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A Review of the Legislative Attitude towards Surrogacy

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ABSTRACT

Surrogacy in normal parlance is understood as a form of contract where the consideration lies in the delivery of the baby for which the delivering mother is paid. The recent developments in technology has paved way for surrogacy to be used on a commercial basis. This involves payment of hefty sum of money as income to the surrogate for the service offered by her plus any expenses incurred in her pregnancy and surrogacy is thereby looked upon as a business opportunity. It is sort of a business transaction where the consideration is delivery of the baby. This commercial usage was particularly prevalent in the Indian scenario where due to excellent medical infrastructure, high international demand and ready availability of poor surrogates it is reaching industry proportions. This has in recent times paved the way for certain problems. Women who choose to become surrogates are often subject to unethical treatment, poor living conditions and they only earn a fraction of what the surrogate companies charge due to their illiteracy. This has led to a popular terming of commercial surrogacy as “baby factories”. Although commercial surrogacy is proposed to be banned as per the surrogacy bill passed in the Lok Sabha in 2019, the prospective effects of the same are not to be forgotten. This research paper focuses on whether as to the such ban on commercial surrogacy would be effective and points out the problems in this regard and the possibility of a regime of regulation of Commercial Surrogacy.

Keywords - Baby factory, Commercial Surrogacy, excellent medical infrastructure, Regulation.

I. RESEARCH DESIGN

A. AIM AND OBJECTIVE:

The main aim of this paper is to bring out the latent elements which are often underlying the positive aspect of surrogacy, through comparison of the legislations on surrogacy.

B. SCOPE AND LIMITATION:

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The scope of this paper extends to the extent of explaining the basic tenets of surrogacy in a general sense and then going on further to explain the relevance of surrogacy in the current Indian scenario with the help of examples. This paper also deals with the various problems which are related to the same.

C. RESEARCH QUESTION:

1. Has the attitude of the legislators towards Surrogacy as process adequate?
2. If not, what are the implications of laws made so?

II. SURROGACY: MEANING AND EVOLUTION

Surrogacy in its traditional form has been practiced since time immemorial. The other form of surrogacy is gestational surrogacy where an embryo created by in vitro fertilisation is implanted in the surrogate and hence the surrogate acts as a gestational carrier. The difference between traditional and gestational surrogacy lies in the fact that in the latter the gestation carrier in all circumstances remains unrelated to the biological parents and is regarded as only the carrier. While traditional surrogacy has been practiced for ages, gestational surrogacy on the other hand had developed only much recently. The world's first in vitro fertilization (IVF) baby was born in 1978. About five years later, in 1982, the first baby was born out of an egg donation. A combination of these two technologies, resulted in the development of gestational surrogacy which proved to be successful world over. In the year 1986, when a surrogate had decided she wanted to keep the child², surrogacy had encountered its first legal hurdle. A two-year-long legal battle between the surrogate and the intended parents eventually resulted in the intended parents retaining custody. As gestational surrogacy continued to grow, a particular landmark case, often referred to as 'the Baby M case,' erupted many legal questions in various countries around the world. Today, commercial surrogacy is legal in most U.S. states, and a handful of countries such as India has proposed bans towards the use of commercial surrogacy. The recent developments in technology have paved the way for surrogacy to be used on a commercial basis. This involves payment of a hefty sum of money as income to the surrogate for the service offered by her plus any expenses incurred in her pregnancy and surrogacy is thereby looked upon as a business opportunity. It has evolved into a normal market transaction. Further financial arrangements are also made for the ancillary expense. This financial agreement often stipulates behaviour the birth mother has to abide by e.g. undergoing various tests, having an abortion if foetus is defective or avoid smoking and drinking. Both the commissioning parents and the birth mother are often strangers. It is argued by many that payment simply for expenses and earnings

² In re Baby M, 537 A.2d 1227, 109 N.J. 396 (N.J. 02/03/1988)

and not the service and surrender of custodial rights will entail calling the agreement non-commercial³. This medical procedure was (Proposed ban under 2019 Bill) legal in India where due to excellent medical infrastructure, high international demand and ready availability of poor surrogates it is reaching industry proportions. "Commercial surrogacy is sometimes referred to by the emotionally charged and potentially offensive terms "wombs for rent", "outsourced pregnancies" or "baby farms""⁴. Commercial surrogacy is not a topic which is related to medical circles. In recent times, this has been generating feminist, ethical, legal and sociological debates for more than three decades. The anxiety surrounding commercial surrogacy increases manifold when surrogacy involves women in the global south this is not altogether surprising since surrogacy is a recent phenomenon in the global south. Since 2010, the use of commercial surrogacy whereby poor women from global north are renting their wombs to people⁵ from the global north, has provoked some thought-provoking academic discussion. Another form of surrogacy which is carried out is altruistic surrogacy. It is the term used to describe the situation where there is no formal contract or any payment or fee to the birth mother. It refers to surrogacy arrangements between close friends or relative. The surrogate is paid merely to recompense her for the pain undertaken by her and includes reimbursement of medical and other expenses or is not paid at all.⁶

III. POSITION OF SURROGACY IN INDIAN

To understand the context of surrogacy in the Indian aspect, we must start with the fact that, while the sale of human organs, organ loaning was banned by Transplantation of Human Organs Act at the same time another difficult venture was being promoted through paid surrogacy. This is primarily due to the profits that arise from reproductive tourism as opposed to low stats of those couples facing actual infertility. The incidence of total infertility in India is estimated at 8 to 10 per cent, and for the vast majority of Indian women it is preventable as it is caused by issues of poverty such as malnutrition, poor health etc. Only about 2 per cent of Indian women suffer from "primary" infertility which is amenable to ART alone. Moreover, it can be further found out that among the reported cases of women who undertake ART treatment, only a mere one per cent require surrogacy assistance⁷

Surrogacy is the practice of gestating a child for another couple and could involve any of the

³ Kush Karla, "Custody of the Child and Surrogacy Contracts in India", Shriram's The Law, (2013)

⁴ Baby Manji Yamada vs Union Of India, WRIT PETITION (C) NO. 369(2008)

⁵ Amrit Pande, *Wombs in Labour: Transnational Commercial Surrogacy in India*, page 5, Columbia University Press: New York, (2014),

⁶ Kush Karla, "Surrogacy Arrangements; Legal and Social Issues" Journal of Law Teachers India 125, (2010)

⁷ Imran Qadeer and Mary E John, "The Business and Ethics of Surrogacy" *Economic and Political Weekly*, (2009)

various Assisted Reproductive Technologies (ARTs) like IVF (in vitro fertilisation), IUI (intra uterine insemination) etc. Surrogacy has in recent times gained much attention to the increasing number of couples settling for surrogacy as well as of the women taking the surrogate roles. The years 2013 and 2014 have seen an exponential 150 per cent rise in surrogacy cases in India. The Gujarat town of Anand has recently become a hub of surrogacy of India.⁸

India has become the favourite destination for infertile couples from across the globe because of the lower cost, less restrictive laws, lack of regulation of ART clinics and availability of surrogate mothers. The surrogate arrangements were drawn up in an unorganised fashion and were exploitive, particularly since these women are mostly from weaker sections of the society.

With India fast emerging as a favoured destination for childless couples across the world, commercial surrogacy raises a host of moral, ethical as well as legal issues. This has reached such an extent that Supreme Court had to eventually enter the debate. Hearing a petition filed by a German couple (Jan Ballas and Susan Anna Pohlad) with regard to grant of Indian citizenship for their surrogate twins, it made pertinent queries. The twins thus born to the Indian surrogate mother in January 2008 were held to be stateless citizens neither German nor Indian citizenship. The German authorities had been steadfastly refusing visas to Nikolas and Leonard (said twins) on the ground that the state law did not recognise surrogacy as a means to parenthood. But finally agreed to provide the necessary documents after Ballas and his wife went through the inter-country adoption process supervised by Central Adoption Resources Agency. The Indian government, which was refusing to grant the toddlers Indian citizenship on the ground that they were surrogate children, also played its part in arranging their flight home by agreeing to provide exit permits⁹. The Supreme Court also echoed concern about the absence of a law regulating surrogacy, so that there should not be any repetition of such a case.

The case of Japanese baby Manji, where a child was born to an Indian surrogate with the application of IVF technology upon the embryo being implanted in Ahmadabad had triggered off a plethora of issues and complexities. The commissioning Japanese parents later had divorced and the surrogate child was disowned by the biological mother. Under the Hindu Adoptions and Maintenance Act, 1956 a single father cannot adopt a girl child and since he is only the biological father, the girl's legitimacy will have to be proved. The grandmother of the infant, challenging the judgement of the Rajasthan High Court petitioned the Supreme Court with regard to the custody of baby.

⁸Ida Parisi, *Surrogacy world's perspective – A review*, Acta Med Int ;2, page 138-143, (2015)

⁹ Pikee Saxena, Archana Mishra and Sonia Malik., *Surrogacy: Ethical and Legal Issues*, Indian J Community Med.37(4): 211–213, (2012),

The issues related to surrogacy remain complex. Even the Law Commission of India has recommended to the Centre that legislation to regulate ART as well as the rights and obligations of parties involved in surrogacy should be enacted. Earlier, surrogacy arrangements were dictated by private contracts between parties. Often contentious concerns arise, especially those involving foreign couples. This leads to complexities since some countries like that of Germany do not validate surrogacy, thus leading to legal complications. Still, as the Supreme Court judgement in the Manji case proved, the legal environment in India remains favourable to surrogacy. Adding to it the cost advantage that India has and surrogacy seems to be thriving, particularly in Anand in Gujarat that has come to be known as India's surrogacy centre. Medical science is advancing rapidly and awareness of the process of in vitro fertilisation is growing fast among the people. Childless couples are prone to the process of surrogate arrangements. It is likely that the process will continue to thrive. Hence, some regulations are necessary in the form of licensing and authoritative inspection for the benefit of the society. There was an ardent need for legislation to be passed by the Central government in order to protect the rights of children as well as that of the mothers who were being exploited. This should include the whole gamut of concern such as that of the health risks to the surrogate mothers, (as a majority of them hails from underprivileged sections of society which should be considered). There is no law governing surrogacy in India. What existed at the time was only a 126-page document recommended by The Indian Council of Medical Research (ICMR) regulating the ART technologies which was then issued by National Guidelines for Accreditation as ART rules for the Supervision and Regulation of ART clinics in India in 2005. However, the guidelines are legally non-binding. These rules published were unclear on various issues such as rights of the surrogate, the minimum age, details about the contracts, requirements for adoption etc. Also, there were many debates as with regard to the parentage of the child legally. Further many of these clinics were found to be conducting an organised network of surrogates, recruiting them and deriving profits from the same

In India, in September 2000, Central Ethics Committee on Human Research (CECHR) of the Indian Council of Medical Research (ICMR) has come out with a statement of specific principles for assisted reproductive technologies. In 2002, a Bill drafted by a 15—member team of experts headed by Baidya Nath Chakraborty in collaboration with the Indian Council for Medical Research and National Academy of Medical Sciences was submitted to the Union Health and Law Ministries on National Guidelines for Accreditation, Supervision and Regulation of Assisted Reproductive Technologies (ART) Clinics in India. This document has drawn up guidelines for the ethical practice of acceptable ART methods and for taking

measures for setting up of an independent body through legislation for accreditation, regulation and supervision of infertility clinics in India, which was later, in 2005; released as a published document. However, since these guidelines had no legal binding and the rules and regulations were not mandatory, they were not strictly implemented, resulting in an absence of any form of regulation. 123 Recently ICMR and Ministry of Health and Family Welfare (MOHFW) have come up with the draft Assisted Reproductive Technologies (Regulation) Bill & Rules 2010. Further a brand new 2016 bill has been passed by the parliament known as the surrogacy bill. this bill has been amended and has been passed in the Lok Sabha in 2019 (pending the acceptance of the Rajya Sabha), according to which commercial surrogacy is proposed to be banned whereas altruistic surrogacy has been allowed.

IV. COMPARITIVE ANALYSIS OF THE 2019 SURROGACY BILL AND ASSISTIVE REPRODUCTION BILL OF 2008

Although the number of surrogate births in India is not known, data suggests that the number is on the rise as the numerous ART facilitators continue to integrate the entire process of the commissioning parents. Thus, the need to regulate the industry has been recognised given data of the plethora of problem which are created which regards to the child's citizenship and parentage¹⁰ etc. To date, all that exists are guidelines which were not legally enforceable. At the central level several versions of the surrogacy bill were proposed until the 2016 bill on the same was passed by the Lok Sabha. One such proposed bill was the Assisted Reproductive Technologies Bill 2010 which granted the central government the power to make rules on the basis of guidelines proposed by the bill.

On July 9, 2012, Ministry of Home Affairs sent a letter to the ministry of External Affairs which sets forth the procedure granting visas to Foreign Nationals who come to India for engaging in the Surrogacy process. The only type of visa available for these Foreign National is medical Visas. these Visas can only be granted if:

- a. The Foreign man and women are married and have been for at least two years;
- b. The vis application must include a letter from the embassy of the Foreign country in India stating that
 1. The country recognises surrogacy
 2. The child born to the commissioning couple through the Indian mother will be permitted entry into the country as the biological child of the commissioning couple

¹⁰ See Law Commission of India, 'Need for Legislations to Regulate Assisted Reproductive Technology Clinics as Well as Rights and Obligations of Parties to a Surrogacy', report number 225

- c. The commissioning couple furnish an undertaking stating that they will take care of the child
- d. Medical Treatment will be performed only at a registered clinic
- e. The commissioning couple must produce a notarised agreement between the couple and the prospective Indian surrogate mother ¹¹

The 2019 bill which was passed by the Lok Sabha however bans commercial surrogacy as per section 3 (2) of the said Bill. this mean that foreign nationals cannot enter into an agreement for the purpose of Surrogacy.: Chapter 6 of the new bill conveys the punishment for the offences of commercial surrogacy. section 35(1) a) to g) list the various offenses that are liable to be punished that include undertaking or providing commercial surrogacy, distribution or advertisement, abandonment of the surrogate child, exploitation of the surrogate mother or child, trade of human embryos, abetting the process of commercial surrogacy and for conducting sex selection for commercial surrogacy. Sub section (2) describes the punishment for the offenses mention in sub- section (1) of section 35. Section 37 of the Bill further goes on to talk about the punishments prescribe to any couple who seeks the aid of a registered medical practitioner, gynaecologist or any other person for the purpose of commercial surrogacy. The new 2016 bill that was passed in 2019 by The Lok Sabha only purports the altruistic surrogacy. According to section 4(2) section a) to g) surrogacy must be undertaken only when either or both the parties are suffering from infertility, when it is used for altruistic non-commercial purposes, when it is not for producing child for sale or prostitution, to the parents suffer from any other condition or diseases as mentioned by the board.

The ART draft bill requires that the surrogate mother must be an Indian woman between the age of 21 and 35¹². A woman may not be sent abroad as a Surrogate ¹³. Women who are married requires the consent of the husband to be a Surrogate.¹⁴ A relative know to the commissioning party or a stranger may serve as a surrogate, but if she a relative, she must belong to the same generation as the commissioning mother ¹⁵. A woman may not serve as a Surrogate mother for more than five successful child birth in her life including her biological children, and she may not undergo an embryo transfer more than 3 time for the same couple¹⁶. However, under the new 2019 bill ,no women other an ever married woman having child of their own and between the age of 25-35on the day of implementation ,shall be surrogate mother or help in surrogate

¹¹ Ibid

¹² ART bill Section 20(14) (2010)

¹³ ART bill Section 34(18) (2010)

¹⁴ ART bill Section 34(16) (2010)

¹⁵ ART Draft bill Section 34(18) (2010)

¹⁶ ART Draft Bill Section 34(5) and 34(9) (2010)

by donating her eggs ¹⁷. Also an eligibility certificate should also be obtained from the appropriate authority .¹⁸ Under the new 2019 bill if the parents are commissioning a male child then the age limit of the parent must be between 26 and 55, 23-50 in case of a female child .further it states that no women shall be a Surrogate by giving her own gamete .further no women shall act as surrogate more than once in her life ¹⁹.unlike the old bill where the foreign couple had to be at least married for about 2 years ,under the new bill the couple has to be married for a term of at least 5 years .and that they must not had any existing child through surrogacy or adoption or surrogacy earlier ²⁰.Surrogacy under the draft bill of 2010 was permissible because no Indian law prohibits it . The Indian contract would apply to the validity of the old bill. Under section 10 of the Indian Contract Act does not prohibit surrogacy if the said agreement was mad with free consent and there as the existence of a lawful consideration. A point of similarity between both the act can be said as to be creation of national and the state boards in order to regulate surrogacy. A particular provision that was established in the 2019 surrogacy amendment was that a certificate of eligibility in order to take part in the surrogate process. also, one pre requisites in order to receive a certificate of essentiality is to provide for insurance coverage for the surrogate

V. ANALYSIS OF THE 2019 SURROGACY AMENDMENT BILL AND THE 2016 SURROGACY BILL.

The bill which was in 2019 by the Lok Sabha in 2019 was actually an amendment bill of the 2016 regulation bill on the same. one of the major amendment that was proposed was that now under the 2019 bill , the women undergoing surrogacy has an option to withdraw from the procedure before the womb is implemented .Prohibition on sex selection was also added ²¹.further the insurance coverage ensured under the new bill be for a period of 16 months including a period of post-partum delivery complications .Also the appropriating power must grant or reject the applications within 90 days .

VI. IMPLICATION OF THE 2019 BILL AND NEED FOR A REGULATORY SCHEME

As per bill passed in 2019 altruistic surrogacy is permitted whereas commercial surrogacy is banned. however, bill is found to vague and has certain inadequacies. since altruistic surrogacy is permitted, the bill permits only close relatives to serve as surrogated. however, the bill as not

¹⁷ Surrogacy Bill Section 4 (3)(b)(1) (2019)

¹⁸ Surrogacy Bill Section 4(3)(c)(2) (2019)

¹⁹ Surrogacy Bill Section 4(3)(b)(4) (2019)

²⁰ Surrogacy Bill Section 4(3)(c)(2) and 4(3)(c)(3) (2019)

²¹ Surrogacy Bill Section 35 (1)(g), (2019)

aptly defined the question as to who serves as a close relative. further this bill also means that foreign nationals are not permitted. the performing couple must be only Indian. Also, NRIs and person of Indian origins as also disallowed. I absolutely do not agree with this, single parents are also disallowed – and this is very rigid, because no other country mandates marriage as a requirement for surrogacy. Same-sex couples are also not allowed. Even people in live-in-relationships are, in all likelihood, not allowed to have surrogate children reasoning that just because they are of ‘Indian origin’, they should be allowed to avail of surrogacy .another major problem that is found with the ac is with regard to the definition of infertility -²²“*Infertility means the inability to conceive after five years of unprotected coitus or other proven medical condition preventing a couple from conception.*”. What the definition leaves out from its purview is that there are various reasons why couples want surrogacy, one of which is infertility. There are other situations which may prevent a couple from having a baby, like genetic disorders, age, endometriosis, multiple miscarriages, diabetes, heavy periods (due to fibroids, cervical cancer), etc. hence persons suffering from these ailments are further left out from this bill. Also, there’s no provision for for the financial support/insurance of the baby if the intending couple divorces, or one of them dies, during the process of surrogacy. There’s also no provision for the right to privacy for the surrogate mother, even after it has been declared to be a fundamental right²³ . One of the major flaws in the act is that it mentions that only if a couple has unfertile for five or in other words has not been able to have offspring for the last five years can perform surrogacy. The provisions in the 2016 and subsequent 2019 amendment bill restrict surrogacy to only infertile couples who are 26-55 years old and married for at least 5 years. But the Indian Contract Act read with the Indian Majority Act merely states that a person is a major if he is above 18 years of age and has the capability to rationalise logically²⁴. This shows that the following provision is allegorical. Further it is only left open to infertile needy couples. In doing so the legislator have tried to protect traditional value of Indian culture without recognising at the LGBT community are also so Indians and enjoy equal protection of law under the Constitution²⁵. The Law Commission in its 228th report has suggested that even a homosexual can be a guardian if they are the biological parent. Hence, it is suggested that regulation rather than ban would be more appropriate²⁶. Further the 2019

²² Surrogacy Bill Section 2(p), (2019)

²³ K.S. Puttaswamy v. Union of India (2017) 10 SCC 1

²⁴ Indian Contract Act, Section 11, section 12 (1872)

²⁵ Navtej Singh Johar vs & Ors. Secretary Ministry of Law and Justice, W. P. (Crl.) No. 76 of 2016 D. No. 14961/2016

²⁶ Zervogianni. E, *Lessons Drawn from the Regulation of Surrogacy in Greece, Cyprus, and Portugal, or a Plea for the Regulation of Commercial Gestational Surrogacy*, *International Journal of Law, Policy and the Family*, Volume 33, Issue 2, Pages 160–180, (2019)

Amendment bill fails to define who exactly is a 'close relative' thus rendering the impossibility of Altruistic Surrogacy in practise²⁷. Hence, any person can claim they are close relatives since there is no definition or the same. Regulation, would in fact solve many problems with regard to surrogacy. It would prevent black market transaction and the introduction of an empowered regulating administrative authority could prove to be effective such as in the Countries of Portugal and Cyprus. This idea has been however outrightly rejected by the Legislators.

The above-mentioned analysis of the 2008 ART Bill and the 2019 Amendment Bill both are faulty in their ambition. The latter favours the lax regulation whereas the former pushes for abolition. The stance would be better if regulation could be achieved but the Government has failed to take such a stance. What is forgotten here is that plenty of women rely heavily on the income that they earn²⁸ from Surrogacy. When the income that is earned is better than the than the income of daily wage labour an obvious choice would be towards Surrogacy. The consequence of the ban will be heavily felt by these women. Although the Government has its precepts in the social welfare of these uneducated vulnerable women, the real question is regarding the future employment of these women. Has the Government taken any such rehabilitation schemes? No. Although it maybe wise to argue government employment scheme, those seem irrelevant to the scale of their former earnings. Regulation of Surrogacy women seem relevant in these circumstances which the Government does not advocate. At this point it is suitable to note the reform in the attitude towards Compensated Surrogacy around the Globe. New York, in April 2020 has passed the Child-Parent Security Act which permits Commercial surrogacy subject to certain conditions. These contain eligibility of the commissioning parents and that of the birthing mother who are subject to the regulation and inspection of the Department of Health. The Department of Health plays a greater role in this regard, formulating guidelines for distribution of information regarding procedures, inspection, registration of ova/egg, and licensing of fertility agencies.

²⁷ Ibid

²⁸ Huber, S., Karandikar, S. and Gezinski, L. 'Exploring Indian Surrogates' Perceptions of the Ban on International Surrogacy', *Affilia*, 33(1), pp. 69–84, (2018)