



Research Article

A CRITICAL STUDY ON SURROGACY IN INDIA

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ARTICLE INFO

Article History:

Received 06th June, 2019

Received in revised form 14th July, 2019

Accepted 23rd August, 2019

Published online 28th September, 2019

Key words:

Surrogacy, India, Bill (2016), legal issues, commercial surrogacy.

ABSTRACT

Surrogacy in India is becoming the concern issue these days because in India surrogacy plays an important role for those who does not have the capacity to have her own child. Now a days India becomes the best place known for the surrogacy because of so many reasons and one reason behind this is the legality of surrogacy in the country. In this article we are going to see if surrogacy is properly guided under the law. This article also discuss the Indian Surrogacy (Regulation) Bill,2016, it's effects on Indian Surrogacy. The paper covers the legal and also the ethical issues in surrogacy practice in India comparison with other countries.

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INTRODUCTION

The Mother Nature has vested the beautiful capacity to create a life within a women. Yet unfortunately because of some physiological conditions some women cannot give birth to their own child. The desire for motherhood leads them to search for an alternate option and surrogacy itself presents a viable solution for it. Surrogate mother is a woman who carries a child usually for an infertile couple. Surrogacy refers to a contract in which a woman carries a pregnancy “for” another couple. Number of infertile couples from all over the World approach India where commercial surrogacy is legal. Although this agreement seems to be benefiting for all parties concerned in it, there are certain complex issues which need to be addressed through carefully framed laws in order to protect the rights of the surrogate mother and the intended parents. Surrogacy is classified into commercial or altruistic surrogacy, it is depending on whether the surrogate receives financial reward for her pregnancy or the relinquishment of the child, or not.(Law report)The first official legal surrogacy agreement was enacted in the mid-1970's with the child who was referred to as Baby M. Surrogacy has become a more popular process and procedure some women than it was just a few decades ago. Here we only look at the surrogacy in India. How does it works in India. Firstly the legality of surrogacy in India. The legal aspects surrounding surrogacy are, complex, diverse and mostly unsettled. The aim of the study is to analyse the ethical and legal aspects of surrogacy in India.

Objective

- To Study the India’s stand in international Surrogacy.
- To study about the ethical issues pertinent in the commercial surrogacy process
- To study about the effects of implementation of The Surrogacy (Regulation) Bill 2016.

Hypothesis

The following hypothesis studied in this research paper,

- The Surrogacy Bill 2016 is not effective in regulating the surrogacy process in the country.

MATERIALS AND METHOD

The study was done in the form of a doctrinal research, where the problem/question is systematised, rectified and clarified by sources from authoritative texts. The study took a qualitative research approach. The information, primary and secondary are gathered from journals, articles, research Papers, study articles, survey results and newspapers. They are analysed, interpreted and presented in narrative form.

REVIEW OF LITERATURE

Tashi Var (2016) claims that India has been a favourite country for those wishing for a surrogate child. Olinda times (2018) points out that infertility clinics flourished in the 1990s riding the wave of a global demand for IVF and surrogacy. Yet Neha Baht (2014) argues that it is inconsistent with human dignity as woman use her uterus for financial profit and treats her womb as an incubator for someone else child and R.M Kaur (2016) adds that commercialisation of surrogacy has raised fears of a black markets and baby selling and breeding

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forms. Therefore there is a need to focus on legalising commercial surrogacy and at the same time permitting altruistic one, Neha Baht (2013). Hariharam (2014) in his article points out that although the ICMR guidelines do exist there is no Central and State Body do you ensure that the regulations all following strictly when it comes to surrogacy. IANS (2018) his review on Surrogacy(Regulation) Bill 2016 points out that the proposed legislation ensures effective regulation of surrogacy, it controlled unethical practices in surrogacy and prevent the commercialisation of surrogacy, yet, he also points in other article that Surrogacy (Regulation) Bill 2016 was okay if it garenteed equality between the clients and the surrogate mother.

Content

Ethical debates

Surrogacy has proved to be a boon for infertile couples. At the same time the increasing use of this technology has also led to various controversies and conflicting legal issues. These conflicts have at times erupted into a fierce debate over the legality of surrogacy. A discussion on this debate is necessary in order to understand the arguments underlying surrogacy. Further, since the controversy surrounding surrogacy, has been brought to limelight by the leading surrogacy cases all over the world as well as arguments made by legal scholars and commentators, such a discussion is important in determining how surrogacy should be dealt with by the legal systems in different countries in future⁸⁹. Most of the criticisms against surrogacy are based on various ethical, moral, religious and legal grounds. Admittedly, the influence of ethics, morality and religious practices cannot be ruled out in a legal discussion, as the ethics and morality have played an important role in shaping the societies attitude towards legal issues as well as the foundation of most of the legal systems of the world.

The moral, ethical and religious objections to surrogacy are based on the premise that life is a creation of God and human beings should not attempt to play God by interfering in the natural processes. Another serious objection in this regard is the fact that surrogacy procedure involves repeated trials which use either male or female genetic material or the human embryo. The wastage of human embryo is criticized as similar to murder, because according to some scholars human life begins at fertilization.

The major legal objection to surrogacy strikes at the very root of the procedure of surrogacy which is due to the need and requirement of a woman to act as a surrogate. Various scholars have criticized surrogate motherhood, as it presents intolerable risks to women, including physical risks, psychological risks, and symbolic risks such as objectification and commodification. Carl Schneider points out that-some surrogate mothers will become sick or even die. Some commentators assert that the chances that the surrogate will be psychologically harmed by the process are very high, analogizing it to the psychological harms felt by birth mothers giving children up for adoption. Some surrogates do regret their decision to bear a child for another couple, as is evidenced by their decision to try to keep the child ⁹¹.

Further many critics of surrogacy have focused on the notion that these arrangements reduce women to the value of their wombs. Such a warning was given by both the Royal

Commission and the Quebec Council for the Status of Women in Canada, which suggested that reproductive technologies risk fragmenting the reproductive process and alienating women from their own reproductive capacities⁹². This is because the procedure of surrogacy separates motherhood as gestational, genetic and intended motherhood. Moreover, once a woman has agreed to be a surrogate mother, she has to follow all the terms and conditions of the contract during the entire process and more importantly she has to relinquish all her rights over the child after its birth. It is claimed that the entire process of reproduction is an inherent part of a women's existence and that transferring a child to someone else upon its birth is unnatural and psychologically damaging.

In spite of all the arguments and criticisms against surrogacy, it cannot be denied that it offers a ray of hope to such individuals who have exhausted all possible means of begetting a child. Thus surrogacy can be considered as one of the best available means for alleviating both medical and social infertility, thereby meeting the needs of individuals who wish to have a biological child.

India – A Reproductive Tourism Destination

Commercial surrogacy has been legal in India since 2002, In commercial surrogacy agreements, the surrogate mother enters into an agreement with the commissioning couple or a single parent to bear the burden of pregnancy. In return of her agreeing to carry the term of the pregnancy, she is paid by the commissioning agent for that. The usual fee in India is around is around 1/3rd of that which is bought in developed countries like the USA. This has made India a favourable destination for foreign couples who look for a cost-effective treatment for infertility and a whole branch of medical tourism has flourished on the surrogate practice. A small town in Gujarat, has acquired a high reputation as a place for outsourcing commercial surrogacy. It looks like that wombs in India are for rent which translates into dollars for Indian surrogate mothers and into babies for foreigners. In *Baby Manji vs Union of India*, a Japanese couple payed for a surrogate mother but they ended in a divorce. The single male parent wasn't granted custody of the child and the mother refused to accept it. Japan has then given the child a humanitarian visa and it allowed the child to. Be taken care by its grandmother on behalf of her son, given his genetic relation with the baby. The Supreme Court of India however, during the case, recognised that the parent of a surrogate child can be a male and also the SC recognised surrogacy as a positive practice.

There are various reasons as to why India is the best destination for surrogacy. The important ones are, Surrogacy treatment is economical in India and it is best of IVF doner. Indian surrogates are popular for their fertile capability. Indian clinics have sometimes becomes more competitive, in pricing and also in the hiring and retention of Indian females as surrogates. Surrogacy in India is comparatively available at a low cost and the legal system is also favorable than other countries. In 2008 the Indian Supreme Court decided that commercial surrogacy is permitted. It also provided direction to the Legislature to pass the appropriate laws governing surrogacy in the country. Giving due regard to the directions of the Supreme Court, the ART BILL, 2008 has been enacted by the legislative. The law commission of India has then reviewed the Surrogacy Law keeping in mind that India is an International Surrogacy destination. The International

Surrogacy is faced with bilateral issues. The rules and laws of both the nations of the parties have to be at accordance, or else the interests of parties involved will remain unresolved. In order to prevent the commercialization of the Human Reproductive system, commoditization of Children and the exploitation of women, the law commission has submitted its report with the relevant suggestion: The Law Commission of India on has submitted the 228th Report on "Need For Legislation To Regulate Assisted Reproductive Technology Clinics As Well As Rights And Obligations Of Parties To A Surrogacy" on August 2009. Accordingly The Surrogacy (Regulation) Bill, 2016 was passed.

Significance of the bill

The Surrogacy (Regulation) Bill, 2016 was introduced in Lok Sabha in November 2016. The provisions of the new Bill impose a complete ban on commercial surrogacy primarily to check the exploitation of poor women, while at the same time regulating altruistic surrogacy in the country. The Surrogacy (Regulation) Bill, 2016 proposes to regulate surrogacy in India by establishing National Surrogacy Board at Central level, State Surrogacy Boards and Appropriate Authorities in States and Union Territories. The proposed legislation ensures effective regulation of surrogacy, prohibit commercial surrogacy and allow ethical surrogacy to the needy infertile Indian couples.

The major objectives of the Bill are to regulate surrogacy services in the country, to provide objectives of the Bill are to regulate surrogacy services within the country, to supply altruistic moral surrogacy to the destitute infertile Indian couples, to ban commercial surrogacy together with sale and purchase of human embryo and gametes, to stop exploitation of surrogacy, to ban potential exploitation of surrogate mothers and shield the rights of kids born through surrogacy.

According to the bill it allows altruistic moral surrogacy to intending infertile couple between the age of 23- 50 years and 26-55 years for female and male severally, they must lawfully married for a minimum of 5 years and should be Indian citizens, they should not had any living child biologically or through adoption or through surrogacy earlier shall not abandon the child or born out of a surrogacy procedure beneath any condition. The bill also states that kid born through surrogacy can have a similar rights as are offered for the Biological child. The surrogate mother ought to be a close relative of the intending couple and may be between the age of 25-35 years and will be able to act as mother just one occasion. The order regarding the parentage and custody of the kid to turn through surrogacy, is to be elapsed a court of the judge of the first category. It also states that a coverage of affordable and adequate quantity shall be ensured in favour of the mother. National Surrogacy Board shall exercise the powers and shall perform functions bestowed on the Board beneath this Act. The Board shall comprises the Minister in-charge of the Ministry of Health and Family Welfare, as the chair, Secretary to the govt. of Asian nation in- charge of the Department addressing the surrogacy matter, as Vice-Chairperson and 3 women Members of Parliament. The National Surrogacy board and State Surrogacy board shall be the politics bodies and acceptable Authority are going to be the Implementation body for the Act.

Constitutional Invalidness of the Projected Law

The projected law infringes Article fourteen of the Indian Constitution, "equality before the law and equal protection of laws to all persons." limiting altruistic surrogacy to exclusively married Indian couples and disabling others on the grounds of position, status, associate degreed gender impinges upon the right to equality for being an unreasonable classification. on condition that the Bill is meant by a necessity to safeguard women from exploitation and stop commodification of the birth method, the restriction in addition fails in touch any nexus with the supposed objectives of the legislation. The Bill violates the "right of livelihood" and "right to reproductive autonomy" enshrined below the broad framework of Article twenty one of the Constitution. The ban on commercial surrogacy threatens the living of the various poor women at intervals the country World Health Organization are able to educate their kids, establish businesses, and financially support their families through surrogacy. the number of such women, many of whom are sole breadwinners, is calculable to be quite 100,000. The projected law is foul of Article nineteen usually, and Article 19(1)(g) specifically, that guarantees the "freedom of trade and profession" in Asian nation. The surrogacy business is that the availability of bread and howeverter for not exclusively the surrogate mothers but in addition the varied surrogacy clinics at intervals the country. A blanket ban on business surrogacy can't be while an affordable restriction as a results of it jeopardizes the interests of multiple stakeholders throughout this multi- billion-dollar business.

Infringement of international covenants and obligations

The Surrogacy Bill in addition contravenes several safeguards to human life, health" and dignity enshrined within the numerous international covenants legal by India. By intrusive with the procreative rights of the individual, the projected law infringes upon the "right to found a family" enshrined in Article sixteen of the Universal Declaration of Human Rights. an additional challenge to the Bill in addition arises from Article 16(1)(e) of the Convention on the Elimination of every kind of Discrimination against women, that desires state parties to create certain equality of rights for men and women "to decide freely and responsibly on the number and spacing of their kids."

The UN Special official on the right to Health has in addition highlighted the importance of freedoms and entitlements concerning generative, maternal, and sexual right, along side the correct to coming up with services for the attainment of the simplest potential customary of physical and status. The Bill further violates the state's core obligation to create certain equal treatment and non- discrimination in access to generative health service by limiting the access to altruistic surrogacy. Completely banning commercial surrogacy by the government will not work as it will:

1. Remove a stable income source for women who are engaged in commercial surrogacy.
2. Not reward the laborious process of reproduction.
3. Engage in and lead to the paternalistic thinking that almost all women do not know what is right for them.
4. Create a black for commercial surrogacy, much like the one for human organs.
5. Drive women who want to be surrogates towards crimes such as prostitution or theft.

6. Go against the right to personal liberty as well as the right to make reproductive choices.

In its present type the Surrogacy (Regulation) Bill 2016 seeks to attain the dual goals of: (1) preventing the exploitation of poor women; and (2) preventing the equation of the surrogacy method with transaction a womb. whereas the legislators' intentions are well placed, their provisions aren't. Yes, the State should intervene to ascertain the exploitation of poor Indian woman who are coerced into surrogacy, however it mustn't be drained a way that is unfriendly to other people who are well inside their legal and human rights to avail surrogacy services.

CONCLUSION

Banning of commercial surrogacy is based on preventing the exploitation of women. It's a good motive – however, a lot of activities can be exploited even if they are heavily regulated. Still, the fear that it can be abused should not deter the government from regulating it. They should also ensure that the women who genuinely help couples while also struggling for a livelihood are compensated fairly. It should also be evaluated if they are using that money for good, perhaps, to start better lives. The government should start by examining the basic premise of the Bill, and remove the ban on commercial surrogacy. Instead, it should regulate it (as the title of the Bill mentions) and also compensate surrogate mothers. It must also issue clarifications on time frames and insert unambiguous provisions so that no flimsy interpretation or loophole can be used.

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How to cite this article:

Bhuvaneshwari S (2019) 'A Critical Study on Surrogacy in India', *International Journal of Current Advanced Research*, 08(09), pp. 19805-19808. DOI: <http://dx.doi.org/10.24327/ijcar.2019.3847.19808>
