



REVIEW ARTICLE

AN EVALUATION OF SURROGACY TOURISM IN INDIA - A STUDY ON ETHICAL AND
LEGAL PERSPECTIVE

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ABSTRACT

Surrogacy tourism or infertility tourism is a type of medical tourism in which couple with infertility travelling to other countries for hiring wombs of woman. There were lots issues in India when surrogacy tourism was a boom. This paper aims to provide a torch to the surrogacy tourism in India before the introduction of "The Surrogacy Tourism Regulation Act 2016" and evaluate the provisions of "The Surrogacy Tourism Regulation Act 2016." This paper is prepared based on secondary data collected from various sources.

INTRODUCTION

Surrogacy nations are those countries and jurisdictions which permit "commercial gestational surrogacy", where the cost is relatively low, and which give the intended parents legal rights over the new born child, whether by streamlined adoption procedures or direct parental rights. "In gestational surrogacy, an embryo, which is fertilized by *in vitro* fertilization, is implanted into the uterus of the surrogate mother who carries and delivers the baby"(Pikee Saxena, Archana Mishra & Sonia Malik, 2012). "Commercial surrogacy" means paying a women to carry a couple's fertilized eggs through pregnancy. It is some sort of renting the womb of a woman for a period of time. "Although surrogacy seemed to have been practiced since ancient times, its resurgence in the contemporary era has been nothing short of phenomenal. with advances made in reproductive technology, it is now possible to fertilize eggs and sperms in laboratories and have to embryo transferred in to the womb of the surrogate mother for gestation" (Rajendra Prasad Gunpath & Kartina Aisha Choong, 2015). The medical statistics shows that infertility affects approximately one out of every six couples.

It is more than just the inability to conceive after 12 months of trying, but also includes those that cannot carry a pregnancy to term. Surrogacy is presented as an option to couples who otherwise would not be able to have children. "Ten to fifteen percent of married couples are unable to have children. Surrogate mothers are not a new solution to the old problem of not being able to reproduce an offspring. Surrogacy has been around a long time and dates back to biblical times" (Grayce P. Storey). "The ever-rising prevalence of infertility world over has lead to advancement of assisted reproductive techniques (ART). Herein, surrogacy comes as an alternative when the infertile woman or couple is not able to reproduce. Surrogacy is an arrangement where a surrogate mother bears and delivers a child for another couple or person" (Pikee Saxena, Archana Mishra & Sonia Malik, 2012).

Surrogacy Tourism in India

India was known as the capital of "commercial surrogacy" and fertility tourism in the world. Once upon a time, India was considered as the most preferred "surrogacy destination" in the world. Commercial surrogacy was permitted in India from 2008 to 2016. "With commercial surrogacy banned in most nations, many are flocking to India – a country free of regulation and with top medical professionals and low costs – to hire the wombs of women in what is known as "surrogacy

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tourism" (Nitha Balla 2013). "Surrogacy has been a thriving part of the Indian medical tourism industry, with many couples from other countries because of relatively lower costs, less restrictive laws and availability of surrogate mothers. Before the government imposed a ban in November 2015, foreigners accounted for 80% of surrogacy births in India"(IMTJ 2016). "India's \$2.3 billion reproductive tourism industry is thriving, with 500 legal fertility clinics; of which 350 offer surrogacy services. 70% of surrogacy cases are for foreign clients, and the 25% for non-resident Indians and persons of Indian origin. Local Indian couples form only 5% of the clientele. Many customers come from the UK, USA and Canada"(IMTJ, 2015). The ICMR reckons that nearly 2,000 children are born to surrogate mothers in India each year, but there are no official figures for the value of the industry (Sourabh Sharma 2016). The main customers of the surrogacy tourism were heterosexual couples, homosexuals, incapacitated and handicapped people and infertile couples and even elderly couples. The surrogacy tourism was a very lucrative business for Indian medical tourism. It was around USD 2.3 billion business with a huge potential to generate foreign exchange earnings for the country. The direct cost of a surrogacy in India for the foreign couple was between Rs 11 to 16 lakhs and a portion of it was shared with the actual womb donor and the rest of the amount was divided by the intermediaries. But in was treated unethical and inauspicious due to many reasons.

- It question the dignity and integrity of the Indian womanhood.
- It leads to woman trafficking
- It also leads to sale of surrogate children
- Most of the surrogacy victims were very poor, rural and less educated. They were always cheated by the middle men.

"The government's reasoning is that the lack of a legal framework has allowed surrogates to be underpaid and exploited by clinics, which charge between \$25,000 and \$50,000 for the safe delivery of a baby. Surrogates get between \$4,000 and \$6,500 from foreign couples and between \$3,000 and \$5,000 from Indian couples" (Sourabh Sharma 2016). "The monetary advantage for a childless foreign couple opting for India are spectacular. In India, surrogacy arrangements usually cost around US\$10,000-15,000 as compared to a whopping US\$50,000- 70,000 in the West" Neetha Lal (2016). Surrogacy was legally permitted in India but Indian government was trying to regulate this industry since 2010 due to some sort of misuse found widely in India. The Government of India has passed a Bill in 2015 to control the foreign citizens and NRI's who visit India for surrogacy tourism. It has provisions to control the clinics who were actively involved in surrogacy procedure. The Surrogacy Regulation Act, 2016 was passed by the government to control the functions of the Infertility Clinics and the ban the commercial surrogacy in India, especially the surrogacy tourism which was existing in India for long years. national Surrogacy Board, an apex authority to deal with all provisions of surrogacy, was established by the act to regulate surrogacy procedures in India. As per The Surrogacy regulation Act, 2016, "Commercial Surrogacy" has been completely banned by the law and only "Altruistic Surrogacy" will be entertained further. "At least 40,000 surrogate babies were born in the past decade. Many foreigners went to India to hire surrogate mothers for prices that could range from \$8,000 to \$40,000. There are 2,000 surrogacy clinics in India's \$400 million industry, and most will close"(IMTJ 2016).

"Commercial surrogacy is banned in New Zealand, Australia, Japan, China, Mexico, the UK, Philippines, South Africa, Canada, Netherlands, Spain, Switzerland, Sweden, France, Germany and most other European countries. Thailand and Nepal have recently banned commercial surrogacy in the wake of exploitation of women. Commercial surrogacy is allowed in Russia, the Ukraine and California in the USA"(IMTJ 2016).

Research Problem

Surrogacy tourism is one of the most demanded tourism service opted by the tourists from developed countries. it is a niche tourism market of the overall medical and health tourism industry. India is a renowned health tourism destination in the world and also was even known as the capital of Surrogacy tourism in the world till 2016. The surrogacy tourism was permitted in India from 2008 to 2016 and lots of well established infertility clinics were operational in India to tap the growing market of surrogacy tourism and around 40,000 surrogate children were born in India. But in 2016, Government of India has banned surrogacy tourism by Law. India has passed The Surrogacy Tourism Regulation Act, 2016 to curb the issues associated with surrogacy and Surrogate Tourism. Many problems were cropped up after a thorough literature review. The following research questions are formulated to carry out the research.

- What is Surrogacy Tourism?
- What was the extend of surrogacy tourism in India till 2016?
- Why did surrogacy tourism proscribe in India?
- What are the various provisions in The Surrogacy Tourism Regulation Act, 2016 to control surrogacy?

Objectives of the Research

The Surrogacy Tourism is banned in India by legislation even though it was a fast growing segment of the medical tourism industry. The main aim of the study is to evaluate the legal and ethical dimensions of surrogacy tourism and to evaluate the backdrops of surrogacy tourism in India. The study also objects to understand the provisions of The Surrogacy Regulation Act, 2016 to control and regulate surrogacy tourism in India.

Significance and importance of the Research

Once upon a time, Surrogacy Tourism was very much visible in India and lots of foreign aspirants choose India as their Surrogacy destination. Surrogacy Tourism leads to lots of ethical and philosophical issues in the Indian society due to many reasons such as physical and economic exploitation of rural women, human trafficking, crime, religious and cultural complications, legal and economic issues etc. Majority of the surrogacy mothers were from very rural and poor family background with less education. So, there is a need to evaluate the surrogacy tourism scenario of India and to educate the people about various provisions of The Surrogacy Tourism Regulation Act, 2016. This study is a humble submission to communicate about the surrogacy tourism and related issues.

MATERIALS AND METHODS

This study a descriptive study based on secondary data collected from various sources, especially journals, blogs,

reports and government proceedings. The data collected has been assessed and analyzed to find out the answer for the research questions and in order to meet the objectives of the study. Some of the information has been reproduced as like to avoid distortion and ambiguity, especially the legal terms and definitions.

Why surrogacy tourism is banned in India? An ethical evaluation

There are lots of ethical and psychological issues associated with surrogacy. "This include the criticism that surrogacy leads to commoditization of child, women, it break the bond between mother and child, it interferes with the nature and it leads to the exploitation of poor women in underdeveloped countries who sell their body for money" (Mehpara Haq, 2015). "The cross border surrogacy leads to problems in citizenship, nationality, motherhood, parentage, and rights of a child. There are occasions where children are denied nationality of the country of intended parents and this results in either a long legal battle like in case of the German couple with twin surrogate children or the Israeli gay couple who had to undergo DNA testing to establish parentage or have a bleak future in orphanage for the child"(Pikee Saxena, Archana Mishra & Sonia Malik, 2012). The major issue is the psychological and emotional attachment of the surrogate mother towards the surrogate child. "There are incidences where the child given to couple after surrogacy is not genetically related to them and in turn, is disowned by the intended parent and has to spend his life in an orphanage" (Pikee Saxena, Archana Mishra & Sonia Malik, 2012).

- Usually, an emotional attachment is created between both of them due to their togetherness during the pregnancy and gestation period.
- There are ethical consideration regarding the right of the child to know its mother (surrogate).
- The relationship between the surrogate mother and the surrogate child after the delivery is also a critical issue.
- Many time, the compensation to the surrogate mother's service is an ethical issue.
- The health condition of the surrogate mother may be deteriorated later due to surrogacy. There a question arises that who will take care of the surrogate mother if anything may happen after the surrogating process.
- Another significant question arises is that whether the surrogate child has any genetic tie with the surrogate mother. "In gestational surrogacy, the surrogate mother has no genetic ties to the offspring. Eggs and sperm are extracted from the donors and in vitro fertilized and implanted into uterus of the surrogate. This is an expensive procedure. Again, the unused embryos may be frozen for further use if the first transfer does not result in pregnancy" (Grayce P. Storey). Another very important issue is that whether the emotional aspects of the surrogate mother has any influence on the surrogate child's behavior.
- Majority of the surrogate mothers are poor and less educated. "If we look upon the problem of surrogate mothers, things are even worse and unethical. The poor, illiterate women of rural background are often persuaded in such deals by their spouse or middlemen for earning easy money. These women have no right on decision regarding their own body and life"(Pikee Saxena, Archana Mishra & Sonia Malik, 2012).

- Many surrogate mothers are afraid of social isolation, social out casting and many other society and religion oriented issues.

Legal frame work- The Surrogacy Regulation Act, 2016

India has introduced the Surrogacy Regulation Act, 2016 to regulate and streamline the surrogacy tourism and the functions infertility clinics throughout India. According to this act, commercial surrogacy has been completely banned in India including surrogacy tourism. Only "altruistic surrogacy" is permitted with lots of restrictions. The details of the Act is summarized below. The Surrogacy Regulation Act, 2016 Clause 3, Sub clause ii states that " no surrogacy clinics, pediatrician, gynecologist, human embryologist, registered medical practitioner or any person shall conduct, offer, undertake, promote or associate with or avail of commercial surrogacy in any form". "Commercial surrogacy" means commercialization of surrogacy services or procedures or its component services or component procedures including selling or buying of human embryo or trading in the sale or purchase of human embryo or gametes or selling or buying or trading the services of surrogate motherhood by way of giving payment, reward, benefits, fees, remuneration or monetary incentive in cash or kind, to the surrogate mother or her dependent or her representative in cash or kind, to the surrogate mother or her dependent or her representative, except the medical expenses incurred on the surrogate mother and the insurance coverage for the surrogate mother" (The Surrogacy Regulation act 2016). "Altruistic surrogacy" means the surrogacy in which no charge, expenses, fees, remuneration or monetary incentive of whatever nature, except the medical expenses incurred on surrogate mother and the insurance coverage for the surrogate mother, are given to the surrogate mother or her dependents or her representative" (The Surrogacy Regulation act 2016)

The punishment for the offenders in India

The clause 35 and sub clause 1 of The Surrogacy Regulation Act 2016 provides a detailed explanation of the offences in connection to surrogacy and the sub clause 2 of the same clause provides a description for the nature and period of punishment for the offenders. The Clause 35 and sub clause 1 of The Surrogacy Regulation Act 2016 states that "no person, organization, surrogacy clinic, laboratory or clinical establishment of any kind shall, Undertake commercial surrogacy, provide commercial surrogacy or its related components procedures or services in any form or run a racket or any organized group to empanel or select surrogate mothers or use individual brokers or intermediaries to arrange for surrogate mothers and for surrogacy procedures, at such clinics, laboratories or at other places;

a)issue, publish, distribute, communicate or cause to be issued, published, distributed or communicated any advertisement in any manner regarding commercial surrogacy by any means whatsoever, scientific or otherwise;

The clause 35 and sub clause 2 of The Surrogacy Regulation act 2016 states that Notwithstanding anything contained in the Indian penal code, contraventions of the provisions of the clauses a and b of subsection1 by any person shall be an offence punishable with imprisonment for a term which shall

not be less than ten years and with fine which may extend to ten lakh rupees"

Conclusion

Surrogacy Tourism or infertility tourism is one of the important niche segments of the multifaceted medical tourism industry. It is a multi-billion dollar business in the world. India was known in the world as most demanded surrogacy tourism destination for the last a few decades due to many reasons such as standard infertility clinical and medical facilities and availability of surrogate mothers. Lot of unethical practices and procedures were followed in India in connection with surrogacy tourism and there was pressure on Indian government to control and regulate the practices related to surrogacy tourism. But surrogacy tourism, especially commercial surrogacy has been banned in India by legislation. The surrogacy Regulation Act, 2016 was established in India to prevent misuse of commercial surrogacy in India.

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