries pertaining to citizenship, ethnicity, maternity, parentage, and the rights of children. In some instances, children may be deprived of their national identity, resulting in either a prolonged legal battle, as exemplified by the German couple who had twin surrogate children, or a bleak future in an orphanage, as demonstrated by the Israeli homosexual couple who were required to undergo DNA testing to establish their parental status. Frequently, following a surrogacy arrangement, a child may not exhibit genetic traits and subsequently be rejected by the intended parent, leading to placement in an orphanage for the duration of their life.<sup>13</sup>

As per the predicament faced by surrogate mothers, the situation is deteriorating and becoming increasingly unethical. Frequently, the spouses or agents of individuals communicate to unschooled women residing in rural areas that they can acquire effortless monetary gains through such transactions. These women lack agency in determining their own lives and making decisions for themselves. In contrast to the United States, India does

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<sup>13</sup> Pradeep Devnath Gerard & Kumaran, Senthil, Surrogacy in India: Ethical and Legal Aspectl, Indian Journal of Forensic Medicine & Toxicology, Vol. 14, No.4 (2020).

not require psychological evaluations or legal counsel to be mandatory. The aforementioned females are transferred to designated lodging facilities during their gestational period subsequent to being enlisted by commercial organisations under the pretext of furnishing prenatal medical attention. The primary motivation is to ensure their safety and avoid potential social stigmatisation. The women exhibit concern for their households and offspring throughout their gestational period. It is recommended that individuals limit their interactions with family members to antenatal occasions and reserve Sundays for familial gatherings. It is noteworthy that individuals who experience an unfavourable pregnancy outcome are not subject to legal charges. Furthermore, there is a lack of provision for health and mental support for these individuals, both during and after pregnancy, as well as in terms of insurance coverage. Affluent female professionals who exhibit reluctance in attending to their personal needs often seek the assistance of surrogate mothers. The utilisation of surrogates raises a number of ethical and moral considerations, necessitating the establishment and implementation of legal frameworks for prospective parents and surrogate mothers.<sup>14</sup>

## **INDIAN STATUS**

In 1986, the first child conceived through scientific means in a test tube was born in India. According to a statement made by Supreet Sidhu, it is predicted that India will witness a rise in the quantity of IVF establishments worldwide in the next decade, leading to its recognition as the “surrogacy capital” of the world. According to estimates, the value of substitution tourism in India was \$500 million in 2012. Anand The state of Gujarat has emerged as a prominent destination for infertile international couples seeking surrogacy, owing to the presence of numerous in vitro fertilisation (IVF) clinics and a plentiful pool of surrogate mothers. The emergence of India's replacement markets can be attributed to various local factors such as scarcity, comparatively low medical expenses, availability of skilled healthcare professionals, and lenient legal regulations.

The procedure for replacement is comparatively straightforward for the childless international couple. The Indian embassy mandates that the couple complete registration and acquire documentation from their medical practitioner affirming their incapacity to procreate

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<sup>14</sup> Nikita Kaushik, “Law in Surrogacy”, *Indian Journal of Health and Medical Law*, Vol. 2(1), page no. 30-43, (July, 2019).

while upholding their medical visa status. After obtaining authorization from the Indian Embassy, the proxy arrangement, which typically involves an intermediary, was finalised, and the trial commenced.

Commercial substitution has been legally permissible in India since 2002. India has been recognised as a global leader in the field of replacement fertility and has established itself as a thriving hub for fertility tourism. In developed countries, the utilisation of Indian surrogacy has become increasingly prevalent among fertile couples due to its relatively low costs. In contrast, Indian clinics gained popularity not only due to their cost-effectiveness but also because they employed and retained Indian women as substitutes. The practise of substitution is relatively low-cost in India, and the prevailing regulatory environment is conducive to its implementation. In 2008, the Supreme Court of India, in the case of Manji, ruled that the legislature should create an appropriate replacement, thereby taking possession of the matter. In India, commercial substitution is legally permissible under the law. The Arrangement for Surrogacy and the Guidelines for assisted reproductive technology currently serve as guiding principles between the parties involved. The ART BILL, 2008 was adopted by the Legislature and is currently undergoing revisions in accordance with the guidelines provided by the apex Court. The Surrogacy Act has been scrutinised by the Indian Legal Committee, particularly due to India's status as a popular international surrogacy destination.<sup>15</sup>

According to Gerber (2015), it is observed that... When discussing surrogacy on a global scale, it is important to take into account the legal frameworks of both nations involved. The commercialization of human reproduction, the exploitation of women, and the commodification of children are all issues that leave the rights and conflicting interests of the people involved in a murky grey area. The Law Commission has provided a report with viable solutions to these problems.

With respect to require for passing regulations to administer helped conceptive innovation offices and the freedoms and obligations of gatherings participated in surrogacy, the Law Commission of India gave the 228th Report in August 2009. “The Law Commission had given the remarks that are:-

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<sup>15</sup> Dr Nandita Adhikari, “Law and Medicine”, Central Law Publications, Allahabad, 4th ed. (2019).

- The protocols for substitution arrangements among parties must encompass all scenarios necessitating the consent of a surrogate mother for conception, the concurrence of her spouse, and the endorsement of other relatives. It is imperative that contracts executed between parties encompass all pertinent circumstances that necessitate the consent of a surrogate mother to carry the child, the concurrence of her spouse, and the endorsement of other individuals within her familial network. The act of giving birth, medical interventions such as artificial insemination, reimbursement for all reasonable expenses incurred during the pregnancy and childbirth, a willingness to relinquish any rights to the child born to the surrogate, with the understanding that such an arrangement should not be legally binding.<sup>16</sup>
- In the event of the demise of the commissioned couple or individual prior to birth, or in the case of divorce between the proposed parents and subsequent decision to not proceed with the delivery of the child, a substitute agreement should provide financial assistance for the child.
- Inclusion of life insurance coverage for the surrogate mother is a necessary component of a substitution contract.
- It is recommended that a donor be selected from among the prospective parents, as the primary basis of a child's relationship is typically rooted in biological ties, as well as emotional bonds of love and affection. Moreover, it could potentially decrease the incidence of various forms of child maltreatment observed in the context of adoption.
- It is recommended that legislation should recognise a surrogate child as the legal offspring of the commissioning parent(s) without the need for adoption or formal declaration by the custodian.
- It is recommended that only the commissioning parent be listed on the birth certificate of a surrogate child.
- It is imperative to ensure the protection of the privacy of both the donor and surrogate mother.”
- The practise of surrogacy that is predicated on the gender of the surrogate should be proscribed.

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<sup>16</sup> Pradeep Devnath Gerard & Kumaran, Senthil, Surrogacy in India: Ethical and Legal Aspectl, Indian Journal of Forensic Medicine & Toxicology, Vol. 14, No.4 (2020).

- The exclusive legislation that should regulate abortions is the Medical Termination of Pregnancy Act of 1971.

The statement advocates for the adoption of substitutes in India and underscores the importance of a suitable strategy for the integration of substitutes in the Indian context. The legislative framework must also encompass the matter of women being utilised as substitutes, which is a matter of apprehension. The Law Commission has strongly advised against the adoption of any type of trade replacement. However, this signifies a significant progress considering the current situation.

The legal matter pertaining to Jan Balaz versus the Union of India is currently under deliberation. The High Court of Gujarat has conferred Indian citizenship upon a set of twin infants who were born via compensated surrogacy to German nationals in the Anand District. The Court issued an observation underscoring the utmost significance of the rights of two neonates who are considered blameless. The Court has additionally contended that the privileges of the infants take precedence over those of their biological parents, the surrogate mother, or the ova donor. The emotional and legal relationship between the newborns and their surrogate mother and egg donor is of paramount significance. The legal frameworks pertaining to the process of substitution in various countries, including Ukraine, the United States, and Japan, were taken into account by the Court.<sup>17</sup>

As India does not recognise dual nationality, offspring of non-Indian citizens are required to obtain Overseas Citizenship of India. Prior to the Supreme Court proceedings, Balaz, the plaintiff, submitted his passports to the Indian Consulate located in Berlin. He made the decision that an NGO in Germany should address the situation and welfare of children in India. The government of India responded that it is imperative to make every possible effort to facilitate the children's relocation to Germany. In the event of Indian approaches, the German authorities have agreed to reassess the matter.

The departure and entrance documents of Balaz's twins were obtained in May 2010. The parents made a decision to adhere to the legal framework of Germany in raising their children.

The legal framework pertaining to Assisted Reproductive Technology in India.

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<sup>17</sup> *Ibid*



The Indian government initially introduced a legislation in 2008, which has since been identified as the ART Regulation Draft bill of 2010. The aforementioned legislation is presently under the purview of the governing body and awaits formal presentation in the legislative assembly. The proposed legislation takes into account several factors, such as the requirements of prospective parents and surrogate mothers. Prior to enacting any legislation, it is imperative to conduct a comprehensive exploration of the proposed Draft, and engage in ethical and moral discussions with social and professional stakeholders in the fields of law and medicine, as well as the wider public.<sup>18</sup>

The legislation acknowledges the validity of substitution arrangements and their lawful implementation. Substitution bonds are subject to similar treatment as that of the Indian Contracts Act 1872 and other relevant legislations governing such agreements. It is imperative that a comprehensive agreement be reached between the parent and surrogate mother, encompassing all pertinent issues and enforceable within the bounds of legal jurisdiction. Several aspects of the proposed legislation entail the registration and regulation of in vitro fertilisation clinics and assisted reproductive technology centres by a national entity. It is suggested that the establishment of a forum for the filing of complaints against clinics and artist centres would be beneficial. It is recommended that the surrogate mother be within the age range of 21 to 35 years, and that she has given birth no more than five times. It is prohibited for a surrogate mother to conduct more than three instances of embryo transfer for a single couple.<sup>19</sup>

In the event that the substitute woman is married, it would be necessary for her to obtain the consent of her spouse prior to assuming the role of a replacement in order to prevent any potential legal or marital complications. Sexually transmitted diseases (STDs) should be screened for alternative options, and it is advisable to refrain from receiving blood transfusions within the preceding six months, as this could potentially have negative implications for the pregnancy's outcomes. It is expected that the prospective parents assume financial responsibility for all associated expenses, such as medical benefits, surgical procedures, and other equitable costs that may arise in relation to pregnancy and abortion. It is recommended that the life insurance policy covering a substitute mother should

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<sup>18</sup> Leelesh Sundaram.B, Asha Sundaram, "Legal and Ethical Issues of Commercial Surrogacy in Indian Scenario", *International Journal of Pure and Applied Mathematics*, Vol. 120 (5), page no. 4295-4312, (2018).

<sup>19</sup> Nikita Kaushik, "Law in Surrogacy", *Indian Journal of Health and Medical Law*, Vol. 2(1), page no. 30-43, (July, 2019).

incorporate a substitution agreement. The surrogate carer may also be entitled to receive financial compensation for serving as a substitute by the individual or couple.<sup>20</sup>

In the event of the demise of the commissioning couple prior to the birth of the child or in the case of a separation between the intended parents, it is imperative that alternative arrangements be made which incorporate a financial provision for the substitute child. Furthermore, if neither party is willing to relinquish a child to the other, this may be necessary to prevent any potential injustice. In order to avoid potential legal complications, it is imperative that a surrogate mother does not assume any parental responsibilities for the child in question. Additionally, the birth certificate of the infant should reflect the intended parents as the legal guardians. The guidelines pertaining to the legitimacy of a child conceived through assisted reproductive technology (ART) stipulate that said child shall be recognised as a legal offspring, entitled to all the rights, safeguards, and inheritance of their biological or adoptive parent, whether married or unmarried. It is recommended that ART clinics refrain from advertising their clients' substitution arrangements, and instead, couples seeking ART services should directly seek out ART Bank facilities.<sup>21</sup>

It is recommended that legal constraints be put in place to ensure that intended parents are obligated to provide safekeeping for their children, regardless of any physical abnormalities or deformities that may be present in the offspring. The privacy rights of the donor and surrogate mother must be respected in all circumstances. Assuming an extraterrestrial or non- resident Indian is in pursuit of a substitute for a juvenile. Under such circumstances, individuals are required to establish an agreement with their government's official citizenship guarantee programme and engage a local custodian who will assume legal responsibility for ensuring the provision of care for the child throughout the duration of the pregnancy and after delivery. The prohibition of sex-selective substitution is imperative, and the Medical Termination of Pregnancy Act of 1971 should be responsible for overseeing abortions.

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<sup>20</sup> *Ibid*

<sup>21</sup> Shabeer Ali. H, Dr.Asha Sundaram, “Commercialization of Surrogacy in India & Its Legal Context: A Critical Study with Regard to Baby Manji Yamada's Case”, *International Journal of Pure and Applied Mathematics, Vol. 120 (5), page no. 4137-4154, (2018).*

# **THE LAW COMMISSION & SURROGACY: A CRITICAL LOOK AT THE 228TH REPORT**

The 228th report of the Law Commission of India has recommended to prohibit the process of commercial surrogacy and enacted the suitable legislation which allows performing altruistic surgery which is ethical.

There were certain guidelines issued by the Indian council of medical research for regulating surrogacy arrangements they are:

- The surrogate mother would be entitled for the monetary compensation, the value of which would be decided by the couple and the surrogate mother.
- The surrogate mother cannot donate her own egg for the surrogacy and that she must relinquish all parental rights related to the surrogate child.

A critique of the Draft Assisted Reproductive Technology (Regulation) Bill and Rules, 2008 (hence referred to as the 'ART Bill') was included in the Law Commission of India's 228th Report, which discussed surrogacy in 2009. This paper argues that the legal acceptance of ARTs (hereinafter referred to as "ARTs") and surrogacy in India, which are praised as beneficial developments in helping the "infertile," is largely motivated by an uncritical acceptance of the patriarchal stigmatisation of "infertility." This is reflected in both the Draft ART Bill and the 228th Report. While the former envisioned legalisation, the later called for the restriction of commercial surrogacy and the legalisation of only altruistic arrangements, a suggestion that the government ignored in its revised Draft ART Bill in 2010. In addition to discussing the Law Commission's involvement in surrogacy, this study investigates the document's reverberations by looking at topics like international adoption and the marketability of women's bodily labour. This study shows how the Law Commission's focus on reproductive issues, including surrogacy and adoption, reflects a bias towards the primacy of 'biological' links as the basis for legitimate identity claims. In addition, the Law Commission constructs women as legal subjects in a way that demonstrates the centrality of the 'heteronormative family' as an ideal by addressing the issue of women's bodily work being available in a market context, whether as 'prostitutes' or surrogates (both 'deviants' in

a patriarchal context).

## **CONCLUSION**

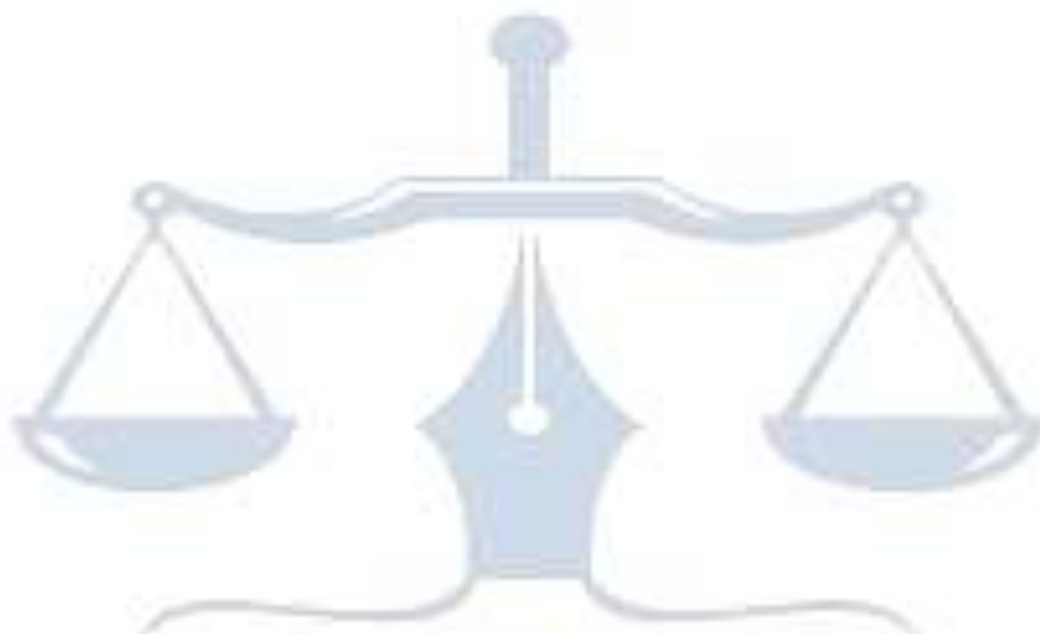
Scholars have recently challenged this notion, contending that a significant proportion of surrogate mothers do not form emotional bonds with the children whom they relinquish to the intended parents. Detachment has been evaluated through various measures such as the success rate of discontinuation, the proportion of replacements expressing satisfaction with the process, and evidence of absence of psychosomatic complications resulting from cessation.

Research on gestational substitution in India suggests that the maternal connection is a crucial factor in the physiological process of childbirth and is heavily influenced by the social context of motherhood. Certain concerns, such as the level of anxiety experienced by both the couple and the surrogate mother, may remain unaddressed. Can the intensity of emotional responses towards the infant be predicted? What are the adverse psychological effects experienced by a child who is separated from their mother during their formative years? What type of identity crisis may manifest as a consequence? Would the juvenile exhibit interest in acquiring further knowledge regarding their biological father or mother during gestation? The act of relinquishing leads to relinquishment.

In conclusion, it is widely acknowledged that the formalisation and implementation of well-defined standards to prevent unethical surrogacy practises is an imperative necessity. Simultaneously, there exists a necessity to enhance adaptability in the formulation of legislation pertaining to Assisted Reproductive Technology, and to recognise multiple groups that can be granted authorization for its use. It is recommended that policies and guidelines exhibit a balance between rigidity and adaptability. Nonetheless, implementing a complete prohibition on surrogacy could be deemed an excessively stringent approach, particularly given the fact that a significant number of couples are unable to attain the joy of parenthood.

The present chapter endeavours to examine the legal status of surrogacy in various nations with the aim of proposing a suitable framework for surrogacy regulations in India. The final section of this chapter posits that diverse nations have implemented distinct sets of directives. There is a lack of agreement or consensus among individuals or groups regarding a particular matter or issue. The act of substitution presents a multitude of challenges, prompting certain governing bodies to establish committees aimed at tackling said issues. The study arrives at the conclusion that the legal systems in both the United Kingdom and the United States are intricate. Diverse regulations

are enforced across various states. The regulation of Assisted Reproductive Techniques in Japan has not been implemented. Surrogacy is regarded as a stigmatised practise. In New Zealand, surrogacy is exclusively limited to non-profit organisations. In 1996, Israel became the inaugural nation to legalise Gestational Surrogacy.



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