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EDITORIAL NOTE

LEXKHOJ is delighted to announce its first edition of the *Lexkhoj Research Journal of Law and Socio-Economic Issues* which is a peer reviewed 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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SURROGACY- WHETHER BENEFICIAL TO SURROGATE WOMEN

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ABSTRACT

The term surrogacy basically shed light on new issues such as social, economic, medical as well as demographic which has become popular and a controversial solution for the childless couples. In general surrogacy is a way to conceive children wherein a woman carries and delivers a child for another couple in the context of growing globalization and the reproductive medicalization. In today's dynamic environment India has become an international leader for surrogacy and one of the main destination for fertility care for the Europeans.

1. INTRODUCTION

The concept of Surrogacy has been gaining popularity all over the world, especially in the countries where the adoption is controlled through long, exhaustive bureaucratic processes. The terms adoption and surrogacy differs from each other. Surrogacy allows parents to not only take control of their own reproductive options, but the parents share genetic bonds. As far as Surrogacy is concerned children born through these techniques are the natural, genetic offspring of their parents.

Surrogacy is in existence, since the ancient times, but the practice has become highly publicized recently. The first successful gestational surrogacy procedure took place in 1985 and is popular since that time. The couples who go for such technique of surrogacy often do so because they are unable to conceive child due to missing of abnormal uterus, or have certain pregnancy losses or had failed multiple times in- vitro fertilization attempts. This phenomenon is currently followed in developing states and is becoming the debatable topic ever since.

2. WHAT IS SURROGACY

The dictionary meaning of the word “surrogate” is “*deputy or substitute*”.

In surrogacy a woman bears through her womb the genetic or biological child of another woman for the full time delivery of the child such women's are known as the surrogate mother who is virtually a substitute mother and carries the child of the another woman who is unable to conceive due to various reasons. This is basically an arrangement between the surrogate and the childless woman till the delivery of the child.

In surrogacy a surrogate woman voluntarily rents her womb to carry a child for another woman with an intention of helping the couple to hand over the child after the delivery of the child.

Basically, this is the technique which is opted when the couple fails to conceive a child and certain other techniques have also been failed. Hence so as to define the term the surrogacy it's an agreement between a woman and a couple or any person who wants to have a child of its own where a woman voluntarily rents a womb for another woman or the same sex couple till the delivery of the baby.

3. TYPES OF SURROGACY-

The surrogacy is briefly classified into two broad categories¹:

- **GESTATIONAL SURROGACY-** In this type of process, there is no biological relationship between the surrogate mother and the child as the eggs of the surrogate mother is not being used in this whole process, the surrogate mother becomes pregnant through IVF procedure where the eggs of the potential mother or the egg donor gets developed into embryos with the sperm of the intended father or the donor.
- **TRADITIONAL SURROGACY-** This type of surrogacy creates a genetic link between the potential parents and the surrogate mother, this type of surrogacy is only chosen by the infertile parents where the surrogate acts both as an egg donor as well as a actual surrogate. Here the surrogate mother is impregnated with the semen of the intended parents or any sperm donor. This process is completed by using a process known as

¹ <http://www.surrogate411.com/>

intrauterine insemination or In vitro fertilization, where the surrogate is also called as the biological mother of the child.

There is no transparency in the whole system due to lack of proper legislations however both the surrogate mother and the intended parents are somehow exploited and the profits is being earned by the commercial agencies and chances of getting involved in legal problems are there due to changeable regulations which are governing the surrogacy in India².

Although in 2005, ICMR issued guidelines for accreditation, supervision, and regulation of ART clinics in India³, these guidelines are repeatedly violated frustration of the cross border childless couples. The cross border surrogacy leads to problems in citizenship, nationality, motherhood, parentage, and rights of a child.

In the case of German Couple wherein the twin surrogate children or the Israeli gay couple had to undergo DNA test to establish the parentage. Thus there are incidences where the child given to the couple after the surrogacy is not related to them and later is disowned by the intended parents.

Therefore if we take into consideration the problem of the surrogate mothers things are even more unethical where the women have no right in regard to their body and life and these issues are now becoming more of a commercial racket, thus there is an urgent need for framing and implementing the law with regard to surrogacy⁴. The contract of surrogacy should include the life insurance cover for the surrogate, which should also provide financial support for the surrogate child. A surrogate mother should not have any parental rights over the child and the birth certificate of the child should bear the names of the intended parents so as to avoid any legal complications. If the surrogate woman is married women, then the consent of her spouse is required. The age of the surrogate mother should be 21-35 years, and she should not have delivered more than 5 times including her own children. Hence all the expenses including

² Available at :<http://www.timesonline.co.uk/toI/news/world/asia/article/7113463.ecc>

³ <http://indiansurrogacylaw.com/>

⁴ Available at: <http://www.nydailynews.com/news/world/india-surrogate-mother-business-raises-questions-global-ethics-article-1.276982>

insurance of surrogate medical bill and other reasonable expenses related to pregnancy and childbirth should be borne by intended parents.

4. SURROGACY AND WOMENS RIGHT TO HEALTH

The concept of surrogacy in India is a growing business, which attracts lots of the clients but still it is very hard to tell the rights of the surrogate women which is are they exercising their own personal rights or whether they are forced to become surrogate mothers due to their mother-in-law's or husband's desire to fulfill material and financial needs⁵. The surrogate mother tries to avoid developing any sort of social bond with the child.

In India, surrogates are implanted with up to five embryos in order to increase the chances of pregnancy. Using such a large number of embryos increases health risks for babies and the mother. Chances of post-partum depression of surrogates are more with the child that grew in mother's womb⁶. A surrogate host of advanced maternal age has increased risk of prenatal mortality & death. There is a greater risk to the mother of pregnancy. When hormones or drugs the surrogate is instructed to take, all drugs have side-effects⁷.

In the surrogacy contract issues such as premature delivery, genetic malformation and infections which lead to increased hospitalization of newborn are considered significantly⁸. Thus, currently there is no law which exists to protect the rights of the surrogate women in cases of birth complication, forced abortion etc. Since 2002, commercial surrogacy has been legalized in India which has led criticism to allege that surrogacy business is exploiting the poor women's in the countries. According to estimates, which might be conservative - the business of surrogacy in India is already touching \$445-million a year.⁹

⁵ Kevin T. The ethics of surrogacy contracts and nebraska's surrogacy law. Vol. 41. Creighton Law Review; 2008. p. 185-206.

⁶ Kevin T. The ethics of surrogacy contracts and nebraska's surrogacy law. Vol. 41. Creighton Law Review; 2008. p. 185-206

⁷ Commercial surrogacy and fertility tourism in India, The Case of Baby Manji, The Kenan Institute for Ethics at Duke University.

⁸ Available from: <https://web.duke.edu/kenanethics/CaseStudies/BabyManji>.

⁹ Edelmann R. Surrogacy: the psychological issues. J Reprod Inf Psychol 2004;22:123-36.

"...if surrogacy becomes an avenue by which women in richer countries choose poorer women in our country to bear their babies, then it is economic exploitation, a kind of biological colonization."¹⁰

The Ministry of women and child development is a comprehensive legislation which is examining the issues relating to the surrogate motherhood. The Indian Council of Medical Research (ICMR) has now set and recommended strict penalties with regard to Reproductive Techniques (ART) in 2005 which states that, "Any known or unknown or a relative can act as a surrogate mother for a couple. In case a relative is acting as a surrogate it must be of a same generation as that of the women desiring the surrogate. Further it also restricts the number of embryo transfer a mother can go through.

Thus, the Section 3 -10.5 of the guidelines¹¹ also states the age limit to which a woman can become surrogate. The ART Clinic must ensure that a woman is capable of going through the pregnancy without any health problem. Further these guidelines are slanted and thoughtless.

Scholars such as Horsburgh (1993) believe that the surrogates are physically exploited once they have signed the contract agreeing to give birth to the clients. If the pregnancy is indeed aborted, the surrogacy often receives a fraction of the original payment. The contracts can also place liability on the mother for risks including pregnancy-induced diseases, death and post-partum complications¹².

Further the famous scholar Foster(1987) was of the view that surrogate mother faces certain emotional problems. As per the study¹³ shows that the surrogate mother does not appear to experience psychological problems as a result of surrogacy arrangements.

¹⁰ Available at: <http://www.blog.indiansurrogacylaw.com/2009/01/few-basics-from-the-icmr-guidelines>.

¹¹ National Guidelines for Accreditation, supervision and regulation of ART clinics in India. Available at: http://www.icmr.nic.in/art/art_clinics.htm.

¹² Available at: <http://www.womenleadership.in/Csr/SurrogacyReport.pdf>.

¹³ Study on surrogacy Java *et al.* (2003)

5. SURROGACY INDIAN ISSUES AND PERSPECTIVE

In the Indian legal system, there is no concept of DNA testing for establishing paternity; it only recognizes the birth by mother. The Supreme Court of India in the landmark case of Manji's (Japanese Baby)¹⁴ held that commercial surrogacy is permitted in India and it has again increased the international confidence of surrogacy in India¹⁵.

The 228th report of law commission of India on the "Need for Legislation to Regulate Assisted Reproductive Technology Clinics as well as Rights and Obligation of Parties to an surrogacy¹⁶". The main observations made in this report are that the Surrogacy arrangements will be governed by the Indian contract Act among the parties, but it should not be for the commercial purposes. It should provide the financial support to the surrogate child in the event of death of the commissioning couple or the individual before the delivery of the child. The report also held that a contract should include the life insurance cover for the surrogate mother. Further the right to privacy of the donor as well as surrogate mother should be protected as well as sex selective surrogacy should be prohibited and the cases relating to the abortion must be governed by the Medical Termination of Pregnancy Act 1979¹⁷.

The growing concept of surrogacy is changing the traditional role of parenthood. Marital status is not a pre-condition for getting child through surrogacy.

The first known case in India was of a single man, wherein it was held that Mr. Amit Benerjee, a Chartered Accountant of Kolkata was a divorced man but was keen to have a child, he had a biological child by a surrogate mother where he took a help of two women's the one denoted the egg and the another carried the foetus, which was fertilized in a laboratory with the sperm provided by Mr. Benerjee. Thus, he became a father, when the surrogate mother delivered the child at Fertility Research Institute in 2005.

¹⁴ 2008

¹⁵ Law commission of India. Report 228. 2009. Available from <http://surrogacylawsindia.com/admin/userfiles/file/report228.pdf>. [Last accessed on 2012 Nov 19]

¹⁶ <http://www.surrogacylawsindia.com/>

¹⁷ Government of India, MOH&FW, ICMR: 2008, ART (Regulatory) Bill, Ch. II, V, VII., Part I. and Schedule I, Part 7 on Forms, 2008. p. 6-11, 20-2, 25-9, 81-135

To the term surrogacy through ART, there are certain religious and doctrinal objections. In India, the Hindu religion is silent on surrogacy. The Islam religion is totally against procreation by surrogacy. Further the catholic and Anglican Church does not accept surrogacy or ART procedures of procreation of surrogate child. Wherein it is argued that the concept of surrogacy is contrary to unity of marriage and dignity of creation of person wherein the rights of the child to know the parenthood is affected.

In the case of *Sutton v. Diane* wherein the Minor J was born in 1989 to Mr., and Ms, J where his parents were divorced in 1995. therefore minor J sued his mother, Diane J, to find out the identity of his biological father because the DNA test after the divorce indicated that there was no biological connection between the two. Minor J in 2006 sued his mother seeking to reveal the identity of his biological father. Both the trial and the appellate court on the basis of marital presumption refused to proceed with the case.

Article 23(1) of the Constitution of India says that traffic in human being and beggar and any other similar forms of the forced labor are prohibited and any such contravention shall be a punishable offence. Whereas Article 39(e) states that the health and strength of the men and women are not abused and the citizens are not forced by economic necessity to enter avocations which are not suitable to their age. Thus children's are given an opportunity to develop in a healthy manner and in conditions of freedom and dignity and are protected against exploitation, moral, and material abandonment. Therefore, the baby bearing contracts on economic necessities definitely attract the constitutional provisions.

6. CONCLUSION AND SUGGESTIONS

As far as the reading relating to the surrogacy goes, it is purely a concept of contract between the parties, so the parties should have a mutual understanding so that it does not causes any confusion on the basis in the mind of the parties. Further not only intended parties but the government must also take due care and must consider the enacting of laws in regard to the surrogacy so as to protect the couples seeking such measures. Thus, there are issues letting single parents and foreign nationals to have children through surrogates in India are one issue to be focus upon.

There are several instances where the interest and rights of the surrogate as well as intended parents have been violated and misled. Yet, there are no clear provision regarding the same yet. The Indian Council of Medical Research in 2005 had issued guidelines for the accreditation, supervision and regulation of surrogacy clinics but still those remain on paper and no such guidelines have been followed so as to protect such women. Further in 2010, the Assisted Reproductive Technologies (regulation) Bill, 2010 was been drafted by the committee of experts. Thus the Union government is now set to table in parliament Bill 2013.

7. CURRENT NEWS

The Union Cabinet cleared the Surrogacy (Regulation) Bill, 2016, banning commercial surrogacy in India¹⁸.

¹⁸ <http://www.thehindu.com/news/national/cabinet-clears-surrogacy-bill>