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Secção I

Investigação Científica*

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Surrogacy in Portugal: drawing insights from international practices

A gestação de substituição em Portugal: uma visão a partir das práticas internacionais

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ABSTRACT: As Portugal prepares to implement surrogacy legislation, it enters a realm fraught with legal, ethical, and psychological complexities. Across the globe, jurisdictions exhibit diverse approaches to surrogacy, reflecting cultural, moral, and legal diversity. This necessitates a comprehensive understanding of the implications of surrogacy within different legal systems. Moreover, the psychological impact on surrogates, intended parents, and offspring demands careful examination. As Portugal embarks on this journey, it must navigate ethical challenges, ensuring the protection of all parties involved. Furthermore, addressing research gaps and moral dilemmas will be paramount in crafting legislation that upholds the rights and well-being of all individuals affected by surrogacy arrangements.

KEYWORDS: Surrogacy; Legal Implications; Ethical Implications; Comparative Law; Regulatory Framework; International Perspectives.

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RESUMO: À medida que Portugal se prepara para implementar legislação sobre gestação de substituição, entra num domínio repleto de complexidades legais, éticas e psicológicas. Em todo o mundo, as jurisdições exibem abordagens diversas em relação à gestação de substituição, refletindo a diversidade cultural, ética e legal. Isso requer uma compreensão abrangente das implicações da gestação de substituição dentro de diferentes sistemas legais. Além disso, o impacto psicológico sobre as gestantes, os pais intencionais e os descendentes exigem um exame cuidadoso. À medida que Portugal embarca nessa jornada, é necessário navegar por desafios éticos, garantindo a proteção de todas as partes envolvidas. Além disso, abordar lacunas de pesquisa e dilemas éticos será fundamental na elaboração de legislação que defenda os direitos e o bem-estar de todos os indivíduos afetados pela gestação de substituição.

PALAVRAS-CHAVE: Gestação de substituição; Implicações Éticas; Direito Comparado; Regulação; Perspectivas Internacionais.

Introduction

Surrogacy, a complex and multifaceted practice, has become a significant focal point in contemporary legal and ethical debates. At its core, surrogacy involves a surrogate mother carrying and giving birth to a child on behalf of the intended parents, creating a unique intersection of biological, social, and legal relationships. This arrangement, while offering hope to many individuals and couples unable to conceive, raises profound legal and ethical questions that challenge traditional notions of parenthood, family, and rights over one's body.

Surrogacy has opened the door to motherhood and parenthood for many who were previously unable to do so, but the emotional complexities of the process are still overlooked. First of all, considering the social-demographic characteristics of those seeking surrogacy and their motivations is essential to take into account in this process. Secondly, the emotional and psychological strain of surrogacy can have not only a severe impact on a surrogate's mental health and general well-being but also a significant impact on all the other actors involved, namely the surrogate's family, intended parents and offspring children, which may be addressed. The intended parents are typically infertile couples who want to start a family, and they have a preference for the biological connection with the offspring baby, even if only partially; preferring this way rather than adoption, it is considered only as a last resort.

The legal landscape of surrogacy varies dramatically globally, reflecting diverse cultural, ethical, and legal norms. Some jurisdictions embrace surrogacy with open arms, offering detailed regulatory frameworks to safeguard the rights and responsibilities of all parties involved. Others, however, view the practice with scepticism or outright opposition, citing concerns over exploitation, the commodification of the body, and the welfare of the surrogate and the child.

This discrepancy in legal approaches underscores the need for a comparative analysis to understand the implications of surrogacy within various legal systems. Such an analysis highlights the diversity of regulatory mechanisms. It sheds light on the ethical dilemmas at play, offering insights into how different societies navigate the complex terrain of assisted reproductive technologies.

As surrogacy continues to grow in prevalence and visibility, it becomes increasingly important to examine the interplay between law, ethics, and surrogacy practices. This exploration aims to frame the problem globally, identifying key issues and considerations that inform the debate on surrogacy. Doing so sets the stage for a deeper investigation into how legal systems around the world respond to the challenges posed by surrogacy and what this means for the future of family, parenthood, and reproductive autonomy.

In terms of motivations, studies¹⁰ have identified different kinds of motivation in the various actors involved and show that surrogates tend to have a more intrinsic and altruistic motivation. They say they are more willing to give the gift of life, enjoy pregnancy and childbirth and develop intense and unusual friendships and social support with the commissioning parents.¹¹ However, other studies¹² reported that the surrogates, usually in their late twenties and with their own family completed, felt happy and relieved when the pregnancy and relinquishment were over.¹³

Although the primary motivations are intrinsic and altruistic, financial reasons have also been described. The economic interest can also be presented where the primary cause is reported to be empathy for infertile or childless couples. This kind of motivation can potentiate the well-known form of fertility tourism aimed to get over the current prohibition of commercial surrogacy,¹⁴ which, given the apparent significant

¹⁰ BLYTH, Eric. "I wanted to be interesting. I wanted to be able to say 'I've done something interesting with my life'": Interviews with surrogate mothers in Britain. *Journal of reproductive and infant psychology*, 1994, 12.3: 189-198. <https://doi.org/10.1080/02646839408408885>.

¹¹ BLYTH, Eric. "I wanted to be interesting. I wanted to be able to say 'I've done something interesting with my life'": Interviews with surrogate mothers in Britain. *Journal of reproductive and infant psychology*, 1994, 12.3: 189-198. <https://doi.org/10.1080/02646839408408885>.

¹² VAN DEN AKKER, Olga. "Genetic and gestational surrogate mothers' experience of surrogacy", *Journal of reproductive and infant psychology*, 2003, 21.2: 145-161. <https://doi.org/10.1080/0264683031000124091>

¹³ VAN DEN AKKER, Olga. "Genetic and gestational surrogate mothers' experience of surrogacy", *Journal of reproductive and infant psychology*, 2003, 21.2: 145-161. <https://doi.org/10.1080/0264683031000124091>

¹⁴ BRANDÃO, Pedro, GARRIDO, Nicolás. "Commercial Surrogacy: An Overview." "Gestação de substituição comercial: Uma visão global." *Revista brasileira de ginecologia e obstetrícia : Revista da Federação Brasileira das Sociedades de Ginecologia e Obstetrícia* vol. 44,12 (2022): 1141-1158. doi:10.1055/s-0042-1759774.

income and power differences between surrogate and intended parents, raises complex ethical issues regarding exploitation, inequality, gender, labour and commercialisation¹⁵.

Understanding Legal Variations Across Jurisdictions

As Portugal prepares to delve into surrogacy legislation, it stands at the threshold of a complex and multifaceted journey. Before delving into a comparative analysis of surrogacy laws across different jurisdictions, it is essential to understand Portugal's unique context and the factors shaping its approach to this contentious issue.

In Portugal, the legal framework, updated by Law 32/2006 and its subsequent amendments, including Law No. 90/2021, allows for surrogacy under particular and exceptional circumstances. These circumstances include cases where a woman is unable to carry a pregnancy due to the absence, injury, or disease of the uterus or any other clinical condition that definitively prevents pregnancy. Surrogacy arrangements must be altruistic, meaning the surrogate mother agrees to undertake the pregnancy for someone else and to hand over the baby after birth without assuming the legal rights and responsibilities of motherhood.

The law emphasises the non-commercial nature of surrogacy agreements, underscoring that such arrangements must not involve financial compensation beyond the reimbursement of medical and associated costs directly related to the pregnancy. This provision ensures the process remains an act of altruism rather than a transactional service. The emphasis on gratuitousness is intended to safeguard the dignity and autonomy of all parties involved, particularly the surrogate mother, by preventing commercial exploitation and ensuring that surrogacy in Portugal aligns with ethical principles and respects human rights.

This legal stance reflects a careful consideration of surrogacy, aiming to balance the interests and protections of the surrogate mother, the intending parents, and the child. By restricting surrogacy to non-commercial agreements and setting stringent conditions for its practice, Portuguese law seeks to create a framework that respects the complexity of surrogacy while addressing the needs of those who rely on it as a means to parenthood.^{16, 17}

This legal framework focuses on medical impossibilities for a woman to get pregnant and is primarily designed to address these specific medical conditions.

¹⁵ JADVA, Vasanti, *et al.*, Surrogacy: the experiences of surrogate mothers”, *Human reproduction*, 2003, 18.10: 2196-2204. <https://doi.org/10.1093/humrep/deg397>.

¹⁶ Law 32/2006, 26/7. <https://diariodarepublica.pt/dr/detalhe/lei/90-2021-175983728>.

¹⁷ GUIMARÃES, Maria Raquel, “Subitamente, no verão passado: A contratualização da gestação humana e os problemas relativos ao consentimento, in *Debatendo a procriação medicamente assistida*, Porto, FDUP, 16, 17/03/2017, p. 114.

The explicit legal criteria do not directly address the eligibility of gay couples for surrogacy. However, the focus on medical conditions affecting a woman's ability to become pregnant implicitly suggests that the legal framework is oriented towards situations where heterosexual couples or women face medical barriers to pregnancy.

This does not mean that male same-sex couples are categorically excluded from surrogacy arrangements. Still, the legal provisions need to be specifically tailored to their situation. In practice, the application of surrogacy laws to these couples depends on the interpretation and implementation of these laws and potential changes to legislation that explicitly addresses the eligibility of all types of intended parents. It's also important to consider that legal frameworks evolve, and there may be ongoing discussions or future amendments that could broaden the scope of surrogacy laws to be more inclusive of various family structures.¹⁸

It must also be said that despite establishing a legal framework through Law 32/2006 and its amendment by Law n.º 90/2021, allowing surrogacy under specific conditions, the practical application of surrogacy still needs to be improved. The critical issue here is that the law, as it stands, is not yet applicable because the necessary regulatory mechanisms and guidelines for its execution have yet to be established. This means that even though the legislation recognises surrogacy under altruistic terms, without the financial transaction between the surrogate and the intending parents, the absence of regulation prevents surrogacy agreements from being legally practised or recognised.

Moving from the legal landscape of surrogacy in Portugal, where the focus is on medical necessity and non-commercialization, to Ukraine presents a shift towards a more open surrogacy framework. Before the conflict, Ukraine emerged as a prime destination for surrogacy in Europe, catering not only to domestic needs but also attracting international couples with its comprehensive and relatively accessible surrogacy regulations.

Before the war¹⁹ Ukraine was highly favoured in Europe for couples seeking surrogacy arrangements. The Ukrainian Health Ministry's requirements for surrogacy include the absence or malformation of the uterus due to congenital conditions or

¹⁸ BRAGA, Maria de Fátima Gonçalves. "A Procriação Medicamente Assistida e os princípios constitucionais da igualdade e não discriminação", *Revista Jurídica Portucalense*, n.º Especial Mecanismos de Proteção Jurídica no Direito Civil., 2023, pp. 57-74, [https://doi.org/10.34625/issn.2183-2705\(ne\)2023.ic-04](https://doi.org/10.34625/issn.2183-2705(ne)2023.ic-04); BLAKE, Lucy, et al. "Gay fathers' motivations for and feelings about surrogacy as a path to parenthood", *Human Reproduction*, 2017, 32.4: 860-867. <https://doi.org/10.1093/humrep/dex026>.

¹⁹ TANDERUP, Malene, PANDE Amrita, e.a., Impact of the war in Ukraine and the COVID-19 pandemic on transnational surrogacy – a qualitative study of Danish infertile couples' experiences of being in 'exile', *Reproductive BioMedicine Online*, Volume 47, Issue 4, 2023, <https://doi.org/10.1016/j.rbmo.2023.06.013>.

diseases that prevent pregnancy and severe somatic diseases where pregnancy risks the woman's health but not the child's or multiple unsuccessful IVF attempts. A surrogate must be a capable adult woman with at least one healthy child and provide voluntary, written consent with no medical contraindications. The process includes selecting a surrogate, synchronising menstrual cycles, preparing embryos, transferring an embryo to the surrogate's uterus, cryopreserving unused embryos, pregnancy diagnosis, monitoring the pregnancy, deciding the delivery method and location with a doctor, and providing medical care according to clinical protocols.

Suppose the parents of a child born through surrogacy are foreign citizens. In that case, they must provide their temporary residential address until the documentation is completed and they leave the country to facilitate paediatric sponsorship and observation. The registration of a child born through assisted reproductive technology by surrogacy is conducted according to the procedure established by current Ukrainian legislation, with the presence of a genetic relationship certificate of the parents (mother or father) with the foetus.

In cases where a child is born to a woman from an embryo conceived through assisted reproduction technologies with her husband's written consent, he is registered as the father of the child. If an embryo conceived by a couple through assisted reproduction is implanted in another woman, the spouses are the legal parents. Additionally, a couple is recognised as parents of a child born to a woman after the transfer of an embryo conceived by her husband to another woman using assisted reproduction. However, Ukraine does not recognise same-sex civil unions for these processes.^{20 21}

Transitioning from the Iberian Peninsula and Eastern Europe, we now gaze at the United Kingdom. The UK offers another distinctive environment for surrogacy, blending a history of common law with statutory regulations. Here, surrogacy agreements are not enforceable by law, yet the practice is permitted and regulated, demonstrating the UK's nuanced balance between legal formality and the practical aspects of surrogacy. This balance reflects the UK's attempt to navigate the ethical complexities of surrogacy while considering the rights and roles of all parties involved.

In the United Kingdom, surrogacy is governed by the Surrogacy Arrangements Act of 1985,²² later amended by the Human Fertilisation and Embryology Act of 1990,²³

²⁰ Ukrainian Family Code, <https://zakon.rada.gov.ua/laws/show/2947-14/page2#Text>.

²¹ Ministry of Health Protection of Ukraine, <https://moz.gov.ua/>.

²² 1985 Surrogacy Arrangement Act, <https://www.legislation.gov.uk/ukpga/1985/49>.

²³ This diploma prohibited the existence of contracts that would result in surrogate motherhood, penalizing only the person who brokered the contract, but absolving the mother and her

with oversight and guidance provided by the Human Fertilisation and Embryology Authority. These laws, applicable in England, Wales, and Northern Ireland, mandate that surrogacy contracts must be altruistic; commercial surrogacy is prohibited. The child must be conceived using the gametes of the intended parents, and the surrogate must consent to relinquish the child after birth. Thus, while surrogacy itself is not illegal, the arrangement must be entered into without the intent of profit.²⁴

When comparing the surrogacy laws of Portugal, Ukraine, and the United Kingdom, there are both convergences and divergences. All three countries permit surrogacy under certain conditions but strongly regulate the practice to prevent commercialisation.

Both Portugal and the UK focus on non-commercial surrogacy, with the intended parents providing the genetic material. The UK mandates that surrogacy agreements be altruistic and not commercial, although surrogacy contracts are not enforceable in law.

Ukraine, on the other hand, was a more liberal surrogacy hub in Europe before the war, with fewer restrictions on international couples. However, like the other two, it requires genetic links between the child and at least one of the intending parents, aligning with Portugal and the UK.

The main discord arises in the commercial aspect, where Ukraine's approach was less restrictive than the other two. Moreover, the UK's legal framework must recognise surrogacy contracts as enforceable, which differs from the legal recognition and structured process in Ukraine and Portugal.

Venturing into Greece introduces another perspective on surrogacy within the Mediterranean context. Greek legislation carefully regulates surrogacy, ensuring a non-commercial, ethically grounded framework akin to the models in Portugal and the UK. The process is clearly defined for cases where a woman, due to medical reasons, cannot conceive and seeks the help of a surrogate following in vitro fertilisation. Greek law, specifically Article 13 of Law 3305/2005, mandates surrogacy agreements to exclude financial compensation beyond necessary pregnancy-related expenses. This law also imposes an age limit on surrogates and requires beneficiaries to be either heterosexual married couples or single parents, alongside residency requirements to minimise reproductive tourism. The entire procedure, from agreement to childbirth, emphasises altruism, with all legal and compensatory aspects subject to judicial oversight to ensure fairness and ethical compliance.

contractors. Contracts that were validly established were legal, and those that went against the will of the parties were illegal.

²⁴ OLAYE-FELIX, Bianca, ALLEN, Deborah Emma, METCALFE, Neil H, "Surrogacy and the law in the UK, *Postgraduate Medical Journal*, Volume 99, Issue 1170, April 2023, pp. 358–362, DOI: 10.1136/postgradmedj-2022-141625.

In Greece, surrogacy agreements must receive judicial approval, ensuring adherence to legal and ethical guidelines. This requirement is part of Greece's structured, non-commercial approach to surrogacy, aimed at protecting the rights and well-being of all parties involved, including the surrogate, the intended parents, and the child. This judicial oversight is crucial for maintaining the integrity of the surrogacy process and aligning with Greece's commitment to ethical reproductive practices.²⁵

In contrast to Greece's relatively restrictive approach to surrogacy, the Netherlands takes a more liberal stance on assisted reproductive technologies, including gestational surrogacy. While surrogacy itself is not explicitly regulated by Dutch law, the country's legal framework does provide guidelines and protections for parties involved in surrogacy arrangements.

In the Netherlands, surrogacy agreements are generally considered legal and enforceable, provided they comply with specific ethical and legal standards. However, unlike other countries, commercial surrogacy is prohibited in the Netherlands. Surrogacy arrangements must be non-commercial and altruistic in nature.

Surrogacy in the Netherlands operates within the broader context of Dutch family law, which prioritizes the child's best interests. Any surrogacy agreement must be approved by the Dutch courts to ensure that the rights and welfare of all parties involved, including the surrogate mother, intended parents, and child, are safeguarded.

The Netherlands also emphasises the importance of informed consent and psychological screening for all parties involved in a surrogacy arrangement. Additionally, Dutch law recognises the genetic connection between the intended parents and the child born through surrogacy, ensuring legal recognition of the parental rights of the intended parents.

Overall, while surrogacy in the Netherlands is subject to specific legal and ethical considerations, the country provides a supportive framework for individuals and couples seeking to build their families through surrogacy, emphasising the importance of transparency, consent, and the well-being of all involved parties.²⁶

In contrast to the Netherlands' regulated yet liberal approach to surrogacy, Russia has been known for its more permissive stance, allowing commercial surrogacy arrangements under certain conditions.

²⁵ LEON, Grigorios, PAPETTA, Angela, SPILIOPOULOU, Chara, "Overview of the Greek legislation regarding assisted reproduction and comparison with the EU legal framework", *Reproductive BioMedicine Online*, Volume 23, Issue 7, 2011, pp. 820-823, <https://doi.org/10.1016/j.rbmo.2011.07.024>.

²⁶ PETERS, Henrike E., SCHATS, Roel, e.a., "Gestational surrogacy: results of 10 years of experience in the Netherlands", *Reproductive BioMedicine Online*, Volume 37, Issue 6, 2018, pp. 725-731, <https://doi.org/10.1016/j.rbmo.2018.09.017>.

Russia has been a popular destination for individuals and couples from around the world seeking surrogacy services due to its relatively lax regulations and lower costs compared to some other countries. Commercial surrogacy, where the surrogate mother receives financial compensation beyond reimbursement for medical and pregnancy-related expenses, has been permitted in Russia.

Surrogacy in Russia is governed by the Family Code and other related legislation, which outlines the legal procedures and requirements for surrogacy agreements. These agreements typically involve detailed contracts specifying the rights and obligations of all parties involved, including the intended parents, surrogate mother, and any intermediary agencies facilitating the arrangement.

Surrogacy in Russia encompasses the gestation and birth of a child under an agreement between the surrogate and the intended parents whose germ cells were used for fertilisation or a single woman for whom pregnancy and childbirth are impossible due to health reasons, including the absence of the uterus, deformities of the uterine cavity or cervix due to congenital malformations or as a result of diseases, endometrial pathology, diseases included in the list of contraindications, repeated unsuccessful IVF attempts (three or more) with repeated receipt of high-quality embryos, whose transfer does not lead to pregnancy but rather to miscarriage (three or more miscarriages in the medical history).

Russian law also sets some requirements regarding the surrogate: she can be a woman between twenty and thirty-five years old, who has at least one healthy child, who has received a medical opinion on satisfactory health status, and who has declared her consent in writing for medical intervention. The law also states that if the potential surrogate is married, she can only accept the agreement with the written permission of her spouse. It is also noted that, as in Portuguese law, the surrogate cannot be an egg donor due to the surrogacy contract to be concluded.

However, it is essential to note that Russia's surrogacy laws have undergone changes and revisions over time, with some regions implementing stricter regulations or outright bans on specific aspects of surrogacy. Additionally, international surrogacy arrangements in Russia have faced increased scrutiny and legal challenges in recent years, leading some prospective parents to seek alternative options.

Overall, while Russia has historically been a popular destination for surrogacy due to its permissive regulations and lower costs, prospective parents should carefully consider the legal, ethical, and practical implications of pursuing surrogacy in the country,

particularly in light of evolving laws and potential risks associated with international surrogacy arrangements.²⁷

Transitioning from the diverse landscape of surrogacy regulations across Europe, let us now explore how the practice is approached in Brazil and the United States. While European countries like Portugal, Ukraine, the UK, Greece, Holland, and Russia each have their legal frameworks governing surrogacy, Brazil and the US offer unique perspectives and regulations on this complex issue. Let's examine how surrogacy is addressed in these two countries and compare it to the European context we've explored.

In Brazil, surrogacy is referred to as "temporary uterus donation." Surrogacy in Brazil is a complex and legally uncertain issue. Brazil lacks comprehensive federal legislation regulating surrogacy, leading to inconsistent rulings and legal interpretations across different states.

In general, traditional surrogacy (where the surrogate's eggs are used) is prohibited in Brazil due to concerns about genetic and parental rights. However, gestational surrogacy (where the surrogate carries an embryo not genetically related to her) is not explicitly banned but also lacks clear legal frameworks.

Some Brazilian courts have allowed gestational surrogacy in certain cases, typically involving individuals or couples who cannot conceive due to medical reasons. However, these rulings are often subject to appeal and may vary depending on the judge and jurisdiction.

Additionally, commercial surrogacy, where the surrogate receives financial compensation beyond reimbursement for medical expenses, is generally prohibited. The focus is on altruistic surrogacy arrangements where the surrogate volunteers to carry the child without financial gain.

Despite these legal ambiguities, there have been calls for comprehensive legislation to clarify the rights and responsibilities of all parties involved in surrogacy arrangements and to ensure the protection of the surrogate, intended parents, and children. However, as of my last update, there has been no significant progress toward enacting such legislation at the federal level²⁸.

The Brazilian Federal Council of Medicine has issued regulations regarding the use of assisted reproductive technologies for surrogacy arrangements, providing

²⁷ WEIS, Christina. *Surrogacy in Russia - An Ethnography of Reproductive Labour, Stratification and Migration*, Emerald, 2021, DOI: 10.1108/9781839828966.

²⁸ TORRES, Gloria, SHAPIRO, Anne & MACKEY, Tim K., "A review of surrogate motherhood regulation in South American countries: pointing to a need for an international legal framework." *BMC Pregnancy Childbirth* 19, 46 (2019). <https://doi.org/10.1186/s12884-019-2182-1>.

frameworks and guidelines for surrogacy arrangements in Brazil, aiming to ensure ethical practices and the protection of all parties involved.

Resolution 1992 regulated that assisted reproductive technologies could be used for surrogacy as long as specific legal requirements were met. These included ensuring that the temporary uterus donation was non-commercial and that the surrogate was a relative of the genetic donor up to the second degree of kinship, such as the mother, daughter, or grandmother of the unborn child. Other cases required authorisation from the Regional Medical Council^{29,30}.

Later, Resolution CFM No. 2,013/2013³¹ allowed surrogacy for same-sex couples, expanding the acceptable degree of kinship for surrogates to the fourth degree. This meant surrogates could be blood relatives like mothers, daughters, grandmothers, or aunts. Further cases required prior authorisation from the Regional Medical Council.

Currently, *uterus donation* remains altruistic, similar to Portugal's. Subsequent resolutions, such as Resolution CFM n. 1,957/2010, addressed post-mortem reproduction, allowing the use of preserved genetic material with specific prior authorisation.

Resolution CFM n. 2,121/15³² maintained previous provisions, while Resolution CFM No. 2,168/2017³³ allowed assisted reproductive techniques for heterosexual, same-sex, and transgender individuals. The resolution also permitted shared gestation in female same-sex unions without infertility, where one partner's egg is transferred to the other partner's uterus.

Exceptions require prior authorisation from the Federal Medical Council. The cessation of uterus donation must be based on a medical condition preventing or contraindicating pregnancy in the genetic donor, or must otherwise be justified by the intended parent(s) being same-sex unions or single individuals. Documents must be recorded in the patient's medical records, including informed consent, medical reports, and commitment statements.

²⁹ Resolução CFM [Conselho Federal de Medicina] n.º 2.121. 2015. *Imprensa Nacional*. [em linha]. Brasil, 20215. [consult. 29 Agos. 2023]. Disponível em <https://www.gov.br/impresanacional/pt-br>.

³⁰ XAVIER, João Proença. *Gestacion por substitución (en perspectiva comparada): Análisis comparativo en contexto iberoamericano Portugal Brasil y España*. Ratio Legis Libreria Jurídica. Salamanca (Espanha), 2019, pp. 28 a 32.

³¹ Resolução CFM [Conselho Federal de Medicina] n.º 2.013/2013. *Imprensa Nacional*. [em linha]. Brasil, 20215. [consult. 29 Agos. 2023]. Disponível em <https://www.gov.br/impresanacional/pt-br>

³² Resolução CFM [Conselho Federal de Medicina] n.º 2.121/15, [viewed 29 August 2023], <https://www.gov.br/impresanacional/pt-br>.

³³ Resolução CFM [Conselho Federal de Medicina] n.º 2.168/2017, [viewed 29 August 2023], <https://www.gov.br/impresanacional/pt-br>.

According to ethical standards, temporary uterus donation is only permitted for surrogates up to the age of fifty, although the responsible medical practitioner can make exceptions. In conclusion, surrogacy is legally used in Brazil as a solution for infertility, prioritising the health and safety of all contractual parties, similar to Portugal.³⁴

In the United States, surrogacy laws vary by state, with some states having specific statutes governing the practice while others rely on case law and precedent. Generally, surrogacy arrangements are permitted, but the legal landscape can be complex and subject to change.

However, it is in the USA that most surrogacy agreements are celebrated, more specifically, in California.

Besides California, states such as Illinois, Nevada, and Oregon are also known for their surrogacy-friendly laws, whether through homologous (the genetic material of the intended parents) or heterologous (genetic material of third parties) fertilisation.

In the United States, the legal framework of surrogacy agreements exhibits considerable variability across jurisdictions, necessitating a nuanced approach to their formulation and execution. The contractual arrangement typically involves the surrogate, potentially her spouse, and the intended parents, outlining the surrogate's relinquishment of all parental rights in favour of the intended parents. This legal construct is designed to facilitate the establishment of the intended parents as the legal guardians of the child conceived through assisted reproductive technology.

The post-birth legal process, integral to formally recognising the intended parents as the legal guardians, varies significantly by state. Some jurisdictions necessitate a court petition by the intended parents to establish legal parentage, culminating in issuing a revised birth certificate that identifies the intended parents as the legal guardians. The handling of the original birth certificate is subject to state-specific legal directives, with practices ranging from sealing to alternative processing methods.

The termination of surrogacy agreements before pregnancy or at designated stages after that is governed by the stipulations of the agreement and the prevailing legal framework of the relevant state. The agreement delineates the procedural requirements for termination, including the requisite notifications and legal filings. Notably, in instances where the surrogate has utilised her ovum for assisted conception, state laws may afford her the unilateral right to terminate the agreement, subject to certain conditions. This legislative provision aims to safeguard the surrogate's autonomy, ensuring her informed

³⁴ CABAR, Fabio Roberto, e.a., "Critical Analysis of The Changes in CFM Resolution 2294/21 And Its Impacts on Assisted Human Reproduction." *JBRA assisted reproduction*, Vol. 26,4 659-665. 9 Nov. 2022, doi:10.5935/1518-0557.20220007.

consent regarding the termination and absolving her of liability towards the intended parents.³⁵

In Canada, only altruistic surrogacy is legal. The Assisted Human Reproduction Act prohibits commercial surrogacy, meaning surrogates cannot be paid beyond reimbursement for approved expenses.

Quebec law renders all surrogacy contracts unenforceable.

Despite these restrictions, Canada is known for its supportive stance towards altruistic surrogacy, attracting individuals from countries where surrogacy is less accessible.³⁶

Iran and Israel represent contrasting approaches to surrogacy within the Middle East. Iran permits both altruistic and commercial surrogacy, making it a popular destination for those seeking surrogacy options in the region. This openness facilitates easier access for couples facing fertility challenges.³⁷ Israel, initially restricting surrogacy to heterosexual Israeli couples of the same religion, has progressively expanded its laws to include same-sex couples, transgender individuals, and single men, reflecting a move towards inclusivity. However, Israel's surrogacy arrangements require state approval, indicating a more regulated approach compared to Iran's broader accessibility.³⁸

India allows surrogacy, but it is strictly regulated under the Surrogacy (Regulation) Act, 2021. The law prohibits commercial surrogacy, permitting only altruistic surrogacy. This means surrogate mothers cannot receive any financial compensation for their role aside from insurance and medical coverage. The Act aims to protect women's reproductive rights and ensures that surrogacy is performed under ethical conditions.³⁹

The Assisted Reproductive Technology Act, of 2021, further broadens the eligibility for surrogacy to include all married couples, cohabitating partners, single women, and foreign nationals, subject to certain conditions. These conditions include verified infertility and the absence of other children, among others. Surrogate mothers must be between the ages of 25 and 35, married, have at least one child, and can only act as a surrogate once in their lifetime. They are also entitled to insurance coverage for 36 months post-delivery to cover any complications.

³⁵ FINKELSTEIN, Alex, e.a, Surrogacy Law and Policy in the US. Columbia Law School Sexuality and Gender Law Clinic, 2016.

³⁶ NELSON, Erin L. Gestational surrogacy in Canada. Handbook of Gestational Surrogacy, 2016, 123-30.

³⁷ PASHMI, Monir; TABATABAEI, Seyed Mohammad Sadegh; AHMADI, Seyed Ahmad. "Evaluating the experiences of surrogate and intended mothers in terms of surrogacy in Isfahan", *Iranian Journal of Reproductive Medicine* Vol.8. No.1. pp: 33-40, Winter 2010.

³⁸ SCHUZ, Rhona. Surrogacy in Israel: an analysis of the law in practice. *Surrogate motherhood: international perspectives*. Portland: Oxford, 2003, 35-54.

³⁹ KUMAR, Pawan, e.a.. Surrogacy and women's right to health in India: Issues and perspective. *Indian journal of public health*, 2013, 57.2: 65-70.

The legislation enforces strict guidelines and conditions for both the intending parents and the surrogate mother, ensuring the process is ethical, respectful, and protective of all parties involved, especially the surrogate mother and the child. The focus is on altruistic surrogacy to prevent commercial exploitation and ensure that surrogacy upholds high ethical standards.

In Thailand, surrogacy is heavily regulated under the Protection for Children Born through Assisted Reproductive Technologies Act, enacted in 2015. Commercial surrogacy, where the surrogate receives compensation beyond reimbursement for medical expenses, is illegal for all individuals, including Thai citizens and foreigners.

Surrogacy is only permissible for married heterosexual Thai couples under strict conditions. At least one spouse must be a Thai citizen, the couple must have been married for at least three years, and the surrogate must be a sibling of one of the spouses. Moreover, the surrogate must be married, have her husband's consent, have previously given birth, and cannot use her eggs for the surrogacy procedure.

There are discussions and efforts to revise the surrogacy laws to allow foreigners to hire Thai surrogates under a regulated system to ensure the children are not trafficked, and to bolster Thailand's position as a medical hub.⁴⁰

Finally, in Australia, surrogacy laws vary by state, but all jurisdictions permit altruistic surrogacy while commercial surrogacy is a criminal offence. Specific laws in some regions, such as New South Wales, Queensland, and the Australian Capital Territory, also criminalise entering into international commercial surrogacy arrangements, with penalties including imprisonment. The legal framework emphasises the need for altruistic intentions behind surrogacy agreements, with the surrogate mother receiving no financial gain beyond reimbursement for medical and associated expenses.⁴¹

Conclusion

Portugal is at a pivotal point as it shapes its surrogacy legislation, informed by the global tapestry of laws. Nations such as the United States, Ukraine, and Russia allow for compensated surrogacy. In contrast, others, including Portugal and Greece, only permit it to overcome fertility challenges, emphasising medical necessity over commercial incentives.

⁴⁰ ATTAWET, Jutharat. Reconsidering surrogacy legislation in Thailand. *Medico-Legal Journal*, 2022, 90.1: 45-48.

⁴¹ MILLBANK, Jenni. The new surrogacy parentage laws in Australia: cautious regulation or '25 brick walls'?. *Melbourne University Law Review*, 2011, 35.1: 165-207.

Intricate conditions like nationality and religious criteria in countries like Israel and India serve not only to preserve cultural and ethical norms but also to mitigate reproductive tourism.⁴² These restrictions are crucial in maintaining surrogacy within ethical boundaries, ensuring the welfare of surrogates and children, and preventing the potential for exploitation.

The lessons from these international experiences enrich Portugal's legislative journey, underscoring the need to balance reproductive aspirations with protecting individuals' rights. Integrating psychological perspectives is crucial, acknowledging the profound emotional experiences of surrogates and intended parents alike.

As Portugal forges ahead, it must address the vulnerabilities inherent in surrogacy, navigate non-commercial agreements, and establish robust legal frameworks. The aim is to foster an environment where reproductive autonomy is respected while upholding the dignity and rights of all parties in surrogacy arrangements.

The synthesis of global legal practices, psychological insights, and ethical considerations will be paramount in crafting legislation that reflects compassion, integrity, and a commitment to the collective well-being of all individuals involved in surrogacy.

References

ATTAWET, Jutharat. Reconsidering surrogacy legislation in Thailand. *Medico-Legal Journal*, 2022, 90.1: 45-48.

BLAKE, Lucy, *et al.* "Gay fathers' motivations for and feelings about surrogacy as a path to parenthood", *Human Reproduction*, 2017, 32.4: 860-867, <https://doi.org/10.1093/humrep/dex026>.

BLYTH, Eric. "I wanted to be interesting. I wanted to be able to say, 'I've done something interesting with my life'" Interviews with surrogate mothers in Britain, *Journal of reproductive and infant psychology*, 1994, 12.3: 189-198. <https://doi.org/10.1080/02646839408408885>.

BRANDÃO, Pedro, GARRIDO, Nicolás. Commercial Surrogacy: An Overview - Gestação de substituição comercial: Uma visão global, *Revista brasileira de ginecologia e obstetrícia: Revista da Federação Brasileira das Sociedades de Ginecologia e Obstetrícia*, vol. 44,12 (2022): 1141-1158. doi:10.1055/s-0042-1759774.

BRAGA, Maria de Fátima Gonçalves. A Procriação Medicamente Assistida e os princípios constitucionais da igualdade e não discriminação, *Revista Jurídica Portucalense*, n.º Especial Mecanismos de Proteção Jurídica no Direito Civil., 2023, pp. 57-74, [https://doi.org/10.34625/issn.2183-2705\(ne\)2023.ic-04](https://doi.org/10.34625/issn.2183-2705(ne)2023.ic-04)

⁴² PIERSANTI, Valeria, e.a.. Surrogacy and "procreative tourism". What does the future hold from the ethical and legal perspectives?, *Medicina*, 2021, 57.1: 47. <https://doi.org/10.3390/medicina57010047>.

CABAR, Fabio Roberto, e.a., Critical Analysis of The Changes in CFM Resolution 2294/21 And Its Impacts on Assisted Human Reproduction, *JBRA assisted reproduction*, Vol. 26,4 659-665. 9 Nov. 2022, doi:10.5935/1518-0557.20220007

FINKELSTEIN, Alex, e.a, Surrogacy Law and Policy in the US. Columbia Law School Sexuality and Gender Law Clinic, 2016.

GUIMARÃES, Maria Raquel, "Subitamente, no verão passado: A contratualização da gestação humana e os problemas relativos ao consentimento, *Debatendo a procriação medicamente assistida*, Porto, FDUP, 16, 17/03/2017, p. 114.

JADVA, Vasanti, et al., Surrogacy: the experiences of surrogate mothers, *Human Reproduction*, 2003, 18.10: 2196-2204. <https://doi.org/10.1093/humrep/deg397>

KUMAR, Pawan, et al. Surrogacy and women's right to health in India: Issues and perspective. *Indian journal of public health*, 2013, 57.2: 65-70.

MILLBANK, Jenni. The new surrogacy parentage laws in Australia: cautious regulation or '25 brick walls'?. *Melbourne University Law Review*, 2011, 35.1: 165-207.

NELSON, Erin L. Gestational surrogacy in Canada. *Handbook of Gestational Surrogacy*, 2016, 123-30.

OLAYE-FELIX, Bianca, ALLEN, Deborah Emma, METCALFE, Neil H, Surrogacy and the law in the UK, *Postgraduate Medical Journal*, Volume 99, Issue 1170, April 2023, pp. 358–362, DOI: 10.1136/postgradmedj-2022-141625.

PASHMI, Monir; TABATABAEI, Seyed Mohammad Sadegh; AHMADI, Seyed Ahmad. "Evaluating the experiences of surrogate and intended mothers in terms of surrogacy in Isfahan", *Iranian Journal of Reproductive Medicine Vol.8. No.1. Winter 2010*, pp: 33-40.

PETERS, Henrike E., SCHATS, Roel, e.a., Gestational surrogacy: results of 10 years of experience in the Netherlands, *Reproductive BioMedicine Online*, Volume 37, Issue 6, 2018, pp. 725-731, <https://doi.org/10.1016/j.rbmo.2018.09.017>.

PIERSANTI, Valeria, et al. Surrogacy and "procreative tourism". What does the future hold from the ethical and legal perspectives? *Medicina*, 2021, 57.1: 47. <https://doi.org/10.3390/medicina57010047>.

SCHUZ, Rhona. Surrogacy in Israel: an analysis of the law in practice. *Surrogate motherhood: international perspectives*. Portland: Oxford, 2003, 35-54.

TANDERUP, Malene, PANDE Amrita, e.a., Impact of the war in Ukraine and the COVID-19 pandemic on transnational surrogacy – a qualitative study of Danish infertile couples' experiences of being in 'exile', *Reproductive BioMedicine Online*, Volume 47, Issue 4, 2023, <https://doi.org/10.1016/j.rbmo.2023.06.013>.

TORRES, Gloria, SHAPIRO, Anne & MACKEY, Tim K., "A review of surrogate motherhood regulation in South American countries: pointing to a need for an international legal framework, *BMC Pregnancy Childbirth* 19, 46 (2019). <https://doi.org/10.1186/s12884-019-2182-1>.

VAN DEN AKKER, Olga. Genetic and gestational surrogate mothers' experience of surrogacy, *Journal of reproductive and infant psychology*, 2003, 21.2: 145-161. <https://doi.org/10.1080/0264683031000124091>.

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CAMPOS, Rita ARAÚJO, Shital JAYANTITAL

WEIS, Christina. Surrogacy in Russia - An Ethnography of Reproductive Labour, Stratification and Migration, Emerald, 2021, DOI: 10.1108/9781839828966

XAVIER, João Proença. *Gestacion por substitución (en perspectiva comparada): Análisis comparativo en contexto iberoamericano Portugal Brasil y España*. Ratio Legis Libreria Jurídica. Salamanca (Espanha), 2019, pp. 28 a 32.

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