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Wombs of Change: Ethical Paradigms in Surrogacy Legislation

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ABSTRACT

This research explores the multifaceted dimensions of surrogacy, focusing on its ethical, legal, and societal implications. It delves into the historical, cultural, and psychological aspects of parenthood, emphasizing the transformative nature of the journey. Infertility, affecting one in six couples globally, has led to advancements in Artificial Reproductive Technology (ART), including surrogacy.

The legal landscape, particularly in India, is scrutinized, with attention to recent developments in surrogacy regulations. The Delhi High Court's concerns about potential exploitation and the clash between commercial interests and ethical considerations are highlighted. The Surrogacy (Regulation) Act, 2021, and the Assisted Reproductive Technology (Regulation) Act, 2021, form the current legal framework, raising questions about discrimination, arbitrariness, and the constitutional validity of these regulations.

The commercialization of surrogacy, termed "wombs for rent," is discussed, with a focus on India's role as a surrogacy market. The paper explores the ethical and moral dilemmas associated with surrogacy, including potential harm to surrogate mothers, the interests of the child, and the degradation of women's dignity. The debate on whether surrogacy equates to prostitution is analyzed, considering the commodification of reproductive abilities.

The research further delves into the empowerment versus exploitation narrative, particularly regarding economically disadvantaged women entering surrogacy arrangements. Traditional and religious perspectives on surrogacy are juxtaposed with modern medical advancements, posing challenges to established norms.

Emotional toll on gestational mothers, legal and emotional dynamics post-birth, and the overall humanization of ethical considerations are scrutinized. The study concludes by emphasizing the need for nuanced approaches to surrogacy issues, considering women's autonomy, human rights, and the broader societal responsibility to ensure empowering rather than exploitative choices in surrogacy contracts.

Keywords: *Artificial Reproductive Technology (ART), The Delhi High Court, Commercialization, Gestational mothers, Reproduction.*

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I. INTRODUCTION

Nature has bestowed female with the profound potential to bring about life, an revel in loved by every girl as the essence of motherhood. The right to reproduction is intrinsic to individuals, and the general desire for children amongst couples is a long-lasting phenomenon. Parenthood, being a transformative and perpetually rewarding adventure, holds huge significance in every society global. The ache and depression because of unfulfilled parenthood goals are immeasurable.

Infertility, a challenge faced by a widespread segment of society for numerous reasons, has been diagnosed as a familiar issue, with research indicating that one in six couples encounters fertility issues. The absence of a baby is often perceived as a societal stigma, and times abound where this incapacity has contributed to the breakdown of marriages. The WHO Report underscores that infertility influences about 10-15 percentage of the global populace, encompassing India.²

Historically, children were deemed critical for the continuity of family lineage and a source of joy for parents. Psychologists emphasize the bonding effect the beginning of a baby has on spouses, contributing to the resilience of annoying marriages.

While adoption became the sole recourse for childless couples in the past, recent advancements in medical technology, in particular in artificial human reproductive technology (ART), have revolutionized answers for infertility. Various ART alternatives, which includes artificial insemination, In-Vitro fertilization, and embryo switch, offer alternatives for couples in search of to conceive genetically associated youngsters. Surrogacy, amongst those methods, has received recognition as a viable and transformative desire³.

II. LEGAL DIMENSIONS

Of late, Delhi High court has expressed concern on how Indian surrogacy industry can be turned into multi billion industry with no restrictions over it. This occurred while courts were pondering on a claim made by indian couple living in Canada. The plea is directed against the government Gazette of date 14th March changing rule number 7 of surrogacy rules 2022, amending form number two making it illegal to use donor surrogates. With respect to this particular bench comprising of acting chief justice Manmoan and Justice Mini Pushkarna, it was asserted that change in the surrogacy laws was an aftermath of the court orders. However,

² 1 Annual Report 2008-2009 Ministry of Health and Family Welfare, Government of India available at http://monh.nic.in/FINAL_HEALTH_MINISTRY_ANNUAL_REPORT_2008_09.pdf accessed on 09/04/2014 at 5:30 p.m.

³ Yashomati Ghosh, "Surrogacy and Law: An Affirmative Approach to Deal with the Ethical and Legal Dilemma", Vol. II.Issue 1, 2011 Journal of Law Teachers of India (83 to 92) at 85

the court was skeptical about such intervention as far as this principle is concerned and asserted that such a practice shall be excluded from the country's internal system. Thus, the bench informed the couple that they are Canadian citizens and should not be involved in the Indian industry.⁴

The bench also cautioned that supporting this kind of business could lead to billions in profit losses. It meant that at that point the judiciary is unwarranted for there must be a sense of voluntariness on the part of the government. The jurisprudential approach highlights many things at stake through the thin balance between commercialism and surrogacy laws in India. The courts' unwillingness towards facilitating an industry for surrogacy agreements can be explained by the broader issues surrounding ethics, legality, and the economic issues related to assisted reproductive technologies (ARTs). As the legal framework changes, we see what the comments from courts will mean towards the course of surrogacy law and practice in India.

The present day surrogacy regulation, contained inside the Surrogacy (Regulation) Act, 2021 and the Assisted Reproductive Technology (Regulation) Act, 2021 (ART Act), has sparked a heated debate. Under such law, it subjects little if you are craving for a organic toddler and want to take recourse to surrogacy.

Surrogacy isn't for you in case you are a single male (single, divorced, widower) or an unmarried girl, or a transgender, or a homosexual, or a stay-in couple, or a married couple with a child, or a married couple who can conceive a baby however the healthful and fertile spouse wants to keep away from undergoing being pregnant. Nor are you able to transfer or use your personal gametes, zygotes and embryos, without delay or not directly, to any celebration outside India for your personal personal use with out the permission of the Indian authorities under the ART Act, thereby impeding get right of entry to to surrogacy even overseas.

Some refer to the Universal Declaration of Human Rights proclaiming that each one ladies and men of complete age have the proper to found a own family [Article 16(1)]⁵ and to the decisions of Indian Supreme Court asserting that own family, procreation and sexual orientation are crucial to the respect of an individual. The reproductive choice of a female to give beginning

⁴ Jha, P. (no date) *Surrogacy industry need not be encouraged in India; will turn into billion dollar business: Delhi high court, Bar and Bench - Indian Legal news*. Available at: <https://www.barandbench.com/news/surrogacy-industry-not-encouraged-india-billion-dollars-industry-delhi-high-court> (Accessed: 04 January 2024).

⁵ Rekha P. Pahuja, "Problem of Surrogacy-A Critical Study" , Vol.XII. Issue 2, 2011 Naya Deep, The Official Journal of Nalsa (112 to 118) at 117

has been held to be a measurement of her non-public liberty below Article 21 of the Constitution [KS Puttuswamy (2017); Suchita Srivastava (2009)]⁶.

The surrogacy law, in their opinion, is discriminatory, exclusionary and arbitrary, and negates reproductive rights. And inside the event of equal-intercourse marriage turning into legal in India, it is requested whether it'd be feasible, for instance, to disclaim a legally married male homosexual couple a organic child through surrogacy to finish their circle of relatives. Then there are others who argue in support of the modern surrogacy law, bringing up the industrial exploitation of surrogate moms and children born through surrogacy, specially at the arms of foreign couples.

The constitutional validity of the surrogacy regulation has been challenged before the Supreme Court. Be that as it is able to, a reading of this regulation does go away one baffled as to what exactly the Indian State is searching for to gain. Let us in short take a look at the regulation.

To start with, the surrogacy law bans business surrogacy, and makes it a non-bailable and non-compoundable offence to adopt industrial surrogacy. The fee of such an offence invites imprisonment for a time period which may additionally expand to ten years and with satisfactory which may also make bigger to 10 lakh rupees.

Further, the surrogacy law specifies who can move for surrogacy, with whom and in what manner. The folks that, as in keeping with the State, may be relied on for being given get right of entry to surrogacy are the "intending couple" and "proceeding female" possessing the subsequent attributes.

The proceeding couple must be

- (a) an Indian guy and woman
- (b) legally married
- (c) in the targeted age corporations
- (d) and not using a surviving organic, adopted or surrogate child and
- (e) need to be afflicted by a clinical indication necessitating gestational surrogacy.

An "proceeding woman" need to be (a) a widow or divorcee and (b) within the distinctive age institution.

Now what must such intending couple/female do?

They ought to come upon a lady who (a) is married (b) is within the specific age organization

⁶ AIR 2017 SC 4161.

(c) has a toddler (d) has now not been a surrogate mom in advance (e) is inclined to act as a surrogate mom without providing her eggs and (f) is willing to accomplish that altruistically – this is, with none charges, charges, costs, remuneration or financial incentive of whatever nature, except for the clinical prices, coverage coverage and such different prescribed charges incurred on surrogate mom.

But then, what are the probabilities that a girl might gratuitously lend her womb to an proceeding couple/female to carry and supply the child and then surrender the kid to the proceeding couple/woman, more so if she isn't always related to them? Experience indicates that it's far more likely that the capacity surrogate mother (whether or not herself or through nominees) could absorb cash or by way of way of blessings the reward for bearing and giving start to the kid and thereafter relinquishing the kid to the proceeding couple/girl. After all, neither the proceeding couple/ lady nor the ability surrogate mom is likely to comply with a law the rationale of which they do now not apprehend. Nor might the hazard of being booked for violating the surrogacy regulation be of any deterrence. Surely, the State is aware that no regulation persuades truly because it threatens.

If the events do have interaction in such industrial phrases as the attention for surrogacy, the very object of the law to ban industrial surrogacy stands defeated. The State may also counter that such industrial transaction is not enforceable, and so none of the parties can without a doubt do an awful lot approximately it. It is here that Section forty two of the Surrogacy Act might be accessible for the surrogate mother. This provision calls for the court, notwithstanding whatever contained inside the Indian Evidence Act, 1872, to presume, until the opposite is proved, that the surrogate mom turned into forced with the aid of the intending couple to render surrogacy offerings for functions apart from those permissible under the Act. All that a surrogate mother desires to do to negate an altruistic surrogacy agreement or to compel the proceeding couple to provide undue or maybe extortionist bills/benefits is to allege that her consent was vitiated as a consequence of some worry of injury, or beneath a misconception of reality or misrepresentation in phrases of Section 90 of the Indian Penal Code, 1860 (IPC)⁷, and depart it to our criminal justice gadget – regarded to make the process a punishment – to do the rest.

The State couldn't have been oblivious to parallels with the prevalent misuse of the provisions of Section 498-A (cruelty)⁸ and Section 377 (unnatural intercourse)⁹ of the IPC through an estranged wife to settle marital scores and the increasing trend of the loved ones of the husband

⁷ Section 90 in The Indian Penal Code.

⁸ Section 498A in The Indian Penal Code.

⁹ Section 377 in The Indian Penal Code.

being roped in under Section 376 (rape)¹⁰ of the IPC.

Then, there may be yet any other issue of penalising the proceeding couple in this kind of scenario. The surrogacy law treats the kid from surrogacy as the organic child of the proceeding couple, and calls for that the kid be surpassed over to them by way of the surrogate mother. In reality, the Gujarat High Court has taken the view that the surrogate mother can't maintain the custody of a brand new-born baby even for the motive of breastfeeding. Where the proceeding couple is jailed for contravening the surrogacy regulation, one is left questioning what the pitiable fate of the child might be.

Should the State critically wish to address the ills of commercial surrogacy, it might should do higher than act as the proverbial ostrich burying its head within the sand, hoping that the surrogacy marketplace will disappear by simply banning commercial surrogacy or making get right of entry to to gestational surrogacy so illusory.

III. WOMBS FOR RENT

It's challenging to envision a child as a commodity, considering they are typically the result of love rather than financial transactions. Throughout history, financially disadvantaged parents have often seen their children as potential economic assets, weighing their future contributions against the costs of raising them. However, the commercialization of surrogacy, known as "wombs for rent," has sparked debates on issues such as the commodification of women's bodies and legal complexities.

In nations like India, surrogacy has evolved into a lucrative business, leading to discussions on its ethical implications. Critics have coined terms like 'baby booming business' and 'parenthood by proxy' to describe the popularity of surrogacy arrangements. This commercialization has transformed a natural biological function into a contractual service, with agencies advertising surrogate services and profiting significantly.

The fear of a potential black market, baby-selling, and the exploitation of impoverished women as baby producers has surfaced. The rising demand for surrogacy in India is attributed to the easy availability of surrogate mothers and the comparatively lower costs. Interestingly, this practice persists despite the Transplantation of Human Organs Act, 1994, which prohibits the sale, loaning, and commercialization of human organs.¹¹

In India, where single parenthood and same-sex relationships face societal restrictions, the

¹⁰ Section 376 in The Indian Penal Code.

¹¹ Anil Malhotra, Ranjit Malhotra, *Surrogacy In India*. 1st Edition (New Delhi: Universal Law Publishing Co. Pvt. Ltd. 2013) at 31

desire for a biological child, coupled with technological advancements and financial means, has fueled a thriving reproductive tourism industry.

Transformed from a hub of lower priced reproductive hard work, India has advanced right into a surrogacy marketplace in which pre-packaged offers abound, often observed through added bonuses.

In the 228th report presented by Dr. Justice AR Lakshmanan, the Chairman of the Law Commission of India on August 5, 2009, it was advised that a practical approach should be taken by endorsing altruistic surrogacy arrangements while prohibiting commercial ones. The report emphasized the necessity of avoiding a blanket prohibition of surrogacy solely on moral grounds, highlighting the importance of a comprehensive assessment of the social benefits and purposes that surrogacy can potentially fulfill to avoid irrational decisions.¹²

IV. ETHICAL AND MORAL DILEMMAS ASSOCIATED WITH SURROGACY

The foundational idea at the back of surrogacy is rooted in altruism, reflecting the noble principle of woman aiding some other. Both Hinduism and Christianity's religious texts cite instances of surrogacy in ancient instances. Various ethical and moral issues associated with surrogacy include:

1. Harm to Surrogate Mother: Many Indian girls grow to be surrogate mothers out of economic necessity, but complications arising from surrogacy technology may pose risks to their health. Determining liability for any harm incurred becomes challenging with out clinical negligence.

2. Interest of the Child: Surrogacy transactions involving economic compensation had been criticized as reminiscent of the buying and promoting of kids. Concerns enlarge to capability selection of a child's traits, growing so-referred to as designer toddlers. Additionally, the manner might also bring about a couple of births or defects, and determining parentage and custody turns into elaborate due to the involvement of more than one adults.

3. Degrading the Dignity of Women: Surrogacy is argued to compromise a lady's inherent proper to dignity. The method entails the usage of a female's frame to produce a infant handed over to commissioning dad and mom, limiting the surrogate mom's choice-making for the duration of pregnancy. Critics contend that the economic nature of surrogacy diminishes the

¹² NEED FOR LEGISLATION TO REGULATE ASSISTED REPRODUCTIVE TECHNOLOGY CLINICS AS WELL AS RIGHTS AND OBLIGATIONS OF PARTIES TO A SURROGACY, Report No. 228, Law Commission of India.

herbal mother-baby bond, reducing the girl's frame to an insignificant incubator or breeder machine.¹³

4. Equating Surrogacy with Prostitution: Some authors draw parallels among surrogacy and prostitution, noting the sale of a lady's reproductive ability and the usage of her frame in change for price. The loss of preference and control for the surrogate mother, corresponding to a prostitute complying with terms set by using clients, increases worries approximately the commodification of bodily offerings in each eventualities.¹⁴

In essence, those moral and ethical issues surrounding surrogacy spark off debates about its societal implications and the want for cautiously considered guidelines.

5. Empowerment or Exploitation of Economically Disadvantaged Women: Women facing economic challenges in India often turn to surrogacy as a means to swiftly earn money and support their families. India's combination of top-tier medical facilities and the availability of affordable surrogate mothers has positioned it as a global hub for outsourced surrogacy. However, this practice has garnered criticism, raising concerns about the potential exploitation of economically vulnerable women, akin to issues such as 'slavery of women,' 'neocolonialism,' and the exploitation of the economically disadvantaged.

6. Challenging Traditions: Balancing Science and Faith: Traditionally, childbirth is viewed as a divine gift, and procreation was considered a sacred duty. Before medical advancements, childless couples had limited options—adoption or acceptance of childlessness as part of a divine plan. While medical progress has allowed childless couples to conceive genetically related offspring, the ethical debate intensifies with the increasing use of technology for selective traits. Critics argue that manipulating the natural reproductive process challenges traditional roles, raising moral, ethical, and religious concerns.

7. Emotional Toll on the Gestational Mother: In surrogate scenarios, the gestational mother carries the baby to term, a physically and emotionally demanding process. After this journey, the surrogate mother faces the unique challenge of detaching herself emotionally from the child once it is born.

8. Legal and Emotional Dynamics Post-Birth: As the gestational mother may not be the child's primary caregiver, legal questions arise regarding her post-birth involvement with the

¹³ R. Sedhuraman, Why no to Surrogacy Laws, Asks SC. 16th December 2009 (Wednesday) The Tribune 2. 24 AIR 2010 Gujrat 21.

¹⁴ Jasdeep Kaur, "Surrogacy: A Paradox Regarding Motherhood Rights With Special Reference to India", Vol II No.1, 2012 The Legal Analyst (113 to 121) at 119

child. Navigating these dynamics involves considerations of the surrogate mother's role and rights after the child's birth.

9. Humanizing the Ethical Considerations:

These complex issues prompt reflection on the societal stance on women making decisions about their bodies. It raises questions about the extent to which we should respect a woman's autonomy in entering contracts concerning her body. Beyond legal frameworks, there's a deeper consideration of women's human rights and the societal responsibility to ensure that choices made in such contracts are genuinely empowering rather than exploitative. It underscores the importance of approaching these matters with empathy, recognizing the nuanced intersections of personal choices, economic circumstances, and the broader ethical landscape.¹⁵

V. CONCLUSION

The surrogacy industry, often considered the capital of the world, cannot be abruptly shut down, risking exploitation of illiterate surrogates and infertile commissioning parents. Instead of an outright ban, a comprehensive approach is necessary. The medical fraternity has dismissed concerns, portraying it as a service meeting the demands of both parties. However, the government and the National Commission of Women opted for a complete ban, neglecting the need for a nuanced draft bill that aligns with societal changes while safeguarding the rights of surrogates, commissioning parents, and children.

The ban on commercial surrogacy should be lifted, accompanied by the establishment of appropriate authorities, state surrogacy boards, and a national surrogacy board. Setting age limits for surrogates and commissioning parents, restricting the number of surrogacies per woman, and disallowing couples with a single child, whether natural or adopted, to commission a surrogate child are essential provisions.

The inclusivity of childless and infertile foreign couples, homosexual couples, and single parents in surrogacy should be permitted under the supervision of well-functioning regulating authorities. Dismissing the cultural argument against recognizing homosexual couples overlooks their fundamental rights, challenging outdated cultural and legal norms, as seen with Section 377 IPC. India's surrogacy industry contributes significantly to medical tourism; effective regulation ensures ethical practices, benefiting both surrogates and commissioning parents.

¹⁵ Baby Manji Yamda v. Union of India and another AIR 2009 SC 84 (2008) 13 SCC 518.