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Legal Regulations of Surrogate Motherhood in Russia and South Africa: Similarities and Differences

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Abstract. This study analyzes the laws and regulations surrounding surrogacy in two of the BRICS countries, namely Russia and South Africa. In particular, the authors examine the list of persons authorized to act as parties to such a contract and the requirements that must be met. The methodological basis of the research is the multidisciplinary approach. The research methods employed included the analysis of scientific literature and legislation. Furthermore, this research examines issues related to determining a child's origin when using assisted reproductive technologies. It also employs a comparative legal analysis to suggest potential solutions for resolving issues in this area that are relevant in both Russia and South Africa. This study is significant given that no comparative analysis of Russian and South African surrogacy legislation has previously been conducted.

Keywords: surrogacy agreement; commissioning parents; surrogate mother; reproductive technologies; Russia; South Africa.

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Table of Contents

Introduction
1. Parties to the Surrogacy Agreement in Russia and South Africa
2. Determining the Origin of a Child in Russia and South Africa
Conclusion

Introduction

The adoption of Russia's new Family Code in 1995 officially legalized surrogacy in the country.[1]

It is worth noting that to date, the surrogacy industry is regulated by only two articles of the Family Code, namely Article 55 of Federal Law No. 323-FZ of November 21, 2011, "On the Basics of Public Health Protection in the Russian Federation" (hereinafter the Basics of Public Health Protection)[2] and the order of the Ministry of Health of the Russian Federation of July 31, 2020 No. 803n, "On the Procedure for the Use of Assisted Reproductive Technologies, Contraindications, and Restrictions to their Use" (hereinafter Order No. 803n).[3]

Despite the significant number of problems that have arisen in relation to surrogacy, legislation in this sphere has remained unchanged in Russia for many years.

Most recently, in December 2022, Federal Law No. 538-FZ of December 19, 2022 was enacted,[4] which clarified and began to partially regulate several legal aspects concerning the methods of assisted reproductive technologies, commonly referred to as ART. In essence, the new laws add Russian citizenship as one of the requirements for parties to a surrogate agreement.

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1 Family Code of the Russian Federation of December 29, 1995, No. 223-FZ (ed. of July 31, 2023). Collection of Legislation of the Russian Federation, 1996, No. 1, Art. 16. (In Russian).

2 Federal Law No. 323-FZ of November 21, 2011 "On the Basics of Protecting the Health of Citizens in the Russian Federation" (ed. of June 13, 2023). Collection of Legislation of the Russian Federation, 2011, No. 48, Art. 6724. (In Russian).

3 Order of the Ministry of Health of the Russian Federation "On the Procedure for the Use of Assisted Reproductive Technologies, Contraindications and Restrictions to Their Use" (registered with the Ministry of Justice of the Russian Federation on October 19, 2020, No. 60457). Official Internet Portal of Legal Information (July 7, 2023). (In Russian).

4 Federal Law No. 538-FZ of December 19, 2022 "On Amendments to Certain Legislative Acts of the Russian Federation" (ed. of July 7, 2023). (In Russian).

South African laws are not only regulated by legislation[5] but are also founded in case law[6] and the common law[7] as well as by the South African Constitution.[8] Surrogacy provisions can be mainly found in legislation and case law. In the majority of cases in South Africa, surrogacy is predominantly regulated by the provisions of the Children's Act 38 of 2005.[9] A surrogacy agreement is entered into between a commissioning parent(s) and a surrogate, and the agreement must be confirmed by the High Court of South Africa. There must also be a genetic link established between at least one of the commissioning parents and the gamete or gametes used in the surrogacy.

South African law allows for In-Vitro Fertilization (IVF) as well as surrogacy. The South African Regulations Relating to Artificial Fertilization of Persons[10] state that IVF is "the process of spontaneous fertilization of an ovum with male sperm outside the body, in an authorized institution." The regulations define a "gamete donor" as a person whose gametes are used for artificial fertilization while a "surrogate" is described by the regulations as a "recipient," a woman who is going to be artificially fertilized. Section 3(13) of the Children's Act defines a "surrogate motherhood agreement" as

> an agreement between a surrogate mother and a commissioning parent in which it is agreed that the surrogate mother will be artificially fertilized for the purpose of bearing a child for the commissioning parent and in which the surrogate mother undertakes to hand over such child to the commissioning parent upon its birth, or within a reasonable time thereafter, with the intention that the child concerned becomes the legitimate child of the commissioning parent.

Thus, there is sufficient regulation pertaining to surrogacy in South Africa, and the issue of whether or not the genetic link requirement for surrogacy is constitutional has recently been dealt with by the South African courts, firstly in the High Court[11] and subsequently in the Constitutional Court.[12] The Constitutional Court case will be discussed further below.

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5 Also known as statutes. An example that is relevant for surrogacy in South Africa is the Children's Act 38 of 2005.

6 Case law consists of decisions of the lower courts, the Magistrate's courts, and the High Courts of South Africa.

7 The main common law in South Africa is Roman-Dutch law, it can be found in the works of authors and referred to in case law.

8 The Constitution is the supreme law and all other laws must comply with the provision of rights found in the Constitution. A copy of the Constitution, Act 108 of 1996 is simply referred to as the Constitution. South African Government. https://www.gov.za/sites.www.gov.za/files/images/a108-96.pdf

9 The Children's Act. SAFLII. https://www.saflii.org/za/legis/consol_act/ca2005104/

10 South African Government. (2012). *Government Notice R175 of 2012*. https://www.gov.za/sites/default/files/gcis_document/201409/35099rg699gon175.pdf

11 *AB and Another v. Minister of Social Development* (2016) 2 SA 27 (GP).

12 *AB and Another v. Minister of Social Development* [2016] ZACC 43.

This study primarily focuses on the key legal and regulatory aspects surrounding surrogacy in Russia and South Africa and, based on a comparative legal analysis, offers appropriate proposals to reform Russian legislation in this area.

We will first examine the key and most controversial aspects of surrogacy in the countries under consideration.

1. Parties to the Surrogacy Agreement in Russia and South Africa

There is no strict definition of a "surrogacy agreement" in Russia. However, it follows from paragraph 9 of Article 55 of the Law on Health Protection that the parties to such a contract are: (a) a "surrogate mother" (a woman carrying a fetus after the transfer of a donor embryo) and (b) the "commissioning parents" whose germ cells were used for fertilization, for whom carrying and giving birth to a child is impossible for medical reasons (genetic mother and genetic father). This could be either two people who are married to each other or a single woman whose germ cells were used for fertilization and for whom carrying and giving birth to a child is impossible for medical reasons (i.e. can primarily be a genetic mother).

Paragraph 10 of the Law on Health Protection states that a woman between the ages of twenty and thirty-five can be a surrogate mother**.** In addition, a candidate for the role of a surrogate mother must meet the following requirements:

- be a citizen of the Russian Federation;
- have at least one healthy child of her own;
- obtain a medical report on a satisfactory state of health;
- provide written and informed voluntary consent for medical intervention.

If she is married, the woman must receive her spouse's informed consent to participate in the program. It must be noted that in Russia, a surrogate mother does not have the right to also be an oocyte donor.

In South Africa, as in Russia, there are strict legal requirements stipulating that a surrogate mother must already have her own child. However, in contrast to Russian legislation, a pregnant mother in South Africa has the right to be an oocyte donor, that is, she can also be the biological mother of the child.

Another difference between surrogacy regulations in Russia and South Africa is that surrogacy can only be carried out free of charge in South Africa. The woman receives financial compensation to cover transportation and medical expenses but carrying someone else's child cannot be a source of income in South Africa, as it can be in Russia. When it comes to surrogacy in Russia, there is practically no difference between it and a contract for the provision of paid services, with the primary motivation being the desire to earn money.

In South Africa, chapter 19 of the Children's Act provides that a surrogate motherhood agreement must be in writing, signed by all parties, as well as confirmed by the High Court of South Africa.[13] Additionally, the surrogacy agreement must be

[13] Sec. 292 of the Children's Act.

signed by all parties and must be entered into in the Republic of South Africa,[14] and at least one of the parents (or the commissioning parent where a single person) as well as the surrogate mother (and her husband or partner, if applicable) must be domiciled in the Republic of South Africa[15] at the time of entering the agreement.

In cases where the commissioning parent is married (or in a permanent relationship), then the court cannot confirm the agreement unless the spouse or partner has given their written consent,[16] and if the surrogate mother is married or in a permanent relationship, then the court may not confirm such an agreement unless her husband or partner has given their written consent and is a party to the agreement.[17] If the husband or partner of the surrogate mother (who is not the genetic parent of the child) unreasonably withholds their consent, the court can still confirm the agreement[18] (sec. 293(3)). Section 294 of the Children's Act states that

> No surrogate motherhood agreement is valid unless the conception of the child contemplated in the agreement is to be effected by the use of the gametes of both commissioning parents or, if that is not possible due to biological, medical, or other valid reasons, the gamete of at least one of the commissioning parents or, where the commissioning parent is a single person, the gamete of that person.

This latter section is known as the "genetic link requirement" and was brought before the Constitutional Court[19] as being unconstitutional. However, the court found that section 294 was valid, making it now a requirement in order for surrogacy to take place in South Africa, although it is not a requirement for IVF if the woman carrying the child in her womb through IVF is also going to be the mother of the child, i.e. keep this child. In the case of surrogacy, the surrogate must carry the product of at least one gamete of the commissioning parents, as well as have some genetic link with the commissioning parents.

Thus, the court will not confirm any surrogate motherhood agreement unless the following requirements are complied with:[20]

1. The commissioning parent(s) are not able to give birth to a child due to a condition that is permanent and irreversible.

2. The commissioning parents are suitable persons to be parents.

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[14] A surrogacy agreement that takes place in South Africa cannot be entered into in a country other than South Africa. The agreement must be entered into in South Africa as well as approved by a court in South Africa.

[15] Sec. 292 of the Children's Act.

[16] Sec. 293(1).

[17] Sec. 293(2).

[18] Sec. 293(3).

[19] In the *AB and Another v. Minister of Social Development* case.

[20] Secs. 295–296.

3. The commissioning parents understand and accept the legal consequences of the surrogacy agreement.

4. The surrogate mother must be a suitable person to be a surrogate mother.

5. The surrogate mother must understand and accept the legal consequences of the surrogacy agreement.

6. The surrogate mother may not use surrogacy as a source of income and must enter into the surrogacy agreement for altruistic reasons.

7. The surrogate mother must have a documented history of at least one pregnancy and living delivery, and she must have a living child of her own.

8. The surrogacy agreement must include provisions that adequately provide for the care, contact, upbringing, and general welfare of the child.

9. The surrogate mother may not undergo any artificial fertilization until after the surrogacy agreement has been confirmed by the court.

Now let us take a closer look at the requirements and restrictions that determine eligibility for surrogacy. First, we will look at who can act as commissioning parents. Changes to Russian legislation of December 19, 2022 clarified and significantly narrowed the circle of the commissioning parents. Those ordering surrogacy services must include and meet the following requirements:

A. Spouses or a single woman.

Russian legislators have finally addressed the possibility of single men participating in the surrogacy program. Consequently, henceforth, neither single men nor their *de facto* spouses have the right to participate in a surrogacy program. This restriction has prompted considerable discussions among scientists. Some authors view this as discrimination and a violation of the constitutional rights of unmarried men. Others believe that this is an adequate measure in response to events that occurred not so long ago in Russia, which we describe below.

In February 2020, Russian media reported that there were hundreds of newborn children born in Russia, whose genetic parents came from countries that do not legally permit surrogacy. Border closures as a result of the COVID-19 pandemic prevented these biological parents from physically taking their children.

Recall that Russia is one of the few countries in which surrogacy is permitted, including for commercial purposes whereby the pregnant mother receives remuneration for her services. There are numerous medical centers in the country offering IVF services with the participation of surrogate mothers, not only to Russians but also to foreign citizens.

Since February 2020, 180 families from China, as well as citizens of Singapore, France, Argentina, Australia, and the Philippines, have had children on behalf of foreign customers as noted by the Deputy Chairman of the Human Rights Council, Irina Kirkora. Furthermore, a St. Petersburg-based company providing surrogacy services also reported that at least 600 of these children were unable to leave for their home countries.[21]

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[21] Pravmir. (2020, July 30). *As a result of the pandemic, approximately one thousand babies from surrogate mothers were "stuck."* https://www.pravmir.ru/iz-za-pandemii-v-rossii-zastryali-okolo-tysyachi-mladenczev-ot-surrogatnyh-materej. (In Russian).

The number of children born 'for export' caused legislators and the public to think seriously about the problem. To be more explicit, the primary concern was two-fold: firstly, it was impossible to officially register the children in accordance with a legally established procedure, and secondly, they did not have an official legal guardian. In the end, these children's births and their subsequent fates were beyond the purview of any form of state control or regulation.

The exact number of children born by surrogate mothers in Russia, including those for foreign customers, is unknown, as there is no state registration for such children. According to some reports, as of 2020, Russia ranked second after the United States in the surrogacy market.[22] According to the Association of Medical Tourism, Russia is one of the most attractive countries for so-called "genetic tourists."[23]

As for South Africa, both single men and women and even same-sex spouses can act as commissioning parents in that country. There is no requirement in South Africa that the surrogate mother must be married; she can be single. However, if the surrogate mother is married or in a partnership, then her husband or partner must also consent to the surrogacy, as explained above.[24]

B. At least one of the spouses must, at the time of the conclusion of the surrogacy agreement, be a Russian citizen.

As demonstrated by the abovementioned requirements, in South Africa, the parties to the surrogacy agreement must also be domiciled in South Africa. You can be a citizen and domiciled in South Africa, but you do not have to be a citizen in order to be domiciled in South Africa. One of the requirements for being domiciled in South Africa is that the person must be lawfully present in the country; thus, residents who are not citizens can be lawfully domiciled only in cases where they are granted residency by Home Affairs in South Africa.

C. Those ordering surrogacy services must be unable to carry or give birth to a child for medical reasons (*see* para. 70 of the Order of the Ministry of Health of July 31, 2020 No. 803n). In other words, the clients are infertile.

An analysis of the current Russian regulatory framework indicates that surrogate motherhood is a viable option to overcome female infertility. However, there is an ongoing debate among scientists and legal practitioners regarding the use of surrogate motherhood for so-called "social purposes." Social purposes encompass a number of different reasons apart from infertility, in which people are unable to

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22 Pankrashkina M. (2020, June 24). *Babies for export: How the pandemic has jeopardized the surrogacy business in Russia, which has been supplying children abroad for more than 25 years*. Spektr.Press. https://spektr.press/deti-naprokat-pandemiya-i-zakrytye-granicy-stali-ugrozoj-surrogatnomu-materinstvu-v-rossii-kotoraya-pyatnadcat-let-postavlyaet-mladencev-na-eksport/. (In Russian).

23 Draft Law No. 133590-7 "On Amendments to Certain Legislative Acts of the Russian Federation regarding the Prohibition of Surrogacy." Russian Association of Human Reproduction. http://www.rahr.ru/dindex/zsm.pdf. (In Russian).

24 Bardashevich, Y.V. (2021). Features of legal regulations on surrogacy and examples in foreign countries. *Epomen, 51*, 113. (In Russian).

bear or give birth to a child on their own. This could be the fear of childbirth, an unwillingness to enter into a close relationship just for the sake of conception, the fear of spoiling one's figure, or the lack of opportunity to carry a child on their own due to the peculiarities of their work (for example, athletes, actresses, ballerinas, and so on).

Some authors believe that surrogacy should be permitted beyond solely for medical purposes. They propose expanding the category of persons who can have access to surrogacy.[25] We believe that a widespread usage of surrogate childbirth will cause infertile people to stop adopting children. In addition, this will also devalue the role of motherhood itself. The surrogate mother will be perceived as a living incubator. Alternative methods of childbirth should in no way routinely replace natural methods. They should be used only in exceptional cases (when the birth of children naturally is impossible for medical reasons). The greater the use of surrogacy, the more likely it is that lawsuits will arise, leading to an increase in problems and more 'rejected' children. It no doubt appears reasonable to consider this method as the only way to have a child that is genetically related to the parent. However, surrogacy should not become a means of income for lawyers, medical clinics, and surrogate mothers themselves. Surrogate mothers are often not fully aware of the consequences of such "work" for their bodies (i.e. the taking of hormonal drugs before and during pregnancy, the risk of infertility, etc.).

Clearly, neither society nor the institution of family law is ready to consolidate a wide list of the various social purposes at the legislative level in Russia. Nevertheless, in our opinion, it is possible to consolidate some non-medical social purposes that could be applied at the legislative level.

One such social purpose could be, for instance, cases involving the death of a female spouse and the desire of a single man to have a child that is genetically related to the parents. This would require the cryopreservation of her oocytes and permission to use them in the event of her death.

In Russia, in practice, there have been cases in which people who were not the genetic parents of the child submitted applications for surrogacy to a reproductive center. For example, a close relative of one or more of a deceased genetic parent may want a surrogate mother to carry the child of a parent who donated their biological material for cryopreservation during their lifetime.

The latest achievements in the field of medicine provide for the possibility of the cryopreservation and storage of biological material that can be subsequently applied for assisted reproductive technologies. Thus, the birth of a new life even after the death of a genetic parent is possible today.[26]

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[25] Levushkin, A.N., & Saveliev, I.S. (2015). Requirements imposed legislators to the future parents of a child born using surrogate motherhood technology. *Modern Law, 9*, 92–96. (In Russian).

[26] Stebleva, E.V. (2011). Legal regulation of posthumous reproduction using the surrogate motherhood method. *Civilist, 3*, 92–96. (In Russian).

However, there are no legal regulations around the conditions for using such biological material after the death of the person who provided it, nor is there a procedure for registering "posthumous" children.

Here is an actual example to illustrate this point. In November 2005, a boy was born in Russia whose father died two years before conception in an Israeli clinic. The child's father had been diagnosed with cancer. He was treated in Israel, where post-mortem reproduction is allowed and actively employed. Before the start of the course of chemotherapy, the young man had his male gametes (sperm) taken from him, which were then frozen and stored in an Israeli hospital for nine years. After his death, the young man's mother decided to conclude an agreement with a surrogate mother for the birth of a grandson. Since there is no legal regulation concerning posthumous reproduction in Russia, registration authorities refused to register the child for the woman. The woman appealed to the court for the protection of her interests, but the court refused to recognize her rights as the mother.[27]

In a similar situation in November 2016, the court upheld the claims of the grandmother. She was recognized as the mother of her granddaughter.[28]

It goes without saying that both lawyers and doctors should exercise caution when formulating a definition of the social purposes surrounding surrogacy. The rights of the child should not be violated, and traditional family values should not lose their significance.

The requirements for surrogacy in South Africa dictate that the woman who is the commissioning parent must not be able to carry a pregnancy; the logic behind this is that if a woman can carry a pregnancy, she can make use of IVF instead of surrogacy. Furthermore, when using surrogacy, the gametes that are donated must also be genetically linked to at least one of the commissioning parents. Surrogate pregnancy can be used by both married and unmarried commissioning parents who are heterosexual as well as same-sex couples, as long as one of the gametes is genetically related to one of the commissioning parents.

D. The germ cells (oocytes and gametes) of the genetic parents are used for fertilization of an embryo and then transferred to the surrogate mother (para. 9 of Art. 55 of the Fundamentals of Public Health Protection). If the client is an unmarried woman, she must also be the oocyte donor.

However, as it turns out, if one of the spouses does not have such cells, it is impossible to use donor material, since the main condition for participation in the program is the genetic link between the unborn child and both commissioning parents.

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[27] Decision of the Babushkinsky District Court of Moscow of April 28, 2011 in Case No. 2-2222/11. Archives of the Court. (In Russian).

[28] Decision of the Prikubanskinsky District Court of Krasnodar of November 1, 2016 in Case No. 2-13109/2016). Archives of the Court. (In Russian).

K. Svitnev writes that the requirement for direct genetic kinship with both parents or with the mother, if we are talking about a single woman, is "an example of discrimination on the basis of health."[29]

It seems reasonable to allow the use of motherhood in the case of a child's genetic relationship with at least one of the commissioning parents.

If germ cells are absent from both spouses, then a refusal to participate in the program seems quite logical. In this case, people are turning to a surrogate mother to carry a genetically alien child. In such a situation, it would be advisable and logical to consider adopting a child.

In South Africa, a truncated genetic relationship with one of the commissioning parents is also acceptable.

In the Constitutional Court case,[30] Section 294, which requires a genetic link with at least one of the commissioning parents, was ruled as constitutional. Prior to the Constitutional Court case, the High Court had determined that the genetic link requirement of Section 294 of the Children's Act was unconstitutional.[31] The Constitutional Court's ruling revealed that the majority of the court agreed on the necessity of a genetic link between the commissioning parent or parents and the child born from surrogacy. The Constitutional Court held that the High Court had disregarded the object of the Children's Act and had, instead of looking at the purpose of the provision of Section 294 and the best interests of the children, overemphasized the best interests of the commissioning parents. The Constitutional Court did not support the High Court decision that Section 294 violates Section 9(1) of the Constitution. In the second applicant's Heads of Argument in the Constitutional Court, the applicant argued that "families without a parent-child genetic link are just as valuable as families with such a link,"[32] and in essence, the High Court also held that "a family cannot be defined with reference to the question whether a genetic link between the parents and the child exists." Despite the arguments brought forward by the second applicant, the Constitutional Court determined that the genetic link requirement as provided for in Section 294 of the Children's Act is constitutional. It is submitted that the High Court decision was the better decision as the court referred to the commissioning parent's right to dignity, and this right is often used instead of the right to a family because no specific right to a family is found in the South African Constitution and families in South Africa are constituted in various ways.

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[29] Pavlova, Z. (2022, December 12). *Law adopted prohibiting foreigners and stateless persons from using the practice of surrogacy in the Russian Federation*. Advocate newspaper. https://www.advgazeta.ru/novosti/nedelya-ag-16-12-2022. (In Russian).

[30] *AB and Another v. Minister of Social Development* [2016] ZACC 43.

[31] For a further discussion of the High Court case and submission that the High Court case was correctly decided, *see* Boniface, A. (2017). The Genetic Link Requirement for Surrogacy: A Family Cannot Be Defined by Genetic Lineage. *Journal of South African Law, 2017*(1), 190–206.

[32] Pg. 5, AB case, Heads of Argument.

Moreover, just because there is no genetic link does not mean that the family is any less important, such as when a family is formed by adoption. In the Constitutional Court case of AB,[33] the Constitutional Court adopted an archaic version of what constitutes a family.

2. Determining the Origin of a Child in Russia and South Africa

This is the most frequently discussed issue among scientists in Russia, both from a legal and bioethical point of view.

In Russia, according to subparagraph 2 of paragraph 4 of Article 51 of the Family Code of the Russian Federation, genetic parents may be recorded as the parents of a child only with the surrogate mother's consent. That is to say, at the legislative level, a surrogate mother has priority in the determination of a child's origin.

For many years, there have been disagreements in the scientific community regarding the degree to which the above-mentioned regulation is reasonable. Most scientists side with genetic parents in this matter. They state that, based on the child's best interests, it is the client who should be recorded as the child's parents, regardless of whether or not they have received the consent of the pregnant mother. Some authors believe that by giving priority to the surrogate mother in the issue of the origin of the child, the law opens up the possibility of blackmail on her part. Furthermore, the intended purpose of the surrogacy agreement, which specifies the surrogate mother's obligation to transfer the child to the clients, has no legal significance.[34]

By giving preference to the will of a surrogate mother, the lawmakers obviously pursued the goal of protecting the rights of a child in the event that the genetic parents change their minds about taking custody. In addition, it should be understood that during pregnancy and childbirth, deep biological and psychosomatic connections arise between the child and the surrogate mother, which may cause a woman to develop maternal feelings and reassess the situation.

Moreover, it is important to mention that the Constitutional Court of the Russian Federation also took the side of the surrogate mother.[35]

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[33] www.saflii.org/za/cases/ZACC/2016/43.html

[34] Gaibatova, K.D., & Shamsudinova, P.M. (2022). The Problem of Establishing the Origin of Children as a Legal Consequence of the Surrogacy Contract. *Legal Bulletin of Dagestan State University, 41*(1), 67. (In Russian).

[35] Definition of the Constitutional Court of the Russian Federation of May 15, 2012, No. 880-O "On Refusal to Accept for Consideration the Complaint of Citizens of C.P. and C.Y. on the Violation of their Constitutional Rights by the provisions of paragraph 4 of Art. 51 of the Family Code of the Russian Federation and paragraph 5 of Art. 16 of the Federal Law 'On Acts of Civil Status.'" ConsultantPlus Legal Database. https://www.consultant.ru. (In Russian); Definition of the Constitutional Court of the Russian Federation No. 2318-O of September 27, 2018 "On Refusal to Accept for Consideration the Complaint of Citizens of S.D. and S.T. on Violation of their Constitutional Rights under paragraph 4 of Art. 51, paragraph 3 of Art. 52 of the Family Code of the Russian Federation, paragraph 5 of Art. 16 of the Federal Law, 'On Acts of Civil Status', and part 9 of Art. 55 of the Federal Law, 'On the Basics of Protecting the Health of Citizens in the Russian Federation.'" ConsultantPlus Legal Database. https://www.consultant.ru. (In Russian).

In 2018, Judge of the Constitutional Court of the Russian Federation, A.N. Kokotov expressed a dissenting opinion on the matter.

The judge stressed that the surrogate mother provides the biological resources of her body to the child during pregnancy, which determines the child's immune and hormonal system. In his opinion, the connection between a pregnant mother and a child is no less significant than its genetic connection with commissioning parents.

> ... regardless of the will and consciousness of the surrogate mother, the instinct of motherhood awakens in her; a deep biological and emotional-spiritual connection is established between her and the child. Modern medicine provides more and more evidence that the intrauterine period of a person's life has a decisive influence on his subsequent development. Pregnancy – with its worries, limitations, and joys – as well as childbirth and the accompanying stress, create a unique bond between the biological mother and the child. As for the clients of the surrogate mother's services, after receiving the child, they still have to feel unaccountable parental feelings for him.[36]

Until 2017, Russian courts ruled in favor of surrogate mothers in disputes arising from the refusal of the latter to consent to the registration of clients as the parents of the child. The courts referred to the gestational model of surrogacy enshrined in the Family Code of the Russian Federation.

However, on May 16, 2017, the Resolution of the Plenum of the Supreme Court of the Russian Federation No. 16, "On the Application of Legislation by Courts when Considering Cases Related to the Establishment of the Origin of Children" was adopted.[37] This called into question the priority of the surrogate mother on this matter.

Paragraph 31 of the above Resolution states that the refusal of the surrogate mother to provide consent to register the clients as the official parents is no longer an unquestionable basis for refusing and denying clients the right to be recorded as the child's parents. In order to properly consider the case, the Supreme Court of the Russian Federation recommends that the courts, in particular, verify whether a surrogacy contract was concluded and what its conditions were. These steps will help accurately determine whether the plaintiffs are the genetic parents of the child and for what reasons the surrogate mother is refusing to consent to the registration of the plaintiffs as the parents of the child. The Court further noted that, after considering the circumstances established in the case as well as the provisions

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[36] Ruling of the Constitutional Court of the Russian Federation No. 2318-O of September 27, 2018 "On Refusal to Accept for Consideration the Complaint of Citizens of S.D. and S.T. on Violation of their Constitutional Rights by paragraph 4 of Art. 51, paragraph 3 of Art. 52 of the Family Code of the Russian Federation, paragraph 5 of Art. 16 of the Federal Law, 'On Acts of Civil Status', and part 9 of Art. 55 Federal Law, 'On the Basics of Protecting the Health of Citizens in the Russian Federation.'" ConsultantPlus Legal Database. https://www.consultant.ru. (In Russian).

[37] Resolution of the Plenum of the Supreme Court of the Russian Federation No. 16 of May 16, 2017 "On the Application of Legislation by Courts when Considering Cases related to the Establishment of the Origin of Children" (ed. of Dec. 26, 2017). Rossiyskaya Gazeta, May 24, 2017, No. 110. (In Russian).

of Article 3 of the Convention on the Rights of the Child, the dispute must be resolved in the child's best interests, that is, the child's needs should take precedence. Thus, the courts of general jurisdiction are recommended not to limit themselves to the literal interpretation of paragraph 4 of Article 51 of the Family Code of the Russian Federation but to approach the decision from the perspective of the best interests of the child.

It is clear that it is often very challenging for courts to make decisions on such cases. The court is forced to act as an arbitrator between two mothers – the one bearing the child and the genetic mother. Apart from these two women, the court decision also affects the interests of a child that was born as a result of surrogate motherhood, the spouse of the surrogate mother, her own children, and other relatives of both parties. In some cases, it is not easy to determine where and with whom the child will be better off and, obviously, sometimes it is simply impossible.

On the one hand, it must be understood that the surrogate mother, at the time of concluding the contract, wants to provide a paid service to carry a child for a monetary reward and not to give birth to a genetically alien child for her personal desire. She has not made any plans to bear the costs associated with their development and upbringing. The entire purpose of this reproductive method is solely the creation of a child with genetic parents.

On the other hand, we must also understand that a surrogate mother performs a very delicate and extremely risky service. There always exists the risk that she can become attached to the child during its gestation. She also runs the risk of jeopardizing her health and often her life. More importantly, the surrogate mother's refusal to consent to the registration of the client as the child's parents is a perfectly legitimate right granted to her by the norms of the Family Code.

Let us now examine the regulations governing the contractual right of a service provider to refuse to provide paid services. The surrogacy agreement has considerable similarities with this arrangement. The contractor, under the contract for the provision of paid services, has the right, according to paragraph 2 of Article 782 of the Civil Code of the Russian Federation,[38] to "refuse to fulfill obligations at any time, as long as they provide compensation to the client." It should be noted that such a refusal is legitimate.

Therefore, allegations that a surrogate mother may violate the terms of the contract by deciding to keep the child for herself appear to be unfounded. Moreover, the provisions of the contract that establish the obligation of the pregnant mother to give consent after childbirth to the registration of the clients as the parents of the child should be considered null and void as they violate the rights of the individual performing the service. It is no doubt necessary to understand and realize that such a contract is risky for commissioning parents due to the unique nature of its subject

[38] Civil Code of the Russian Federation (Part Two) of January 26, 1996, No. 14-FZ (according to comp. on July 24, 2023). Collection of Legislation of the Russian Federation, 1996, No. 5, Art. 410. (In Russian).

matter. However, the contract is also risky for a surrogate mother since it is unknown how the pregnancy and childbirth will develop (as a result of complications, the pregnant mother herself could lose the ability to further bear and give birth to children); it is also uncertain what could occur with the clients during pregnancy (for example, divorce, death, refusal of the contract, etc.), leaving the surrogate mother to fend for the baby regardless.

Additionally, it is important to remember that in any contract pertaining to the provision of paid services, customers are not actually paying for the result but for the actions that are involved of those performing the tasks; the client may or may not obtain the desired effect of the service. This is neither good nor bad, fair nor unfair – it is merely a "unique" contract and definitely not conventional or natural, since according to some authors, "such processes interfere with human nature and divine providence."[39]

Accordingly, it is extremely difficult for the Russian legislature to adopt a law that would satisfy the interests of all parties to the surrogacy agreement.

Considering that the Resolution of the Plenum of the Supreme Court of the Russian Federation adopted in 2017 is not a normative legal act, research authors V.M. Ashura and E.L. Nevzgodina believe that the procedure for establishing the origin of a child born by a surrogate mother does not require explanation but rather legislative changes.[40]

It is hard to argue with the authors. Their rationale is clear; the law should, in their opinion, protect the interests of the genetic parents since for them surrogacy is the only chance to have a genetically native child. However, given that cases of a surrogate mother claiming the child for herself are extremely rare, we agree with the opinion of the judge of the Constitutional Court of the Russian Federation A.N. Kokorin, who believes that the risks to clients can be minimized by including relevant norms in the text of the contract. So, for example, the contract could include a condition stating that if the pregnant mother keeps the child for herself, she will not receive remuneration and must reimburse the ordering party for the expenses incurred by them under the contract.[41]

We believe that the adopted Resolution of the Plenum of the Supreme Court of the Russian Federation is sufficient for now to protect the interests of commissioning

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[39] Savchenkova, E.C., & Sadovaya, L.C. (2015). Ethical Aspects of Surrogacy. *Education and Science in Modern Conditions, 3*, 245. (In Russian).

[40] Ashuha, V.M. (2017). Paragraph 4 of Art. 51 of the Family Code of the Russian Federation – A Guarantee of Protection of Maternal Rights, a Reason for Abuse of the Right, an Anachronism? *Bulletin of Omsk University. Series: Law, 3*(52), 114. (In Russian).

[41] Definition of the Constitutional Court of the Russian Federation No. 880-O of May 15, 2012 "On Refusal to Accept for Consideration the Complaint of Citizens of C.P. and C.Y. on Violation of their Constitutional Rights by the provisions of paragraph 4 of Art. 51 of the Family Code of the Russian Federation and paragraph 5 of Art. 16 of the Federal Law, 'On Acts of Civil Status.'" ConsultantPlus Legal Database. https://www.consultant.ru. (In Russian).

parents. It seems premature to talk about changing the gestational model of surrogacy in Russia at the moment.

Even if a lawmaker considers it reasonable to give priority to commissioning parents, in any case, the inherently risky nature of the contract will not disappear for the clients. Furthermore, for example, certain changes may occur in the life of a surrogate mother, in which she will not be able or will not want to continue carrying a child. And ultimately, no law or contract can force her to continue to "provide a service."

Thus, the practice of surrogate motherhood presents numerous moral, ethical, and legal problems. Obviously, this is the reason why this method of childbirth is forbidden in so many countries.

In South Africa, the right of a surrogate mother to register as the parent of the child is impossible (unless she is also an egg donor); the commissioning parents are officially registered as the parents.

If the surrogate mother is also an egg donor (which again is impossible in Russia), a different rule applies – in this case, the woman has the right to be registered as the mother of the child within sixty days after giving birth.

Section 297 of the Children's Act provides that a child born from a surrogate mother is considered the child of the commissioning parent or parents from the moment that such a child is born and the surrogate mother must hand the child over to the commissioning parents as soon as it is reasonably possible after birth. Furthermore, the surrogate mother and her husband or partner or relatives have no rights with regards to the child born from the surrogacy, and the surrogate mother and her husband or partner also have no right to have any contact with the child, although contact could be provided for by means of such a provision in the surrogacy agreement. The Act also makes it clear that a surrogacy agreement may not be terminated after the surrogate mother has been artificially fertilized. Furthermore, the child born as a result of surrogacy does not have any claim of succession (inheritance) or maintenance against the surrogate mother, her husband or partner, or any relatives. If a child is born from a surrogacy where the agreement did not comply with the provisions of the Children's Act, then the agreement becomes invalid and the child is considered the child of the woman that gave birth to that child and not the child of the commissioning parents.

Where a surrogate mother is also a genetic parent of the child, then she may terminate the surrogate motherhood agreement any time prior to sixty days after the birth of the child, and the court will then issue an order that is in the best interests of the child.[42] Section 299 of the Children's Act provides that the effect of the termination of the surrogacy agreement is such that parental rights are given to the surrogate and her husband and partner, or if none, to the commissioning father and such parties are obliged to accept the obligation of parenthood while

[42] Sec. 298 of the Children's Act.

the commissioning parents will not have any parental rights unless they adopt the child born of the terminated surrogacy agreement.

In South African law, a fetus is regarded as being a part of its mother's body, and thus the Children's Act allows the surrogate mother to terminate the pregnancy in accordance with the terms of the Choice of Termination of Pregnancy Act 92 of 1996,[43] but the surrogate mother must first inform the commissioning parents that she wants to terminate the pregnancy and she must also consult with them. If the surrogate mother decides to terminate the pregnancy, she is not liable for any payment to the commissioning parents except any payments made as per section 301, particularly if the decision to terminate was not due to medical grounds. Section 301 of the Children's Act provides that no reward or compensation may be given for surrogacy. The surrogate mother may only receive compensation for expenses that are directly related to the pregnancy and birth as well as the confirmation of the agreement. Additionally, consideration may be given for the potential loss of earnings that a surrogate mother may experience as well as medical and insurance costs associated with a surrogate's potential death or disability resulting from the pregnancy. However, the persons who provide professional legal or medical services are entitled to receive compensation for such services.

The privacy of the parties to a surrogacy agreement is protected by section 302, which prohibits the publication of their identities unless the parties have provided their written consent. Section 303 of the Children's Act further regulates surrogacy by stating that no one may artificially fertilize a woman for the purpose of surrogacy unless an agreement has been approved by a court.

Conclusion

Having considered the legal regulations surrounding surrogacy in two BRICS countries, namely Russia and South Africa, we will now briefly outline the main differences in their regulatory norms:

1. In Russia, the circle of persons entitled to use the surrogacy method as customers is noticeably narrower compared with South Africa. In Russia, this procedure has, in fact, recently been restricted to only an infertile married couple or an unmarried, barren woman.

In South Africa, both same-sex couples and unmarried men and women can act as clients for surrogacy.

2. In Russia, the requirements for surrogate mothers are fixed at the legislative level. Compliance with these requirements is checked by the medical organization conducting the IVF procedure. In South Africa, compliance of parties with the stipulated requirements is ensured by the High Court of South Africa. Moreover, the court checks not only the surrogate mother for compliance with the requirements but also the commissioning parents.

[43] Sec. 300 of the Children's Act.

3. In Russia, in paragraph 9 of the Fundamentals of Public Health Protection, there is only a cursory mention of the surrogacy contract, in which it is said that such a contract is concluded between a surrogate mother and commissioning parents. However, the very definition of this agreement and its requirements are absent. In South Africa, the surrogate motherhood agreement must be concluded in writing, signed by all parties, and approved by the High Court of South Africa. Such a certification from the authority of a court in South Africa seems reasonable. In Russia, on the other hand, it would be necessary to establish the written form of the contract at the legislative level and also require that it be certified by a notary.

Furthermore, in contrast to Russian legislation, a pregnant mother in South Africa has the right to participate in an oocyte procedure. In other words, she can also serve as the biological mother.

In Russia, there is a legal requirement for commissioning parents to be Russian citizens, married, show proof of infertility, and have a genetic connection with the child.

We mentioned that in Russia, both commissioning parents must be the child's genetic parents. In other words, if one of the spouses or a single woman, for some reason, cannot provide their own biological material for conceiving an embryo, they cannot participate in the surrogacy program. Moreover, in May 2023, the Government of the Russian Federation adopted a resolution developed by the Ministry of Health of the Russian Federation "On Approving the Procedure for Establishing Commissioning Parents as a Genetic Mother and Genetic Father, as well as a Single Woman as a Genetic Mother."[44] In accordance with this decree, the procedure for establishing the genetic relationship of potential parents or a potential single mother with a newborn is an obligatory stage of the surrogacy program.

Thus, establishing the commissioning parents as genetic parents includes:

• confirmation that the fertilization process, within the framework of assisted reproductive technologies, was undertaken using genetically affiliated germ cells, and (or) the use of an embryo from commissioning parents or a single woman;

• molecular genetic research to accurately determine the genetic relationship of a child born by a surrogate mother to commissioning parents or a single woman.

Based on the results of the medical study, a medical report is issued on the establishment (non-establishment) of the commissioning parents as the genetic mother and genetic father or a single woman as a genetic mother.

Commencing from the date of entry into force of the decree (September 1, 2023), commissioning parents will be able to be officially recorded as the child's parents only after the genetic relationship is established by the above method. That is, in addition to obtaining the consent of the surrogate mother, commissioning parents

[44] Resolution of the Government of the Russian Federation No. 882 of 31 May 2023 "On Approval of the Procedure for Establishing Potential Parents as a Genetic Mother and Genetic Father, as well as a Single Woman as a Genetic Mother." Government of Russia. http://government.ru/docs/all/147805/. (In Russian).

must now undergo a medical examination as a required stage of the program. It is possible that the developers of this project have data related to violations on the part of medical authorities involving genetically alien children passed on to commissioning parents. Such a scenario could likely occur if one of the spouses, or even both, does not possess the germ cells necessary to conceive a child. As a result, the proposed measure seems justified since it is aimed solely at complying with the requirements of the law on the child's mandatory genetic relationship with both potential parents or with the mother (in the case in which a surrogate is carrying the child of a single woman).

In South Africa, a truncated genetic relationship is permissible – this means that in order to participate in the program, at least one of the two commissioning parents must provide biological material. This is, again, understandable since same-sex couples are also allowed to participate in the program in the country. In principle, such couples cannot participate in the program without donating oocytes or spermatozoa.

The changes made to regulatory legal acts in December 2022 in Russia, which narrowed the pool of persons who can act as clients, should be assessed as positive as they were adopted in the interests of the child. On the matter of the surrogacy agreement, it should be noted that as the next step, it would be advantageous for lawmakers to, in the near future, provide clear regulations about age restrictions for commissioning parents and strict requirements regarding their mental health.

South African law also imposes specific requirements on the commissioning parents. The commissioning parents must be able to take on parental rights and be proper parents for the child born from a surrogacy agreement. Additionally, the commissioning parent or parent must be genetically linked to the child born from a surrogacy in order to fulfill the requirements of the Children's Act.

3. If in Russia, genetic parents are recorded as parents only with the consent of the surrogate mother, then in South Africa, a child born from a surrogate mother is considered the child of the commissioning parent or parents from the moment that such child is born. Only in cases in which the carrying mother is also his biological mother (oocyte donor) can she keep the child for herself. The surrogate mother is required to make such a decision within a certain period of sixty days at the legislative level.

4. Another difference between surrogacy regulations in Russia and South Africa is that surrogacy is solely permitted without payment, i.e. free of cost in South Africa. This restriction in South Africa is obviously aimed at preventing the exploitation of women in difficult financial situations by well-off people and the mass use of pregnant women in the role of "living incubators." However, a surrogate in South Africa may be compensated for reasonable expenses incurred (medical costs, insurance, etc.) as well as for any loss of earnings caused as a result of undertaking the surrogacy. Furthermore, it is possible that commissioning parents still informally pay a surrogate mother a reward for the birth of a healthy child. Otherwise, the motivation of the

surrogate mother, who decided to take such a step only for compensation of medical and transportation costs, is not entirely clear, other than for altruistic reasons.

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