

SURROGACY IN INDIA AND EFFECTS OF ITS NON COMMERCIALIZATION UNDER SURROGACY (REGULATION) BILL, 2016

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Abstract:

Surrogacy is a method or agreement whereby a woman agrees to carry a pregnancy for another person or persons. Surrogacy is very popular for those persons, who can't conceive children in the natural way.

Under Surrogacy regulation Bill, 2016 government of India took a step to ban "commercial surrogacy." The sole aim of this article is to find out problems, which will pop up after banning commercial surrogacy and solution for them.

Introduction

When it is not advisable to carry pregnancy due to the danger of mother's health or if the couples are of same sex and they want to have child, in such a case generally couple or an individual prefers surrogacy. Money can or cannot be given in surrogacy practices. If the surrogate mother receives money for the surrogacy then such surrogacy is commercial surrogacy. If she receives no compensation beyond reimbursement of medical and other reasonable expenses it is called 'Altruistic'. There are so many countries which restrict and regulate surrogacy. Some couples or individuals who want a child in this manner but who live in a country where surrogacy is banned they come to other country, where surrogacy is permissible. The legality and costs of surrogacy vary countries to countries. Commercial surrogacy is legal in India since 2002. **But The Surrogacy (Regulation) Bill, 2016, aims to ban commercial surrogacy so that exploitation of poor women will not happen.** This Bill allows for Altruistic surrogacy with some conditions. India is a popular destination for those who desires child through surrogacy. Low cost service of surrogacy encourages,

commissioning parents to arrive from various other countries to India. In 2002, the Indian Council of Medical Research (ICMR) laid down some guidelines for surrogacy, which made the practice legal, but still there is no law to regulate surrogacy practices in India. The Surrogacy (Regulation) Bill, 2016 is pending in Rajyasabha, waiting for approval.

Two Types of surrogate.

- 1) **Traditional surrogate** - It's a woman who gets artificially inseminated with the father's sperm. She then carries the baby and delivers it to couple, intended to be parents.

A traditional surrogate is the baby's biological mother. That's because it is her egg that is fertilized by the father's sperm. Donor's sperm can also be used.

- 2) **Gestational surrogates**- A technique is called "In Vitro Fertilization" (IVF) -

In this technique, egg of the mother is taken and fertilizes it with sperm of the father, and place the embryo into the uterus of a gestational surrogate. The surrogate then carries the baby until birth. She doesn't have any genetic ties to the child because it is not her egg that is used.

A gestational surrogate is called the "birth mother." The Biological mother is a woman whose egg is fertilized.

Problems relating surrogacy-

The woman, who is carrying a baby, generally get very less remuneration and large money is taken by the clinic. Surrogacy gives the encouragement for gender selection which itself illegal in India. Many ART (ASSISTED REPRODUCTIVE TECHNOLOGY CLINICS) Clinics in the name of surrogacy illegally running sex determination and abortion business. At present, there is no law in place to regulate the surrogacy and related issues in India. The surrogacy is governed by guidelines of Indian Council of Medical Research (ICMR) and by judgments of High Court and Supreme Court of India. The women health is a serious issue in surrogacy. In India, health of the Surrogate mother gets little importance as ART Clinics generally ignores regular medical check-up. No proper food is provided to surrogate mother. The surrogacy involves many risks to baby's health such as genetic disorders, low birth weight or membrane damage. If the baby is disabled, then generally such baby is left with surrogate mother.

Law related to surrogacy

Generally a woman, who gives birth to a child is called as the legal mother of that child. In India Intended parents are also legal parents.

The ICMR, has issued some guidelines in absence of law. Most of the guidelines are in favour of surrogate mother and commissioning parents. Some guidelines are as under-

- 1 prohibited sex selective surrogacy
- 2 birth certificate will only have the names of commissioning parents
- 3 provision for life insurance for surrogate mother
4. Privacy of the surrogate mother and the donors.

The Law Commission of India has submitted the 228th Report on “Need for Legislation to Regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of Parties to a Surrogacy.”

Observation of law commission

- 1) Surrogacy contract will involve consent of surrogate mother to bear child, Desire to give the new born baby to the commissioning parents. Such contract should not be for commercial purpose. It will also include medical procedures of artificial insemination.
- 2) Surrogacy contract should also make provision for financial support to the surrogate child in case of the death of to be parents or individual.
- 3) It should include Life Insurance cover for surrogate mother.
- 4) Love and affection with a surrogate child comes from biological relationship, so one commissioning parents should be a donor. Which will further stop child abuse. If the single parent is there, in such case that person should be donor.

Other recommendations are. Birth certificate of surrogate child should mention the name of to be parents, privacy of surrogate mother and donors, prohibition of sex selective surrogacy.

This report has strongly recommended against Commercial Surrogacy. Government has proposed Assisted Reproductive Technology Bill which aims, to regulate the surrogacy business.

Assisted Reproductive Technology Bill, 2016

Surrogacy procedures cannot be conducted without Assisted Reproduction Technology.

The Bill proposes for prohibition of commercial surrogacy and restricted surrogacy for “Infertile Indian couple”. However Indian couple definition includes OCI, PIO, NRI or foreign nationals who have married to Indian.

A couple is defined as a married man and woman which means homosexual and live in relationship people will not be allowed to opt for surrogacy.

All married and single women are allowed to be surrogate mother. The surrogate mother shall be of age in between 23-35 years. She must have at least her own children not less than 3 years and not allowed to born more than one successful surrogate child.

The Surrogacy (Regulation) Bill, 2016

This Bill aims to ban commercial surrogacy so that exploitation of poor women will not happen. This Bill allows for Altruistic surrogacy with some conditions.

This bill outlaws altruistic surrogacy for unmarried couples, foreigners, single parents, live in partners and homosexuals. Only Indian couples who is legally married for a minimum of five years can opt for surrogacy.

The couple who wants child through surrogacy must be Indian Citizens, married for at least 5 years, one of them should be infertile.

Surrogate mother should be a close relative, married and should have her own child. Surrogate mother will only get medical expenses. The surrogate child will be biological child of the intending couple.

Eligibility certificate will be provided to intended parents and surrogate mother by authorities. These authorities will be appointed by central and state government. These authorities will also put checks upon surrogacy clinics.

Some lacunas in the Bill

This Bill failed to define who will be close relative? In case of abortion, the consent of surrogate mother and compliance of Medical Termination of Pregnancy Act, 1971, are required but the consent of intending couple is not required.

We cannot deny the possibility that singles, homosexuals and heterosexuals (both are infertile) will go to foreign countries for surrogacy. It is impossible for poor persons to go to foreign countries for surrogacy as it will be so costlier for them.

Judicial Approach

Supreme Court of India urged for the making of law to regulate surrogacy practices, while deciding the case of **Baby Manji vs. Union of India & Anr. [2008] INSC 1656 (29 SEP 2008)**. A couple from Japan take recourse of Surrogacy by taking help of surrogate mother in India. During this period couple got divorce. The father didn't get the custody of the child and mother refused to take the custody of child. Japan granted visa to child and allowed the grandmother of child to accept the child of her son. In this case SC of India held that the parent of a surrogate child may be a male and also held that surrogacy is a positive practice. Supreme Court of India in **Manji's case (Japanese Baby) has held that commercial surrogacy is permitted in India**. But in 2014 Supreme Court of India has restricted homosexual and single parent to opt for surrogacy. Recently, home ministry has issued a notification to authorities for not granting visa to foreign nationals for purpose of surrogacy.

In the affidavit filed to Supreme Court, government proposed to penalise commercial surrogacy to protect women from exploitation. And Surrogacy will be limited only for Indian Couple. Thus Supreme Court asked government to make the Law on surrogacy to regularise it. Government should regulate the surrogacy to protect the dignity of woman in society rather than banning it.

Conclusion

Instead of prohibiting commercial surrogacy, it is necessary to regulate surrogacy. Many poor women are earning their livelihood through surrogacy. They have so many family responsibilities like to educate their children, financially support their family. Some surrogate mothers are sole earner of their families. Banning of commercial surrogacy will not solve the problem of baby trade. To avoid the ban infertility in India will move surrogate mother out of

India and there surrogate mother will give birth to child. Under such conditions surrogate mother will be more exploited. The good solution will be to legalize commercial surrogacy and regulate it. But the good initiative of this surrogate bill 2016 is it will encourage for adopting a child by banning surrogacy to single and homosexuals.

