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CHANGES IN THE SURROGACY LAW AND ITS SOCIAL AND LEGAL IMPLICATIONS

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ABSTRACT

“Of all the rights of women, the greatest is to be a mother. Becoming a mother is one of the happiest moments a woman can experience.” However, for some women, achieving motherhood can be challenging due to infertility. Infertility for the longest time in India has been considered a social taboo, therefore the options available to infertile couples are also treated as such, and surrogacy is one of them. Surrogacy was introduced in India in 1980 and was legalised in 2002. Later, only altruistic surrogacy was permitted, and commercial surrogacy was banned in 2015, which had a detrimental effect on the livelihood of commercial surrogates. Over time, the bill was amended, restricting surrogacy to married infertile heterosexual couples only, barring singles, homosexuals, and unmarried couples. The Surrogacy (Regulation) Act, 2021, passed in 2022 required the surrogate mother to be a “close relative” of the intending parents. Owing to these amendments, the Surrogacy Law has been criticised as it restricts surrogacy to married Indian infertile couples while disqualifying others based on nationality, marital status, and sexual orientation, which is seen as violation of their fundamental rights. This research paper examines the social consequences of the changes made to the Surrogacy (Regulation) Act, as well as how the amendments in the law have affected legal rights. To accomplish the research goals of this paper, the authors have examined quantitative and qualitative data from secondary sources and primary data using questionnaires and in-person interviews.

Key Words: social taboo, surrogacy, surrogates, fundamental rights, amendments

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INTRODUCTION

The word "Surrogate" is rooted in Latin "Subrogare" (to substitute), which means "appointed to act in the place of." (Insight into Different Aspects of Surrogacy Practices, 2018). Surrogacy is an arrangement whereby a woman agrees to deliver /labour on behalf of another couple or individual who will parent the child once it is born, which is frequently backed by a legal contract. Under broad definition, there are different classifications made on the basis of embryos and on the basis of monetary compensation.

On the basis of embryos, it is classified into- Traditional surrogacy and Gestational surrogacy. In Traditional Surrogacy, the surrogate mother is the egg donor, thereby becoming the child's biological mother. Sperm used to fertilise the egg is provided by the intending father. The baby is then born after the surrogate mother has carried the pregnancy to term. In gestational surrogacy, the surrogate mother is genetically not related to the child she is carrying. Instead, fertility specialists can fertilise the intended father's sperm into the intended mother's eggs. The fertilised eggs are then implanted into the surrogate's uterus, making her strictly the carrier of the child. The surrogate then delivers the child after carrying the pregnancy to term.

On the basis of monetary compensation, it can be classified into - Altruistic surrogacy and commercial surrogacy. In Commercial Surrogacy, a surrogate is given monetary compensation in exchange for carrying the child. There should be a contract between the intended parents and the surrogate, with the surrogate receiving compensation for carrying the child full term. This type of surrogacy was banned in India in 2015. In Altruistic Surrogacy, the surrogate is paid only 'reasonable costs', i.e medical care, IVF, and no extra charge for carrying the child. This type of surrogacy is usually carried out with the intention of helping the parents selflessly. Currently, India allows only altruistic surrogacy which has to be carried out by a "close relative."

Hindu mythology contains a few instances of surrogacy, for example, when Devaki and Vasudev's seventh child, Balaram, was conceived, the embryo was transferred onto Rohini, Vasudev's first wife, to prevent the kid from being slain by Devaki's brother Kamsa. Another instance is the story of Draupadi and the Pandavas: Draupadi, the wife of the Pandavas, was unable to conceive a child. The Pandavas then took a decision to have children through their wife's maidservants, who were then known as their surrogates. The five brothers each had a child with a different maidservant, and these children were collectively known as the Upapandavas.

The use of surrogates has grown in popularity in the modern era as more couples look for non-conventional ways to conceive.

Public-Perspective:

We created a questionnaire where many people believe that outright prohibition of commercial surrogacy is unjust and that instead, there should be some regulations and checks on the law. People tend to view the amendments that forbid live-in couples, homosexuals and single parents with resentment because they are exceedingly partial, unfair, and unjust to many of the individuals concerned. People think the government's choice to limit surrogates to close relatives of the intending parents was a negative one because it limits couples options and not all relatives would be willing to act as surrogates. Close relative might be a good idea, but it shouldn't be necessary. Surrogacy should be regulated by the government to make sure that the people who do it are well aware, healthy and protective towards children. All the parties involved should get counselling, and the laws shouldn't be ambiguous. Lawmaking should be based on fundamental issues like finances, health, emotional and mental wellbeing rather than subjects like sexuality, gender, etc.

Legal Perspective

We conducted an in person interview with Justice Swati A. Chauhan, the Principal Judge of the Family Court in Bandra, to gain valuable insights into the legal framework surrounding surrogacy in India. According to her, surrogate mothers should not be exploited, so prohibition on commercial surrogacy is justified. She stressed the importance of not manipulating commercial surrogates and protecting their rights and welfare. She preferred the concept of close relatives over commercial surrogates to ensure a positive and supportive environment for the surrogate and child. She also noted that many families who go for adoption have the same love and bonding as biological families, so blood lineage shouldn't be overemphasised. Overall, Justice Chauhan stressed that surrogacy is a complex and sensitive issue and that the legal system must strike a balance between protecting all parties' rights and allowing families to form safely and supportively.

Medical Perspective

In our interview with two practising gynaecologists, Dr. Meenakshi Jindal and Dr. Himani Choudhary, we gained valuable insights into the various perspectives surrounding surrogacy laws in India. While both doctors had differing opinions, Dr. Meenakshi Jindal was

particularly vocal about her concerns over the commercialization of surrogacy. She emphasised that commercial surrogacy can lead to the exploitation of women who act as surrogates. In her view, close relatives who act as surrogates may be a better option. Dr. Jindal also expressed her support for altruistic surrogacy. Dr. Himani Choudhary, on the other hand, expressed concerns about the ban on commercial surrogacy, noting that loopholes may exist and that people will find a way to circumvent the law. Dr. Choudhary spoke positively about altruistic surrogacy, as it is not associated with malpractices. From a medical perspective, Dr. Choudhary believes that surrogacy does not have any negative effects on the surrogate or the child. She criticised the law that allows only a close relative to be a surrogate, arguing that every person has the right to have a baby and that this law may restrict that right. Dr. Choudhary's opinions provide valuable insights into the complexities of surrogacy laws in India and highlight the need for a nuanced and comprehensive approach to this sensitive issue.

Conspectus of Surrogacy Laws

India legalised commercial surrogacy in 2002. India became a major surrogacy centre after the government allowed medical tourism for surrogacy. The lower cost and lack of regulation compared to the U.S. (where costs can reach \$100,000) attracted prospective parents. In 2012, the Confederation of Indian Industry estimated India's surrogacy industry at \$2 billion and 3,000 fertility clinics.

The ICMR established surrogacy guidelines in 2005. The couple and surrogate mother would decide on monetary compensation according to the guidelines. The surrogate mother must give up all parental rights to the surrogate child and cannot donate her own egg.

- The hon'ble Supreme Court of India's 2008 Baby Manji Yamada vs. The Union of India case highlighted India's lack of surrogacy regulation.
- The 2009 Law Commission of India 228th report recommended banning commercial surrogacy and allowing ethical altruistic surrogacy through legislation. Poverty drives Indian women to rent their wombs for money or other necessities, which fuels surrogacy services.

- In 2015, the government partially outlawed surrogacy. India banned foreign surrogates. The 2009 Law Commission's 228th report recommended banning commercial surrogacy, which influenced this decision.

Surrogacy (Regulation) Bill, 2016.

On 21 November 2016, Lok Sabha introduced the Surrogacy (regulation) Bill, 2016, which was referred to the standing committee on 12 January 2017. On 10 August 2017, the committee reported to Lok Sabha, which passed the bill on 19 December 2018.

This bill's highlights:

- India's surrogacy bill prohibits commercial surrogacy. Indian married couples without children can use altruistic surrogacy.
- The bill requires the surrogate mother and the intended parents to be close relatives.
- The bill restricts surrogacy to Indian citizens. Foreigners, non-resident Indians, and Indians are prohibited from seeking surrogate mothers.
- India prohibits surrogacy for homosexuals, single parents, and live-in couples.
- Couples with children cannot use surrogacy, but they can adopt under a separate law.
- After confirming the following conditions:
 - 1) Certificate of infertility to the couple intending surrogacy by District Medical Board,
 - 2) Order of Court passed by a Magistrate of the first class or above regarding child custody and parentage,
 - 3) Surrogate mother/child insurance.

Surrogacy (Regulation) Bill, 2019.

Dr. Harsh Vardhan, Minister of Health and Family Welfare, introduced the Surrogacy (Regulation) Bill, 2019 in Lok Sabha on July 15.

Bill was proposed in 2016. In 2019, the Lok Sabha passed the proposed legislation, which the Rajya Sabha Select Committee reviewed and the Union Cabinet approved.

This bill's highlights:

- The Bill regulates Indian surrogacy.
- The surrogate mother and intended couples must be close relatives. Rules and Regulations will define close relatives.
- The Bill defined infertility as inability to conceive within five years of marriage.

- The intending couple's consent is irrelevant for surrogate foetus abortion, and only the surrogate mother's written consent is needed, subject to authorization from the appropriate authority under the Medical Termination of Pregnancy Act, 1971.
- Surrogacy requires clinic registration.

Surrogacy (Regulation) Bill, 2021

The Lok Sabha passed the Surrogacy (Regulation) Bill, but the Rajya Sabha did not, sending it to a Parliamentary Standing Committee. On December 25, 2021, the President signed the Surrogacy (Regulation) Act, 2021.

This bill's highlights:

The intended couple must be legally married Indian men and women between the ages of 26 and 55, and the surrogate mother must be an Indian woman between 35 and 45 years old. • The National Assisted Reproductive Technology and Surrogacy Registry will register surrogacy clinics under this Act. Surrogacy Boards will be established by the Centre, States, and Union Territories.

Surrogacy (Regulation) Bill, 2022

The Ministry of Health and Welfare published The Surrogacy (Regulation) Bill, 2022, on June 21.

This bill's highlights:

- Under the Medical Termination of Pregnancy Act, 1971, the intending woman or couple must buy a general health insurance policy for the surrogate mother for 36 months from an insurance company or agent recognised by the Insurance Regulatory and Development Authority.

Case Analysis of 'BABY MANJI YAMAMDA V/S UNION OF INDIA'

Facts: In November 2007, a Japanese couple, Mrs. Yuki Yamada and Mr. Ikufumi Yamada, visited India in search of surrogates. They met with a reproductive facility in Anand, Gujarat, known for its commercial surrogacy services. The clinic arranged a surrogacy contract for the intended parents and surrogate mother. The infant was conceived using Ikufumi Yamada's sperm and an unidentified Indian woman's eggs. An embryo was implanted into the surrogate mother's womb. However, due to marital issues, the intending parents separated in June 2008. Dr. Ikufumi Yamada, the child's genetic father, wanted to claim custody but had to return to

Japan since his visa has expired, and Dr. Yuki, the child's intended mother, did not want to raise the child because she was neither biologically nor legally related to the baby.

This case is significant because it reveals the absence of surrogate legislation in India and offers an alternative. An NGO, M/s SATYA, Habeas Corpus Writ Petition (PIL) in the High Court of Rajasthan, Jaipur Bench against the Union of India through Ministry of Home Affairs, State of Rajasthan through the Principal Secretary, the Director General of Police, Government of Rajasthan and the Superintendent of Police Jaipur City (East), Jaipur. The writ petition argued that surrogacy feeds an illegal sector in India and in the name of surrogacy a lot of irregularities are being committed. According to it, a money-making scheme is being perpetuated in the name of surrogacy, and a surrogacy law was sought. The Division Bench of the High Court of Rajasthan challenged Manaji Yamada's custody. Ms Emiko Yamada, the child's grandmother, filed a writ action under Article 32 of the Constitution of India before the Supreme Court contesting Rajasthan HC's order.

Analysis: Since this case was the first major case involving surrogacy, the Court had no precedent cases to refer to and were presented with a difficult situation. The court had a perfect chance to set a landmark judgement by carefully analysing the facts and regulating a law for surrogacy sooner. But the court was short-sighted while passing the judgement and without thinking in the longer term hastily directed the parties to seek remedy under the provisions of Commission for Protection of Child Rights Act, 2005. The bench passed up the chance to go into more depth about the case's circumstances and the legitimacy of surrogacy agreements. Surrogacy was discussed, along with its success in the market, and it was noted that "This medical procedure is legal in several countries, including India, where due to excellent medical infrastructure, high international demand, and ready availability of poor surrogates it is reaching industry proportions." The Court was not alarmed by the mere mention of "poor surrogates" and "reaching industry offers" in relation to the uncontrolled surrogacy sector in India.

Social and Legal Implications and Data Analysis

In the past, India was a common destination for people seeking surrogate mothers because of low cost and few regulations. Because of this, it became much simpler for foreign couples to hire Indian women to carry their babies. However, this practice has become controversial because some people are worried that the surrogate mothers are exploited, that they lack adequate legal protection, and that they are treated differently from other groups.

Violation of Fundamental Rights

The new Surrogacy laws violate the Fundamental Rights of a considerable proportion of the population. It calls for an outright ban on commercial surrogacy and limiting altruistic surrogacy to legally wed Indian couples who are infertile and have been married for at least five years, thereby barring gay couples, foreign couples as well as unwed couples and violation their Right to Equality (Article 14). Since the main objective of the new law was to prevent the exploitation of commercial surrogates, the banning of the aforementioned stakeholders doesn't appear to have any nexus to the primary goal of drafting this law, thereby not standing the test of constitutional rights. After the K. Puttaswamy Judgement, the right to privacy has become an essential part of Article 21, and according to the ruling in B.K. Parsarathi v. Government of Andhra Pradesh reproductive rights are an element of one's right to privacy, therefore matters concerning procreation do not lie under the Government's purview. The state is not intended to interfere in intimate matters, such as marriage, procreation, motherhood, etc., yet the new law enacted by them does. A couple can choose to conceive naturally or via surrogacy, adoption, or by any other means, but the bill prohibits the fertile couples to opt for surrogacy, which has no justifiable foundation. There are many fertile women who do not want to undergo labour pain or experience the bodily changes; therefore, they may choose to opt for surrogacy, but they cannot because the bill restricts fertile couples from opting for surrogacy.

Discrimination on gender and other basis

For a long time, discrimination based on gender, sexual orientation, and infertility have been among the primary concerns raised in relation to surrogacy in India. This has made the topic of surrogacy in India a contentious one. It has been brought to people's attention that there is discrimination based on both sexual orientation and gender. In India, same-sex couples and single people are not permitted to legally have children through the process of surrogacy. It has been claimed that this is discriminatory and unfair. Concerns have also been raised regarding discrimination against surrogates, particularly those who come from marginalised communities and who may be at a greater risk of being exploited. There have been calls for increased legal protections for surrogates, including increased disclosure of the process by which surrogacy operates and increased compensation for the work that they do. In general, the issue of discrimination in surrogacy in India is one that is complex and multi-faceted, and both sides have good reasons to be concerned about it. It is critical to maintain communication and work towards finding solutions that are reasonable and equitable for all parties involved.

Challenges Faced by LGBTQ Community in Surrogacy Arrangements

One of the many criticisms of the 2019 version of the surrogacy bill was that it only allowed heterosexual couples to opt for surrogacy. By limiting surrogacy to heterosexual couples and prohibiting it for LGBT couples, the Bill distinguishes between the two groups. Everyone has the right to equality before the law and equal protection under the law under Article 14 of the Indian Constitution. Justice Malhotra ruled in *Navtej Singh Johar v. Union of India* that legislation that discriminates against people based on any fundamental or inborn human characteristic (including sexual orientation) is ipso facto in violation of Article 14 of the Constitution. As a result, the Bill is null and void because it violates the Constitution's equal protection clause, which forbids discrimination and exclusion, by forbidding LGBT couples from choosing surrogacy. Furthermore, it is against a number of international agreements to keep the surrogacy industry tied to the idea of heterosexuality. To promote equality in society, which every Indian citizen has a right to because of the fundamental freedoms guaranteed to them by the Indian Constitution, it is imperative to recognise the LGBTQ community. Thus, there is a need to give the status and the privilege of having kids to the homosexual couples and non-binary sections of the society.

The law and even society do not recognise or make accommodations for the right to parenthood for members of the LGBTQ+ community. Article 21 of the Constitution also guarantees a person's right to life and personal liberty, this interpretation does not appear to apply equally to same-sex couples, transgender people, or the LGBTQ+ community as a whole.

Potential Challenges of Surrogacy with a Close Relative as the Surrogate

Acting as a surrogate of a close relative may be morally debatable and viewed as a form of exploitation of a family member. Due to the complexity of emotions and expectations involved, it can also cause conflict between family members. Close relative surrogacy can also be expensive emotionally and financially, and some might argue that it shouldn't be used in place of more conventional methods of conception. The partner of the surrogate mother may find it challenging to adjust to their relative becoming pregnant with someone else's child. The intended parents and the surrogate mother might not have the same legal rights and obligations, which could lead to future legal complications. Finally, the social stigma attached to using a surrogate for a close relative can hurt everyone. If the surrogacy arrangement results in a miscarriage or other complications, the surrogate mother may feel guilty or regret, which can be particularly challenging. Finding a close relative to serve as a surrogate can also lead to

tension and conflict within the family. The psychological impact of having a child who is genetically related to the surrogate mother should also be taken into account, as this can be a challenging adjustment for everyone involved. Ultimately, any decision to pursue close relative surrogacy should be done with careful consideration of the potential risks, legal implications, and emotional consequences.

Problems faced by the surrogates

Commercial surrogacy has been outlawed as a result of the Surrogacy (Regulation) Bill, 2016, which also forbids commercial surrogates from practising their profession, creating further monetary difficulties for the commercial surrogates and logistical issues for the surrogacy industry in India. There will be greater exploitation of surrogates due to the absence of regulating legislations because this will result in the black marketing of surrogates, due to the high proportion of people who are willing to opt for surrogacy and are unable to find surrogates who meet the criteria demanded by the law. These women should be able to practise commercial surrogacy, and it ought to be up to them to decide whether to do so, instead, the new law is eliminating their right to decide. As commercial surrogacy was the main source of income for commercial surrogates, it would not be ideal to outright prohibit the practice instead of regulating the legislation. This implies that the urgent necessity of the hour is to regulate surrogacy regulations rather than outright outlawing commercial surrogacy, and the law restricting surrogacy to only altruistic surrogacy is also flawed, because when a surrogate is not paid fairly, it amounts to her being exploited because she has invested all of her time and energy without receiving anything in return. Thus, a ban on commercial surrogacy will rob many women of the income they could have gained through commercial surrogacy.

View of society towards surrogacy

It's important to note that cultural, religious, and socio-economic factors can all play a role in shaping people's perspectives on surrogacy in India. This can result in a complex and diverse range of attitudes. It's possible that some people see surrogacy as a controversial practice that goes against traditional values, while others may see it as a way to help infertile couples or individuals have children. Both perspectives are valid. Because of India's progressive legal climate and relatively low costs, the practice of using a surrogate mother to carry a child has become increasingly common there in recent years. However, there have been instances of surrogates being exploited by commissioning parents or intermediaries, which has led to concerns regarding the industry's need for regulation. In addition, there are a number of cultural

and religious communities in India that may hold the belief that surrogacy is immoral or goes against their core principles. Concerns about the commodification of women's bodies and the possibility of exploitation have led some religious leaders in the Hindu faith, for instance, to express their opposition to the practise of surrogacy. In general, the societal perspective on surrogacy in India is a complicated issue that reflects the various points of view and values held by the various groups that make up Indian society. Others question the morality of surrogacy and the manner in which it is practised in this country, but there are some people who believe that it is a good way to help people who are having trouble getting pregnant.

Positive Aspects of the Amended Surrogacy Laws

Surrogacy laws in India have been updated to address the complex and sensitive issues surrounding the rights and interests of intended parents, surrogate mothers, and the child. The changes aim to tackle the ethical and legal challenges associated with surrogacy. This article explores the benefits of the updated surrogacy laws for all parties involved.

1. **Manipulation and exploitation of commercial surrogates can be prevented:** The abuse of commercial surrogates was largely caused by the practice of commercial surrogacy itself. The lack of economic stability for the surrogates led to pressure from their families and other acquaintances to become mothers for financial gain. Later, after the complete prohibition of commercial surrogacy has benefited society in a number of ways. First and foremost, it has assisted in preventing vulnerable women from being used and abused because people looking to hire a surrogate are no longer able to take advantage of them financially or in other ways. Additionally, it has aided in ensuring that surrogacy is carried out ethically where the close relative acts as a surrogate thereby taking the surrogate's interests into account.
2. **Encourages Adoption:** The restrictions placed on the practice of surrogacy in India have resulted in a reduction in the number of persons who can opt for it. This will lead to an increase in the number of people opting for adoption over surrogacy. The amendments in the surrogacy laws are particularly good for children in orphanages because it provides a loving home for children who would not otherwise have one, and it may be a fulfilling experience for adoptive parents. It is preferable to provide a nurturing and loving home to an existing life that requires it than to produce a new life.

3. **Having a close relative as a surrogate:** A close relative acting as a surrogate can convey a higher sense of trust and security than a stranger. The intended parents may feel more at ease with someone they know well and with whom they have a close bond, and since the surrogate is genetically related to the parents, they may be more eager to support and help the intended parents throughout the process since they have a greater emotional investment in the pregnancy and birth's success. This will be less costly because the relative will be acting as a surrogate out of genuine concern rather than monetary gain.
4. **Legal rights of intended parents and the child:** The intended parents who will be the biological parents of a child born through surrogacy will have all the legal rights and responsibilities that come with being a parent. The child born through surrogacy has the same rights as any other child, and that it is the responsibility of the intended parents to make sure that the child's rights are protected. The child has the right to live, so the parents must meet the child's basic needs and make sure he or she is healthy and safe. The child also has the right to education, which means that the intended parents must make sure the child gets a good education. It is the responsibility of the intended parents and the surrogate mother to make sure that the child is not abandoned.

Conclusion

In conclusion, amendments to the law regarding surrogacy have both advantages and disadvantages. However, data analysis shows that the negative consequences outweigh the positive ones. A prohibition on commercial surrogacy may help to prevent surrogate exploitation, but it is not a justifiable solution. Instead, proper regulations and checks should be in place to ensure the surrogates' safety and well-being. Adoption can be a viable alternative to surrogacy, but it is not always feasible for everyone. As a result, it is critical to strike a balance between the rights of the intended parents and the surrogate's well-being. Ultimately, additional study on this topic is required to improve the laws and regulations surrounding surrogacy, making it a safe and viable option for all parties involved.

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