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LEGAL AND ETHICAL ISSUES OF SURROGACY

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1. INTRODUCTION:

These days great hue and cry is going on in regard of surrogacy, as the Cabinet, on August 24, 2016 cleared the Surrogacy Bill 2016, with an aim to ban commercial surrogacy and make the process of surrogacy more transparent.

Surrogacy is an agreement or arrangement wherein another woman carries and gives birth to a baby for the couple who wants to have a child. Eventually the couple will become the parent of the infant after the birth.¹

Intended parents seek surrogacy under following circumstances:

- A. Absence or malformation of the womb.
- B. Repeated in vitro fertilization (IVF) implantation failures.
- C. Recurrent pregnancy loss posing danger to mother's health.
- D. Pregnancy is medically impossible. For e.g.: same sex couples.²

2. CLASSIFICATION OF SURROGACY:

Surrogacy can be classified under two categories:

A. The Consideration for surrogacy (Nature of agreement between the couple who desires child and the surrogate mother). On the basis of consideration there are two types of surrogacy:

- i. ALTRUISTIC SURROGACY: This is a form of surrogacy under which the surrogate mother receives only medical reimbursement and other such reasonable expenses required.
- ii. COMMERCIAL SURROGACY: This is a form of surrogacy under which the surrogate mother receives monetary benefits for an agreement of surrogacy.³

¹ Surrogacy, Wikipedia (Aug. 9, 2017, 11:20 a.m.), https://en.wikipedia.org/wiki/Surrogacy#Legal_issues

² Surrogacy, HFEA (Aug. 9, 2017, 11:40 a.m.), <http://www.hfea.gov.uk/fertility-treatment-options-surrogacy.html#1>

B. The nature of fertilization. On the basis of nature of fertilization surrogacy can be classified under two categories:

i. **TRADITIONAL SURROGACY:** This type of surrogacy is also referred as Genetic, Straight or Partial Surrogacy. Under this type of surrogacy the surrogate mother uses her own egg and becomes pregnant through an artificial insemination usually using the intended father's sperm.⁴

ii. **GESTATIONAL SURROGACY:** This type of surrogacy is also referred as Host or Full surrogacy. Under this category of surrogacy the surrogate gestates the couple's embryo, or an embryo created using donor gametes, and becomes pregnant using IVF.⁵

3. ETHICAL ISSUES OF SURROGACY:

Ethical dilemmas related to surrogate motherhood are not only difficult to tackle but also pose many questions to humanity. The following issues need to be taken into consideration:

a. **Exploitation of Surrogate Mother:** It has been observed that mostly illiterate and impoverished women are involved in the process of surrogacy. As a result they get easily exploited and are convinced to become surrogates for a large sum of money. Further these women are kept in seclusion throughout their entire antenatal period to protect them from social stigma. The surrogate mother sacrifices her self-dignity, compromises with her daily duties in the household and stays away for that period of nine months in order to make financial gain for her family. The basic ethical question which arises is that "Is this the only resort for women to obtain financial gains?" In fact in many instances in the developing countries, there are no provisions of insurance or post-pregnancy medical and psychiatric support for the surrogate mothers. This practice is therefore considered as unethical because woman is not a commodity and should not be treated such that after the child is born, her job is over.⁶

b. **Identity of the Child:** Whether a child born via surrogacy has the right to enquire the identity of the people involved in his conception and delivery.

³ Supra note 1.

⁴ Susan Imrie & Vasanti Jadva, The long-term experiences of surrogates: relationships and contact with surrogacy families in genetic and gestational surrogacy arrangements, Reproductive BioMedicine Online, Vol. 29, Issue 4, pg. 424-435 (2014).

⁵ Id.

⁶ Ragini Kulkarni, Ethical Dilemmas in Surrogacy, Hektoen International (Aug. 10, 2017, 11:20 p.m.), http://www.hekint.org/index.php?option=com_content&view=article&id=1361:ethical-dilemmas-in-surrogacy&catid=2&Itemid=435

RELIGIOUS VIEWS ON SURROGACY:

Paragraph 2376 of the Catechism of the Catholic Church states that the techniques which entails the dissociation of husband and wife, by the intrusion of a person other than the couple (donation of sperm or ovum, surrogate uterus), are gravely immoral.⁷

However, in recent times under Judaism surrogacy is permissible if there is full gestational surrogacy with both intended parents gametes included and the fertilization is done via IVF.⁸

4. LEGAL ISSUES OF SURROGACY:

We all know that surrogacy is a very controversial practice. It raises many ethical, religious and legal questions. The legality of surrogacy varies widely between different state jurisdictions. Many countries do not have laws in specific to deal with surrogacy. Some countries ban surrogacy outright, while the others ban commercial surrogacy, while allowing altruistic surrogacy. Some countries do allow commercial surrogacy, however with few restrictions. Some jurisdictions extend a ban on surrogacy to international surrogacy.

Altruistic surrogacy is legal in Australia (except Northern Territory where there is no law on any form of surrogacy), Canada and New Zealand. Commercial surrogacy is a criminal offence in Australia, United Kingdom. However, in United States of America there is no uniform law on surrogacy. Every state in United States has its own set of laws to deal with surrogacy. Some states have written legislation, whereas the others have developed common law regimes for dealing with surrogacy issues. Some states facilitate surrogacy and surrogacy contracts, whereas the others simply refuse to enforce them, and some of the states have even penalized the practice of commercial surrogacy. Surrogacy is completely legal in Ukraine. However, only healthy mothers who have had children before can become surrogates.⁹

Both Altruistic and Commercial surrogacy is legal in India. Conservatives estimates states that more than 25,000 children are now being born through surrogates in India every year in an industry worth \$2 billion.¹⁰ Many complicated legal and health hazards aroused in India because of commercial surrogacy. Initially surrogacy was started with a noble aim for those

⁷ Catechism of the Catholic Church, Paragraph 2376.

⁸ J.G. Schenker, Assisted Reproductive Technology: Perspectives in Halakha (Jewish Religious Law), Reproductive Biomedicine Online, 17(S3), 17–24 (2008).

⁹ Supra note 1.

¹⁰ Kishwar Desai, India's surrogate mothers are risking their lives. They urgently need protection, The Guardian (Aug. 11, 2017, 11:58 a.m.), <https://www.theguardian.com/commentisfree/2012/jun/05/india-surrogates-impoverished-die>

who were not in a position of having a baby, but now a day it has become a vogue and a way of waving the pregnancy pains for the fat packets. Surrogacy in India is of low cost and the laws are flexible.

In 2008, the Supreme Court of India in the Manji's case (Japanese Baby) has held that commercial surrogacy is permitted in India. That has again increased the international confidence in going in for surrogacy in India. But as of 2014, a surrogacy ban was placed on homosexual couples and single parents. With respect to the problems, the law commission in its 228th report highlighted the necessity to prohibit commercial surrogacy in India and only allow it to needy Indian parents. The Union cabinet therefore gave approval for introduction to 'Surrogacy (Regulation) Bill, 2016'. This Bill permits altruistic surrogacy and prohibits commercial surrogacy.

5. SURROGACY (REGULATION) BILL, 2016

The Union Cabinet recently approved the Surrogacy (Regulation) Bill 2016, banning commercial surrogacy in India. The surrogacy bill aims to prohibit potential exploitation of surrogate mothers and children born through commercial surrogacy.

According to the Bill, only Indian couples, who have been married for at least 5 years can opt for surrogacy, provided at least one of them have been proven to have fertility-related issues. Further only close relatives will be able to offer altruistic surrogacy to the eligible couples. However, the relatives need not be necessarily related by blood. As per the bill the surrogate child will have same rights as that of a biological child of the couple. The bill also bans unmarried people, live-in couples and homosexuals from opting for altruistic surrogacy. Even foreigners and Overseas Indians, cannot commission surrogacy.¹¹

Apart from that a Surrogacy regulation board would be set-up at both Central and State-level. The law will be applicable to the whole of India, except for the state of Jammu and Kashmir. All Assisted Reproductive Technology (ART) clinics will need to be registered. Surrogacy clinics will be permitted to charge for their services rendered in the course of surrogacy, but the surrogate mother cannot be paid beyond reasonable medical expenses. Further, the clinics will also have to maintain records of surrogacy for 25 years.¹²

¹¹ Surrogacy (Regulation) Bill 2016: 12 facts about the bill banning commercial surrogacy, India Today (Aug. 12, 2017, 11:30 a.m.), <http://indiatoday.intoday.in/education/story/surrogacy-bill/1/749353.html>

¹² Id.

The Bill also specifies that any person who takes the aid of a doctor or a surrogacy clinic in order to conduct commercial surrogacy will be punishable with an imprisonment for a minimum term of five years and a fine that may extend to five lakh rupees. Offences such as (i) undertaking or advertising commercial surrogacy; (ii) exploiting or abandoning the surrogate mother or child; and (iii) selling or importing human embryo or gametes for surrogacy will attract a minimum penalty of 10 years and a fine up to 10 lakh rupees.^{13 14}

6. CONCLUSION:

The development in medical science and increased social awareness and acceptance has made surrogacy popular. As a result more and more couples are getting benefitted by it every year. Today surrogacy has established itself as a reliable way for infertile family to have a baby.

However, Commercial surrogacy has resulted in physical and mental exploitation of many surrogate mothers. Therefore, this practice needs to be stopped. Further strict guidelines should be there which need to be followed by doctors during altruistic surrogacy. For this very purpose Indian Government has introduced Surrogacy (Regulation) Bill, 2016. This bill aims to check surrogacy in India and prohibit any form of commercial surrogacy. Thus, it's high time for the parliament to pass this bill as it will stop the exploitation of the poor and illiterate women who are exploited in the process of surrogacy.

¹³ Mandira & Nivedita Rao, The Surrogacy (Regulation) Bill, 2016: All you need to know, PRS India (Aug. 12, 2017, 7:30 a.m.), <http://www.prsindia.org/theprsblog/?p=3721>

¹⁴ Soumya Swaminathan, Why the Surrogacy Bill is necessary, The Hindu (Aug. 13, 2017, 8:00 a.m.), <http://www.thehindu.com/opinion/op-ed/Why-the-Surrogacy-Bill-is-necessary/article14593359.ece>