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Volume: 4, Issue 3, 2017 (July-Sept)

INTERNATIONAL JOURNAL OF LAW, EDUCATION, SOCIAL AND SPORTS STUDIES (IJLESS)

<http://www.ijless.kypublications.com/>

ISSN:2455-0418 (Print), 2394-9724 (online)

2013©KY PUBLICATIONS, INDIA

www.kypublications.com

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A CRITICAL EVALUATION ON LAW OF SURROGACY IN INDIA

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ABSTRACT

Now-a-days many women are found who suffer from the problem of infertility. Over a couple of centuries the desire to beget a child for an infertile couple was being satisfied by adoption. But modern sciences has provided new opportunities or options we can say to overcome adoption, i.e. surrogacy which has resulted as a benefit for those childless couples who want their own child.

Towards regulating the activities in the aspect of surrogacy the Union Government of India passed two Bills i.e. The Assisted Reproductive Technology (Regulation) Bill, 2010 and The surrogacy (Regulation) Bill, 2016, with stringent provisions for the protection of surrogate mother and to regulate law in the aspect of surrogacy.

Even it is stringent in nature, there are many lacuna's which requires rectification and concentration for the protection of surrogate mother and also child. The poor and needy woman, because of surrogacy meets the financial difficulties. But where there is ban on this the woman who is financially struggle may opt the prostitution and some of them became the anti social elements.

Considering the above it is need to enact appropriate legislations in the aspect of surrogacy.

INTRODUCTION

There are worldwide changes happening on earth due to climatic variations, global warming and stuff alike, it has taken a charge on human body. Now-a-days many women are found who suffer from the problem of infertility. Over a couple of centuries the desire to beget a child for an infertile couple was being satisfied by adoption. But modern sciences has provided new opportunities or options we can say to overcome adoption, i.e. surrogacy which has resulted as a benefit for those childless couples who want their own child. Surrogacy is a practice whereby a woman agrees to become pregnant by implanted embryo or medically inseminated sperm and bear a child for another person or persons, to whom she intends to transfer the child's care at, or shortly after, birth and in return receives the compensation for carrying and delivering the child.

At present we witness the development of science and technology, which leads to scientific advancement in all aspects including to fulfill the desire of women or men to have children. Medicine, particularly in the area of reproduction has in fact replaced a phenomenal revolution. It

started with the development of contraceptives that separated reproduction from sexual intercourse without having to be overly concerned with the possibility of causing pregnancy¹.

In recent era, this revolution has involved the development of reproducing technologies that allow reproduction without the usual traditional intercourse between partners. These medical and scientific advances considers as Artificial Reproductive Technology. But as ours is democratic country prevailing different religious laws in and around India, it is problematic situation to accept surrogacy. The success of these technologies has today brought huge controversial legal questions to which answers are not readily available. This is the time to enact the appropriate legislations to resolve the questions arise in case of surrogacy in India. An important factor behind the increased interest in Artificial Reproductive Technology is the decreasing availability of children for adoption and the urge of a human being to have their own genetically linked child.

The world's second and India's first IVF (in vitro fertilization) baby, Kanupriaya alias Durga was born in Kolkata on October 3, 1978 about two months after the world's first IVF boy, Louise Joy Brown born in Great Britain on July 25, 1978. Since then Artificial Reproductive Technology has developed rapidly².

A woman is respected as a wife only if she is mother of a child, so that her husband's masculinity and sexual potency is proved and the lineage continues. Some authors put it as follows: "The parents construct the child biologically, while the child constructs the parents socially". The problem however arises when the parents are unable to construct the child through conventional biological means. Herein surrogacy comes as a supreme savior.

TYPES OF SURROGACY

There are two main types of surrogacy, gestational surrogacy and traditional surrogacy.

- **TRADITIONAL SURROGACY:** In traditional surrogacy, the surrogate mother is impregnated naturally or artificially, but the resulting child is genetically related to the surrogate mother. A traditional surrogate is the baby's biological mother since the child was conceived from the union of her egg and the father's sperm.
- **GESTATIONAL SURROGACY:** In gestational surrogacy, the pregnancy results from the transfer of an embryo created by in-vitro fertilization (IVF), in a manner so the resulting child is genetically unrelated to the surrogate. Gestational surrogate mothers are also referred to as gestational carriers.

Additionally there are 2 types of surrogacy arrangements:

- **ALTRUISTIC SURROGACY:** In this type of surrogacy, the surrogate mother is not paid for her 'service'. She 'offers her womb' as an act of 'altruism'. Often there will be a pre-established bond between the surrogate mother and the expecting couple. Typically the surrogate mother is a friend or a relative.
- **COMMERCIAL SURROGACY:** In commercial surrogacy the surrogate mother receives compensation for carrying the child. Often there will be a mediating party, a surrogacy agency that deals with all the practical arrangements for the commissioning couple: finding a suitable surrogate mother and dealing with all the paperwork etc.
- **LEGAL INFERENCE:** India in the year 2002 opened commercial surrogacy. It leads to women can be paid to carry another's genetic child through a process of in-vitro fertilization (IVF) and embryo transfer³. The low-cost technology, skilled doctors, limited bureaucracy involvement and plentiful supply of surrogates have made India a preferred destination for fertility of tourism, attracting nationals from Britain, the United States, Australia and Japan, to name a few. There are

¹ R. Black and J.C. Merrick, *Human Reproduction Emerging Technologies* 85 (1995)

² Law Commission of India Report No. 228 Para 2 see at www.lawcommissionofindia.nic.in

³ Dr. Nayna Patel has delivered some 500 surrogate babies since 2004; she is one of the pioneers in surrogacy in India, having her clinic, Akanksha at Anand, Gujrat.

no official figures on how large the fertility industry is in India. A United Nations backed study in July 2012 estimated the surrogacy business at more than 400 million dollars in a year, with over 3,000 fertility clinics across India⁴. People travel to India to commission a baby and doctors become brokers in surrogacy arrangements. Is renting a womb different from selling an organ? It leads to Draft A.R.T. (Regulation) Bill, 2010. In reality the draft Bill promotes the interest of providers rather than women who undergo these procedures and actively promotes reproductive tourism in India.

As in the absence of regulation, they say many poor and uneducated women are lured by agents, hired by clinics, into signing contracts they do not fully understand. A recent government funded study of 100 surrogate mothers in Delhi and Mumbai found there was “no fixed rule” related to compensation and no insurance for post-delivery health care. “In most of these cases, the surrogate mothers are being exploited” said Ranjana Kumari, director of the centre for Social Research that conducted the study. She explained further that, ‘moves to introduce a law the Assisted Reproductive Technologies Bill to protect surrogates, the children and the commissioning parents is long overdue’.

There are many legal hurdles in the aspect of law of surrogacy. One may like to use possible technology to get a child, one may earn money by providing services or one may decide characteristics of their child. One may look at the surrogacy as one of the dimension of freedom. However while considering the said facts, must take into account, interest of child, women’s health and dignity. Surrogacy can be misused, overused or abused; the law has to balance between these conflicting and competing interests.

ISSUES RELATING TO SURROGACY⁵:

- **POOR REMUNERATION:** Woman, who is carrying a baby, generally gets very less remuneration and large share is taken by ART clinics.
- **GENDER SELECTION:** Surrogacy is generally involves gender selection which itself illegal in India. If it is a girl child then in many cases surrogate mother either left with baby or get poor remuneration as compared to previously decided. Many ART clinics on the name of surrogacy illegally running sex determination and abortion industry.
- **LEGAL LOOPHOLES:** The surrogacy is governed by guidelines of Indian Council of Medical Research (ICMR) and by judgments of High or Supreme Court. As no law is in place, surrogate mothers can’t claim their rights from courts or other authority and suffer due to this.
- **DATABASE:** However, surrogacy has a legal status in India since a decade and we have guidelines for the same but till now there is no central database for ART clinics, surrogate mothers or other related matters of surrogacy.
- **WOMAN HEALTH:** The women health is a serious issue in surrogacy. In India, health got little importance as ART clinics generally ignores regular medical checkup, no proper food, no special hostels for pregnancy time or generally had very poor conditions staying home to live in.
- **RISK TO BABY HEALTH:** The surrogacy involves many risks to baby health such as genetic disorders, low birth weight or membrane damage, etc. as many survey studies reported. Further in case of defected or disabled baby, baby has been generally left with surrogate mother or in an orphanage and an innocent baby has to suffer for whole the life for a crime did by his/her intended parents.
- **CHILD TRAFFICKING:** The legal status of surrogacy in India helps in growing child trafficking industry.

⁴ Nita Bhalla and Mansi Thapliyal, “India seeks to regulate its booming ‘rent-a-womb’ industry” Mon Sep 30, 2013.

⁵ <https://iaspoint.gktoday.in/current/various-issues-around-surrogacy-in-india>

- **ETHICAL ISSUE:** Surrogacy leads to commoditization of the child, breaks the bond between the mother and the child, interferes with nature and leads to exploitation of poor women in developing countries.
- **ADOPTION:** Many argue that adopting orphan child should be given preference than allowing commercial surrogacy.

LEGISLATIVE INITIATIVES IN RESPECT TO A.R.T

The Law Commission of India's Report No.228 on Need for Legislation to regulate Assisted Reproduction Technology Clinics as well as rights and obligation of parties to a Surrogacy has stressed upon the need to have proper legislation.

The following are the problems in case of A.R.T. recognized by Law Commission and the government of India through its 'Assisted Reproductive Technology (Regulation) Bill, 2010' tries to reduce the problems.

1. The legal status of children born;
2. The rights of donors;
3. The rights and obligations of the social father;
4. The physicians responsibility with regard to selection of the donor, limitation of the use of donor and liability to donor, recipients and any resulting child;
5. The licensing of sperm banks, centers and physicians;
6. The keeping of records.

The Assisted Reproductive Technology (Regulation) Bill, 2010 suggests certain solutions for the problems faced in the aspect of surrogacy, they are not exhaustive and not remedial. To rectify the lacunas in this Bill, the new Bill introduced under the name of '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 surrogacy (Regulation) Bill, 2016 is considered as an important step towards the regulation of surrogacy practices in India. The Bill focuses on preventing commercial surrogacy, exploitation of surrogate mothers and child born through surrogacy. It also provides a detailed regulatory framework for surrogacy clinics. However this Bill raises several question and concerns.

1. **PROHIBITION ON COMMERCIAL SURROGACY:** The ban on commercial surrogacy is only due to the fact that there is a chance of exploitation of surrogate mother. Women exploited not only in the aspect of surrogacy but also exploited in many ways in India. The solution is not to prohibit commercial surrogacy, but to make strong regulation in this aspect. Therefore, the ban on commercial surrogacy on the ground of exploitation is irrational and is a direct encroachment of the couples right. Further ban on commercial surrogacy will adversely affect the interests of prospective surrogate mothers. Most of the woman who agrees to act as a surrogate is due to their financial necessity. The proposed ban on commercial surrogacy will prevent those women from acting as a surrogate and thereby obtain the required money. It may force such women to do other illegal acts such as prostitution or theft for finding the money.
2. **CONTROL ON INTERNATIONAL SURROGACY:** Concept of surrogacy confined to Indian citizens and not to allow the foreigners to beget a child through the method of surrogacy with Indian surrogate mother leads to reduce the international relations.
3. **CLOSE RELATIVE:** This word not defined properly in the Bill. If close relatives are not willing, then the needy couple suffers loss. At the same time the close relative surrogate mother also suffered from social problems.
4. **FIVE YEARS PERIOD OF WAITING:** The clause of waiting period for five years after marriage is also baseless and not appreciable. The reason for waiting period is not specifically mentioned in this Bill.

5. DESIGNER BABY: One of the major criticisms against surrogacy is that, it may be used to produce children of desired sex and with desired characteristics, i.e. surrogacy may be used for the creation of designer babies. However, the bill is silent about this issue.
6. CERTIFICATE OF ELIGIBILITY: The Bill specifies that in order to initiate a surrogacy procedure, the surrogate mother and the couple intending to commission the surrogacy are required to obtain certificates of eligibility and essentiality from the relevant appropriate authorities at the centre or state. However, the Bill does not specify a time period by which the appropriate authority will grant these certificates. At the same time appeal and review procedure not mentioned in Bill.
7. VIOLATION OF SURROGACY CONTRACTS: The Bill is silent regarding the breach of terms and conditions of surrogacy by surrogate or indented couple during the surrogacy process or afterwards.

The adoption of Surrogacy (Regulation) Bill, 2016 establishes a regulatory framework for the good surrogacy practices in India However, the proposed ban imposed by the Bill on commercial surrogacy and exclusion of foreign couples from availing surrogacy services are considered as biggest flaw of this bill. Considering the above defects it is need to rectify the lacunas in 2016 Bill forthwith.
