



Surrogacy laws in India: A critical study and comparison with China

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Abstract

Surrogacy as a notion has been popular in India since a very long time. The idea of commercial surrogacy surfaced in the country when women were traded for indiscriminate reasons as surrogate mothers with no legal proof to incur their expenses and thus becoming a use and throw thing. This sole practice has contributed to the decades long worsening problem of women being exploited.

This research tends to be a theoretical one which delves into the concept of surrogacy from a historical perspective and how it progressed with ultimately leading to enactment of Surrogacy (Regulation) Act 2021. This paper has been precised with certain jurisdictions of my research. It covers a detailed analysis of generality of surrogacy laws in India and China. I have specifically chosen India and China because the former has certain rules and regulations that have emerged in my research field and the latter has banned all forms of surrogacy among its people.

I categorically listed this title for my research as surrogacy is still considered to be a stigma in the society with the legal obligations attached to it holding least prominence especially among the lower strata. Further, there has much emphasis provided upon the exploitation of the rights and interests of surrogate mothers which needs to be taken into account. With heightened inquisitiveness on my part I would like to explore more on the topic.

Keywords: Surrogacy, Commercial Surrogacy, Surrogacy Regulation Act, 2021, India and China, Stigma, Exploitation

Introduction

The research paper titled “Surrogacy laws in India: A Critical Study and Comparison with China” has the objective of analyzing the concept of surrogacy and its laws in India and a critical study and comparison with China. Further, the research also focuses on the affect of surrogacy on the rights of surrogate mothers and how they’re being protected.

Hypothesis

The Surrogate mothers and their interests are constantly ignored and exploited in India and China.

Research Methodology

The research methodology for this research relies both on primary and secondary sources for gathering the required amount of information. Primary sources include laws enacted by the Legislature and legal rulings. Further, Secondary sources include articles, websites and other publications.

Introduction: Surrogacy

Surrogacy, the word derived from the Latin word “Surrogatus” meaning ‘substitution or replacement’. Surrogacy is a legal arrangement where a woman (the surrogate mother) agrees to bear a child for one or more persons who will become the child’s parent after birth. The surrogacy contract is a great option for people who wish to fulfill a dream of having their genetic child but couldn’t due to infertility.

Forms of Surrogacy

▪ **Traditional Surrogacy:** This type of surrogacy artificially inseminating the woman with the father’s

sperm. The surrogate bears the child and gives birth. The Surrogate mother will be regarded as the biological mother of the child as the surrogate's egg was fertilized with the sperm of the father.

- **Commercial Surrogacy:** It is the type of surrogacy wherein the surrogate mother receives a sizeable amount of payment in exchange for her services. This also serves as business opportunity for the surrogate. This form is basically carried out between the surrogate mother and intended parents being complete strangers. Commercial Surrogacy is sometimes referred in the form of certain offensive terms as “wombs for rent”, “outsourced pregnancies” or “baby farms”.
- **Altruistic Surrogacy:** It is a form of surrogacy to define a circumstance where there is no formal contract for payment or fee for the surrogate. The important aspects surrogate mother having the child, dissolution of her parental rights after the child’s delivery and the required payment by the genetic parents. The surrogate receives the payment just to make up for the pain she endured and includes her medical bills and other costs. It is usually an arrangement between close relatives or friends.
- **Gestational Surrogacy:** It is the type of surrogacy involving the use of in vitro fertilization (IVF) where the mother’s egg is extracted, fertilized with the father’s sperm and then the embryo is placed inside the gestational surrogate’s uterus. In this form, the surrogate doesn’t have any right over the child because her egg wasn’t used in the process instead she just gave birth to the child which was implanted within her.

Research Question 1

What Are the Main Elements of India And China's Surrogacy laws?

Surrogacy in India

History of Surrogacy in India

Surrogacy as a practice as its roots in the history of India and has evidences proving it to be a century old procedure. Those are:

Ancient India (Mythological perspective)

- Two test tube babies, as son named Kripa and daughter named Kripi was born to Sage Gautama from his own semen.
- Infertile couples can benefit from the practice of surrogacy. It was formally known as Niyoga Dharma and has been prevalent in India since centuries.
- Balram, Devki and Vasudev's seventh child was implanted as an embryo in Rohini, Vasudev's first wife to prevent Kansa from killing the infant.
- In the Mahabharata, Gandhari gave birth to a mass after a two-year pregnancy. There were in total 101 cells in there which led to birth of 100 infants known as Kaurvas.

Modern India

Surrogacy became a popular practice in India after the birth of Kanupriya also known as Durga, the world's second and India's first IVF baby, born in Kolkata on October 3rd 1978.

Legal Developments

- India is becoming a surrogacy regulation hub at a much faster pace than expected as it poses a great yet cheap deal platform for childless couples all around the globe. Tourists come here, appoint a surrogate through agents, get a passport and take away the child after paying whatever amount that was decided through a legal agreement.
- **Assisted Reproductive Technology (Regulation) Bill 2008:** As per the bill, the country strives to encourage women to rent their wombs. The bill further claims for the "womb on loan" process to be painless and legal. Moreover, the bill focuses upon no discrimination in terms of defining the couple who want to become the intended parents to a surrogate child. The kid born through an ART treatment must be accepted by the concerned couple as legitimate and legal.
- **Surrogacy (Regulation) Bill 2016:** The bill focuses upon requiring alternatives to altruism and prohibiting trade substitutes. Altruistic replacement will not require any sort of financial remuneration for the surrogate mother other than health and indemnity expenditures throughout the pregnancy period whereas the trade or marketable substitutes requires the financial costs to be beyond the medical concerns. Further, a certificate of entitlement should be granted to the intended spouses by an appropriate authority.
- **Surrogacy (Regulation) Bill 2019:** The bill was introduced with an aim to promote altruistic surrogacy. Further, the bill established certain requirements for the substitutes like age criteria being between the age

25 to 35 years and should be mentally and physically stable person. Moreover, the bill focuses upon the providing substitutes for intended parents being married and having proven infertility for five years or more and the intended parents shouldn't have a surviving kid (biological; adoptive; surrogate) with an essentially and eligibility certificate from a relevant central authority. There is also punishment for infringers causing misuse to the substitute, involved in commercial substitution up to Rs. 10 lakh rupees fine or 10 years of imprisonment.

- **Assisted Reproductive Technology (Regulation) Bill 2020:** The bill provides for creation of National Registry of Clinics and Banks to access all required information regarding the clinics and banks in the country. As per the bill, the sourcing of the gametes should only be done by a registered ART bank. The kid which has taken birth through an ART treatment must be treated as the natural born child of the intended couple and must be given all the rights and privileges available to a biological child of the couple. Moreover, the semen collection should be from both the genders including 25 to 55 years for Males and 23 to 55 years of age for Females.
- **Surrogacy (Regulation) Act 2021 And Assistive Reproduction Technology (Regulation) Act 2021:** The two bills aim to setup in vitro fertilization (IVF) clinics and prohibit commercial surrogacy in India. Further, in 2022, the health and family welfare ministry gave the Assisted Reproductive Technology (Regulation) Rules, 2022.
- **Assisted Reproductive Technology (Regulation) Act 2021:** The act aims to regulate and supervise ART clinics and banks and prevent their misuse. Further, the act focuses on aspect that every ART clinic and bank must be notified under the National Registry of Banks and Clinics in India. The act further lays down the conditions for gamete donation and supply. Moreover, clarification is provided for that the donor will have no parental rights over the child born through ART.

Surrogacy (Regulation) Act 2021: The act only promotes altruistic surrogacy and opposes commercial surrogacy. Further, the intended couple need to obtain an essential certificate issued from a relevant central authority. Moreover, the act strictly adheres to the gestational surrogacy thereby cutting the biological link of the surrogate mother from the child.

Surrogacy in China

History of Surrogacy in China

Surrogacy in China emerged in the 20th Century with the categorization of Gestational Surrogacy coming into being. As per Chunyuan Ding, earliest surrogacy practice originated from the story of "a man wants to borrow a women's belly to produce offspring". After the birth of first test tube babies in Third Hospital of Peking University in Beijing in 1988 and the first surrogate baby in China was born in the year 1996. The demand for surrogacy increased drastically in order to solve the problem of infertility. In the ancient times, because of the people's urge to solve the

problem of infertility through surrogacy and have a connection with the offspring. Due to certain controversial ethical issues with traditional surrogacy, Gestational Surrogacy sprung up.

- **Main Elements of Surrogacy in China**
- Surrogacy in China emerged in the 1980s with the introduction of Gestational Surrogacy.
- With the enactment of ONE CHILD POLICY in China, the rates of surrogacy cases took a faster pace. Due to preference of male child over a female child, especially in the impoverished areas of china, people produced more and more children in order to fulfill their desire of male child due to their traditional mindset. However, due to the governmental interference with limitation over number of children. The people turned towards surrogacy as their only way to have children more than one.
- Globally, the concept of Surrogacy has achieved great heights but in China, the government does not promote surrogacy causing an underground surrogacy market to rise. Restraining the practice of surrogacy in china has become a daunting task for the government to regulate.
- As per the specifications of Human Assisted Reproductive Technology, the medical bodies which may develop the above-mentioned technology will be charged with a fine of 30,000 RMB (CHINESE YUAN). Further, according to the rules on management of medical bodies, the non-medical bodies using the above technology will be charged with 10,000 RMB.
- But, administrative punishment for illegal surrogacy is weak in China leading to surrogacy agencies earning a much higher profit.
- Due to such restrictions, an underground surrogacy market has been thriving in the country. The city of Shenzhen is an example of such an underground surrogacy market.

Research question 2

In india and china, how the interests of surrogate mothers are protected and safeguarded?

India

- Commercial surrogacy has been termed to be the core issue of all the evils as it plagues the image of surrogacy in India. Till 2008, there was alarming increase in the cases of oppression against the surrogate mothers. Because of insufficiency of rules there was no correction on the treatment of the surrogates and they were considered as last option by the medical institutions which employed them as they focused just on profit maximization at best.
- For the very time, the 228th report of law commission of India recommended a complete ban on the practice of commercial surrogacy and allowed the ethical practice of surrogacy I.e altruistic surrogacy institutions which hired them as they focused just on profit making.
- Due to heightened levels of woman exploitation in this practice, the introduction of surrogacy (regulation) bill 2019 became a ray of hope for women in misery. But the act faced certain criticism on the ground of complete ban on commercial surrogacy implying its adverse impact upon the medical institutions, the aspiring surrogate mothers and the intended parents.

▪ **In the case of baby manji yamada v. Union of india (2008)** ^[5, 7]

A Japanese couple named Dr. Ikufumi Yamada and his wife, desired to have a child and thereby entered into a surrogacy agreement with an Indian woman in Anand, Gujarat. Meanwhile, the intended couple underwent a matrimonial discord as the wife wasn't ready to accept the child. Further, the surrogate mother also abandoned the child but the father insisted on having the custody of the child. In the absence of clear laws of Surrogacy, the fate of the child became a question of concern. The high court under a impugned order as a Habeas corpus petition styled as PIL filed by an NGO regarding the custody of the involved child M. The writ jurisdiction under Article 32 of the Indian Constitution was invoked. Grandmother of the baby M claimed that the Japanese father had to return to Japan because of his Visa expiration and also claimed that the municipal authority in Gujarat issued a birth Certificate of the infant with the name of the genetic father.

JUDGEMENT: The Supreme Court of India held that the custody of the child should go the grandmother because of the separation of the intended parents and the child wasn't allowed to enter into Japan. So, ultimately, the custody of the child was handed over to the grandmother.

▪ **Jan balaz v. Union of india (2010)**

The Gujarat High Court conferred Indian Citizenship on two twin babies fathered through compensated surrogacy by German national in Anand District. The Court observed "we are primarily concerned with the rights of two new born, innocent babies, much more than the rights of biological parents, surrogate mother or the donor of the ova. Emotional and legal relationship of the babies with the surrogate mother and the donor of the ova is also of vital importance." The case basically dealt with the legal status of children born via commercial surrogacy.

▪ **Shama v. Union of india (2010)**

In this case, Delhi High Court examined the legal aspect of these type of contracts and whether surrogate mother could claim rights to the child after birth. The court ruled once the child gets delivered, the concerned couple have full parental rights over the child. After the execution of the surrogacy agreement, the surrogate mother has the responsibility to relinquish all her rights over the child.

▪ **National commission for women v. Union of india (2011)** ^[10]

This case was significant in addressing the exploitation of surrogate mothers in India. The National Commission for Women approached the Supreme Court to raise concerned regarding the exploitation of women in commercial surrogacy. The Court ruled that the need for regulating surrogacy to prevent abuse, particularly financial exploitation of vulnerable women. The case made way for the discussions on drafting the Surrogacy (Regulation) Bill 2020 with a deep focus over ethical surrogacy practices.

China

- Due to Traditional Chinese beliefs, more than half of the Chinese population believes that males are superior to women. Women of China still have a weaker position when it comes to employment and education. In order to flourish as economically independent

beings, many Chinese women have taken the profession of being surrogates.

- However, the laws of China on surrogacy remain unfinished, the welfare of surrogate mothers are scarcely considered.

Moreover, many Chinese scholars have pointed out that China upholds the idea of typical oriental cultural personality i.e. which states that Chinese traditional culture focuses upon the connection amid the families and the society at large and surrogacy has the capacity to distort such holistic relationship.

Conclusion

This research was mainly focused upon the credentials to analyse in the concept of surrogacy. Further, the paper also considered the concerns and grievances of surrogate mothers being impacted and safeguarded in the process as mentioned in the hypothesis.

The hypothesis proved out to be true in the sense that in both India and China the rights and interests of the surrogate faced a drastic phase to go with. The former country surfaced grave exploitation of surrogate mothers which ultimately got on the right track with the enactment of Surrogacy (Regulation) Act 2021 but still certain stringent guidelines needs to be implemented at the earliest.

Whereas, the latter country banning all forms of surrogacy has ultimately surfaced an underground surrogacy market for the Chinese population which has pushed the Chinese women who aspire to pursue this profession into a daunting situation with their financial position at stake and especially their own security not being backed by legal obligations.

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