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ETHICAL AND LEGAL ASPECTS OF SURROGATE MOTHERHOOD

“The greatest good is what we do for one another.” — Mother Teresa

ABSTRACT

Parenthood is all about love and not DNA. The paper starts by defining the meaning of surrogacy including the various types of surrogacy, namely, commercial and Altruistic surrogacy. Former involves payment of money as consideration while the latter has no monetary transaction involved. Moving the papers highlights the traditional and gestational forms of surrogacy. The overall research of the paper is focuses on the analysing the legal ethical arguments in favour and against surrogacy. The article analysis the various legal contentions that are related to surrogacy and critically evaluate the pros and cons of the surrogacy (regulation) bill, 2020 which was passed in Lok Sabha on 26th February, 2020. After revealing different legal issues, the paper than discusses the ethical issues in connection with surrogacy. The paper concludes by suggesting ways to cure the loopholes which are existing in the current law and to draw a win-win solution for all the parties involved.

INTRODUCTION

Children have always been considered as blessing in disguise. Since vedia period, motherhood is the most divine and beautiful gift mankind can receive. As for the Indian society, the drive for propagation can be traced back to the pages to history mainly, to continue their lineage or *vansh*. However, many a times we come across couples who are infertile and hence, unable to have their own offspring. In India infertility is a social stigma combined with lot for torture and agony from the society. Impotency is even a ground for

divorce under Hindu Marriage Act, 1955¹. Nevertheless, with the development is the field of science and medicines, infertility can be cured through various new treatments such as Assisted Reproductive Technology (ART) such as *in vitro* fertilization (IVF) or intra cytoplasmic sperm injection (ICSI), *etc.* However, in some cases it is risky and undesirable to carry the baby in the mother's womb; therefore, in such cases surrogacy is performed.

Surrogacy is derived from Latin word '*surrogatus*' meaning substitute, i.e., a person chosen in place of another. According to *Black Law dictionary*, surrogacy means the process of carrying and delivering a child for another person². The *New Encyclopaedia Britannica* defines surrogacy as a practice in which a woman bears a child for a couple unable to produce children in the usual way³. According to *Warnock Report (1984) HF&E*, surrogacy is the practice whereby one woman carries a child for another with the intension that the child should be handed over after birth⁴.

Surrogacy contract consists of the following parties- first, the surrogate mother, who carries the child in her womb for another couple. Second are the couple (intending mother and father) who wishes to have a child. Surrogacy is legally recognized in India, Ukraine, and California whereas, England, many states of United States and Australia recognize only altruistic surrogacy. Contrary of this, countries like Germany, Sweden, Norway, and Italy do not recognize any kind of surrogacy contracts. The surrogacy business is estimated to earn more than \$400 million a year, with over 3,000 fertility clinics across India. Therefore, it becomes necessary to identify the various ethical and legal constrains with may arise in relation to surrogacy.

There are two types of surrogacy:

- a) Altruistic surrogacy: In this type of surrogacy, the surrogate mother is not given any kind of financial reward except for medical expenses.
- b) Commercial surrogacy: In this type of surrogacy, the surrogate mother is paid reward in addition to medical expenses.

¹Section 13, Hindu Mariage Act, 1955

²Oliphant RE. New York: Aspen Publishers; 2007. Surrogacy in Black law dictionary, family law; p. 349.

³<http://www.britannica.com/EBchecked/topic/575390/surrogate-motherhood>

⁴Warnock DM. London: Command of Her Majesty; 1984. Report of the committee of inquiry into human fertilisation and embryology; p. 42.

Surrogacy allows couples of all kinds to create their idea of family. The intending father may or may not be the sperm donor and may not have genetic link to the baby. Similarly, the intending mother may or may not be the egg donor. In some cases, an embryo is created through *in-vitro* fertilization and implanted in the surrogate mother *via* artificial insemination and after the gestation period is over, it is handed to the intending parents. There are two types of surrogacy:

- a) Traditional – wherein the intending father provides the sperm and surrogate provides the egg.
- b) Gestational – When both the intending parents provides for the necessary gametes. In this type of surrogacy, the child will be genetically linked to the intending couple.

LEGAL ISSUES

After 2002 when commercial surrogacy has been legalized in India, it has become of hub of for surrogacy. Couples from all the countries visit India to find a surrogate mother. The simple reason behind this is poverty. Women being poor agree to rent their womb in exchange for money. Many scholars argue that, surrogacy contracts are against the principle of public policy and hence, should be declared void⁵. The reason is that surrogacy involves renting of womb of surrogate mother and then delivering the baby when it's born to intending parents for money, so it's no less selling of a child. Using of body parts for commercial purpose is outside the public policy. However, on the other hand, others say that it such contacts are valid because everyone has autonomy on their body, hence, it's the free will of the surrogate mother to carry a child in her womb.

There is a need to regulate Inter-country commercial surrogacy. The lack of regulation makes it difficult to address the inherent problems and which results in extreme exploitation. In the case of *Baby Manji Yamada v. Union of India*⁶, the court came across a situation where in a Japanese couple appointed a surrogate and one month before the child was being born, the parents got divorced. The indenting father wanted to take back the child to Japan but the Indian laws do not allow single father to adopt a child. Later on, the child was sent back to Japan along with her grandmother. The case is important because it threw light on the lack of proper laws in relation of surrogacy in India.

⁵ Section 23 of the Indian Contracts Act, 1872

⁶ (2008) 13 S.C.C. 518

It is also contended that surrogacy takes away dignity of a woman and dignity is an inherent right of the individual. It is because during the gestation period, surrogate mother is supposed to abide by the terms of contract. Hence, she is not free to take decisions relating to her body. Since, the whole process is commercial; the surrogate mother cannot develop a special bond with the unborn child. The body of a female is reduced to an incubator, taking away her dignity. These women end up being seen as persons to use rather than persons of respect.

The surrogacy (regulation) bill, 2020

The bill was passed in Lok Sabha on 26th February, 2020. The 2020 bill has tried to balance the interest by protecting the rights of surrogate mother and the rights of the child so born. In attempt to prevent exploitation, the bill extends the insurance period from 16 months to 36 months which includes medical expenses, health issues, specified loss, damage, illness or death of the surrogate mother. Further, the bill bans commercial surrogacy in India and limits it only to Altruistic surrogacy. In my view, this a key concern because consideration is an important element of a valid contract. Since, Altruistic surrogacy involves no consideration; even if there is a written contract between the parties it will be unenforceable as there is no consideration involved which in turn will render the contract will be invalid. The bill only makes couples eligible for surrogacy which means an unmarried individual, divorcee or a single person cannot ask for surrogacy. Furthermore, the surrogate mother can only be a close relative of the intending couples. This is a critical point because of two reasons: -

- a) *Legal issue*- the bill is silent on the definition of close relative.
- b) *Practical issue*- Most of the females are carrier oriented, thus, it becomes difficult to find a close female relative who is willing to give up her earnings and career. This may lead to friction in the families.

She should be between the age brackets of 23-50 years and must have a child of her own. However, in my view this feels a disturbing point because, if the infertile couple go for surrogacy in blood relations, there are chances the child is born with genetic disorders. In order to protect the health of surrogate mother and to prevent exploitation, a female can be a surrogate only once in her lifetime. The bill proposes for the establishment of regulatory authorities, namely, National Surrogacy Board at the central level, the State Surrogacy Board at the state level. The main functions of these regulatory bodies are as follows:

- To advise the government on the policy matters related to surrogacy

- To supervise the working of other bodies established under the bill
- To lay down a code of conduct for surrogacy clinics such as standard infrastructure, qualified and expert personnel and proper diagnostic equipment

With the intention, to prevent any false use, the bill mandates 'certificate of essentiality' and a 'certificate of eligibility' issued by the appropriate authority. This certificate will prove the infertility of one or both the members and will be provided only to couple who are married for minimum of five years and do not have a living child. Section 8 of the bill states that a child born out of surrogacy shall be deemed to be the biological child of the intending couple and will be entitled all the rights on par to the natural child. In the case of *Jan Balaz v. Anand Municipality*⁷, the court recognized the surrogate mother as legal mother of the child born because unless a law contrary to it, the court incline towards the existing laws namely, Indian Evidence Act, 1872 and Birth Registration Act which allow a birthing mother to be the natural mother of the child.

ETHICAL ISSUES

The contentions related to surrogacy not only poses question to humanity but also raises ethical considerations. Generally, the surrogates are from the underprivileged class of society and the reason they agree for surrogacy is for money, thus, making them vulnerable and the right target for the job. Hence, the question arises surrogacy is another form of rich exploiting the poor. The dilemma between the autonomy of female over their body parts or using their body parts as baby-producing machines is still debatable

Surrogate perspective- Carrying a baby in a womb is a very exhausting task and requires lot of physical and emotional strength. Expecting the surrogate mother to not develop any bond with the child is unreasonable and suppresses the emotions of surrogate, thus, causing adverse physiological effect. Further when a woman does this as a profession then, she exposes herself to a lot of medical complications in the long run.

Child's perspective- according to Article 7 (1) of the Convention on the Rights of the Child (CRC), 1992 emphasises that a child has the right to know about his or her origin. Consequently, the child so born has a right to know about his birth when the right time comes, which may impact him mentally and there are chances he would like to go back to his

⁷ AIR 2010 Guj 21

birth mother. Further, it is necessary to know the genetic history of surrogate and match it with child in order to diagnose certain diseases. The process of delivering the child to intending parents in exchange of money resembles the transaction related to selling/ buying of child. It needs to be noted that children are not toys and should be given the same value as a grown human.

Traditionally a child was considered a gift of God and the task of procreation was a sacred obligation on the couples. Surrogacy has been a boon for infertile couples but the increased use of medical technology of creating children with certain traits is highly criticised. Some critics argue that there is manner in which works and it must not be interfered with. However, with such leaps in science mankind wishes to replace the creator of the universe.

CONCLUSION

There are various unsettled questions such as, what will happen if intended parents die. Will the intending couple be liable in case of any complications undergone by surrogate? What will happen if the child born has physical deformity? How to regulate cross-country surrogacy? All these questions need to be addressed at the earliest. From the abovementioned ethical and legal contentions, it can be concluded that, the dire need of the hour is enforcing a proper legislative framework to regulate and manage surrogacy. In my point of view, in case of any harm the sole obligation should fall on the intending couple jointly and severably. There should be a mandatory written contract between parties having a liability clause in order to protect the rights of surrogate mother. Everything has two sides of the same coin and so does surrogacy. There is no doubt this way of fertilization will bring contentment to many infertile couples but at the same time, we must not be reckless and stride to have a balance between the health of surrogate and the happiness of couples.