

THE EFFECT OF NATIONAL AND TRANSNATIONAL COMMERCIAL SURROGACY IN INDIA, IN LIGHT OF THE SURROGACY (REGULATION) BILL, 2016

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INTRODUCTION

Surrogacy means substitute and it means surrogate motherhood. Surrogate motherhood means the practice in which a woman bears a child for a couple who is not able to produce a child in a usual manner. According to Black's Law dictionary surrogacy implies the process of carrying and delivering the child of any other person. The legal prohibition of surrogacy in some of the countries also leads people to come to India. Through this research project researchers have tried to put the effects of surrogacy and recently cleared Surrogacy (Regulation) bill, 2016.

REVIEW OF LITERATURE

Books:

- 1) Amrita Pande, *Wombs In Labor-Transnational Commercial Surrogacy in India*

This book provides highly perceptive and thought-provoking questions that need to be answered. It gives an insight on the exploitation of women through various analogies. It talks about how babies and children become products and the surrogate mothers (women) become producers, machines and labourers that produce babies. It reflects the boundaries between non-market/ethical and market/unethical form of surrogacy. It has helped the researchers in connecting with the need of an 'altruistic relative' in the above-mentioned law.

- 2) France Winddance Twine, *Outsourcing the Womb-Race, Class, and Gestational Surrogacy in a Global Market*

This book provides an introduction to different kinds of surrogacies and whether these are allowed in different countries of the world. It raises various questions pertaining to Reproductive justice and procreative liberty and whether the state shall provide all citizens a common right. This has helped the researchers to know the importance of democratizing the Bill and easing the suffering of same-sex couples and single parents.

3) Sayantani Dasgupta and Shamita Das Dasgupta, *Globalization and Transnational Surrogacy in India-Outsourcing Life*

This book offers an account of the position of the surrogate mothers according to which there is an unavailability or limited availability in the case of legal assistance (the book being written in 2014). Also, it gives the researchers an idea about the primary reasons as to why a woman agrees for commercial surrogacy i.e. financial and monetary gain. This has thus, helped the researchers to study the present legislature in light of the earlier situation and unavailability of law.

Articles:

1) Sonali Kusum, PhD Research Scholar, NLSIU, Bangalore, *Surrogacy (Regulations) Bill, 2016-Overview, Issues and Limitations*

This article provides a brief analysis about the important features of the bill as to how the merits of the bill can result in increasing crimes as it confines the surrogacy to altruistic relatives and thus curtails the procreative freedom of couples. It also presents the impact of close family relative of the couple to be the surrogate mother. This has helped the researchers to view the bill and its provision with an analytical perspective.

TYPES OF SURROGACY AND LEGAL STATUS OF EACH

Altruistic Surrogacy: It is a type of surrogacy, in which neither commercial transaction, nor third party payment is being involved. It does not involve any sort of profit motive because a woman agrees to help a couple which is often related to a friend which may or may not be genetically related. Countries allowing altruistic surrogacy are Australia, Canada, Denmark,

Greece, Hungary, Israel, the Netherlands, Spain, South Africa, United Kingdom and United states (New York, New Jersey, New Mexico, Nebraska, Virginia, Oregon, and Washington).

Gestational Surrogacy: It is the common form of commercial surrogacy. The surrogate does not have a genetic tie to the child she is carrying. The surrogate works under a contract. The country which does not ban altruistic surrogacy bans gestational surrogacy. Israel and Russia allow Gestational Surrogacy.

Traditional Surrogacy: The surrogate has a genetic tie to the child the surrogate is carrying. The surrogate in this case is the legally recognized Surrogacy in India

Intended Parents: This term refers to a man, a woman or a couple who enter into a commercial contract. The individuals initiating the contract are the intended parents and custody of the baby is turned to them at birth.

LEGAL STATUS OF SURROGACY

Surrogacy in Australia

Commercial surrogacy is not permitted in Australia and intended parents cannot pay a surrogate. But in the Northern Territory it is legal technically, since commercial surrogacy by the means of traditional surrogacy is permitted and not via gestational surrogacy. Australia permits altruistic arrangement of surrogacy that does not only any financial assistance to the surrogate. In Southern and Western Australia, only straight couples can opt for altruistic surrogacy and it is illegal for same-sex couples and single parents. In Tasmania, according to the law a surrogate should not be less than 25 years of age and it should not be her first pregnancy. Although paying money is illegal but the intended parents are expected to meet medical bills and other expenses without getting into any kind of financial agreement.

Surrogacy in Italy

Altruistic and commercial surrogacy arrangements are unlawful in Italy.

Surrogacy in Japan

The Science Council of Japan banned surrogacy in March 2008. The council stated anyone- an agent, a doctor or a client, all would be punished on entering into a commercial surrogacy arrangements.

Surrogacy in Netherlands and Belgium

Netherlands and Belgium allow Altruistic surrogacy and consider commercial surrogacy as unlawful. However, there is only once hospital for the same and that too with very strict rules.

Surrogacy in New Zealand

New Zealand permits altruistic arrangement of surrogacy.

Surrogacy in Pakistan

Pakistan does not permit surrogacy.

Surrogacy in Russian Federation

Gestational and commercial surrogacy is legal in Russia but unmarried heterosexual couples or single parents opt for gestational surrogacy for a child, the court has the right to take the decision regarding the resulting child. A Moscow court in August 2010 stated that if a single man opted for gestational surrogacy but with the use of donor eggs, he could be the only parent of the resulting child. The birth certificate would not contain the surrogate's name. Regardless of their sexual orientation, single men in Russia are considered the only parent of the surrogate child and can exercise their parenthood child.

Surrogacy in South Africa

Surrogacy agreement between a surrogate and 'commissioning parents' needs to be validated before fertilization by the High Court, under South Africa Children's Act of 2005. This makes the intended parents, legal parents but a span of 60 days after delivery is given to the genetic surrogate if she wants to change her mind. Gay couples as well as single parents can also be intended parents. Single parents and a couple can opt for this option only if they have any physical inability. Only that woman can become a surrogate who has at least one living child. She has the right to terminate the pregnancy but only after consulting the intended parents. If

she is doing so due to non-medical reasons, she must be ready to make medical reimbursements.

Surrogacy in Sweden

There are no clear laws regarding surrogacy in Sweden. The intended parents need to adopt the child from the surrogate; nevertheless, she has the right to change her mind, before the adoption process. However, biological father have complete right over the child. Fertility clinics in Sweden cannot make any surrogacy arrangements.

Surrogacy in Switzerland

Surrogacy is illegal in Switzerland. People who make any such arrangements or clinics that perform in vitro fertilization for surrogacy can get punished. However, a surrogate mother would be the child's legal mother and cannot be punished.

Surrogacy in Ukraine

From the year 2002, surrogacy or surrogacy along with egg/sperm donation has been declared legal. The law clearly states that neither the surrogate nor the donor but only the prospective parents have legal rights over the resulting child. A written consent of all the parties is necessary. The birth certificate will carry the names of the intended parents and the child legally belongs to them. Single women as well as married couples can opt for gestational surrogacy. Although there is no concept of lesbian or gay marriages here but if such a couple picks up surrogacy, they are treated as a single parent.

Surrogacy in United States

Surrogacy and its related issues come under the state jurisdiction and laws regarding surrogacy differ largely in different states. While there is proper written legislation in some states, there are common simple laws in the others.

In most of the countries, commercial surrogacy is banned and if is allowed, costs too much for the intended parents. India in less than 1/3rd of the cost involved in surrogacy in other countries, completes the process due to which, has attracted customers from various countries.

WHY SURROGACY (REGULATION) BILL, 2016?

There always are some kinds of limits in what a person does-those limits may be ethical or legal in nature. Roger Rosenblatt in 1987 said that the question of ethical limits arises rarely in the world of normal commerce. And this is why; there is a need for legal limit to be put in certain aspects of commerce. Surrogacy has now become a major industry attracting global attention. This has grown with time and is flourishing as a commercial market at present.

Surrogacy has its roots in Bible, where Rachel, being infertile, gives a concubine to her husband. The servant serves them as a surrogate and gives birth to two kids who are considered by Rachel as her own. This Biblical example represents surrogacy being followed at that time. Hindu mythology also has such instances where Dronacharya was born through this process. According to Jain mythology, Lord Mahavira was also born by transferring the embryo from one woman's womb to another. These traditional examples present, how the surrogates were considered merely slaves and had no right and were not recognized as legal mothers of the child.

Modern day surrogacy is no different than that of traditional times or Middle Ages. The only difference that has been created is of the limits that are imposed legally.

The Baby M trial¹ is an example of 1987 where the New Jersey Court stated that surrogacy contracts are not enforceable and the surrogate mother, who in this case had a genetic tie with the child, can retain her maternal rights and can remain the legal mother of the child. The court compromised and enforced the contract in this case because the surrogate mother already had two kids and the intended mother had none and also, she was unable to carry a pregnancy. However, the contract was partially enforced as the court did not allow the intended mother to put her name in the Birth Certificate of the child, thus upholding the legal status of the surrogate as the mother of the child.

It was decided in this case that, surrogacy is in dissonance with the laws and policies of the state created for public welfare. Also, payment of money to a surrogate is illegal, criminal in nature and disregarding to a woman.

What is important is to understand that surrogacy is gender specific. Surrogacy deals with purchasing of labour for the process of reproduction. The labour is a woman who puts herself

to physical risks of death and pain in return of money. Women who come from low income background and are financially challenged, get a chance to earn fast cash by selling their wombs in cases of Commercial surrogacy. However Indian Constitution aims at Equality before Law under Article 14ⁱⁱ and Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth under Article 15ⁱⁱⁱ, this is why gestational surrogacy which is a form of commercial surrogacy is now banned in India and Surrogacy (Regulation) Bill, 2016 has been passed by the Union Cabinet for protection of women from such exploitation and for uplifting the rights of surrogates and the child born through surrogacy. As Article 21^{iv} provides the right to live with dignity, with this act of surrogacy is violated by outraging women's esteem.

“Human dignity is an important aspect of liberty and while considering liberty, people have to consider human dignity.”^v mentioned by Justice Bhagwati and Justice Krishna Iyer.

SURROGACY AS VIOLENCE AGAINST MANY

There has been many argument that transnational surrogacy is a win-win situation for both the parties i.e. the surrogate and the couple getting their wish fulfilled by having the child but at the same time in poor countries like India surrogate are taken benefit of the same. The rich infertile couple hire these poor Indian surrogates to rent out their wombs. These are in fact the violence caused by globalized Arts market. “Yet all of these remain unexplored and thus invoking their rights under article 23^{vi} of the constitution of India”, said Justice GopalSankaranarayan. The analyses of the reproductive violence are rarely taken into account of the surrogates as the productive labourers. Amrita Pande in her book “*Not an Angel not a whore*” introduces the term “*sexualized care work*” in the context of Indian surrogates arguing that such labour is often construed with sex work by the general public. Surrogacy decisions it cannot be believed to be taken by surrogates alone that are mainly influenced by physical and psychological violence or even economic disturbance in the family. Thus surrogates' rights are infringed under article 21^{vii} of the Constitution of India as self preservation is the necessary concomitant under this article. Sometimes a man even can force his wife to abort her own pregnancy just to engage in a commercial surrogacy. All these things happen just because of lack of proper regulation and policies. It also happens that “*surrogates do not get compensated*

for the late miscarriage since their contract stipulates that they are to deliver a live child^{viii}. In the case of *K. Kalaiselvi v. Chennai Port Trust*,^{ix} the petitioner decided to have a child through surrogacy required maternity leave. Initially, leave was not given to her but later on it was granted because article 21 was invoked mentioning that every child has an inherent right to life.

Baby Manji Yamada's case^x has been one of the landmark judgements given by the Apex Court. Also, it is the first judgement on surrogacy by the Supreme Court. This case is important for a reason that, it was decided considering commercial surrogacy to be legal. In the above-mentioned case, the child's parents who were Japanese got divorced one month before the child was born and the intended mother refused to take the custody of the child. In this case, the egg was of another woman and not of the intended mother. The intended mother contended that she is genetically and biologically not related to the child, mentioning it to be a reason of not accepting the child. The surrogate mother, who was an Indian, refused to take the custody as according to her, her job was fulfilled and her part of contract was performed once she delivered the child.

Matter of concern relating to Indian laws and Constitution of India

There are certain questions regarding the provisions of surrogacy bills, whether the provisions of the bill are justified and these can be answered by understanding the case of Baby Yamada, in which the father was refused, being a single parent, to take the custody of the child; there was no recognition of nationality of the child without having a mother. At last, the Supreme Court of India needed to intercede and the youngster was permitted to leave the nation with her grandmother after various formalities. Because of absence of arrangement till date, the single guardian needs to endure. The surrogacy charge has its own particular decent amount of loopholes which must be satisfied by the officials. It is the need of the hour to have a thorough draft which will cover each and every part of the commercial surrogacy industry.

Recognition of nationality and identity of the child-Right of foreigners

Under Article 14^{xi} and its various interpretations, the government of India has an absolute and complete power to extrude foreigners of Article 14. So in case of giving a person who is not a citizen of India, "*right to be heard*", it is completely the discretion of the court. "The procedure

followed under Foreigners Act and Foreigners (Tribunals) Order 1964 is just, fair and reasonable and does not offend any constitutional provision.”^{xii}

In this case too, government in the absence of the status of the mother of the child, has used its discretion and applied Indian laws in not giving custody of a girl child to a single man, even after him, being his genetic father.

Rights of a single parent or homosexuals being affected by the laws made.

The new surrogacy bill does not allow single parents and couple of same gender to get a child through this process.

However, Article 14 strikes at the arbitrary and unjust action of legislative. On these grounds of inequality and discrimination on grounds of sex, this can be challenged. “It is now considered that non-compliance with the rules of natural-justice amounts to arbitrariness violating Article 14.”^{xiii}

It also “restricts discrimination and creation of such laws. It now has “highly activist magnitude” and hence Indian constitution provides equality and opportunity under this.”^{xiv}

So, on what basis this discrimination on the grounds of sex is implemented through law?

As there are various other interpretations and provisions of this article, it however provides equality, but as the fact provides, not all persons are equal. Thus, equality in such cases may result in injustice. This is the reason, that we have a provision of “Intelligible differentia” according to which “equal protection in no case means that same rules are to be made applicable even in different circumstances or conditions.”^{xv}

In this case of giving responsibility of a child to a homosexual or a single parent, differences can be found on the grounds.

How does “altruistic surrogacy” become an option to regulate the problem?

The homosexuals and the live in couples according to the surrogacy bill are not allowed for opting surrogacy. This is unfair on their part because homosexuals and the live in couples

should be given the same right as the married ones. The homosexuals are being discriminated on the basis of their gender. Their fundamental rights as per Article 15^{xvi} of the constitution are getting violated.

Altruistic surrogacy is a solution for this problem because it will help us in reducing the exploitation of women and let us deal with the following issues which are the result of surrogacy:

- It harms the surrogate- Irrespective of this fact of problem of health issues and complications, women from economically backward classes opt for this option of surrogacy for earning fast cash. In case of any harm caused, it becomes difficult to make the actual and responsible person liable.
- Surrogacy has been kept at an equal position to that of prostitution as women who reproduce and are sold for their reproductive capacity.

Government is free to make laws for the benefit of women even if it contradicts Articles 14^{xvii} and 15^{xviii}. There already are various laws in favour of women considering the point that “women in this country were so situated that special legislation was required in order to protect them.”^{xix} The same principle can be applied in case of surrogated mothers to because the actions taken by the government are only to protect women from exploitation. This is the reason “altruistic surrogacy” has been given an upper hand.

There have been cases where child after birth through surrogacy is left because of certain disabilities or other reasons. Commercial surrogacy made it easy for people to be unaccountable for the child, after birth, even in cases of divorce, the same that happened in Baby Manji’s case^{xx}.

So, the state has exercised its power under Article 15(3)^{xxi}, and created such laws as “under this article, state is relieved from the bondage of Article 15(1)^{xxii} and this article enables it to make special provisions to accord socio-economic equality to women.”

CONCLUSIONS AND SUGGESTIONS

Through this research paper the researchers have come to a conclusion that the rights of homosexuals and the single parents are not being violated and the permission to be a surrogate mother must only be given to a close relative. Because if not for altruistic surrogacy, the individuals will get involved in commercial surrogacy and the surrogate mother can easily get exploited due to the same. Therefore, to avoid commercial surrogacy to flourish and unethical practice to evolve the altruistic form of surrogacy must be adopted. All of the medical aspects are covered under the bill. The bill also prohibits foreigners from allowing surrogacy in India to avoid the rights to middle and lower caste of women getting exploited and according to the bill they can be allowed only when they fulfil all the criteria of the Surrogacy bill thus preventing Commercial Surrogacy and promoting ethical Surrogacy. The ban is on those women who do the surrogacy just because they do not want to gain weight and to the ones who do not have a genuine reason for the same. Exploitation of the surrogates is one of the main reasons for the ban.

Another aspect is that the bill prohibits live in couples to go for surrogacy because there are many chances that the couple might get separated and thus might risk the future of the child. The government thus seems appropriate in doing so. Thus, government through this is playing an effective role in avoiding the development of Commercial Industry through Surrogacy.

There are various suggestions relating to Surrogacy laws in India

- India itself has banned commercial surrogacy which brings a requirement for it to protect and prohibit commercial surrogacy outside the borders by its own citizens.
- Altruistic or Domestic Surrogacy should always be available as an option for the women as procreation is a fundamental right and it cannot be absolutely taken. Hence, the cases that involve misuse of Altruistic surrogacy must be duly dealt without resulting into a blanket ban on surrogacy.
- Rights for the protection of women and children should have a separate provision in the laws made for surrogacy to fulfil the objective of such laws.
- Laws should be made focusing more on and taking into account the issues like liability or interest of the child and parental rights.

- Health issues and risks related to surrogate mother should be taken into consideration by medical practitioners under the guidance of law. And a surrogate should not go for surrogacy or its trials more than thrice.

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Constitution of India

- Article 14
- Article 15
- Article 21
- Article 23

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ⁱBaby M, 109 N.J. 396

ⁱⁱINDIA CONST. art. 14.

ⁱⁱⁱINDIA CONST. art. 15.

^{iv}INDIA CONST. art. 21.

^v Jolly G. Varghese v. Bank of Cochin, AIR 1980 SC 470.

^{vi}INDIA CONST. art. 23.

^{vii}supra note 4.

^{viii}Sayantani Dasgupta & Shamita Dasgupta, *Globalization and Transnational Surrogacy in India*, 190-01(2d ed. 2014)

^{ix} K. Kalaiselvi v. Chennai Port Trust (2008) 13 S.C.C 518.

^xBaby Manji Yamada v. Union of India and another, AIR 2009 SC 84 (2008) 13 SCC 518.

^{xi}Supra note 2.

^{xii}Sarbananda Sonowal v. Union of India, AIR 2005 SC 2920.

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^{xv}Chiranjeet Lal v. Union of India, AIR 1951 SC 41

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^{xvii}Supra note 2.

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^{xix} CHAGLA, C.J., in Yusuf Abdul Aziz v. State of Maharashtra, AIR 1951 Bom 470.

^{xx} Supra note 7.

^{xxi}INDIA CONST. art.15, cl. 3.

^{xxii}INDIA CONST. art.15, cl. 1.