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A Discourse on The Concept of Surrogacy In India

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Surrogacy in India has emerged as a complex and multifaceted topic encompassing various social, legal, ethical, and economic dimensions. The concept of surrogacy involves an arrangement where a woman (the surrogate mother) agrees to carry and give birth to a child for another individual or couple, who subsequently become the legal parents of the child. In India, the practice has gained significant attention over the past few decades, transitioning from an unregulated domain to a topic of national policy and legislative action. Historically, India became one of the most sought-after destinations for surrogacy due to its relatively lower costs and the availability of willing surrogates. This was coupled with the absence of stringent regulations, which made it attractive for both domestic and international intended parents. The practice offered economic benefits for surrogate mothers, often from lower socio-economic backgrounds, and created business opportunities for fertility clinics and related medical services.

However, the expansion of the surrogacy industry brought with it several challenges and controversies. Ethical debates arose concerning the exploitation of surrogate mothers, who were sometimes subjected to poor living conditions, inadequate healthcare, and unfair compensation. Additionally, concerns were raised about the commodification of women's bodies and the potential psychological and emotional impact on surrogates. Cases of disputes between surrogates and intended parents, particularly regarding parental rights and responsibilities, further highlighted the need for a structured legal framework. In response to these issues, the Indian government introduced the Surrogacy (Regulation) Bill, which was passed in 2019 and enacted into law in 2021. The legislation aimed to create a more ethical and regulated environment for surrogacy in the country. The key features of the Surrogacy (Regulation) Act, 2021, include the prohibition of commercial surrogacy and the allowance of only altruistic

surrogacy, wherein the surrogate mother receives no financial compensation other than medical expenses and insurance. The law also specifies that only married Indian couples who meet certain criteria, such as age and medical necessity, are eligible for surrogacy arrangements.

While the Act sought to address ethical concerns and protect surrogate mothers from exploitation, it has also faced criticism for being overly restrictive. Many stakeholders argue that the limitations imposed by the Act exclude single individuals, same-sex couples, and unmarried couples from accessing surrogacy services, thereby raising questions about discrimination and the right to parenthood. Furthermore, the regulation has reduced the pool of potential surrogates and created challenges for couples who seek surrogacy as a solution to infertility.

The socio-cultural context of surrogacy in India adds another layer of complexity. Traditional values and beliefs regarding family and motherhood often shape public perceptions and acceptance of surrogacy. The stigma associated with infertility and the cultural emphases on biological parenthood influence the choices and experiences of both intended parents and surrogate mothers. Additionally, religious perspectives on surrogacy vary, with some viewing it as a compassionate act that supports the creation of life, while others express concerns over the sanctity of childbirth and the moral implications of surrogacy arrangements.

In conclusion, the discourse on surrogacy in India is marked by a dynamic interplay of ethical considerations, legal structures, and socioeconomic factors. The Surrogacy (Regulation) Act, 2021, represents a significant legislative milestone aimed at safeguarding the interests of surrogate mothers and ensuring ethical practices. However, the policy's restrictive nature has sparked ongoing debates about inclusivity and access. To address these challenges, a balanced approach that considers the rights and welfare of all parties involved, including potential parents and surrogate mothers, is essential. As the practice of surrogacy continues to evolve, further research and policy discussions are needed to create a more comprehensive and equitable framework that aligns with India's social and cultural fabric.

A nation like India where morality resides in the veins of society &is considered to be the supreme law a concept like surrogacy has not remained a new concept there are diverse options diverse positive — negative &silent views as regards with one view is that to promote is to enhance immorality commercialization of human reproductive organs &to win the sanitize of parent —child relationship. Another view is that it bring the parenthood to those couples who due to anyhow reason cannot have their own children.

Root of Surrogacy in India

In India, history the root of surrogacy can be traced long back in the decades of seventy(70"&). It was on oct31978 in Kolkata that baby Kanupuriya alias Dura was born using the In vitro that fertilization technique (IVF)just about two math's after the world "s first IVF boy Louise jog brown born in great Britain on July 25 1978. In this way it can be said that it was second time in the world when this technique was used since then the field of assisted reproductive technology (AR)has

developed rapidly. but legalize the laws related to surrogacy are stilling resent stage in India the reason behind this is that surrogate has the potential various kinds of cloth between moral social & legal issues with the resent growth in the intended parent for surrogacy. Here India is one of the much sought surrogacy destinations a few other are US States, Russia, Thailand, Ukraine etc. Labile the other face of the same practice is that nation all across the goal of condoning commercial surrogacy as it is result in commercialization of human reproductive system for its deep interest amongst the government of different nations medico legal luminaries as well as publics at large.

What is surrogacy

The word "surrogate "came from the nation word "subrogate "means "appointed to act in place of " In general surrogacy is a method or agreement whereby a woman agree to carry a pregnancy for another personal couple who will become the new born child's parents after birth. Therefore it is a method of reproduction where by a woman gives birth as a substitute for the contracted party or parties.

An over view of "surrogacy process

There are two types gestational and traditional former is most common in united states legs teals complex also called host or full surrogacy while traditional also known as partial genetic or straight surrogacy the honorable Supreme Court in the case of bay mania kamada vs. union of India in paragraphs 10 to 13 &16 explained them .According to supreme court in traditional or straight or natural surrogacy the surrogate mother. The child may be conceived via sexual intercourse home artificial insemination using fresh or frozen seem or impregnated via IVI intrauterine insemination or ICI contra cassias insemination which is performed at a fertility clinic sperm cloner can be used. Donor sperm will for e.g. used it the "commissioning couple" are both female and where it the "commissioning couple "are both female and where the child is commissioned by a single woman.

Gestational surrogacy

In this surrogate is only a carries female host is hot genetically or biologically related to the child. The surrogate is implanted with an employ that is not her own becomes pregnant with a child to which she is not the biological mother. After birth the surrogate relinquishes the child to the biological mother and or father to rise or to the adoptive parents chin which case the employ would have been a colonnaded epos. The surrogate mother may be called agitation carries.

Classification of surrogacy surrogacy may be classified into commercial surrogacy

In this a gestational carries obis paid to carry a child to maturity in her would is usually resorted to by higher income infertile couples who can afford the cost involved people who save or borrow in order to complete their dream of being parents this procedure is legal in several countries including India commercial surrogacy is also known as "wombs for rent" "out showered pregnancies" or "baby forms".

Altruistic surrogacy

Altruistic surrogacy is a satiation where the surrogate receives no

financial reward for her pregnancy or the relinquishments of the child although usually all example related to the regency & birth are paid by intended parent such as medical expenses maternity clothing accommodation diet & other related expenses.

Position of surrogacy laws in different countries

The legal aspects surrounding surrogacy are complex diverse & mostly unsettled. In the most of the countries world over the woman giving birth to a child is considered as the child legal mother. India is one country among the few which recognize the intended commissioning parent as the legal parent different laws prove in different countries, somewhere it is illegal &complete.

Prohibited let us take it a glace of it

Hungary commercial surrogacy prohibited. France (any surrogacy arrangement is illegal unlawful &prohibited by law since 1994. Canada commercial surrogacy is illegal, an altruistic remains legal. same condition in Netherlands, Belgium, Japan but is race was the first country in the world to implement a form of state controlled surrogacy in which each and every contract must be approved directly by the state surrogacy arrangements there are permitted only to Israeli citizens who share same religion. Surrogacy must be single widow or divorced & only infertile hetero sexual couple are allowed to hire surrogates. Altogether this in all states of Australia the surrogate's mother is considered to be the legal mother by law of the child. In addition in all states & abstraction capital region arranging commercial surrogacy is a criminal offence although hothead region has no legislation governing surrogacy at all. In United Kingdom surrogacy have been legal since 2009, in United states because of being a federal country many states have their own state law regarding the legality of surrogate parenting e.g. most common for surrogates to reside in Florida & California while in network it is illegal etc.

Surrogacy laws in India

The Indian Council for Medical Research (ICMR) had given national guidelines in the year 2005 regulation assistant reproductive technology procedures but these were only guidelines. In this the right of a surrogate mother were not mention anywhere let we take bring look of those national guidelines issued by the India. Under these the age of surrogate mother should be over 45 years a relative as well as unknown may at as a surrogate mother or the couple. In it is relative than it should belong to same generation as woman desiring the surrogate before accepting a woman as a surrogate the put on record that the woman satisfies all the testable criteria to go through a successful teen pregnancy such as tested for HIV and must also provide a certificate, that she has though ashamed syringes not undergone blood transfusion and it has husband to the best of her knowledge has no extramarital relationship in last 6 month beside a woman may not act more them thrice as a surrogate in her lifetime. The law commission of India affirming these guidelines submitted its 228th report discussing the importance and need for surrogacy. The following observation had been made under 228th report by law commission.

In surrogacy arrangement will continue to be governed by contact amongst parties which will contain all the teams requiring cannot of surrogate mother agreement of her husband & other family member's reimbursement medical; procedure for artificial insemination willingness to handover child etc. but the purpose.

- A surrogacy contract should necessarily take cake of life insurance cover for surrogate mother.
- The birth certificate of surrogacy child should contain the wave of the commercial parents only.
- · Right of cloner surrogacy should be protected.
- Sex selection surrogacy should be prohibited.
- Cases of abortion should be governed by The Medical Termination of Pregnancy (MTP) Act, 1971 only.
- A surrogate arrangement should provide for support for surrogate child in the event of death of the commissioning couple or individual before delivery of the child or divorce between the intended pasties & subsequently willingness of none to take child delivery
- Legislation itself should recognize a surrogate child to be the legate child of the commissioning parents without there being any need for adoption or ever dilation of guardian.

There are many other observations given by law commission submitted in its 228th report Assisted Reproductive Technology (ART) procedures not possible to mention here. Except all these the view of Woman & Child Development Ministry also cannot be neglected. According to its view it is a very sensitive issue, because in absence of laws or regulation the surgery has become a free playing field for usurpation intermediaries' who pure & push poor and illiterate women into this type motherhood A laced ministry official argued that there was every possibility for misuse of surrogate child for terrorism prostitution or unethical genetic engineering reach. In absence of any clean laws on the issue it will not be welfare step for a density population country where a bun dance of poor illiterate people is. These are the main provisions of this act and this provision shows a lot of impact of the surrogacy arrangement in India. But for the deep analysis of the impact on the arrangement can be studied by the knowledge of all the sections which were implied in this act which deeply support surrogacy.

Section 2 of this act deals with the definitions of this act. This defines altruistic surrogacy and the benefits of this method. As in this one, only medical expense and insurance coverage is provided to the surrogate mother.

Section 2(g) of this act defines commercial surrogacy which is banned by the Indian government as this method is all about giving the sum of money to the child. Commercialization is banned and the practice of the same is unacceptable and punishable too.

Section 2(h) of this act defines the meaning of the word "couple" which is a legally married man and woman. They must be above 21 years.

Section 2 (r) this section defines the word "intending couple" which says that the couples who are intending to become parents through the procedure of the surrogacy. The age eligibility of the intending couple is

from 23 years to 50 years in the case of females and males it is from age 26 years to 55 years.

Section 2 (s) this section defines the meaning of the "intending woman". It means that a woman who wants to avail the benefits of the surrogacy method. It can be a woman from 35 years to 45 years who is either a widow or divorced and intends to avail[1].

Regulations of Surrogacy Clinics

Section 3 of the act provides the regulation of the clinic. Every clinic must be registered under the act of surrogacy regulation so that the conduction of surrogacy can be maintained properly. Commercial surrogacy was banned and in no case it will be practiced in India in any hospital by any gynecologists. All the said procedures will be followed at registered clinics. And in no case, sex selection is allowed in the procedure of surrogacy.

Regulation of Surrogacy and Surrogacy Procedures

Section 4 of this act provides that if the clinic is not registered under the act then, that clinic will not participate in the activities relating to surrogacy. No one would be employed for the procedure, no assistance, no collaboration, no participation if lacks the required qualification. No doctor, gynecologist, no medical practitioner, no embryologist will promote or associate with commercial surrogacy. Sex selection is strictly prohibited in the procedure of surrogacy.

Written Consent of the Surrogate Mother

Section 6 of the act provides that the surrogate mother will be informed of all the consequences of being a surrogate mother. She should be known with all the facts and no misrepresentation of the facts will not be appreciated. Side effects and all medical knowledge should be given to her and the whole consent should be there from the side of the surrogate mother. Written informed consent will be taken into consideration.

Prohibition to Abandon Child

Section 7 of the act provides that the born child from surrogacy can't be abandoned in any situation. Even on the grounds of birth defect, any genetic defect, or any medical problem, no other problem will be considered as an excuse to abandon the child in India or outside India.

Rights of the Surrogate Child

Section 8 of the act provides that the child born out from the Surrogate mother will be considered as the biological child of the intending couple and the child is eligible to have all the rights as a natural child under the law. After birth, the child will have no connection with the surrogate mother biologically.

Section 10 of the act provides that no organization or no person can force the surrogate mother to abort the child under any condition or any other circumstances.

The above provisions of this act showcase the positive impact of the surrogacy act on the surrogacy system in India. But every act has some challenges which can create a negative impact on the arrangement. Let's discuss about challenges:

Exploitation of the Surrogate Mother And Child

It should be taken care of that there should be no exploitation of poor women under surrogacy and the rights of the children should be protected. However, the act is unable to balance both the interests.

Reinforce Patriarchal Norms

This act reinforces the patriarchal norms of the traditional era. This act doesn't attribute to the economic value of women's work and directly affects the fundamental rights of women to reproduce under Article 21 of the constitution.

Denies Legitimate Income of the Surrogate

Banning commercial surrogacy has affected the legitimate resource of the income of surrogates, and it also limited the women to participate in surrogacy. Not everyone is willing to get pregnant just to give birth in return for nothing.

Emotional Complications

As in altruistic surrogacy, there should be a close relative of the couple as a surrogate mother. So this arrangement can create an emotional bond between the child and surrogate mother.

This can also affect the relationship of the intending couple and the surrogate mother. This method of surrogacy also limits the option for the couple in choosing a surrogate as it is not easy to convince your relative to become a surrogate mother.

No Third Party Involvement

In altruistic surrogacy, there is no involvement of the third party. But in many cases, a third party was helpful as it can help both the intended couple and the surrogate mother to navigate from the complex process.

As in altruistic surrogacy, all the medical expense is taken care of by the intended couple during the surrogacy process. Third parties can help them financially too but this is not possible in altruistic surrogacy.

Offenses and Penalties:

The Surrogacy (Regulation) Act, 2021 in India penalizes various offenses related to surrogacy with imprisonment and fines. Commercial surrogacy, exploiting the surrogate mother, and selling or importing human embryos or gametes are punishable with a jail term of 10 years and a fine of up to 10 lakh rupees. For other contraventions not specifically mentioned, the penalties can range from imprisonment of up to three years and a fine of up to five lakh rupees, with additional fines for continuing violations.

Specific Offenses and Penalties:

Commercial Surrogacy:

Engaging in or advertising commercial surrogacy, exploiting the surrogate mother or child, or selling/importing human embryos or gametes can lead to a 10-year jail sentence and a 10 lakh rupee fine.

Exploitation of Surrogate Mother:

Any act that exploits the surrogate mother or child is a punishable offense with the same penalties as commercial surrogacy.

Unauthorized Procedures:

Performing surrogacy procedures without proper registration or authorization, or violating other rules and regulations of the Act, can lead to imprisonment of up to three years and a fine of up to five lakh rupees.

Penalties for Continuing Contraventions:

If the violation of the Act or its rules continues after the initial conviction, additional fines of up to 10,000 rupees per day can be imposed.

Altruistic Surrogacy Restrictions:

If an intending couple is not allowed to follow the procedure of altruistic surrogacy, the clinic, laboratory, or authorized person can be punished with imprisonment for up to five years and a fine of up to five lakh rupees for the first offense, and a higher penalty for subsequent offenses.

Surrogacy (Regulation) Amendment Rules, 2024

Notified on February 21, 2024, these amendments introduced significant changes to the existing surrogacy regulations:

Key Amendments:

- 1. Use of Donor Gametes: Previously, both gametes (sperm and egg) had to be from the intending couple. The amendment allows the use of one donor gamete (either sperm or egg) if the District Medical Board certifies that one partner has a medical condition necessitating it. Ensures that at least one gamete is from the intending couple, maintaining a genetic link to the child.
- 2. Single Women Eligibility: Only widowed or divorced women aged between 35 to 45 years are eligible for surrogacy. They must use their own eggs and donor sperm. Unmarried single women remain ineligible.
- 3. Medical Certification Requirement: The District Medical Board must certify the medical condition necessitating the use of donor gametes.

Important observations made by the Indian counts-

Beginning of the surrogate market in India happened in year 2002. India since then has become so famous that it is being called as "Baby factories". Supreme Court had legalized it in 2002 its delft but no separate lows were given by legislation. It is estimated that If market to grow by 20% between 2015-2020. As per the 2009 Law Commission Report, the artificial reproduction treatment industry is Rs. 25,000 crore industry.

The famous case regarding with surrogacy is Baby Manji Yamada vs Union of India & Anr (2008) 13 SCC 518. In which in Nov 2015 Govt. imposed some restriction on surrogate.

Facts of the case

A baby girl was born on 25-07-2008, under a surrogate agreement. The parties of the executed agreement were Japanese biological genetic parents and an Indian surrogate mother, M/S Satya (An NGO) fields a writ petition in High Court Gujarat. The High Court passed certain directions on issues relating to custody of the baby girl. The writ jurisdiction of the S.C. under

Art. 32 of India Constitution was invoked there against by the grandmother of the child regarding issuance of visa and passport for the child & herself.

As per the grandmother of the baby, the genetic father had to return to Japan due to expiration of his visa. The grandmother also claimed that the municipality concerned in Gujarat, India has issued a birth certificate to the baby indicating the come of the genetic father. The grievance of the grandmother was related to matters concerning assume of her visa & passport & for the visa & passport of the child.

The Hon'ble Supreme Court made observations in paragraphs 8, 9, 13, 14, 15, 16 of the integument given in this case the Apex court dealt with issue of commercial surrogate in India. In another subsequent—case 17 the Gujarat H.C have also showed the argent of having a proper legislation so as to govern surrogate as many legal & ethical questions arise out of agreements of surrogate which need to be answered.

In this case the main issue was whether a child born in India to a surrogate mother who is a citizen of India & a biological father who is a foreign national, would get citizenship in India by birth? In this case the Gujarat High Court held that a child born in India would get the citizenship in India by birth. Therefore the court declared twin babies whose biological father & mother were Gunman national & the surrogate mother the India National, would to be regarded as citizens of India & that passport to travel abroad cannot be denied to such child as it would be the violation of Art 21 of Indian constitution. Besides above the Gujarat H.C also made some important observations as regards with legal, moral & ethical issues commercial surrogate, legality of surrogate in India, various problems relating to a mother-child relationship which conflict with the clanses of surrogate agreements and need of a proper legislation as soon as possible.

Therefore, the above cases shows that there are many more social, legal, ethical issues that certainly will arise out of surrogate arrangements. It also shows the urgent need to have lows to regulate such agreements. Although the counts generally be in favor of genetic relations whether it was Baby case or Johnson Calvect or In re the Marriage of Moschetta or it was In re marriage of Buzzanaca In all these cases counts have given more importance to genetic connection & commissioning couple.

In Jan Balaz v Union of India AIR 2010 Guj. 21, the Gujarat High Court confronted a question of the citizenship of two twin babies born through surrogacy to German parents. The court opined that primary consideration should be given to the rights of two newborn, innocent babies, and after them to the rights of the biological parents, surrogate mother, or etc. Any relationship, which may be emotional or legal in nature, with the surrogate mother is to be given due consideration. The issue here was that the German parents wished to take the twins back to Germany but surrogacy had already been abolished in Germany and the baby could not be given an Indian Citizenship because dual citizenship is not offered in India. The court, however, allowed the parents to go back to Germany ensuring that the children will be sent to Germany where the parents can adopt them as per the law prevailing in Germany. Later it came as a basic belief that any surrogacy agreement will be covered by contract laws in the absence of a specific law, which in India is the Indian Contract Act, 1872. But there were many arguments for and against it as there was no clarity on the aspect of consideration and a valid object on which the contract was performed. This faced a lot of criticism as it was against public policy to state the child as an object for the contract and it was a doubt that will the compensation given in commercial surrogacy will be called as consideration or not.

The discussion about governing the surrogacy agreements under contracts laws came into the notice of judiciary and there are various common law judgments like the case of Re TT, where it was held that surrogacy agreements cannot be considered as surrogate contracts and reliance was placed on the principle that "All contracts are agreements but not all agreements are contracts". Though there was a conflict of views in the case Re Paternity of FTR, where the Supreme Court of Wisconsin held that public policy is not hindered and even the compensation can be called as consideration and also opined that the agreement can be enforced if it is for the welfare of the child.

Suggestions:

- Awareness and Education: Conduct public awareness campaigns to educate the public about surrogacy, dispel misconceptions, and address social stigmas.
- **Provide Counseling:** Offer counseling and psychological support to surrogates and intended parents to help them navigate the emotional and psychological challenges of surrogacy.
- Address Financial Challenges: Explore ways to make surrogacy more affordable, potentially through government subsidies or financial assistance programs.
- Ethical Practices: Promote ethical practices in surrogacy arrangements, including ensuring informed consent, protecting the rights of the surrogate, and prioritizing the well-being of the child.
- Strengthen Dispute Resolution Mechanisms: Develop clear procedures for resolving disputes that may arise during the surrogacy process, ensuring that all parties have access to legal representation and fair resolution.
- Include LGBTQIA+ and Live-in Partners: Consider legal reforms to allow LGBTQIA+ and live-in partners to access surrogacy services, in line with principles of equality and human rights.
- **Protect the Rights of the Surrogate Mother:** Ensure that surrogate mothers are fully informed about the process, have access to medical care, and are protected from exploitation.
- Classify the Child's Welfare: In all surrogacy arrangements, prioritize the child's well-being and ensure that they are raised in a loving and supportive environment.

Conclusion

The Surrogacy law in India 2021 has been step towards surrogacy in India and addressing the practice's exploitation and ethical issues. With the implementation of this act, couple seeking surrogacy services can now

have confidence that their journey to parenthood will be conducted in a safe and transparent manner, with the rights of the surrogate mother and child protected. Besides, as the country continues to develop and refine its regulations surrounding surrogacy, it is clear that the welfare and protection of all parties involved will remain a top priority.

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