A Comparative Study On Surrogacy With Respect To Challenging Personal Liberty Of Women’s Rights And Health

Introduction

“Sometime when making something so precious, beautiful and unique, it takes and extra helping heart.” Surrogacy may come as surprise that is existed in ancient times as well widely mentioned in our mythology and was practised socially accepted and even respected. Surrogacy means to carry the child for the other women who is not capable of producing the one, due to certain complexities. In past decade commercial surrogacy has grown tremendously in India. Herein surrogacy comes as an alternative when the infertile women or couple is not able to reproduce. India is one of the first country in the world to legalize commercial surrogacy since the year 2002 under reproductive tourism policy aimed at earning foreign exchange. Subsequently the Supreme court of India in the epoch making case Baby Manji yamada’s vs. Union of India (UOI) formally legalized commercial surrogacy in the year 2008.

The surrogacy problem arises because of the absence of the uterus, or uterine abnormalities, either congenital or acquire repeated in vitro fertilization (IVF) failures, medical conditions for which pregnancy is contraindicated. In Indian societies, the social attitude towards surrogate motherhood are defined by name calling as “baby breeders”, incubator”, carrier or vessel” among others. India has emerged as an international centre of “surrogacy industry”. Thousands of infertile couples from india and abroad are flocking to the assisted reproductive technology(ART) clinics to have a child of their own. It raises many complex ethical social and legal issues. At present ART Bill 2014 is introduced which has made attempt to provide for reproductive health safeguards for surrogate mother yet the Bill has certain chief limitation which has been subject to critics by medical doctors, lawyers as well as surrogate mothers who have voiced their concern against it. It highlight the total disregard for the rights of the surrogate mother and child and have resulted in a manner of public interest litigation in the supreme court to control commercial surrogacy. Commercial surrogacy or “womb for rent”, is a growing business in India. It is hard to explain that in case of surrogacy, whether these women are exercising their own personal liberty or they are forced to become a surrogate mother due to their in laws or husband’s desire to fulfil material and for sake of financial needs. If I talk about health risk associated with surrogacy then In the US, surrogates are given more than two embryos for their for their safety but in India, Surrogate are implanted with five embryos in order to increase the chances of pregnancy which increases the health risk of babies and the surrogate mother both. The risk more increases to mother which induced hypertension, stroke and placental abruption.

Literature Review

Referring few books , articles, reports, research paper : Surrogacy in India by Advocate Dev P. Bhardwaj, Exploring Indian Surrogates’ Perceptions of the Ban on International Surrogacy By Sarah Huber, Sharvari Karandikar and Lindsay Gezinski, Surrogacy under Indian Legal System Legal and Human Rights Concerns By Pillai, Aneesh V.y (researcher), Dr. V. S.

Sebastian(guide), IASSCORE, Concept of surrogacy and rights of women in the Global Era By Dr. saroj saini, Department of laws, Punjab university, Chandigarh, Surrogacy and Women in India: Issues and Perspectives By Dr. Reena devi Chandel, National report on surrogacy by Royal society research, An evolution of Surrogacy Tourism in India(ARTICLE), By Dr. Binoy, T.A.(International Journal of current Research,vol.10,issue,02,February,2018)

Objectives of the Study

The main objectives of this study are as follows:

1. To study the importance and significance of the Assisted Reproductive Technology, in the modern era.
2. To understand the working of the practice of surrogacy in India and suggest a better mechanism for India.
3. To study the ART Bill 2008, 2010, 2014 and the recent Surrogacy (Regulation) Bill, 2016 for regulation and supervision of the assisted reproductive technologies, and surrogacy and hurdles this came in the way of enacting it.
4. To study the working of the commissioning of the surrogacy along with government notifications.
5. To study the Social, Legal, Moral and Ethical issues surrounding the surrogacy and to find out whether it is a boon or a bane.
6. To study the various international human rights laws for protection of the rights of the parties of the surrogacy and the surrogate child.
7. To provide different remedies which can supplement and not supplant to the remedy by way of surrogacy.
8. To analyze and compare the mechanisms adopted in various countries and to identify the best experiences and make a mold which would be most suitable for Indian economical, socio-cultural, and politico-legal system.
9. To find out the consequences and effects of surrogacy as a growing role in India.
10. To describe the role of the Legislature, Judiciary, Administrative bodies, Medical Science, etc., with reference to surrogacy institutions in India which are dealing with framing, interpreting, implementing or notion of surrogacy policy.

Scope of Study

The research study will help to identify the problems faced by the community in the present and future because of the issues of the surrogacy. The arrangement of surrogacy is achieved through scientific research and reproductive technology in the recent years. It is being practiced without the being proper law and legislation, consequently the interests of agencies are exploiting women by making her a machine for a creation of children for the childless couple and earning money making it as a trade or business.

It is important to evaluate the impact the social, ethical, moral and legal issues from the perspective of the Indian society.

This study is also equally significant to educate the society for the childless couple and single persons, homosexual couple’s reproductive rights and the remedies available to have their own biological children. In the event of infertility either in wife or in husband as well as too educates

such society on their available legal rights.

Research Question

This research is trying to analyse the various aspects of law on surrogacy in different countries and India, and also with regard of commercialization of surrogacy in India with reference to Baby Manji Yamda's Case

- Is it legal to become surrogate mother in India as per Article 19(1)(d) ?
- Would prohibition of surrogate contract violate constitutional 'Right to Privacy' under Article 21?
- Whether commercial surrogacy is inconsistent with the dignity of Indian womanhood and therefore voilative of article 21 of the Indian Constitution?
- Whether commercial surrogacy amount to economic and psychological exploitation of surrogate mother ?

Research Methodology

The researcher has gathered the information from various books, journals, research papers, research reports such as - ALRRJ Vol. 1 eBook (2).pdf (manupatra.com), NHRC report on surrogacy, Articles by journalist, newspapers like THE HINDUSTAN TIMES, U.N. Conventions and other national and international statutes dealing with surrogacy and related aspects. The relevant data was gathered from various websites, e-newspapers, e-journals, foreign books, periodicals, reports of NGO's and the opinions of doctors, etc. The methodology adopted for the study and research of situational analysis through the means of survey. The aim of methodology to discuss on surrogacy both national and international level and analyse the surrogacy arrangement across the globe and the legal issues so far, etc. it also analyses about the existing surrogate mother health issues and rights of women and child.

Tenative Chaptarisation

It is divided into six chapters.

1. First Chapter is the about Introduction chapter, which provides a basic outline regarding this work. It highlights meaning, origin and development of surrogacy and the need and significance of a detailed study on surrogacy practices in India. The basis of every surrogacy arrangement is derived from the desire and right of an individual to beget a child. To understand the objectives of the study and why and how surrogacy came into practice.
2. Second Chapter discusses the Indian mythology of surrogacy and development of modern surrogacy. and what are types of surrogacy wherein commercial surrogacy will be explain more in detail with respect to related law. It examines the various legal, human rights, moral and ethical issues related to surrogacy practices in India and the measures taken by the Indian Government for regulating surrogacy. At the same time criticisms are made on the various ethical, moral and religious objections to surrogacy and there are different countries have adopted different guidelines and legislations as per the social, economic, culture, and religious needs and legal requirement. The various issues related to surrogacy practices in India can be classified into four major

heads, i.e. issues related to intended parents, surrogate woman, surrogacy contracts and surrogate child.

3. Third Chapter identifies the various legal and human right issues concerning the Intended parents in a surrogacy arrangement. It tries to answer the important questions such as whether there is a right to be an intended parent, what are the eligibility criteria to be fulfilled by an intended parent, and whether the single individual, gays and lesbians can also claim the right to be intended parents. Further this chapter also examines the rights and responsibilities of intended parents.
4. Fourth Chapter identifies the various legal and human right concerns related to surrogate women. It is to be noted that a women's right to be surrogate is not expressly mentioned in any international and national legal documents. This chapter examines the important questions such as whether a woman has a right to be a surrogate, who can be a surrogate and what are the rights and duties of a surrogate woman. It discusses on whether right to personal liberty of women includes right of rent her womb? To understand this it is necessary to understand the meaning of personal liberty and how it is violating fundamental right of the Indian constitution?
5. Fifth Chapter deals with the conflicting legal and human rights issues relating to surrogacy contracts. It examines in detail the various arguments against the legality of surrogacy contracts and tries to answer the question whether surrogacy contracts are valid or invalid in India. It also discusses the various circumstances in which a surrogacy contract can be broken and the remedies available in case of breach. The main objective and purpose of every surrogacy arrangement is to beget a child.
6. Sixth Chapter highlights the need and important of a child and discusses the national and international perspectives of right to procreation of an individual. Further, it identifies the various barriers to enjoyment of such right and the various measures available to overcome it. Among the various measures available to overcome childlessness, the practice of surrogacy is considered as the most controversial and widely practiced method in India. It highlight the need and importance of child in religious, culture, social, economic and legal perspectives and how it is addressed in various international human rights conference. It also emphasis that how right to reproductive freedom is recognized and protected in every corner of the world.

CHAPTER 1. INTRODUCTION

1. Origin and development of surrogacy
2. Assisted human reproductive technologies(ART)
3. Surrogacy: why and how ?
4. Types of surrogacy

CHAPTER 2. SURROGACY : LEGAL, ETHICAL AND MORAL ISSUE

1. Surrogacy in mythology
2. Surrogacy: Legal and ethical debates
3. Surrogacy vs. other form of ART
4. Legal response in India and foreign countries

CHAPTER 3. INTENDED PARENTS AND THE LEGAL CONCERNS

1. Meaning and definition

2. Right to be intended parent
3. Criteria for being an intended parent
4. Right and duties of intended parents

CHAPTER 4. RIGHTS AND HEALTH ISSUES OF SURROGATE MOTHER

1. Surrogate mother: concept and meaning
2. What are the health issues affect by surrogate?
3. Right to personal liberty and right to be surrogate
4. Eligibility criteria for a surrogate mother
5. Rights and duties of surrogate mother

CHAPTER 5. SURROGACY CONTRACT : ISSUES AND CHALLENGES

1. Surrogacy contracts: meaning, object and purpose
2. Essentials of surrogacy contracts
3. Enforceability of surrogacy contracts
4. Breach of surrogacy contracts and its remedies

CHAPTER 6. RIGHT TO PROCREATION : NATIONAL AND INTERNATIONAL PERSPECTIVES

1. What are Reproductive right?
2. Right to procreation and national laws
3. Procreational right for single parent, Transgenders and foreigners
4. Barriers to Right to procreation and parenthood
5. Comparative view of judicial forum and legislations

Conclusion

The love and happiness which is spread by innocent children is incomparable in the world. since the ancient times the task of giving birth and rearing of children has been accomplished through the institution of marriage and family and is celebrated as joyous occasion and gifts and offerings are made to god to express one’s gratitude and happiness. There are many religious aspect which has emphasised the importance to the begetting of a child. And apart from religious and cultural perspective, there are various other inter-dependent reasons for begetting a child such as personal, family, social and legal. The development of society and legal systems led to the emergence of adoption as a overcoming childlessness and to enable infertile couples to have a child. The most commonly used method to fulfil the desire of individual with these technologies of ART’s are artificial insemination, In-vitro fertilization and surrogacy, which are criticized on the basis of various human rights, legal, ethical and on moral grounds.

Surrogacy is not a treatment but is a method which allows individual or couples to beget a child genetically related to them. It is arrangement which are being practiced since ancient time and is also mention in Hindu mythology as well as in Bible. In modern India, this method allows the infertile individual like gays, lesbian, divorced and unmarried, to beget a child. But at the same time this right to act as a surrogate is not an absolute and can be restricted like any other human rights i.e. right to personal liberty and right to privacy; property right over human body

and right to benefit from progress in science and technology. Therefore in order to exercise this right a woman must satisfy certain criteria relating to age, mental and physical health, marital status and relation with intended parents, etc. hence it can be concluded that surrogacy in India is a purely a contractual bond between the parties and proper care must be taken while drafting such a contract so that it must violate Article 14 and Article 21 of the Indian constitution. All surrogacy clinic must be under the strict supervision and the laws of India must not be imposed on the weaker section women just for the sake validating a developmental and welfare measures.

Suggestions

1. The study of all social and legal aspects of surrogacy, I firmly believe that government shall promote “Adoption” as the option to infertile couples as there are many unfortunate babies in this world who has lost their parents and are orphans rather than bringing more children in this overcrowded and difficult world.
2. If the surrogacy has to be legalised, then only altruistic surrogacy shall be allowed that too in the rare of the rarest case, so that stigma of “trafficking in human beings” associated to surrogacy may be removed instead it shall be revered as an act of great sacrifice by the surrogate.
3. Commercial surrogacy shall be banned as if fragments motherhood and treat child as a thing of sale and purchase which is in violation of article 23 of the Indian constitution.
4. If any surrogate child are refuses to accept it then it shall be considered as an offence and the intended parents should be made responsible for the maintenance of the child till the adoption or upto the age of majority.