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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated 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

# **THE PRACTICE OF ALTRUISTIC SURROGACY HAS SIGNIFICANT VARIATION; HOWEVER, IT IS MORE PREVALENT THAN COMMERCIAL SURROGACY: A CRITICAL ANALYSIS**

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## **Abstract**

The multi-faceted aspect of surrogacy has attracted a lot of interest and sparked a lot of discussion in the legal and ethical spheres<sup>1</sup>. Surrogacy brings up serious ethical questions that need to be carefully considered. In the discussion of the role of commercial surrogacy and altruistic surrogacy in present days, the questions of reproductive autonomy, bodily integrity, exploitation, the best interests of the child, and the commercialization of human life are all entangled in complex ethical dilemmas. The continuing ethical disputes regarding commercial surrogacy and altruistic surrogacy are based on diverse viewpoints that prioritize personal autonomy, dignity, and fairness to clarify the complex ethical terrain surrounding surrogacy and to encourage critical thinking about the consequences of this practice for people, families, and society.

## **Keywords:-**

Altruistic Surrogacy, ART, Biological Connection, Biological Mother, Biological Father, Embryo, Fair Expenses, Genetic Mother, In Vitro Fertilization (IVF), Commercial Surrogacy, Infertility, Intending Couple, Motherhood, Regulations, Surrogate Mother.

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<sup>1</sup> Pradeep Devnath, Gerard & Kumaran, Senthil (2020), Surrogacy in India: Ethical and Legal Aspect, Indian Journal of Forensic Medicine & Toxicology, vol. 14(4), pp. 386-92. DOI:



## **Introduction**

In an altruistic surrogacy agreement, the surrogate mother bears and delivers a baby for another couple or individual without getting any financial compensation other than the reimbursement of reasonable pregnancy-related expenses. Helping other people become parents is the main goal of altruistic surrogacy, which is often prompted by empathy, connections to family, or a desire to give back.

Although an unpaid volunteer may also be involved, the surrogate in this form of surrogacy is most often a close relative or acquaintance of the intending parents. When it comes to altruistic surrogacy, the rules and regulations differ greatly from one country or region to another. Some countries, such as the United Kingdom and Canada, have outright banned commercial surrogacy, which involves paying the surrogate to carry a child for another family. Such agreements may be subject to interpretation in other areas where there is no clear legal framework. Medical methods such as in vitro fertilization (IVF) that utilize the genetic material of the intended parents or donors, as well as emotional support for all individuals involved, are typically a component of the process, as are legal agreements to define parental rights. The decision is complex and very personal; it is both lauded for its generosity and contested for ethical, psychological, and legal reasons.

The term "commercial surrogacy" describes a situation in which one couple or individual pays another to bear and deliver a child on their behalf. Commercial surrogacy typically involves a monetary transaction beyond basic costs and is regulated by a legal contract, in contrast to altruistic surrogacy where the surrogate may merely get reimbursement for expenditures.

The method is different all across the world. Historically, commercial surrogacy has flourished in nations with lax regulations and relatively low expenses, such as India and Ukraine. However, since 2015, policies in countries like India have become more stringent. Canada and the United Kingdom are among those that prohibit direct payment and only permit altruistic surrogacy. The situation is more complicated in the United States, with some states explicitly prohibiting commercial surrogacy and others having well-defined legal frameworks that allow it, such as California. Advocates claim it gives surrogates financial stability and a way for infertile couples or same-sex partners to have children. Some worry that it may lead to the exploitation of the poor, particularly in less developed areas, and the commercialization of



women's bodies.

## Surrogacy

When other methods of conception fail, infertile couples may look into surrogacy as a possible alternative. The pregnant lady agrees to carry the kid until delivery on behalf of another person or group of persons who will legally be considered the baby's parents. Custody of the child is transferred to the awaiting women after the pregnancy reaches term. The Surrogacy (Regulation) Act, 2021 defines "surrogacy" as "a practice whereby one woman bears and gives birth to a child for an intending couple with the intention of handing over such a child to the intending couple after the birth" when a couple cannot have a child of their own, according to Section 2(1)(zd)<sup>2</sup>.

### Countries Prohibiting Surrogacy

The surrogacy procedure is not legal in **Germany**. The protection of social dignity is guaranteed by the German constitution, which is violated by surrogacy arrangements. It is against the law to utilize a surrogate mother to carry a child<sup>3</sup> since it dehumanizes both the infant and the mother. Furthermore, in cases of split biological motherhood, a child's mental health may be adversely affected by having two mothers: one who gave birth and another who refers to the genetic mother. Giving birth creates a unique biological and social bond between the child and the birth mother, in contrast to adoption and sperm donations, which lead to "divided" parenthood. Therefore, they are both seen as having been victimized. The conventional conception of motherhood and the bond between mother and child must be protected at all costs. In Germany<sup>4</sup>, surrogacy for profit or charity is illegal. Two important German statutes that deal specifically with surrogacy arrangements are the Adoption Placement Act (AdVermiG) and the Embryo Protection Act (ESchG).

Surrogacy is not allowed in **France**. It is illegal to engage in any kind of surrogacy agreement. Although there is no official legislation regarding surrogacy in France, it is nevertheless considered illegal and punishable by law. Public morality and civil law hold surrogacy

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<sup>2</sup> The Surrogacy (Regulation) Act 2021 available at [chromeextension://Efaidnbmnnnibpcajpgclefindmkaj/https://egazette.nic.in/WriteReadData/2021/232118.pdf](https://chromeextension://Efaidnbmnnnibpcajpgclefindmkaj/https://egazette.nic.in/WriteReadData/2021/232118.pdf).

<sup>3</sup> Carla Spivak, 'The Law of Surrogate Motherhood in the United States', Hein- Online 58 The American Journal Of Comparative Law, vol. 98, 2010, p. 114.

<sup>4</sup> Article 1, para. s. 1 of the Grundgesetz für die Bundesrepublik Deutschland, GG, Basic Law of the Federal Republic of the Germany.

contracts to be unconscionable, while criminal law holds them to be illegal.

**Spanish Law** prohibits surrogacy. A human ART study included<sup>5</sup>. The Spanish Parliament's 1980 approval of an anti-surrogacy campaign made it quite clear that being a mother in Spain carries no legal weight. There was a great deal of confusion caused by the recent liberalization of Spain's administrative authorities' stance toward overseas surrogacy as a means of forming parental bonds. The Spanish government's department for general registration of civil status (DGRN) ordered a surrogate pregnancy and a gay couple to be registered as parents in a case involving a mutual recognition ruling that formed the parent-child connection. This directive was made in reaction to the homophobic ways in which the couple had registered their young children with the civil registry. There is no basis for the registration to assume that reproductive treatment is involved in the case of Spanish male and female, and authorization is granted even in cases where the kid was born via surrogacy. The intended father can be acknowledged as the biological father according to Article 10.3 of Law 14/2004. This directive makes surrogacy legal in Spain<sup>6</sup>.

Surrogacy is totally forbidden in **Japan**. As early as April 2008, the Japan Science Council proposed a ban on surrogate births<sup>7</sup>. Although surrogacy is against the law in Japan, the Science Council reports that parents can still plan for a surrogate birth overseas; this raises the question of the child's legal standing in Japan. An amendment to Japanese legislation was proposed by the Science Council to recognize the biological mother as the legal mother and to establish parental rights between adoptive parents and children solely through formal adoption<sup>8</sup>.

### Altruistic Surrogacy

"Altruistic surrogacy" is a situation in which the birth mother does not get any financial compensation for carrying the baby. The surrogate mothers in selfless surrogacy arrangements

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<sup>5</sup> Ley35/1988 of 22, November, sobre técnicas de reproducción humana asistida, Boletín Oficial del Estado no 282, 24 November 1988, From Patricia Orejudo Prieto De Los Mozos, supra note 5 at p 346.

<sup>6</sup> See M. Requejo Isidro, 'Spanish Homosexual Couple and Surrogate pregnancy', available at [www.conflictoflaws.net/2008/spanish-homosexual-couple-and-surrogate-pregnancy](http://www.conflictoflaws.net/2008/spanish-homosexual-couple-and-surrogate-pregnancy).

<sup>7</sup> Science Council of Japan, Assisted Reproductive Technologies Review Committee, Issues Related to the Assisted Reproductive Technologies Centred on Surrogate Pregnancy: Toward a Social Consensus (2008)39, available at <http://www.scj.go.jp/ja/info/kohyo/Pdf/kohyo-20-t56-1e.pdf>, visited on 20 January 2025.

<sup>8</sup> Melissa Ahlefeldt, 'Less than Family: Surrogate Birth and Legal parent Child relationships in Japan', ZJAPANR /J.JAPAN.L, Nr. / No. 32 (2011)S available at [https://sydney.edu.au/law/anjel/documents/2012/ZJapanR32\\_12\\_Ahlefeldt\\_Endf3.pdf](https://sydney.edu.au/law/anjel/documents/2012/ZJapanR32_12_Ahlefeldt_Endf3.pdf), visited on 20 January 2025

are frequently personal friends or relatives of the intending parents. In an altruistic surrogacy arrangement, the surrogate receives no compensation beyond what is required to cover the costs of carrying the baby to term. In this type of surrogacy, the intended parents cover all of the costs associated with the pregnancy. Being generous does not come with any strings attached.



"'Altruistic surrogacy' as the surrogacy in which no charges, expenses, fees, remuneration or monetary incentive of any kind, except the medical expenses and such other prescribed expenses incurred on the surrogate mother and the insurance coverage for the surrogate mother, are given to the surrogate mother or her dependents or her representative," states Section 2(1)(b) of the Surrogacy (Regulation) Act, 2021. In this type of surrogacy, both the intended parents can seek the mother's assistance.

Altruistic surrogacy occurs when the intended parents do not compensate the surrogate financially beyond covering her "fair expenses" associated with the surrogacy. There is no additional payment for the surrogate. This could be a regular surrogacy agreement or one specifically for gestational surrogacy. It is not always the case, but a cousin or acquaintance could be involved in such deals. Only in the context of purely altruistic partnerships is surrogacy legal in **Canada, the UK, and Australia.**<sup>9</sup>

Surrogacy in the **UK** is regulated by a number of statutes, such as the Surrogacy Arrangement

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<sup>9</sup> Babygest. (n.d.). Legislation on Surrogacy. Babygest. Retrieved from Surrogacy: - What Does the Law Say? (babygest.com)



Act of 1985<sup>10</sup>, the Human Fertilization and Embryology Act of 2008<sup>11</sup>, the Human Fertility and Embryology (Parental Order) Regulations of 2010<sup>12</sup>, and Part 13 of the Family Procedure Rules of 2010. The British government appointed Mary Warnock to head the Committee<sup>13</sup> Inquiry into Human Reproduction and Embryology in 1982 to recommend safeguards and regulations for the study of embryogenesis and the treatment of human infertility. The report came out in 1984. Promoting and making reproductive care more accessible was the first issue the Committee considered.

"Infertility is not inexplicable, nor is it absolutely something that must be suffered without trying to remedy." Is the Committee's final determination. On top of that, infertility can make people feel emotionally and mentally sick, which can necessitate medical attention for mental illness. We believe it is better to address the underlying cause of the problem rather than just covering up the symptoms. Now we may officially state that infertility is a diagnosable medical condition<sup>14</sup>.

### **Advantages Of Altruistic Surrogacy**

- Emotional Satisfaction: Knowing that they have contributed to someone's desire of parenthood can provide the surrogate with a great deal of emotional fulfilment through altruistic surrogacy.
- Strong Emotional attachment: Throughout the surrogacy process, intended parents and surrogates frequently develop a strong emotional attachment that promotes a feeling of support and shared experience.
- Reduced Cost: Because intended parents are not obliged to pay a sizable fee to the surrogate, altruistic surrogacy is usually less expensive than commercial surrogacy.
- Legal Clarity: Altruistic surrogacy is more easily regulated in many places, with explicit laws that safeguard the rights of all parties.

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<sup>10</sup> surrogacy Arrangement Act .1985 available at <https://www.legislation.gov.uk/ukpga/1985/49>

<sup>11</sup> Human Fertilisation and Embryology Act 2008 available at <https://www.legislation.gov.uk/ukpga/2008/22/contents>

<sup>12</sup> The Human Fertilisation and Embryology (Parental Orders) Regulations 2010 available at <https://www.legislation.gov.uk/ukdsi/2010/9780111491355/contents>

<sup>13</sup> Priest, J.A. (1985), The Report of the Warnock Committee on Human Fertilisation and Embryology. The Modern Law Review, vol. 48(1), pp. 73-85. Retrieved from JSTOR.

<sup>14</sup> Jacqueline A Priest 'Assisted Reproduction-Developments in England', International and Comparative Law Quarterly July (1988), vol. 37, p. 535.

### **Disadvantages Of Altruistic Surrogacy**

- **Limited Availability:** Because it depends on people's willingness to endure the mental and physical strain of pregnancy without receiving payment, finding a qualified altruistic surrogate can be difficult.
- **Emotional Difficulties:** All parties involved may experience emotional exhaustion during the surrogacy process, which may include stress, anxiety, and uncertainty.
- **Medical Risks:** Pregnancy and childbirth entail inherent medical risks, and surrogates may suffer problems that can impair their health and well-being.
- **Legal Difficulties:** Although certain jurisdictions may have more straightforward laws governing altruistic surrogacy, managing the legal ramifications can still be difficult and time-consuming.

### **Nations that allow Surrogacy by Consent**

Surrogacy arrangements can be regulated by specific laws in a small number of countries. Countries such as the **US, Russia, Thailand, Australia, and the UK** are among many more. These nations further subdivided surrogacy arrangements into economic and humanitarian categories based on the surrogate's compensation.

#### **Certain countries only allow surrogacy for charitable purposes.**

Altruistic surrogacy occurs when the intended parents do not compensate the surrogate financially, or if they just pay her "fair expenses" associated with the surrogacy. No further payment is made to the surrogate. An ordinary surrogacy agreement or one tailored to gestational surrogacy could be this. Although it is not always the case, such agreements may involve a cousin or friend. Altruistic surrogacy<sup>15</sup> is the only type of surrogacy that is legal in **Canada, the UK, and Australia.**

### **Commercial Surrogacy**

"Commercial surrogacy" describes the form of surrogacy in which the surrogate mother

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<sup>15</sup> Baby gest. (n.d.). Legislation on Surrogacy. Baby gest. Retrieved from Surrogacy : - What Does the Law Say? (babygest.com)

In certain countries such as Australia, Canada, the United Kingdom, the Netherlands, Denmark, Israel, and specific states in the United States (New Jersey, New Mexico, Nebraska, Virginia, Oregon, Washington), surrogacy is exclusively allowed in the context of non-commercial arrangements where the surrogate does not receive any payment or compensation.

receives financial compensation<sup>16</sup>. The term "commercial surrogacy" describes this arrangement in the surrogacy industry. It is common practice in commercial surrogacy for the surrogate mother to get paid for her services and reimbursed for any medical expenses she incurs. This has sparked much debate, and rightfully so, for it is a contentious issue. Current proposals aim to outlaw commercial surrogacy and restrict surrogacy to those who can prove a blood relative relationship to the intended parents.



In Section 2(1)(g), "commercial surrogacy" as commercialization of surrogacy services or procedures or its component services or component procedures," meaning "selling or buying or trading the services of surrogate motherhood by way of giving payment, reward, benefit, fees, remuneration or monetary incentive in cash or kind, to the surrogate mother or her dependents or her representative, except for medical expenses and such other prescribed expenses incurred on the surrogate mother and insurance coverage for the surrogate mother," is defined.

Private surrogacy arrangements are illegal in all Australian states and provinces with the exception of the Northern Territory. Everyone engaging in a commercial surrogacy agreement is breaking the law in Australia's five states and territory. Paying a surrogate mother more than what she has already spent is also against the law in **Queensland, Australia**<sup>17</sup>. If the surrogate mother receives more than what is legally required, commercial surrogacy agreements can

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<sup>16</sup> Choudhury, Cyra Akila, 'Transnational Commercial Surrogacy: Contracts, Conflicts, and the Prospects of International Legal Regulation', Oxford Handbook Topics in Law (online edn, Oxford Academic, 2 May 2016), <https://doi.org/10.1093/oxfordhb/9780199935352.013.38>, accessed, 11 March 2025. See, Why Is India's Ban on Commercial Surrogacy Bad for Women, vol. 43 N.C.J. Int'l L. pp. 70 (2018), available at He in Online.

<sup>17</sup> Section 57 of the surrogacy Act 2010(Qld).



legally be entered into in Victoria State<sup>18</sup>. The Family Relationships Act, 1974 in Southern Australia forbids it on the basis of contracts<sup>19</sup>.

Also criminalized are third-party acts like obtaining surrogacy agreements, advertising surrogacy, and services to aid achieve pregnancy through contractual arrangements. The Australian Capital Territory, South Australia, Tasmania, and Western Australia have all passed laws making it unlawful to obtain or broker surrogacy partnerships<sup>20</sup>. No part of the country, with the exception of the NT, allows advertisements<sup>21</sup>. At best, Australia's legal norm is disjointed and inconsistent. Under some circumstances, the surrogacy statute authorizes altruistic surrogacy. Despite the fact that commercial surrogacy is against the law in many nations, it appears that Australians who are planning to become parents are nevertheless entering into such partnerships overseas. This makes it seem like the surrogacy regulations in Australia are mostly useless. The adopted mother has sought recognition of her parental responsibilities through the application of federal family law.

The absence of coordination across several areas of law makes surrogacy proceedings difficult for courts to handle and causes confusion for the parties involved. Not enough attention is given to cross-border surrogacy in the surrogacy regulations<sup>22</sup>.

### **Advantages Of Commercial Surrogacy**

- A motherhood is an option: Couples who are unable to conceive naturally can now enjoy the joys of motherhood through commercial surrogacy.
- Reasonably priced in comparison to other nations: India is frequently regarded as an affordable surrogacy location, making it available to couples from other countries.
- Facilitates biological connection: The intended parents can establish a biological bond with the child through gestational surrogacy.

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<sup>18</sup> Section 44(1) of the Assisted Reproductive treatment Act 2008(Vic).

<sup>19</sup> Section 10 G of the Family Relationship Act 1974.

<sup>20</sup> Section 42(1) and Section 42(2) of the Parentage Act 2004(ACT), Section 10H(a) of the Family Relationship Act 1975 ,Section 41(2) of the Surrogacy Act 2012(Tas), Section 9(1) of the Surrogacy Act 2008(WA).

<sup>21</sup> Section 43(1) of the Parentage Act 2004(ACT), Section 10(1) of the Surrogacy Act 2010(NSW),Section 55of Surrogacy Act 2010(Qld),Section 10H(c) of the Family Relationship Act 1974(SA),Section 41(2) of the Surrogacy Act 2012, Section 45 of the Assisted Reproductive Treatment Act 2008(Vic), Surrogacy Act 2008(WA).

<sup>22</sup> Mary Kanes, Supra note 5 at p47

- Overcomes medical obstacles: For couples with health issues that prohibit them from becoming pregnant themselves, surrogacy offers an alternative.

### **Disadvantages Of Commercial Surrogacy**



- Absence of a structured payment structure for surrogates.
- The surrogate mother does not receive a large percentage of the money spent on commercial surrogacy in India, such as the average cost of 40 lakh rupees. Rather, residences and surrogacy agencies keep a large portion of it.
- Inadequate medical facilities: The health and safety of the surrogate and the child may be jeopardized by the widespread absence of basic medical standards in Indian surrogacy institutions.
- Insufficient legal safeguards: There are legal gaps pertaining to surrogate mothers' and the child's rights, particularly when it comes to matters like citizenship and nationality.
- Risks of exploitation: Because paid surrogacy in India is unregulated, women, especially those from underprivileged families, may be exploited. Concerns about consent, how surrogate mothers are treated, and the pressures imposed on them are among the ethical issues brought up by the surrogacy industry in India.
- Social and emotional ramifications: Social stigma is still a significant problem, and surrogacy can lead to long-term emotional difficulties for both the intended parents and the surrogate.

### **Countries not prohibit Commercial Surrogacy**

A surrogacy arrangement occurs when the intended parents pay the surrogate more than what

she deserves for carrying the child. The surrogate may seek "compensated for misery and anguish" or just receive payment for carrying the child. Either a conventional or gestational surrogacy arrangement could be taking place here. Though it is permissible in India and Thailand without any laws or regulations at all, private surrogate relationships are governed by special legislation in a number of **US states, Ukraine, and Thailand.**

**Ukraine** has a permissive stance on surrogacy and has made it legal. Legal experts in Ukraine have found surrogacy to be less restrictive than in other European nations. When it comes to surrogacy, Ukraine is right now among the friendliest countries in Europe. Ukrainian law recognizes surrogacy as a legitimate form of childbearing from the moment of conception, and the surrogate mother's name<sup>23</sup> is omitted from the birth certificate in favor of the intended parents. This is in contrast to other nations that either severely limit or completely ban surrogacy.

### Conclusion

Some argue that commercial surrogacy is exploitative of the surrogate mother and amounts to "baby-selling," which is a salient point in the argument between the two types of surrogacies. Two lines of criticism are open to this argument. One, within the broader framework of the conditions that unorganised labor encounters in the current economic environment, surrogates, like sex workers, are exploited just like any other "work". Furthermore, the act of surrogacy itself reinforces the idea that women's reproductive labor is a "free" resource that may be utilized by the family. Feminists have highlighted the historical coercion of women in households and families to serve as surrogates, often referred to as "second wives" or "maids." Given this history, it is reasonable to predict that a similar practice of gestational surrogacy will be practiced inside the family. Although there are several advantages to commercial surrogacy in India, there are also many drawbacks, such as unethical behaviours, unequal pay, and inadequate regulation. There may be a win-win scenario for intended parents and surrogate moms if these problems are resolved.

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<sup>23</sup> <http://mother-surrogate.info/law-on-surrogacy-in-ukraine/last> visited on 1\11\2015.