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Morals Dilemmas And Societal Norms In Surrogacy With Special Reference To The Surrogacy (Regulation) Act 2021

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Abstract

‘Surrogacy’ is a kind of assisted reproductive technology to help childless people to get children. It is divided into two types (i) altruistic surrogacy means without any monetary consideration (ii) commercial surrogacy means where surrogate mother takes money for letting her womb as a substitute womb. Eventually commercial gained more popularity than altruistic one. Commercial surrogacy had changed the view about motherhood. Motherhood has always been praise by every religion, every community and all worldwide cultures. Commercial Surrogacy is precluded by many people as they thought this is against morality. In commercial surrogacy intended parents paid good amount to surrogacy clinics, in consideration these clinics arranged the medical services plus surrogate mothers for carrying foetus in her womb. Some people termed it ‘womb on rent’, ‘womb on labour’ etc. Even some compared it with prostitution, human trafficking and organ selling. Therefore it is prohibited under The Surrogacy Regulation Act 2021, only altruistic surrogacy is allowed. The Surrogacy Regulation Act is debar single men, gay couple etc. for the sake of societal norms and avoid interest of these persons.

This paper is aim to study impact of societal norms on The Surrogacy (Regulation) Act 2021.

In 2018 Supreme Court protect the personal autonomy of the women in ‘Joseph shine Case’ and S.377 struck down in ‘Navtej Singh Johar’ case, impact of these moral changing judgments on Surrogacy will also examine in this paper.

INTRODUCTION

The branch of philosophy known as morality is concerned with human conduct and character and the science of morality is called Ethics. Ethics can be defined as moral codes or values that control or influence a person's behaviour in business or professional realm. Perception about what act is right or what act is wrong is based on the principles of ethics. Every society has its own set of morals which makes it different from others. Often it is seen that act which is morally wrong in one society but acceptable in other. 'Surrogacy' or 'Surrogate motherhood' is an intense example of such moral dilemmas. This moral dilemma is the cause for acceptance and rejection of Surrogacy by the countries in the world. There are some countries permitted both kind of Surrogacy e.g. Nigeria and Ukraine. On the other hand, in some countries all kinds of Surrogacy is banned e.g. China and Italy. There is also third category of the countries where only altruistic surrogacy is permitted like India. Every country has own kind of justification regarding practice of Surrogacy.

It is a fact that Surrogacy is a technology of science to help childless couples to beget a child but results were not as happy as it seemed at the time of the invention of the technology. Surrogacy became the hot debate as it involved many moral issues since its inception. The first IVF baby was born in 1978 in UK. This technology is a method to get full or partial genetic child through a third party i.e. Surrogate mother. This makes the whole phenomenon very complex. In Surrogacy those who are going to have baby do not carry the child in mother's womb and who is pregnant (Surrogate mother) is not going to nurture or raise the child.

Motherhood is a blessing of God to the women class. It always been praised as a form of love and sacrifice in every society and culture. Surrogacy involves the stigma of getting pregnant for money, which is associated with the 'immoral commercialisation of mother'. Some authors compared Surrogacy as commodification of women's body and baby as a product for sale. Surrogacy commoditised pregnancy as the surrogate is encouraged to unnaturally suppress maternal bonds which form during pregnancy (even in gestational surrogacy when she does not contribute the egg) her dignity and labour denigrated.¹ Igreja believed "From an ethical standpoint the commercialisation of surrogacy transforms the woman's reproductive capacities into a service that can be bought, objectifying the human body, making the surrogate just an 'incubator'. This reproductive trivialisation might not just harm surrogates, but also woman's status as a whole."²

Niekerk and Zyl states the problem with surrogacy is it causes a woman to pregnant while she expecting not to acknowledge the fact that she is expecting her child. It tries to divorce pregnancy from the conscious knowledge

¹ Seow Hon Tan, Should Commercial surrogacy be legalised? Strait Times Research collection, School of Law, 2018,pp. 1-4 URL-http://ink.library.smu.edu.sg/sol_research/2547

² Ana Rita Rodrigues Igreja, Surrogacy Challenges and Ambiguities, MESTRADO INTEGRADO EM MEDICINA,2017/18, U.PORTO,FACULDADE DE MEDICINA, UNIVERSIDADE DO PORTO

that you are going to give birth to your child. In this way the surrogate becomes a mere 'environment' or 'human incubator' for someone else's child.³

Some critics also claimed that Surrogacy degraded children and women by treating children as commodities to be exchanged for profit and women bodies as childbearing factories; the arrangements also degraded the mother-child relationship by paying woman not to bond with their children.⁴ Vinod Kumar supports Surrogacy because it is not bad unethical per se, especially when it is for altruistic purpose. He claimed that altruistic surrogacy is certainly a humanitarian and philanthropic act of psychological fulfilment. However, commercial surrogacy cannot be equated with the altruistic one as the same sense. He supports Commercial Surrogacy as it gives childless families a chance to fulfil a basic human need that would otherwise be impossible to achieve in natural course.⁵

Unlike natural conception and delivery of child where only two parties involved i.e. mother and father, Surrogacy has three parties (i) Intended Mother (ii) Intended Father and (iii) Surrogate mother. Intended parents are those people who had wish to get their genetic child though it is not possible in natural way because of their age, disease like absence of uterus, loss of children, blocked fallopian tube, uterine cancer, failure to conceive, aggravating varicose veins etc.⁶

Types of Surrogacy

Traditional and gestational are the two types of surrogacy agreement. In traditional/natural Surrogacy, there is genetic relation of embryo with surrogate and it is done with her own ovum. Commissioning father can donate the sperm and becomes the genetic father of the child. In this the sperm can also be taken from some third male person in the case of two female commissioning couples or the single woman also, can commission the child. The women can get pregnant through the like sexual intercourse, intra-uterine insemination or in vitro fertilization (IVF). In gestational/full surrogacy, surrogate acts as a carrier of embryo if fertilized is done in the surrogate's uterus. In this the embryo either fertilised by the commissioning parents or by some other anonymous persons.⁷

³ Anton Van Niekerk and Liezl von Zyl, The Ethics of Surrogacy: Women's Reproductive Labour, Journal of Medical Ethics, vol.21,no.6 (Dec.1995) pp.345-349

⁴ Elizabeth S. Schott, Surrogacy and The Politics of commodification, law and contemporary problems, Vol.72,no.3, Show me the money: Making markets in the forbidden exchange, (Summer 2009) pp.109-146.

⁵ Vinod Kumar, LEGALISED COMMERCIAL SURROGACY AND ECONOMIC NEOLIBERALISM IN INDIA: THE CONTEXT OF HUMAN RIGHTS, REPATS, Brasilia.v.5,n.2, Jul-Dez,2018, pp.799-815

⁶ Dr. Kalpana V. Jawale, does Law protect Surrogacy? : National- International perspectives, Civil and Military Law Journal, vol. 49, no. 3, July- September 2013, pp.221- 228.

⁷ Ana Rita Rodrigues Igreja, Surrogacy Challenges and Ambiguities, MESTRADO INTEGRADO EM MEDICINA,2017/18, U.PORTO,FACULDADE DE MEDICINA, UNIVERSIDADE DO PORTO,p.2

Further Surrogacy, on the monetary basis can be divided into two types- i) Altruistic Surrogacy ii) Commercial Surrogacy. In Altruistic Surrogacy Surrogate do not get monetary consideration. She only gets medical expense and not any fees for her labour. In Commercial surrogacy she gets the monetary consideration as fixed in surrogacy agreement for letting her womb as 'substitute womb'.

Altruistic Surrogacy is an example of true altruism/sacrifice/sisterhood, whereas, Commercial Surrogacy always been condemned by Scholars as it involved many moral issues like commodification of babies, instrumentalisation of woman's body, economic compulsion of the surrogates, the atrocities they faced during pregnancy and post delivery, downgrading behaviour of the society, comparison with prostitution, alienated labour, relinquishment of child after birth , baby-selling, organ selling, human trafficking, anti-moral practice etc.

The question rose about 'Model Surrogacy Act 1988' in USA whether payment of a fee should be made to the surrogate mother. The opponents of the Surrogacy argued that "payment of any fee constitutes the commercial use of woman's body and thus goes against public policy. Supporters of surrogacy contended this statement and argued that the combination of the rising incidence of infertility and declining availability of infants to adopt makes Surrogacy a desirable alternative therefore a fee paid to the surrogate is a necessary element of the Surrogacy.⁸ Critics of 'for-profit' surrogacy claimed that the human body and sacred motherhood is transformed into commodity that is no longer solely a personal resource but which can be sold, traded or rented at market value.⁹

Pande in her article ranked Surrogates at par with domestic workers, sex worker and other dirty workers. She claimed that Surrogacy involves the stigma of getting pregnant for money, which is immoral. She stated the stigma about Surrogacy that many Indian equates Surrogacy with sex work and clarifies that due to lack of information – people are not aware of reproductive technology which separate pregnancy from sexual intercourse.¹⁰

The empirical studies of Amrita Pande and Sharvari Kharandikar showed that Surrogate mothers had to face ostracism for opting Surrogacy. Both studies showed that most of surrogates are poor and less educated sometimes illiterate. They had chosen surrogacy under economic compulsion circumstances in the family. Critics claimed it coercive but there is lack of evidence that coercive measures adopted by the other parties to take the

⁸ H. Joseph Gitlin, Family Law section approves Model Surrogacy Act : a Comment, Family Law Quarterly, Special issue on surrogacy vol.22,no.2, p.145

⁹ Louis Anna Helena Ramskold and Marcus Paul Posner, Commercial Surrogacy : how provisions of monetary remuneration and powers of International Law can prevent exploitation of gestational surrogates, Journal of medical Ethics, vol.39, no.2 (June2013) p.399

¹⁰ Amrita Pande, Not an 'Angel', not a 'Whore' Surrogates as 'Dirty' Workers in India, Indian Journal of Gender Studies 2009;16;141 URL- <http://ijg.sagepub.com/cgi/content/refs/16/2/141>

consent of the Surrogate. Though the Surrogates were less educated but they were aware that 'surrogacy is not prostitution, it is far better than that'.¹¹

Oraiz in her article analysed American term 'Global Sisterhood' for surrogacy on the other hand she referred it 'rhetoric of American media' because Indian Surrogates chosen to be 'Surrogate' only for economical reasons not to help 'sister' on the other side of the world.¹²

All of the above stated negative aspect of the Commercial leads the Indian Government to ban the Commercial form of Surrogacy. Impact of societal assumption also can be seen in the 'The Surrogacy (Regulation) Act 2021 promotes 'Binarism'(Male- Female consummation) as it allowed to only heterosexual couples, widow and divorcee woman to avail this service. A thorough observation of Act revealed that patriarchal mindset is shining through the Act. This Act prohibited the availability of Surrogacy service to the Single men and gay couple. In a latest news a 37-year-old Surat man known as "Pritesh Dave" is the latest man to break with India's stringent surrogacy laws and become a proud parent of twins.

According to a TOI report, Dave refused to let societal norms define his happiness, even though he faced rejection in his search for a life partner because he did not have a job in the government. Dave's journey to parenthood occurred just a few months prior to the enactment of new surrogacy laws, which limit the option to live-in couples, single men and women, and same-sex couples. Dr. Parth Bavishi, a specialist in infertility, said that Dave is one of the lucky few who were able to get around the system before the changes took effect.¹³ This is the only one example where a single man benefitted from Surrogacy, there could be many other single unmarried men and women who are not married for some but have a wish to own their genetic child which is not possible without a marriage.

In 2018 Supreme Court changed the moral standard of Indian society with its two historical decisions viz. i) Joseph Shine v. Union of India¹⁴, and Navtej Singh Johar v. Union of India¹⁵. "Right of Privacy is a fundamental

¹¹ ibid

¹²Oraiz, Natalie Fixmer, Speaking of Solidarity: Transnational Gestational Surrogacy and Rhetorics of Reproductive (In)justice, Frontiers: A journal of Woman Studies, vol.34 no.3, Special Issue: Reproductive Technologies and Reproductive Justice, 126-163,2013

¹³ https://economictimes.indiatimes.com/news/new-updates/surat-man-latest-to-defy-surrogacy-laws-embrace-parenthood/articleshow/101077162.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst/ visited on 23 JUNE 2023

¹⁴ Joseph Shine v. Union of India, Supreme Court of India, 27 September 2018 URL--<http://indiankanoon.org/doc/42184625>

¹⁵ Navtej Singh Johar v. Union of India Through Secretary Ministry of Law and Justice held on 6 September 2018 URL--<http://indiankanoon.org/doc/168671544>.

right under Article 21” SC held in Justice KS Puttaswamy vs.. Union of India¹⁶. The application of privacy extended in Joseph Shine and Navtej Singh.

In Joseph Shine, SC stated that “The right to privacy enables an individual to exercise his or her autonomy, away from the glare of societal expectations. In Navtej Singh case SC clarified that “When the liberty of even a single person of the society is smothered under some vague and archaic stipulation that it is against the order of nature or under the perception that the majority population is peeved when such an individual exercises his/her liberty despite the fact that the exercises of such liberty is within the confines of his/her private space, then the signature of life melts and living becomes a bare subsistence.”

Conclusion

Surrogacy is a boon for infertile heterosexual couples but it’s benefits should also be available to the Single men, single women and gay couples. It is suggested that ‘The Surrogacy (Regulation) Act 2021’ should be reconsidered and restructured on the basis of above decisions. In the words of Justice Chandrachud in Sabrimala case “Morality of the mob cannot overrule individual dignity.¹⁷

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¹⁶ Justice KS Puttaswamy V. Union of India held on 24 August 2017 URL- <http://indiankanoon.org/doc/91938676>

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