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LEGAL AND ETHICAL DILEMMAS RELATING TO SURROGACY

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ABSTRACT

Surrogacy is the act in which one woman carries a child to full term for another couple who is unable to have a child on their own due to infertility or other reasons. The legal definition of infertility refers to those couples who are unable to bear an offspring of their own despite having unprotected coitus for more than a year or have been deemed medically infertile due to a variety of reasons. There could be a multitude of reasons for infertility including diseases, immunological disorders, genetic factors, psychological causes etc. These couples have a few options depending upon which method suits them the best. This paper aims to explore the various methods of surrogacies or in-vitro fertilisation and weigh the ethical and legal dilemma, ultimately leaving the readers to formulate an informed opinion of their own. It accomplishes this goal by undertaking a journey beginning from Ancient Indian practises to the latest ART technology, while weighing the merits and demerits of the concept of surrogacy and the need for more provisional legislation.

Keywords – Surrogacy, dilemma, rights, women, parents, ART

I. Introduction

The first could be of Artificial Reproductive Technology, in which through in vitro-fertilisation the male sperm is artificially transferred into the female egg or ovum (artificial insemination) which is further implanted into the uterus of the female (Intra Uterine Transfer). Another method could be through surrogacy in which a close relative or friend of the couple agrees to carry their child to full term after which she will hand over the child to the original couple. This is called altruistic surrogacy in which no remuneration besides the surgery and insurance cost has to be covered by the couple. Surrogacy can further be of traditional and gestational method. In the former the sperm of the man out of the couple and the egg from the surrogate mother is used in making a child in the womb of the surrogate³.

In the latter method the sperm and egg of the couple is used in making the child which is then implanted into the womb of the surrogate mother, this method is also known as GIFT – Gamete intra fallopian tube, this is a preferable as the surrogate is not the biological mother of the child and is just providing a suitable environment for its development⁴. However, there are a lot of religious and ethical reservations regarding surrogacy which will be discussed in this essay.

II History of Surrogacy

The practice of Surrogacy had already started in the ancient times and it was referred to as Niyogi⁵. In this practice a woman whose husband had either died in war or was incapable of siring a child appointed a

³Bhatia, Kalsang; Martindale, Elizabeth A.; Rustamov, Oybek; Nysenbaum, Anthony M. (2009). "Surrogate pregnancy: an essential guide for clinicians". *The Obstetrician & Gynaecologist*. 11 (1): 49–54. doi:10.1576/toag.11.1.49.27468. ISSN 1744-4667

⁴ Brinsden, Peter R. (September 1, 2003). "Gestational surrogacy". *Human Reproduction Update*. 9 (5): 483–491. doi:10.1093/humupd/dmg033. ISSN 1355-4786. PMID 14640380.

⁵Shah, S. (2020). Book review: Sahgal Smita, Niyoga: Alternative Mechanism to Lineage Perpetuation in Early India: A Socio-Historical Enquiry. *Indian Journal of Gender Studies*, 27(1), 159–160. <https://doi.org/10.1177/0971521519891471>



respected male of the society to help her bear a child. During those times it was an acceptable practice as it was very common during those times for kings to get killed in battles or duels. It was not shunned by society as it was a respectable task that ensured the continuity of the families and their lineage. However, there were certain rules laid down to prevent misuse of this practice. This could only be done with the purpose of bearing a child and not involve any other ulterior motive⁶. This task could be performed by a man only thrice during his life. The child would only belong to the husband and wife or the wife alone and the male could not seek any paternal relation with the child in any way. This can be seen in the case of Mahabharata wherein Queen Satyawati of Hastinapur asks her eldest son Vyasa to perform Niyoga with her daughter - in - laws Ambika and Ambalika⁷.

III Controversies regarding Surrogacy

However, these surrogacies are the Altruistic surrogacies wherein the surrogate is undergoing pregnancy for a friend or relative selflessly out of Dharma (self – righteousness). There is another form of surrogacy referred to as Commercial Surrogacy which is performed solely for monetary gains. This sort of pregnancy also has a lot of controversy around this practice as the Indian Government banned this practice in 2015 to prevent exploitation of the surrogate child and mother. Prior to 2015, after its legalisation of commercial surrogacy in 2002, India was one of the few countries allowing commercial surrogacy during which it became a popular destination for foreigners from all over the world as the procedure was also comparatively cheaper in India. It also had a religious and societal taboo attached to it in a conservative nation like India. There is also this misconception regarding surrogacy that it reduced the status of women to that of prostitutes as they're renting their womb for 9

months for a child that they won't even get to keep. Although the surrogate retains authority on whether or not she decides to follow up with the pregnancy she is under the control of the intending parents and various laws that regulate this practice. This causes a ethical dilemma as on one side being able to have kids is a wonderful joy for infertile couples throughout the world but it also poses a risk to the lives of surrogate mothers.

IV Theory of Consequentialism

Theory of consequentialism essentially refers to the belief that an act whether moral or immoral only depends upon the consequences it brings about⁸. An action that brings about more benefits than harm is good while an act that leads to more harm than benefit is bad. The most common example of this theory is utilitarianism. This belief states that only those actions are right which benefit the majority of population. Surrogacy acts in the same way as both the surrogate mother and intending parents are benefitted from this contract. Even though, this benefit comes from certain sacrifices from both the parties, the good outweighs the bad and hence this act is ethically admissible. But this perception requires a deeper analysis of all consequences and their effects on the parties. the surrogate also gets to reap certain additional benefits such as payment for hospital bills, medical care, maintenance cost while being pregnant and post pregnancy healthcare benefits. She is able to gain autonomy over her body as she gets to decide whether or not she'll take up the pregnancy. However, even if she is willingly following up with the procedure, she might be burdened by social and financial responsibility and her body is under the control of the intending parents for the entirety of the pregnancy. This could further lead to exploitation of the poor women who would be willing to do this job at a cheaper cost due to

⁶ "The Laws of Manu IX". www.sacred-texts.com.

⁷ Sutherland, G. H. (1990). Bija (Seed) and Ksetra (Field): Male Surrogacy or Niyoga in the Mahābhārata. *Contributions to Indian Sociology*, 24(1), 77–103. <https://doi.org/10.1177/006996690024001004>

⁸ Sinnott-Armstrong, Walter, "Consequentialism", *The Stanford Encyclopedia of Philosophy* (Winter 2022 Edition), Edward N. Zalta & Uri Nodelman (eds.), forthcoming URL = <<https://plato.stanford.edu/archives/win2022/entries/consequentialism/>>.



their conditions. Even the child would become an object of exchange leading to the risk of exploitation and trafficking. This was so in the case of Britain's infamous case of Baby cotton⁹ in which the surrogate mother had no interaction with the intending parents and all the exchange was managed by a third-party agency. This pushed the British government into making more stringent laws regulating surrogacy

V Relevant Provisions and Case Laws

The Surrogacy (Regulation) Act of 2021, sheds some light to the eligibility requirement for both the intending parents and the surrogate mother, to qualify for the procedure. According to the SRA Act, the surrogate must be married and have her own child. The Act places an age restriction on the couple, stating that the husband must be between the ages of 26 and 55 and the wife between the ages of 23 and 50, therefore restricting altruistic surrogacy to lawfully wed infertile Indian couples. Unless the parents already bore children with some mental or physical disabilities, they cannot be allowed to have a child through surrogacy if they already have a biological child of their own. Violating any provision of the law could result in 10 years of behind bars with a hefty fine.

There is also the problem of regulation concerning international surrogacies that can be seen in the case of *Baby Manji Yamada v Union of India*¹⁰. Wherein a Japanese couple hired an Indian woman as a surrogate to carry their child, however, before the child could be born, they separated but the father still wanted custody of the child and even though the Indian Government does not grant ownership of ward to single fathers, the laws regarding surrogacy were ambiguous at that time and so the father was granted sole ownership of the ward.

Concerns relating to the citizenship of the child also comes to play in the case of *Jan Balaz v.*

*Anand Municipality*¹¹. In this case two German parents residing in the UK appointed a surrogate from India who gave birth to twins but since their state did not allow surrogacy, the parents weren't able to take the twins back with them. The passport authorities suspended their passports and the twins did not receive any citizenship till the age of two. They had to be adopted by the parents from the surrogate mother to finally take the twins back to their country.

VI Conclusion

This theory comes into play as pregnancy being a sensitive issue in a country like India comes with a lot of challenges, especially from the society. If a couple is not able to reproduce naturally or gets diagnosed with infertility would face a lot of backlash if they tried to resort to IVF (in-vitro fertilisation) or ART (Artificial Reproductive Technology) or even adoption for that matter so it doesn't come off as a surprise that the procedure of surrogacy would also have certain criticism linked to it. The risk posed to the surrogate mother, child and parents alike due to commercial surrogacy calls for regulation of surrogacy in India. Even adoption or Altruistic surrogacy can be a better option as it does not lead to the exploitation of the parties involved¹². Having kids is a blessing and should be enjoyed and celebrated across the globe no matter which method is used for the same.

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¹⁰ AIR (2009) SC 84

¹¹ AIR 2010 GUJ 21

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