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Email: editor@whiteblacklegal.co.in

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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provide dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

WHITE BLACK LEGAL: THE LAW JOURNAL

SURROGACY IN INDIA : LEGAL STATUS AND PERSPECTIVE.

Authors:

Abirami G (17BLA1063)

4th year, BA LL. B (hons), VIT university, Chennai
(abirami.2017@vitstudent.ac.in)

Iswarya N (17BLB1042)

4TH year, BBA LL. B (hons), VIT university, Chennai
(iswarya.n2017a@vitstudent.ac.in)

ABSTRACT:

The prevalence of infertility all over the world increasing steeply in recent times has paved way for the advancement of assisted reproductive techniques (ART). Herein, surrogacy came as an alternative when the infertile individual or couple is not able to reproduce. Surrogacy is basically a form of assisted pregnancy where a woman agrees to carry out pregnancy for another couple who on the birth of the child will become its parents. If the surrogate mother is rewarded financially it is commercial otherwise altruistic. Commercial surrogacy is legal in countries like Ukraine and California but illegal in England, many states of the United States and in Australia where altruistic form alone is recognised. Parallely in Germany, Sweden, Norway, and Italy any form surrogacy agreements are illegal. Commercial surrogacy is now illegal in India after a bill passed in August 2016 as although the arrangement seems beneficial for all parties concerned, it involves certain delicate issues regarding the rights and wellbeing of the surrogate mother and the intended parents in different ways socially, physically and emotionally. This paper will discuss the legal status the prevailing situation in India with regard to surrogacy.

OBJECTIVE:

To present a descriptive study the legal status of surrogacy in India and its practical perspective.

METHODOLOGY:

Owing to the lockdown situation due to COVID-19 the study is intended to be carried out by reading the legislations and legal texts with regard to surrogacy along with referring to other books, articles and published interviews of surrogate mothers and parents.

INTRODUCTION:

The term “surrogate,” is derived from the Latin word “Subrogate” which means “appointed to act in the place of” or “substitute” . Surrogacy is an agreement where a woman agrees and carries out a pregnancy for another couple or individual who on the birth of the child will become its parent(s). Traditional surrogacy involves artificial insemination Hence, in this case the surrogate mother is also the biological mother whereas Gestational Surrogacy is a procedure where the embryo is formed through invitro fertilization and placed in the surrogate mother’s womb. Surrogacy maybe opted either due to medical impossibility of pregnancy, pregnancy only possible with sure and extreme health risks or the intending couple is of the same sex. Any form of Surrogacy involving Monetary compensation for the surrogate mother beyond mere reimbursement of medical and other reasonable expenses is referred to as commercial surrogacy otherwise it is considered altruistic. The legality and costs of surrogacy vary widely between jurisdictions, sometimes resulting in interstate or international surrogacy arrangements.

INTERNATIONAL STATUS

commercial surrogacy is illegal and prohibited by the surrogacy arrangement act 1985 in England. A surrogate mother has the right to be the child’s legal mother irrespective of being genetically unrelated if there is not a parental or adoption order made. In USA, the legalities of surrogacy come within the state jurisdictions in the USA due to which it is different for different states. Some states facilitate while some refuse to enforce surrogacy and, in some states, commercial surrogacy alone results in being penalised. for example, The Assisted Human Reproduction Act in Canada only permits altruistic surrogacy allowing surrogate mothers to be reimbursed for approved expenses alone. South Africa Children’s Act of 2005 has allowed commercial surrogacy if the surrogacy agreement is validated by the High Court before fertilization which seems to be very diligent. The Science Council of Japan proposed a ban along with punishment for all the parties involved in commercial surrogacy arrangements. Saudi Arabia has disallowed surrogacy due to religious authorities. China’s Ministry of Health banned surrogacy in 2001 Despite this regulation it is reported that illegal surrogacy is still prevalent in China. In Ukraine married couples alone may legally perform gestational surrogacy. In Russia along with certain medical indication commercial surrogacy is legal for both it’s citizens and foreigners who are willing adults. Georgia has allowed surrogacy legally however it has deprived the surrogate mother any parental rights over the child. In Bulgaria due to illegal practice of surrogacy the government has now sanctioned it in

the name of substitute mother instead of surrogacy. However, in countries such as Romania and Poland there is no defined laws and regulations relating to surrogacy hence, there is also no restriction on undergoing surrogacy in those nations.

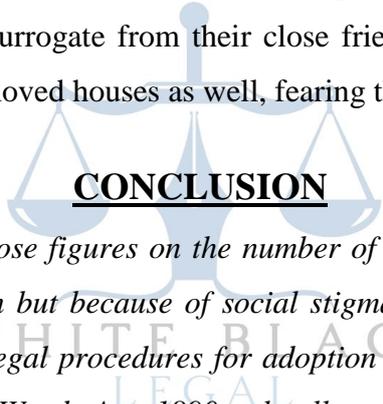
LEGAL STATUS IN INDIA

In 2002 India legalised commercial surrogacy intending to expand medical tourism in India. However, this did not last too long. The 228th Law Commission report recommended the enactment of legislations that provided for restricting commercial surrogacy and allowing altruistic surrogacy alone ensuring ethical standards. Then in 2005, the ICMR (Indian Council of Medical Research) set out guidelines for the regulation of surrogacy arrangements. It stated that the surrogate mother can get monetary compensation as would have been decided by the couple and the surrogate mother. The guidelines also said only gestational surrogacy has to be practiced and that she must relinquish all parental rights related to the surrogate child. through the ICMR's letter dated 28th September, 2015 to all clinics in India there was practically already a ban on foreign couples practicing surrogacy through Indian surrogate mothers. The Surrogacy (regulation) bill, 2016 was passed on 19th December 2018 after lok sabha's consultation with the standing committee and its report. The bill imposed bann on commercial surrogacy and only allowed altruistic surrogacy provided the conditions set out by the bill are met. The bill also clearly drew the line between monetary compensation and reimbursement of medical and other reasonable expenses of pregnancy.

PRACTICAL PERSPECTIVE IN INDIA

Commercial surrogacy was first legalized in India in 2002 aiming to expand India's medical tourism sector. But now, the business is facing extinction due to the government's differed perspective. Last year a bill was passed in the lower house, which bans commercial surrogacy and allows only altruistic surrogacy in India intending to protect the women from abuse and exploitation. Like the two sides of a coin, surrogacy has its advantages and disadvantages too. After the legalization of commercial surrogacy in India in 2002, the business surged. But as the business grew, so did the associated controversies too. There were cases where the children born out of surrogacy were commoditized and the surrogates were exploited. For example, a surrogate who was seventeen weeks pregnant died and it was revealed that she went to be a surrogate mother in want of monetary benefits concealing her past record of tuberculosis. Similarly in the case of Baby Manji Yamada vs Union of India (AIR 2009 SC Page 84) In 2008, a Japanese couple opted to have a baby through an Indian surrogate. But a

separation arose between the couple which led to a custodial dispute before the child was born leaving the child's life in dark. These are the main reasons why the government banned the issue of tourist visa to foreign couples. Even though this bill is the need of the hour to prevent exploitation and to prevent unethical practices, this might also affect women who are only dependent on such jobs to meet the basic needs of their daily lives and to run a family. A single mother from Gujarat who worked in a limestone production factory was paid around fifty to sixty rupees per day. So, she signed up as a surrogate in a hospital and started renting out her womb to feed her two sons. It is totally the choice of such women who voluntarily come forward to be a surrogate after being intimidated with the knowledge of all the physical and mental consequences. There are many other reasons why couples opt for surrogacy. A woman unable to have a child loses respect of her community and her family. Even though there are a lot of changes happening in our society, it is still difficult for people to accept a woman for who she is, because of which such couples go through extremes to have a baby like spending a lot of money. Because of such societal pressures, a couple from Bangalore had concealed their use of a surrogate from their close friends and they had not even told their parents about it and had moved houses as well, fearing the society



CONCLUSION

Ironically, India has almost close figures on the number of reported cases of infertility and the number of orphan children but because of social stigmas, norms and pressure coupled with the lengthy complicated legal procedures for adoption intending parents(s) may go for surrogacy. The Guardian and Wards Act, 1890 only allows Guardianship but not adoption. Similarly the Hindu Adoption and Maintenance Act, 1956 restricts non-Hindus from adopting a Hindu child also requirements of immigration after adoption have further hurdles. The most recent bill is expected to be reintroduced in parliament after the country comes to a normal phase after the current stringent phase of COVID-19. Right now, the lockdown has disrupted everything including the surrogacy industry, bringing down the demand and compelling clinics to focus only on essential services. This bill would ban all commercial surrogacy, if passed, and also impose limitations on the eligibility criteria. Also, the original bill allows only a married heterosexual couple who are childless and where the surrogate already has a child of her own. So, it basically says that, single people, homosexual couples and heterosexual unmarried couples are not a legitimate family. The aim of the bill is to allow ethical surrogacy and preventing women from exploitation. If the aim of the bill was to prevent exploitation, it should have focused on the consent part and not just on women seeking commercial gain. Though the government feels that surrogacy is exploitative, it does

not ban surrogacy; it only bans commercial surrogacy. Many women have struggled a lot before they became surrogates. Even though they had to bear the consequences that will arise out of it, the money they made from it helped them to take control of their lives. It has become way out of poverty for many women in rural India. India is a country which is ranked 112th in the world for gender equality. The social and economic factors that drive a women's choice to become a surrogate are complex. The ban on commercial surrogacy is more of political thing than by the understanding women who face choices in low income communities in India. It is the choice of the women to decide whether she wants to be a surrogate or not. If the government decides to ban commercial surrogacy, then it should first ensure support to these women who are struggling financially, who are illiterate and are disadvantaged economically.



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