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Surrogacy and Reproductive Rights of Women in Family Law: A Critical Study with special reference to Indian Legislative Framework

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ABSTRACT

The institution of motherhood is considered as one of the most prime events in the life of a woman in Indian Society. Due to this reason, inability to attain parenthood has numerous societal and psychological consequences, which results into instability in marriages, social and emotional trauma as well as negated self-esteem in the lives of infertile women. The societal pressure to have children has resulted into evolution of ART Industry, which has rapidly grown in the recent decades in India. Nevertheless, an allied issue which has always persisted along with frequent usage of reproductive technologies such as surrogacy is the question of its legitimacy, due to various underlying controversies and complexities involved in the subject matter. Furthermore, the issue also raises some serious concerns with regards to personal freedom and reproductive rights of women in the light of self-determination of rights over one's own body and usage of newer reproductive technologies as a medium of women empowerment. Amidst technical and procedural complexities involved while exercising newer forms of reproductive mechanisms, there exists fundamental question of a properly chalked out legislative enactment on the subject matter. The paper shall focus on determining the ambit and scope of surrogacy and reproductive rights of women in the country and will critically evaluate the present legislative regime on subject matter. The paper shall also articulate and assess proposed legislations on the subject matter in form of Assisted Reproductive Technology Bill, 2013 and Surrogacy (Regulation) Bill, 2016 and 2019. Doctrinal Research methodology shall be adopted while undertaking the research and reliance shall be placed on landmark decisions of Hon. Supreme Court and High Courts on the subject matter. Finally, an attempt shall be made to provide concrete suggestions and recommendations on the subject matter.

Keywords: ART Industry, Reproductive Rights of Women, Legislative Regime on Surrogacy, ART Bill 2013, Surrogacy Bill 2016 & 2019.

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I. INTRODUCTION

Invent of scientific temper, science based research and advancement in technology has always excited mankind and posed exciting challenges to the very aspect of how society lives and evolves. In the recent few decades, advancement in the field of medicinal sciences; particularly advancement which directly deals with the physiology and anatomy of humans; has not only lead to evolution of medicinal procedures, but also impacted the social structure, political actions and the course of law surrounding them in order to regularize the same. In the wake of these advancements, various reproductive rights of women and couples have emerged as topic of an important discussion which will set standards for the future generations and pave path for newer legal regimes and governing laws in the regulation of such rights. These reproductive rights primarily revolve around notions of reproductive health concerning contraception, instances of sexual violence, incidents of maternal mortality, abortion measures, surrogacy and allied issues, safety of mother and child in the process of child bearing etc. The overall discussion on the above said reproductive rights is incomplete without addressing and articulating extraneous variables in this context in the form of underlying social-cultural milieus prevailing, respect to individualistic freedoms and choices, governmental norms and laws, social and reproductive justice, adherence to health and legal standards etc.² Thus, the institution of ARTs i.e. *Assisted Reproductive Technologies* is not individualistic or monotonous for that matter and has various societal and personal implications which needs to be studied and addressed simultaneously in order to develop a better and sound understanding of the concept. Before shifting the focus of the study to allied concepts of Surrogacy and legislative framework concerning same, it is worthwhile to mention the objective laid down in “*International Conference on Population and Development, 1994*” vide Paragraph 7.16 of ‘Program of Action’, i.e. “The aim should be to assist couples and individuals to achieve their reproductive goals and give them the full opportunity to exercise the right to have children by choice.”³

II. THE RISE OF ART INDUSTRY AND PRACTICE OF SURROGACY

There is no denying the fact that the very aspect of wishing or desiring to carry forward the lineage is all pervasive and has existed since time immemorial. In fact, it has various social,

² Saravaran, Sheela. “A Feminist Discourse on Surrogacy: Reproductive Rights and Justice Approach”. *Springer Link*, 2018, pp. 47-48.

³ Ghosh, Arijeet, et.al. “A womb of one’s Own: Privacy and Reproductive Rights”. *Economic and Political Weekly*, vol. 52, no. 42-43, 2017.

psychological, physiological, personal, environmental as well as political connotations to it. This element of longing to carry forward lineage is present in all species present in the natural environment apart from human beings. This goes on to suggest that the rise of Assisted Reproductive Technologies has its basis in the notion of inability to carry forward the lineage. In other words, ‘infertility’ or ‘inability to give birth’ is considered as one of the prime reproductive health problems around the globe. Studies have revealed that around 80 million people across the world are infertile.⁴ Further studies have revealed that as many as 186 million married women in the age group of 15-49 years in lower strata and resource countries were infertile.⁵ It is worthwhile to address the primary and root causes of the problem of infertility, which comes out as delayed marriages, delayed pregnancies, greater amount of prevalence of infections transmitted through sexual intercourse, unsafe reproductive hygiene, other forms of infections etc. It could be articulated that towards later 1990s, the practice of Assisted Reproductive Technologies became more prevalent and common as the medical guidance on the subject matter became more pervasive. Furthermore, the emergence of more donors and surrogates towards beginning of the 21st Century paved path towards more frequent adoption of methods of surrogacy. As the practices surrounding Surrogacy started becoming common, some countries became stricter concerning norms, rules and regulations surrounding surrogacy. Couples across the globe facing infertility issues started looking for cross-border surrogacy regimes, which could cater to their individualistic needs. The governing legal and medical prohibitions also played a significant role in determination and selection of cross-border surrogacy. A crucial aspect with regard to evolution of institution of surrogacy is the sense of mutual help co-existing between the infertile couple/ women and the surrogates/ voluntary women. It becomes fundamentally important to discuss the underlying vulnerabilities and challenges associated with the notion of surrogacy. Right from a basic and fundamental challenge to ethics and morality of two given social systems; to safeguarding the health of surrogate mother; staying within the prescribed legal and medical standards; and eliminating instances of overall exploitation; the institution of surrogacy presents some complex and aggregated issues cum concerns which would be discussed in the following sections of the Paper.

⁴ *Ibid.*

⁵ *Id.*

III. THE CONCEPT OF SURROGACY AND UNDERLYING IMPLICATIONS OF SURROGACY

In order to develop a sound understanding of underlying implications surrounding surrogacy, it becomes relevant to develop a foundational and fundamental understanding of concept of surrogacy first. The term ‘surrogacy’ comes from its Latin counterpart ‘*subrogare*’, which means “to substitute” or “to be appointed in the place of.”⁶ In general parlance, surrogacy refers to the mechanism of reproduction of a child through assistance or assisted means, wherein a woman gives consent to give birth to a child on behalf of other woman or give birth to a child to be raised by someone else. It becomes important to understand and reflect here that the woman who gives consents to bear someone else’s child may be the genetic mother, known as the traditional and more common form of surrogacy or there can be an instance wherein she bears the child by way of implantation. In this regard, it is also worthwhile to mention the key difference between the Gestational surrogacy which is also known as Surrogacy through IVF i.e. *In Vitro Fertilization* and Natural cum Traditional form of surrogacy. In the former category (Gestational form), the process of surrogacy includes fertilization of egg (which is provided by the natural mother) and gets fertilized by adopting *In Vitro Fertilization* or *Intra Cytoplasmic Sperm Injection* method. Once the egg gets fertilized, the embryo is thereupon conveyed or shifted to the uterus of another woman (surrogate) who had consented to bear the child on behalf of the natural mother. The surrogate hereby carries the embryo for the gestational period of nine months till the birth of the child. *Per Contra*, the natural or traditional form of surrogacy involves insemination of the sperm directly by the surrogate from male partner of the concerned infertile couple. Thus, the natural surrogacy revolves around the notion of genetically reproducing the child in the womb of the surrogate mother. As the foundational aspects concerning surrogacy are established and made clear, it is worthwhile to analyze some of the consequent and allied implications surrounding surrogacy. At its very outset, it is argued sometimes that surrogacy which was developed as an institution of reflecting altruistic notion has moved and shifted towards the commercial side. This goes on to suggest that altruistic surrogacy, whereby the surrogate mother consents to bear the child on behalf of another woman for the reasons to the tune of needs and overall happiness of other human beings of the society, without any monetary benefits in return has become quite obsolete in the present social and geo-political contexts. On the other hand, it has paved path for commercial form of surrogacy, wherein the infertile parents do offer some sort of financial assistance or monetary help to the

⁶ Kumar, Anuj. “Concept of surrogacy and Rights of women in the Global Era”. *Legal Desire*, 2016, <https://legal-desire.com/concept-of-surrogacy-and-rights-of-women-in-the-global-era/>

surrogate mother for the act of bearing child on their behalf. As a result, this leaves open a wide grey area of manipulation, exploitation as well as controversies and contradictions since people belonging to different social and ethnic backgrounds, governments and governmental norms of differing countries/ states, societal/ religious as well as cultural ethics and morals get involved in this context. The fundamental argument raised in this behalf is based on the context that agreeing to give birth to a new life in lieu of money is against the ethics and basic morality.⁷ Secondly, the existence and prevalence of risk and dangerous consequences in the form of exploitation, frustration etc. can never be negated in the institution of surrogacy, since the act involves social/ economic/ political and other forms of gaps and differences between the intended parents and the surrogate; thus leaving open the increased chances of vulnerability of weaker/ less advantageous side in the hands of the other.

IV. SURROGACY VIS-À-VIS REPRODUCTIVE RIGHTS OF WOMEN - AN ANALYSIS

At its very outset, the concept of surrogacy touches upon the issue of being able to take decision towards the reproductive life of an individual. This also underlies taking such informed decision without any forced means, instances of coercion and violence etc. One of the fundamental issues which come into play in surrogacy is the exploitation of the surrogates in certain cases. This issue has its roots in the lack of “fixed compensation” or “insurance cover” in the aftermath of giving birth to the child.⁸ There have also been instances and incidents concerning abandonment of the child by the intended parents. In such a scenario, the position of surrogates is very critical, since they might end up being commissioned with the responsibilities of bearing the child which was otherwise borne for the sake of and on behalf of the intended parents for that matter. It becomes extremely important to highlight that the presence of grey areas *qua* regulation of institution of surrogacy has paved path for violation of human rights in one form or the other.⁹ Finally, it must be appreciated and articulated that from the perspective of child, the underlying rights of children must also be protected in all circumstance, which sometimes get compromised in the wake of difficulties and complexities of two differing nations in event of cross-border surrogacy. While understanding the realm of reproductive rights of women, an emphasis also needs to be made on governing principles of International Instruments such as “*International Conference on Population and Development, 1994*”, “*The Convention on the Elimination of All Forms of Discrimination against Women,*

⁷ Anu, et.al. “Surrogacy and women's right to health in India: Issues and perspective”. *Indian Journal of Public Health*, vol. 57, no. 2, 2013, pp. 65-70.

⁸ *Supra Note 6.*

⁹ *Ibid.*

1979”, “United Nation Population Fund New York, 2004”, “ICPD Programme of Action” etc. A discussion on recognition of rights concerning Surrogacy would be incomplete without understanding the stand of Courts/ Judicial Organ on the subject matter. The judicial interpretation on the subject matter of surrogacy and allied rights across different legal regimes has been discussed as follows: In *Baby Manji Yamada v Union of India & Anr.*¹⁰, Hon. Supreme Court held that, “commercial surrogacy was legal and surrogacy agreement was valid in India. Hon. Supreme Court further declared the Japanese Father as the genetic father of the child was given custodial rights of the child.” In *Jan Balaz v Union of India*¹¹, High Court of Gujarat, “granted Indian citizenship to two twin babies fathered through compensated surrogacy by a German National.” In *P.Geetha v The Kerala Livestock Development*¹², Hon. Supreme Court opined that, “since the biological mother of a surrogate child does not go through the gestational period, she is not entitled to maternity leave, along with the maternity benefits.” In *K. Kalaiselvi v Chennai Port Trust*¹³, Hon. Supreme Court categorized Surrogacy into four major types i.e. “Traditional Surrogacy, Gestational Surrogacy, Altruistic Surrogacy and Commercial Surrogacy.” Hon. Supreme Court in *Justice K.S. Puttaswamy v Union of India*¹⁴, has held that, “Privacy is an inalienable right, grounded in values such as dignity which underlie all our fundamental rights, and it categorically located privacy in the individual. The bench commonly held privacy to cover personal autonomy relating to the body, mind, and to making choices, as well as informational privacy.” In the American case of *Johnson v Calvert*¹⁵, the Supreme Court of California held that, “a surrogacy contract was enforceable and commissioning parents had all parental rights over the child and not the surrogate. Any conflict regarding parentage was to be resolved on the basis of the intention of the parties at the time of agreement. Further, the Court clarified that the payments made in surrogacy agreements are for services rendered and not compensation or consideration for transfer of parental rights.” In another American case titled as *Re Marriage of Moschetta*¹⁶, the California Court of Appeal granted parental rights to the surrogate as the commissioning parents got separated in the meantime.”

¹⁰ Supreme Court of India. *Baby Manji Yamada v Union of India & Anr.* SCC, 13 (2008) SCC 518 at 521.

¹¹ High Court of Gujarat. *Jan Balaz v Union of India.* AIR, 2010 Guj 21.

¹² Supreme Court of India. *P.Geetha v The Kerala Livestock Development.* SCC, 2015 SCC Online Ker 71.

¹³ Supreme Court of India. *K. Kalaiselvi v Chennai Port Trust.* MLJ, (2013) 3 MLJ 493.

¹⁴ Supreme Court of India. *Justice K.S. Puttaswamy v Union of India.* SCC, (2017) 10 SCC 1.

¹⁵ Supreme Court of California. *Johnson v Calvert.* (1993) 2d 494, 851 P. 2d 776.

¹⁶ California Court of Appeal. *Re Marriage of Moschetta.* (1994) Nos. G013880, G014430.

V. LEGISLATIVE FRAMEWORK CONCERNING SURROGACY – GAUGING THE LEGISLATIVE GAPS

From the above discussion it could be stated that the concept of Surrogacy has remained subject matter of contradictions and complexities from over quite a time now. With no substantive Legislation into force which could set out the legal regime of subject matter and define the scope of effective and efficient administration cum governance of the issue, there exist numerous grey areas concerning surrogacy in the country at the moment. Lack of a comprehensive and effective legislation on the subject matter is not only leading towards absurdities and confusions, but also is facilitating unchecked and illegal activities in the wake of surrogacy. Furthermore, the issues such as exploitation of the surrogates and determining the legality and parenthood of the child born in instances of abandonment of child by the intended parents are yet another major concern which remains unaddressed. It becomes pertinent to quote that “Indian Council for Medical Research” gave special guidelines in 2002 for the regulation of Assisted Reproductive Technology procedures.¹⁷ Furthermore, “The Law Commission” in its 228th Report also highlighted the significance and underlying reasons for surrogacy. The Law Commission’s Report highlighted the much required safeguards for the surrogates and assured financial assistance in event of death of the intended parents. Further, the Report also mandated for life insurance cover to the surrogate mother as a part and parcel of the surrogate contract. The Report recognized the legality of child born through surrogacy to be equivalent to that of child which would have been otherwise born to the intended parents in ordinary circumstances. In order to facilitate and promote the procedure of surrogacy, the Report also highlighted that birth certificate of the child must bear names of intended/ commissioning parents only to eliminate chances of confusion as well as prohibition on use of sex-selective measures in surrogacy. Finally, the report suggested for governance of Medical Termination of Pregnancy Act, 1971 in event of abortion. It could be inferred that the set of guidelines formulating part and parcel of 228th Law Commission’s Report would have made the institution of Surrogacy quite an easy and practical affair. Nevertheless, The Parliament of India has been reluctant to pass two important legislations concerning subject matter of Surrogacy. These two legislations (bills) are Assisted Reproductive Technology Bill, 2013 and Surrogacy (Regulation) Bill, 2016 and 2019. Whereas the first bill would dissolve the institution of Commercial Surrogacy, the second bill aims at allowing surrogacy to Indian heterosexual couples only married for at least 5 years and facing issues concerning fertility.

¹⁷ Timms, Olinda, et.al. “Ending commercial surrogacy in India: significance of the Surrogacy (Regulation) Bill, 2016”. *Indian Journal of Medical Ethics*, vol. 3, no. 2, 2018, pp. 99-102.

Both the bills, which rather diminish the scope of surrogacy in the country, have been pending ever since 2013 and 2019 respectively for the approval and passing from both the houses. It becomes important to articulate here that lack of effective and comprehensive legislation on the subject matter would only deter the scope of an already unorganized institution, which would further pave path for unlawful and illegal activities to flourish.

VI. CONCLUSION AND SUGGESTIONS

The pressure to have children has resulted into various psychological, societal, physiological and biological consequences and has paved path for evolution of ART Industry, which has rapidly grown in the recent decades across the globe. Nevertheless, the frequent usage of reproductive technologies has also resulted into numerous controversies and complexities concerning the subject matter. As the world became a globalized place, the institution of surrogacy became a familiar practice due to the emergence of more donors and surrogates towards beginning of the 21st Century. Surrogacy brought with itself the notions of commercialization, which created space for misusing the practice, bypassing laws and norms of the countries, exploitation of the surrogates, issues concerning legality and parenthood of the child born through surrogacy etc. The reproductive rights of women directly became affected with the practice and prevalence of surrogacy. The lack of a comprehensive and holistic legislation covering major concerns revolving around surrogacy has always remained and continues to remain a matter of concern for the surrogates, commissioning parents as well as various stakeholders involved in the institution of surrogacy. The Assisted Reproductive Technology Bill, 2013 and Surrogacy (Regulation) Bill, 2016 and 2019 still remain pending in the Parliament which, if passed, would further diminish the practice of surrogacy. It becomes important to note and address that in a society and legal regime which approves of gender neutrality and recognizes third gender as of today, restricting surrogacy to such couples would further lead to more contradictions and legal battles in the future. In this light, it could be suggested that the mandate of Law Commission's 228th Report must be given practical shape and color and must be implemented in full letter and spirit in order to facilitate and properly regularize the institution of surrogacy across borders. Finally, such redressing mechanisms and agencies must be set up which could assist the surrogates and commissioning parents on a common platform for better counseling of all the parties involved in the process as well as protection and promotion of interests of the child born out of surrogacy.
