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# SUSCEPTIBLE OUTSIDE THE WOMB: A CRITICAL ANALYSIS OF INTERNATIONAL LAW ON SURROGACY

AUTHORED BY - VIDYA M.N [Research scholar]

## ABSTRACT

The present paper seeks to examine the framework governing the formalities, procedural aspects and creation of rights involved in the process of transnational surrogacy, in a critical limelight. In order to do so, the paper will primarily elucidate on the concept of surrogacy. The same will be expounded upon in relation to the formation of civil rights of the individuals born through this method, based on certain domestic laws. Thereafter, the paper will present the existing legal structure that governs transnational surrogacy. It will further highlight the problems and potential drawbacks of the current framework in this regard. Subsequently, the paper will venture into the necessity and viability of various models proposed to shape the body of private international law relating to surrogacy. Ultimately, the paper will provide a few suggestive reforms to enhance the legal tools that determine the rights of the parties involved in surrogacy.

**Keywords:** Transnational Surrogacy, Conflict of Laws, International Surrogacy Agreements

## 1. INTRODUCTION

The augmentation of society's ability to develop mutually beneficial relationships has facilitated the creation of varying arrangements in nearly every sphere of life. Coupled with advancements in science and technology, this understanding has permitted the most natural of biological processes- of procreation and parentage to transcend a binary relationship. In other words, aspiring parents are now presented with the option of surrogacy i.e., of opting for the foetal development of their child in the womb of another. Surrogacy pertains to the practice of child-birth, whereby an individual who is capable of bearing a child does so for such other person/people who intend to become parents. Accordingly, there are two primary parties involved in the process of surrogacy- the 'surrogate' (who bears the child) and the 'intending parents' (for whom the surrogate carries the child during pregnancy). Furthermore, surrogacy

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may be either *traditional*-whereby the surrogate's egg is fertilised via a donor, consequently making the surrogate the genetic mother; or it may be *gestational*- whereby an embryo that has been formed by way of Assisted Reproductive Technology, is placed in the surrogate to bear through the term of pregnancy. Surrogacy may also be categorised as *altruistic* or *commercial*- the former setup involves nominal or no payment to the surrogate whereas in the latter arrangement, the surrogate is paid a sum of money in addition to medical and other expenses.

In this regard, it is also pertinent to note the role of private international law, which is that set of laws including conventions, legislations, rules, etc. that primarily deals with matters involving a foreign element and accordingly govern private relationships that are established across global borders. It therefore, provides the legal framework for all transnational and non-criminal transactions, including that of surrogacy.

Thus, factors like development of reproductive technology coupled with the dwindling of geographical limitations, development of international relations and the body of international law, have further widened the scope for intending parents to arrange for surrogacy.

## 2. INTERNATIONAL LEGAL FRAMEWORK GOVERNING TRANSNATIONAL SURROGACY

### 2.1 TRANSNATIONAL SURROGACY

#### *2.1.1 Concept of Transnational Surrogacy*

In the iatric context, surrogacy is a form of third-party reproduction wherein an individual who has the medical capacity to give birth, consents to bear a child for intending parties who are unable to conceive a child for any reason- medical or otherwise.

In plain language, transnational surrogacy refers to an arrangement for surrogacy wherein the intending parents reside in a country different from the one where the surrogate resides. It has been defined as- "Transnational commercial surrogacy represents a form of medical tourism undertaken by intended parents who seek to hire women in other countries, increasingly often in the global South, as surrogates"[1].

[1] Kristin Lozanski, *Transnational surrogacy: Canada's contradictions*., 124 SOC. SCI. MED. 383 (2015). https://doi.org/10.1016/j.socscimed.2014.10.003.

 ISSN: 2582-6433

### *2.1.2 Pros and Cons of Transnational Surrogacy*

The presentation of pros and cons of transnational surrogacy is relevant to identify the concerned drawbacks and facilitate the formulation of more holistic suggestions.

1. Pros of Transnational Surrogacy
   (i) It provides more options to experience parenthood- whether limitation on the same is placed due to lack of imminent resources or natural impermissibility. In other words, transnational surrogacy provides the choice of opting for surrogates from countries with legally or monetarily favourable systems.
   (ii) It provides the surrogate with financial benefits and in some cases, a sense of industriousness too[2].
   (iii) It holds scope to cultivate a culture of a positive melting pot- which can in turn, contribute to smoother international regulations, albeit in the distant future.
   (iv) It has also been propounded[3] that- in a system exhibiting transformed social valuation towards the labour of surrogates, the same may also be regarded as positively contributing to the economy.

2. Cons of Transnational Surrogacy
   (i) In any matter involving transnational arrangements, there is a want of legal consistency- a problem that invariably pervades the concept of surrogacy as well. This particular drawback will be addressed in greater detail in the present paper.
   (ii) The potential risks posed to the surrogate themselves in terms of medical issues, abandonment by the intending parents[4], etc. also place a critical shadow on the process of transnational surrogacy.
   (iii) Several legislations do not permit the commercialisation of surrogacy on the grounds that it primarily amounts to the sale of a child and/or organs and further that, such activity of pregnancy is so inherent to womanhood and a mother's dignity that paying a sum for the same would amount to selling their wombs[5] and be morally wrong.

[2] Rozée et. al., *The social paradoxes of commercial surrogacy in developing countries: India before the new law of 2018*, 20:234 BMC WOMEN'S HEALTH, 9-14 (2020). https://doi.org/10.1186/s12905-020-01087-2.
[3] H. Gottfried, and J. J. Chun, *Care Work in Transition: Transnational Circuits of Gender, Migration, and Care*, 44(7–8) CRIT. SOCIOL., 997–1012 (2018). https://doi.org/10.1177/0896920518765931.
[4] Brianne Richards, *"Can I take the Normal One?" Unrelated Commercial Surrogacy and Child Abandonment*, 44:1(7) HOFSTRA LAW REV. 203, 212 (2015). (Available at: https://scholarlycommons.law.hofstra.edu/cgi/viewcontent.cgi?article=2809&context=hlr).
[5] Kristiana Brugger, International Law in the Gestational Surrogacy Debate, 35(3) FORDHAM INT. LAW J. 672 (2012). (Available at: https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2438&context=ilj).

 ISSN: 2582-6433

(iv) In addition, some viewpoints put forth indicate that surrogacy in itself, cuts ties between the person who actually gives birth and the child- which in turn, is deemed as ethically wrong[6].

For the purpose of the present paper, while the aforementioned positives and negatives will be taken into account, the primary concern pertains to the legal inconsistences that fall within the ambit of private international law.

## 2.2 INTERNATIONAL LEGAL FRAMEWORK GOVERNING SURROGACY

The civil rights of a child (such as those obtained by virtue of one's citizenship) are largely dependent on their parents[7]. In order to claim such right, determination of parentage is a pre-requisite- particularly so in matters of transnational surrogacy where the intending parents and the surrogate belong to two different nations thereby giving scope for inconsistency between their laws. It is at this juncture that the body of private international law intervenes, to assist in resolution of conflict of laws and determine the rights of parties involved. This is particularly significant as there is no extensive international convention or binding instrument that holistically governs transnational surrogacy[8]. However, it is pertinent to note that few instruments provide for safeguarding rights of children (including right to nationality[9], right to private and family life[10], etc.), which is at risk in case of transnational surrogacy. Additionally, 'Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material'[11], also extensively addressed the imminent necessity to address the threats posed to children born out of surrogacy arrangements.

Since parentage is the foremost factor to be established for a child to claim rights, the first

[6] *See* Mehpara Haq, *Ethical and Moral Issues Concerning Surrogacy*, THE RMLNLU LAW REVIEW BLOG (July 31, 2015) https://rmlnlulawreview.com/2015/07/31/ethical-and-moral-issues-concerning-surrogacy/.

[7] Rutuja Pol, *Proposing an International Instrument to address issues arising out of International Surrogacy Arrangements*, 48 GEORGET. J. INT. LAW 1315 (2017). (Available at: https://www.law.georgetown.edu/international-law-journal/wp-content/uploads/sites/21/2018/05/48-4-Proposing-an-International-Instrument-to-Address-Issues-Arising-Out-of-International-Surrogacy-Arrangments.pdf).

[8] Seema Mohapatra, *Adopting an International Convention on Surrogacy- A Lesson from Intercountry Adoption*, 13 (1) LOY. U. CHI. INT'L L. REV. 47 (2015). (Available at: https://lawpublications.barry.edu/cgi/viewcontent.cgi?article=1082&context=facultyscholarship).

[9] International Covenant on Civil and Political Rights (ICCPR), G.A. Res. 2200A (XXI), art. 24, U.N. Doc. A/6316.

[10] European Convention on Human Rights (ECHR), Rome, 4.XI.1950, art. 8.

[11] UN General Assembly, Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material, 24 January 2017, A/74/162, available at: https://undocs.org/A/74/162 [accessed 09th November, 2021].

 ISSN: 2582-6433

conflict that private international law must seek to resolve is determining which country's laws must apply- while some countries such as Sweden regard the surrogate as the child's mother and her husband as the child's father and not the intending parents[12]; whereas some other countries like India require for the surrogate mother to wholly terminate her rights over the child post birth[13]. This is in further comparison to other countries like UK where commercial surrogacy is not permitted[14] and Germany where surrogacy is altogether barred by law[15] and as such, the person bearing the child would be the parent. This in turn, helps determine citizenship (as the child usually acquires the citizenship of the parents) and the associated civil rights of the child born out of surrogacy such as equality rights, freedoms, and political rights as well.

It is also pertinent to note the following judicial pronouncements that have specifically dwelled into the matter as well-

For instance, vide its pronouncement in *Mennesson v. France*[16], the European Court of Human Rights held that where the Courts of USA had recognised intending parents having French nationality as the legal parents of a child that was born via surrogacy, the French Courts had acted in completed violation of the provisions of the European Convention on Human Rights[17], and was accordingly wrong in refusing registration of the intending parents in France. In essence, the European Court of Human Rights rendered the rights to private and family life of the child to prevail over that of the parents.

Furthermore, the *Federal Court of Justice in Germany held*[18] that if a child is born to a surrogate mother in Ukraine and immediately thereafter brought to Germany to reside permanently, it is the law of Germany that will apply and as such only the surrogate mother would be recognised as the parent under its laws. The case had arisen out of the issue that the surrogate mother had been wrongly recognised as the wife of the intending father due to conflict of laws relating to surrogacy in Germany and Ukraine.

[12] Act on Children and Parents Code 1949, (SFS 1949:381) Ch. 1-3.
[13] *See* Indian Council of Medical Research, *National Guidelines for Accreditation, Supervision & Regulation of ART Clinics in India, 2005* (Guideline No. 3.5.5.) https://main.icmr.nic.in/sites/default/files/guidelines/b.pdf. *But cf.* MoHFW, *Instructions regarding Commissioning of Surrogacy, (Notification dated November 4, 2015)* at https://main.icmr.nic.in/sites/default/files/art/Document.pdf. (Whereby transnational surrogacy by foreign nationals in India has been wholly prohibited). *See also* Baby Manji Yamada vs. Union of India and Another, (2008) 13 SCC 518 (wherein the Apex Court had iterated the absence of adequate framework governing surrogacy in India).
[14] Surrogacy Arrangements Act 1985, (c. 49, §2).
[15] Embryo Protection Act 1990, (Part I, No. 69).
[16] Mennesson v. France, No. 65192/11 ECHR 2014. *See also* PJS v. News Group Newspapers [2016] UKSC 26.
[17] *Supra* note 9.
[18] Docket No. XII ZB 530/17, *rev'd*, 15 W 413/16.

 ISSN: 2582-6433

Therefore, it may be stated that the international legal framework- comprising of related instruments and few pronouncements, governing the process of transnational surrogacy is still very haphazard and exhibits little to no characteristic of global uniformity- where one country upholds the practice to protect the child and simultaneously does not condone the practice, etc.

## 2.3 EVALUATION OF PROPOSED MODELS (CONTEMPORARY DEVELOPMENTS)

For the purpose of the present paper, two specific models for international law to govern transnational surrogacy will be examined-

### *2.3.2 **Evaluating Model 1***

'Model 1'[19] herein, proposes an international instrument to govern all forms of surrogacy, from which member States can selectively opt to ratify those provisions which are in tune with their domestic laws. In addition to recognising the child's right to family and nationality and proposed counselling for surrogates and intending parents, the instrument further propounds the establishment of Competent Authorities and Governing Committees at the Federal Level to act as authorities in charge of regulating international surrogacy arrangements. The aforementioned dimensions of the said model undoubtedly provide the basic, if not universally acceptable framework that would provide a starting stone in formally recognising and regulating international surrogacy arrangements.

However, the instrument also proposes to have a panel of 'eligible' surrogate mothers, who meet certain criteria and from which, intending parents can explore their options for surrogacy. Furthermore, choice is purely provided to the intending parents to select a surrogate mother whereas the initial consent provided to be on the panel is regarded as the sole discretion that the surrogate mother enjoys. This ambit of the proposed instrument is highly problematic as it not only reduces the act of surrogacy to an economic transaction but in doing so, it objectifies the surrogate mother. This further leaves them open to exploitation and also brings in the risk of the child being adversely affected, due to possible ill-treatment, abandonment, etc. Another important suggestion made in the proposed instrument is the establishment of a single deciding authority on matters of transnational surrogacy. While this per se does not appear problematic, from the perspective of private international law, further confusion may arise as to conflicts

[19] Pol, *supra* note 6, at 1331-1334.

 ISSN: 2582-6433

between the decision of this authority and of Courts deciding matters of nationality in cases of transnational surrogacy. Thus, in a sense the model has adopted an approach of conglomerating the existing web of laws on surrogacy under a single instrument.

### *2.3.3 **Evaluating Model 2***

'Model 2'[20] herein, proposes the development of a model law- a Hague Convention on International Surrogacy, based on the Hague Convention on Inter-Country Adoption. The proposition is that of an international convention, based on the premise that multilateral agreement would be the most effective way to address transnational surrogacy. It demonstrates several promising features such as the acknowledgment of the need for gradual uniformity and addressing the conflict between existing standing and new jurisdictional authority. The model is more surrogate-centric in that it proposes for provision of adequate consideration towards health and legal representation of surrogate.

However, there is little to no provision to address the rights of a surrogate child, at large. The model also proposes to confine convention to the definition of surrogacy for the preliminary period. While common agreement on definition is vital, it is pertinent to note that apart from the form of surrogacy, there may be little to no difference in the definitions, bearing in mind the similarities between existing definitions of transnational surrogacy. Moreover, the proposed model also recognises scope to subsequently include aspects of nationality and parentage into the convention. While it is questionable as to what issue the primary convention will address if not for aspects of parentage and nationality (at the bare minimum), the said recommendation is suggested to have been made in line with the model's step-by-step approach. One of the most double-edged provisions proposed by the model is the prohibition of vetting of intending parents due to scope for discrimination against same-sex couples. While this fosters a more inclusive environment for intending parents, it may pose threats to the child or even the surrogate mother, as substantiated previously[21] based on the ill-practice of abandonment of the surrogate and child. Thus, it may be inferred that Model 2 embarked on an attempt to replicate the existing convention governing another inter-country interaction i.e., of adoption.

[20]Mohapatra, *supra* note 7, at 47-55.
[21] Richards, *supra* note 4, at 212.

 ISSN: 2582-6433

# 3. SUGGESTIONS & CONCLUSION

## 3.1 SUGGESTIVE REFORMS

The following suggestive reforms are made-

(i) The principles of private international law essentially seek to provide justice. Utilising the discretion afforded to Courts with regard to the choice of law, jurisdiction, etc. in matters involving a foreign element, Courts must seek to act in the best possible interest of the three primary parties- the surrogate child, the surrogate parent and the intending parents.

(ii) While the proposed conventions as examined under the banner of 'Model 1' and 'Model 2' herein render some exemplary suggestions, there is further need for refinement in the mentioned models- for instance, permitting partial uniformity through advancement of binding nature of conventions, ensuring proper background check for both- intending parents as well as surrogates, etc.

(iii) While determining parentage of a surrogate child, the Courts may impose an obligation to report to the Court/authority for the purpose, about the well-being of the child and post-natal health of the surrogate, for the first few years. This will enhance accountability of intending parents and safety of the child.

(iv) In terms of the concept of surrogacy, there is a need for a sociological shift before it can be recognised as positive and consensual labour as opposed to the present viewpoint held. This may be achieved through awareness programs.

## 3.2 CONCLUSION

The opposing views expressed regarding transnational surrogacy stem from ideological differences at the grassroot level whereby ethical dilemma persists such that- on one hand being a ray of hope for intending parents who are unable to conceive, and on the other hand, being regarded as demeaning and being tantamount to organ-selling. Simultaneously, this collective morality is translated into the law of the land and therein power dynamics steer the legal standpoint. It is the range of contrasting legal standpoints that further complicate the matter of determining parentage, citizenship, etc. The ultimate reformation rests upon the two-fold approach- of improved legislations and an empowering judiciary, to adequately resolve the questions raised under the ambit of private international law in relation to transnational surrogacy.

 ISSN: 2582-6433

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