

A STUDY OF CONFLICT OF LAWS AND PRACTICE OF SURROGACY IN INDIA

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ABSTRACT

Since the advent of modern medical technology in the late 20th century, the practice of commercial surrogacy has been widely accepted in India. The notion is gaining popularity throughout the globe and expanding fast, becoming a major sector in India, despite the social and legal complexities involved. Even though commercial surrogacy is common in India, the lack of a legislation governing the practice raises serious ethical and moral questions about its potential for abuse. The lack of proper legislation and the implementation of numerous new laws in India contribute significantly to the country's legal difficulties. Defining the legality of surrogacy contracts, determining the status of the surrogate child, commissioning a parent, and resolving disputes over custody, citizenship, and parentage of a surrogate child are all made more difficult by the complexity, diversity, and unsettlement of the law surrounding surrogacy. While the ICMR has issued recommendations that provide some suggestions for how to resolve these problems, they are not legally obligatory, and the applicable legislation is inadequate. The lack of a legal framework to handle the ramifications of surrogate motherhood is the fundamental criticism against the practice. Until the rights and obligations of all parties are legally established and enforced, the child's and others' statuses are in jeopardy.

KEYWORDS: Conflict of Laws, Practice of Surrogacy, India, medical technology, commercial surrogacy.

INTRODUCTION

Contractual surrogacy is an agreement between at least two people. Although the law commission suggests in its 228th report that such contracts be governed by the Indian Contract Act of 1872, the question of whether such contracts are enforceable remains open. The entire arrangement rests on a contract between the parties. If the consideration in a surrogacy contract is deemed to be immoral or against public policy, the contract may be ruled null and invalid in India under Section 23 of the Indian

Contract. According to Article 23 of the ICA, unless it is forbidden by law, is of such a nature as to defeat the provisions of any law, is fraudulent, involves or implies injury to the person or property of another, or is regarded by the court as immoral or contrary to public policy, the consideration or object of an agreement is lawful. However, in regards to the legitimacy of surrogacy contracts, it is important to note that article 15.1 of the Universal Declaration of Human Rights states that all adults, regardless of their race, nationality, or religion, have the right to enter into a

marriage and start a family. In India, the legal system also views the right to reproduction as fundamental. For example, in B.K. Parthasarthi Vs. Government of Andhra Pradesh¹³⁷, the Andhra Pradesh high court agreed with the decision of the US Supreme Court in Jack T. Skinner Vs. State of Oklahoma, which characterized the right to produce as 'one of the basic civil rights of man,' and upheld " the right of reproductive autonomy" of an individual as a facet of his " right to privacy. The Supreme Court refused to rule that the right to procreate is not a fundamental human right in Javed Vs. State of Haryana¹³⁸, but upholding the two living children criterion to disqualify a person from participating a Panchayati Raj election. If the freedom to reproduce is guaranteed by the constitution, then infertile couples should have the right to use surrogacy to have a child. Furthermore, autonomy may be used to defend these contracts. There are two possible arguments why a surrogacy agreement should prevent others from thinking that women don't know how to take care of themselves.

The first argument emphasizes the value of sexual and reproductive freedom. A person's freedom to decide for themselves whether or not to become a parent, and under what conditions, is essential if they are to be free to put into practice whatever idea of the good they have chosen. Whether or if they will be compensated monetarily for their efforts. Second, the independence emphasizes the value of opting for one's own profession. Surrogacy is a kind of employment; hence surrogate mothers should be afforded the same legal protections as other workers. Thomas

Hobbes argues that one's "person" is his property. He may, at most, use it. Self-destruction is the limit of this freedom. Man has a right to his own labour's rewards. Therefore, commercial surrogacy arrangements should likewise be legitimized and upheld. It is further argued that the right to life extends beyond the protection of the lives of animals and encompasses all of the things that make life worthwhile. Article 21 of the constitution explicitly includes the freedom to procreate and the right to reproduce as components of the right to life.

LEGALITY OF SURROGACY CONTRACTS

Article 21's positive substance includes the right to life and the ability to perform the basic minimum of human functions and activities. Therefore, in this context, surrogacy provides an alternative to having a child who is genetically related to the couple, which helps the couple form their family and provides with a status in the society, and on the other hand, the surrogates are able to raise their living standard or provide for their families' basic needs. Therefore, rather than forbidding, we must enforce such contracts. Furthermore, it is maintained that women's reproductive rights are crucial to women's progress and autonomy.

It's often held that women can't fully enjoy their human rights unless they have access to safe and legal abortion. The freedom to control one's own reproduction is central to the argument for women's empowerment. An alternative where women may negotiate and sign contracts to have their babies carried seems liberating. Thus, surrogacy is seen as a potential

conduit for women's emancipation. It is important that surrogacy contracts be enforced since they ultimately benefit the parties to the relationship. In addition, the Indian judicial system, in the case of baby Manji, upheld the legitimacy and legality of commercial surrogacy in India, not dismissing it on the grounds of public policy. Given the interest in surrogacy among individuals who cannot have children naturally, it is important that surrogacy contracts be legally binding.

LEGITIMACY OF SURROGATE CHILD

Another issue with surrogacy is the potential for legal problems with the surrogate kid. Adoption is considered a valid kind of familial tie under Indian law, with the adopted kid being accorded the same legal presumption as a biological child. Full, half, and uterine blood relationships are often used to describe the familial ties between offspring. Children's legal standing is determined by their parents' marital status. Children conceived or born within the marital relationship are considered legitimate. Offspring of an unmarried couple are considered illegitimate.¹⁵ Surrogacy violates both of these tenets. One legal issue is whether or not the kid is considered legitimate after such a birth. Paternity is a matter of genetics for legal reasons. The issue of paternity is unaffected by whether the father's sperm is used to inseminate the mother in vitro or in utero (via artificial insemination). When these methods are employed on a woman who is not the wife, or when a third party is involved, as in the case of donated sperm or donated ova or eggs, the situation becomes complicated or contentious.

Legitimacy issues in India are governed by Section 112 of the Evidence Act, which states that a child born as a result of the use of artificial reproduction techniques between a woman and her husband is presumed to be born within a legitimate wedlock, regardless of whether or not the techniques were actually used. The personal laws of India also control the legal standing of children.

Children born of null marriages only under the Hindu Marriage Act, 1955 or the Special Marriage Act, 1954 are considered legitimate, whereas those born of null marriages under any other law are not. And a kid conceived using ART would not be eligible for protections under any of the aforementioned statutes. Therefore, without laws validating ART children, they will be considered illegitimate. Moreover, the child must be adopted by the intended parents or the parenthood should be established by DNA testing, and cover if the intended parents fail to adopt the child or does not establish their parenthood by DNA testing, then the child comes under the preview of section 112 of the Indian Evidence Act, 1872.

The legislation pertaining to the establishment of paternity is discussed in Section 112 of the IEA. A child born during a valid marriage or within 280 days after the dissolution of a marriage but before the woman remarries is presumed to have the same biological father as the woman's husband, but this presumption is rebuttable if the husband can show that he could not have had sexual intercourse with the mother at the time of the child's birth. Surrogate children are considered illegitimate if it is established that the surrogate mother's spouse is not the child's

biological father. The paternity of the kid must be confirmed by either the biological parents or the adoptive parents in order for the child to be considered legitimate.

CUSTODY OF SURROGATE CHILD

There are three people involved in a surrogate birth: the intended mother, the genetic mother, and the biological mother. In certain circumstances, all three may coincide. Intentional mothers become genetic mothers if their ovum is utilized, whereas biological mothers take on that role if they provide their own ovum. The ethical and legal dilemma here is determining which woman should be recognized as the biological mother. The lack of legislation in India just serves to complicate an already difficult situation. Given the absence of legislation on the subject, couples seeking surrogacy must follow the recommendations of the International Society for Assisted Reproductive Technology (ICMR). Surrogate babies should be loved and accepted. Tom is researching the people who share his ancestry in the hope that the type may be there for commercial purposes via genetic (DNA) fingerprinting. It will be required to make a choice in A DNA test will be required to establish the legitimacy of a surrogate alternative. In such a case, the question of who should be recognized as the surrogate child's legal mother and father arises, as does the possibility of a legal battle between the intended parents and the person who provided the genetic material. The question of who should be given the child in the event that neither the intended party nor the surrogate mother accepts the child arises when the intended party refuses to take the baby for some reason, such as the

child's physical disability. The lady who conceived the child is considered the mother since her ovum was fertilized. However, from a biological standpoint, the surrogate mother is the true mother because of the close bond that develops between the fetus and the woman carrying her. There have already been fights over who gets to keep the kid. The law currently recognizes the biological mother as the legal mother, and the genetic mother must adopt in order to claim the kid as her own. However, the difficulties are not limited to the genetic and biological mother. Depending on the circumstances, a surrogate may be the child's genetic mother, genetic father, intended parents, or biological parents. It's possible that these cases make up the majority, yet in some ways, the legitimacy of their parents' parenting choices became more dubious. Using a surrogate mother as an example, the type is predetermined Tom's reading will lead to mothballing eventually, but first they have to find a way to get rid of all the inherited mothballing genes (where those donor ovum will be put to good use). As a result, there are certain grey areas and areas of contradicting law, which can only be resolved by comprehensive legislation that addresses all the concerns raised by the surrogacy industry as a whole.

RIGHTS OF SURROGATE MOTHER, SURROGATE CHILD AND COMMISSIONING PARENTS

Because there is no special legislation addressing the subject of surrogacy, the laws that are already in place are not only in contradiction with one another, but they also are not enough or sufficient to address all of the associated concerns about the rights of the surrogate child, the surrogate

mother, and the intended parents. The current recommendations of the ICMR are not clear on a number of concerns, including the following: if those who are appointing guardians cannot refuse to exercise their responsibility over the surrogate kid, then what will happen and should that authority be handed to the surrogate mother? And still another possibility is that the surrogate won't take the kid, leaving the question of the child's future unanswered: what will happen to them? Then what will the kid be entitled to as their rights? The question is whether or not he should be considered a legitimate kid or an illegitimate child. If he is considered to be a legitimate kid, the question arises as to who should have custody of the child in the event that neither of the biological parents choose to raise the child and the surrogate mother is required to take on the responsibility anyway. If the kid is determined to be an illegitimate child, then the question of what will happen to her inheritance arises. According to Indian law, if a child is born in a legally wedlock, then the child is presumed to be the legitimate child of the couple, who were living as husband and wife at the time of the child's birth. In the case of surrogacy, if the surrogate mother is married, then the child born to the surrogate mother is deemed to be the child of the surrogate mother and her husband. In this circumstance, if the surrogate does not want the child, And on the other hand, if the surrogate mother is a woman who has never been married or is a single woman who has never been married (for example, a divorcee or a widow), then the kid may be considered illegitimate since it is not the product of a legally binding

marriage. Should the surrogate mother be obliged to accept the kid if she also refuses to take the child, and should the child be liable to inherit the property of the surrogate mother if she does not take the child? This is the issue that arises in the event that the intended parents decline to adopt the child in the scenario described above. Concerning those more significant aspects, on the other hand, but ignoring the question of the surrogate kid, the area in which the legislation is unreasonable is in relation to citizenship requirements. What are the benefits of parenthood for the child? What happens to the child's citizenship if the intended parents are from a country other than India and the surrogate mother is an Indian? To what extent does the child's heritage include Indian heritage? It is possible that the decision about the citizenship of the child was made in the instance of Jan Bala based on the fact that the nationality of the surrogate mother was taken into consideration. Previously, An opinion that those top officials in Gujarat ought to have according to a point of interest judgment is that those surrogate mothers Regarding by way of instance the conventional mothballs In addition, her nationality determines the citizenship of her children, regardless of the color of their father's skin. The court said that under the current legal system, it has no other choice than to hold that kids born in India through gestational surrogates are citizens of the nation, and it did so in order to uphold the citizenship rights of the boys.

CONCLUSION

The constitution also protects the right to procreate. A fascinating example of contemporary technical wonders is

surrogacy. Being a parent is an important aspect of life, and not being a parent causes people to feel unhappy. In the long term, society could suffer if reproductive technologies are banned. Although banning surrogacy also ends many legal, social, and ethical disputes, what society stands to gain from doing so is not worth what it would stand to lose. So it would appear that controlling surrogacy would be a better way to address the problem.

Increasing numbers of infertile couples are becoming increasingly despondent because they can only have children through adoption or risk never becoming parents at all. However, adopting a child is not necessarily preferable to having a child of your own genetics through the process of surrogacy. However, disagreements will persist until there is a consistent law that everyone must follow. There will be ongoing problems, confrontations, illicit paperwork, and a great increase in corruption. Because having children is a basic human right, society need reproductive technology.

The benefits to society from this technology far outweigh any potential risks. Both the intended parents and the surrogate stand to benefit from this arrangement; the intended parents get a child and the surrogate gets paid for her time and effort. If this were allowed to happen, it would pave the way for more sophisticated technology that would help ensure humanity's survival. Surrogacy is a complex subject, but finding a solution to it is considered as essential to ensuring the future of human growth and prosperity. As surrogacy becomes in popularity, it seems that society is witnessing beneficial effects and is, in, need of these technologies,

suggesting that regulation of reproductive technology may be the best approach to handle the concerns. The advent of surrogacy has saved many infertile couples from divorce, feelings of worthlessness, and criticism from society, so there are good reasons to ban the practice but even better reasons to keep it going until medical science provides society with a better alternative to child bearing. Although surrogacy is a common social practice, it is not regulated in India. Surrogate motherhood in India is unregulated, and there is a lot of confusion about the legal implications of artificial methods of conception, especially of sex exchanges, because the legal provisions existing under various laws in India, which, when interpreted, do not hold good in the interest of the child born out of surrogacy. If a surrogate kid is deemed illegitimate, it loses all rights and is subjected to tremendous sufferings, which is rather unfair. Therefore, comprehensive legislation is required, taking into account many current statutes, whereby concerns of legality of surrogacy intersect.

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