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LEXKHOJ PUBLICATIONS

EDITORIAL NOTE

LEXKHOJ is delighted to announce its Second edition of the *Lexkhoj Research Journal of Law and Socio-Economic Issues* which is an international journal, publishing critical approaches to socio-legal study and multi-disciplinary analysis of issues related to law and socio-economic. The journal will strive to combine academic excellence with professional relevance and a practical focus by publishing wide varieties of research papers, insightful reviews, essays and articles by students, established scholars and professionals as well as by both domestic and international authors. Authors should confirm that the manuscript has not been, and will not be, submitted elsewhere at the same time.

The Journal provides a forum for in-depth analysis of problems of legal, social, economic, cultural and environmental transformation taking place in the country and world-wide. It welcomes articles with rigorous reasoning, supported by proper documentation. The Journal would particularly encourage inter-disciplinary articles that are accessible to a wider group of Social activist, economist, Researcher, policy makers, Professionals and students.

This quarterly issue of the journal would like to encourage and welcome more and more writers to get their work published. The papers will be selected by our editorial board that would rely upon the vibrant skills and knowledge immersed in the paper.

Needless to say, any papers that you wish to submit, either individually or collaboratively, are much appreciated and will make a substantial contribution to the early development and success of the journal. Best wishes and thank you in advance for your contribution to the Lexkhoj Research Journal of Law and Socio-Economic Issues.

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IS COMMERCIALISATION OF SURROGACY UNETHICAL?

**Payal Dey*

Introduction

According to the Artificial Reproductive Technique Guidelines, surrogacy is an “arrangement in which a woman agrees to a pregnancy, achieved through assisted reproductive technology, in which neither of the gametes belong to her or her husband, with the intention of carrying it to term and handing over the child to the person or persons from whom she is acting as surrogate; and a ‘surrogate mother’ is a woman who agrees to have an embryo generated from the sperm of a man who is not her husband, and the oocyte for another woman implanted in her to carry the pregnancy to full term and deliver the child to their biological parents”

Some women due to certain physiological conditions cannot give birth to their own offspring. Those unfortunate couples take the advantage of ART, IVF and IUI, in hope of having a child of their own.

In the past, surrogacy arrangements were generally confined to kith and kin of close relatives, family, or friends, usually as an altruistic deed. But, with the introduction of financial arrangements in the process, surrogacy has extended its network beyond family, community, state, and even across the country. The concept of surrogacy has turned a normal biological function of woman’s body into a commercial contract. Surrogate services are advertised. Surrogates are recruited, and operating agencies make huge profits. The commercialization of surrogacy has raised fears of a black market and of baby selling and breeding farms; turning impoverished women into baby producers and possibility of selective breeding at a price. Surrogacy degrades a pregnancy to a service and a baby to a product. Experience shows that as with any other commercial dealing, the ‘consumer’ lays down his/her conditions before purchasing the goods.

Slowly but steadily India is emerging as a popular destination for surrogacy arrangements for many rich foreigners. Cheap medical facilities, advanced reproductive technological know-how, coupled with poor socio-economic conditions, and a lack of regulatory laws in India, in this regard combined to make India an attractive option.

This is mainly because the surrogate mothers in India are generally from low financial background and offers their service at a very low rate.

In surrogacy, the rights of the child are rarely considered. Early handover of the child hampers breastfeeding. Transferring the duties of parenthood from the birthing mother to a contracting couple is denying the child it's claim to both the mother and father. It could affect the psychosocial well-being of children who are born as result of a surrogate motherhood arrangement.

Government initiatives

To address such issues and to regulate surrogacy arrangements, the Government of India has taken certain steps including the introduction and implementation of National Guidelines for Accreditation, Supervision, and Regulation of Assisted Reproductive Technology Clinics in 2006, and guidelines have been issued by Indian Council of Medical Research under the Ministry of Health and Family Welfare, Government of India.

However, till now there is no legal provision dealing directly with surrogacy laws to protect the rights and interests of surrogate mother, the child, or the commissioning parents. Nonetheless, Assisted Reproductive Technique (ART) Regulation Bill, 2010 lays down few guidelines.

Rights and duties in relation to surrogacy –

(1) Both the couple or individual seeking surrogacy through the use of assisted reproductive technology, and the surrogate mother, shall enter into a surrogacy agreement which shall be legally enforceable.

(2) All expenses, including those related to insurance, of the surrogate related to a pregnancy achieved in furtherance of assisted reproductive technology shall, during the period of pregnancy and after delivery as per medical advice, and till the child is ready to be delivered as per medical advice, to the biological parent or parents, shall be borne by the couple or individual seeking surrogacy.

(3) Notwithstanding anything contained in sub-section (2) of this section and subject to the surrogacy agreement, the surrogate mother may also receive monetary compensation from the couple or individual, as the case may be, for agreeing to act as such surrogate.

(4) A surrogate mother shall relinquish all parental rights over the child.

(5) No woman under twenty one years of age and over forty five years of age shall be eligible to act as a surrogate mother under this Act. Provided that no woman shall act as a surrogate for more than three successful live births in her life.

(6) Any woman seeking or agreeing to act as a surrogate mother shall be medically tested for such diseases, sexually transmitted or otherwise, as may be prescribed, and all other communicable diseases which may endanger the health of the child, and must declare in writing that she has not undergone intravenous medical treatment or received a blood transfusion.

(7) Individuals or couples may obtain the service of a surrogate through a semen bank, or advertise to seek surrogacy provided that no such advertisement shall contain any details relating to the caste, ethnic identity or descent of any of the parties involved in such surrogacy. No assisted reproductive technology clinic shall advertise to seek surrogacy for its clients.

(8) A surrogate mother shall, in respect of all medical treatments or procedures in relation to the concerned child, register at the hospital or such medical facility in her own name, clearly declare herself to be a surrogate mother, and provide the name or names and addresses of the person or persons, as the case may be, for whom she is acting as a surrogate, along with a copy of the certificate mentioned in clause 17 below 27

(9) If the first embryo transfer has failed in a surrogate mother, she may, if she wishes, decide to accept on mutually agreed financial terms, at most two more successful embryo transfers for the same couple that had engaged her services in the first instance. No surrogate mother shall undergo embryo transfer more than three times for the same couple.

(10) The birth certificate issued in respect of a baby born through surrogacy shall bear the name(s) of the genetic parents / parent of the baby.

(11) The person or persons who have availed of the services of a surrogate mother shall be legally bound to accept the custody of the child / children irrespective of any abnormality that the child / children may have, and the refusal to do so shall constitute an offence under this Act.

(12) Subject to the provisions of this Act, all information about the surrogate shall be kept confidential and information about the surrogacy shall not be disclosed to anyone other than the central database of the Indian Council of Medical Research, except by an order of a court of competent jurisdiction.

(13) A surrogate mother shall not act as an oocyte donor for the couple or individual, as the case may be, seeking surrogacy.

(14) No assisted reproductive technology clinic shall provide information on or about surrogate mothers or potential surrogate mothers to any person.

(15) Any assisted reproductive technology clinic acting in contravention of sub-section 14 of this section shall be deemed to have committed an offence under this Act.

(16) In the event that the woman intending to be a surrogate is married, the consent of her spouse shall be required before she may act as such surrogate.

(17) A surrogate mother shall be given a certificate by the person or persons who have availed of her services, stating unambiguously that she has acted as a surrogate for them.

(18) A relative, a known person, as well as a person unknown to the couple may act as a surrogate mother for the couple. In the case of a relative acting as a surrogate, the relative should belong to the same generation as the women desiring the surrogate.

(19) A foreigner or foreign couple not resident in India, or a non-resident Indian individual or couple, seeking surrogacy in India shall appoint a local guardian who will be legally responsible for taking care of the surrogate during and after the pregnancy as per clause 34.2, till the 28 child / children are delivered to the foreigner or foreign couple or the local guardian. Further, the party seeking the surrogacy must ensure and establish to the ART clinic through proper documentation that the party would be able to take the child / children born through surrogacy, including where the embryo was a consequence of donation of an oocyte or sperm, outside of India to the country of the party's origin or residence as the case may be.

(20) A couple or an individual shall not have the service of more than one surrogate at any given time.

(21) A couple shall not have simultaneous transfer of embryos in the woman and in a

surrogate.

Status of the child –

(1) A child born to a married couple through the use of assisted reproductive technology shall be presumed to be the legitimate child of the couple, having been born in wedlock and with the consent of both spouses, and shall have identical legal rights as a legitimate child born through sexual intercourse.

(2) A child born to an unmarried couple through the use of assisted reproductive technology, with the consent of both the parties, shall be the legitimate child of both parties.

(3) In the case of a single woman the child will be the legitimate child of the woman, and in the case of a single man the child will be the legitimate child of the man

(4) In case a married or unmarried couple separates or gets divorced, as the case may be, after both parties consented to the assisted reproductive technology treatment but before the child is born, the child shall be the legitimate child of the couple.

(5) A child born to a woman artificially inseminated with the stored sperm of her dead husband shall be considered as the legitimate child of the couple.

(6) If a donated ovum contains ooplasm from another donor ovum, both the donors shall be medically tested for such diseases, sexually transmitted or otherwise, as may be prescribed, and all other communicable diseases which may endanger the health of the child, and the donor of both the ooplasm and the ovum shall relinquish all parental rights in relation to such child.

(7) The birth certificate of a child born through the use of assisted reproductive technology shall contain the name or names of the parent or parents, as the case may be, who sought such use.

Right of the child to information about donors or surrogates –

(1) A child may, upon reaching the age of 18, apply for any information, excluding personal identification, relating to his / her genetic parent or parents or surrogate mother.

(2) The legal guardian of a minor child may apply for any information, excluding personal identification, about his / her genetic parent or parents or surrogate mother when required,

and to the extent necessary, for the welfare of the child.

(3) Personal identification of the genetic parent or parents or surrogate mother may be released only in cases of life threatening medical conditions which require physical testing or samples of the genetic parent or parents or surrogate mother.

Provided that such personal identification will not be released without the prior informed consent of the genetic parent or parents or surrogate mother.

Is commercial surrogacy legal in India?

In 2008, the Supreme Court of India in the Manji's case (Japanese Baby) has held that commercial surrogacy is permitted in India with a direction to the Legislature to pass an appropriate Law governing Surrogacy in India. At present the Surrogacy Contract between the parties and the Assisted Reproductive Technique (ART) Clinics guidelines are the guiding force. Giving due regard to the apex court directions, the Legislature has enacted ART BILL, 2008 which is still pending and is expected to come in force somewhere in the next coming year. The law commission of India has specifically reviewed the Surrogacy Law keeping in mind that in India that India is an International Surrogacy destination.

Recent proposed changes against commercialisation of Surrogacy

While commercial surrogacy is banned in countries such as United Kingdom, Canada, and France, it has exploded in India over the past decade with many couples, especially foreigners, flocking to the country, partly because its doctors and clinics broker the service at a relatively low cost.

The draft bill makes it mandatory for all surrogacy clinics to register with the government. Violators will face jail term of five years and a fine of Rs ten lakh.

Abandoning a child born out of a surrogacy procedure by a commissioning parent has also been criminalised, inviting a 10-year jail term and Rs 10 lakh fine.

Foreign minister Sushma Swaraj, who made the announcement at a press conference, proposing certain changes in the surrogacy laws

Only infertile couples who have been married for at least five years can seek a surrogate, who must be a close relative, said Swaraj who headed a group of ministers that reviewed the

surrogacy regulation bill that aims to end exploitation of poor women. Close relatives “could include a sister or a sister-in-law or a daughter-in-law”, she said.

Swaraj said only altruistic surrogacy, where the expecting parents pay for the medical procedure and not the surrogate mothers. Single women will not be allowed to become surrogate mothers.

My view

Commercialisation of surrogacy has helped poor families and reduced prostitution. The laws is not yet strong protecting the rights of the child and the surrogate mother, which needs to be looked upon. According to me, commercialisation has helped many families financially. And definitely helping a couple to have a child of their own, is not unethical.

But we cannot deny the fact that Adaptation is a simpler and more glorious way to have a child. Adaptation gives a homeless child, a family.