



Study of Surrogacy, its types, Legal framework and Surrogacy regulation (bill) 2016

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Abstract : In India many instances pertaining to unscrupulous practices, maltreatment of surrogate mothers, desertion of children born out of surrogacy and illegal importing fetus or embryos and gametes of human have been reported. India is transpired to be the fulcrum for surrogacy among couples of different countries. Proscription of commercial surrogacy and countenance of ethical altruistic surrogacy for the indigent citizen of India through enactment of a decorous law has been recommended by the Law Commission of India in its 228th report.

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Under the chairmanship of Prime Minister Shri Narendra Modi the Union Cabinet has approved the introduction of the “Surrogacy (Regulation) Bill, 2016”. The Bill provides that National Surrogacy Board at the center and State Surrogacy Boards and Appropriate Authorities in the State and Union Territories should be established for regulating surrogacy in India and addressing the ethical and legal issues involved therein. This paper attempts to answer the quest that is Surrogacy Act the need of the hour and provide an overview of Surrogacy Regulation Bill, 2016.

Key Words : Surrogacy, Indian Contract Act, The Surrogacy (Regulation) Bill, 2016

Introduction : In India multifarious instances pertaining to dodgy practices, persecution of surrogate mothers, forsaking of children born out of surrogacy and illicit importing fetus or embryos and gametes of human have been reported. India is transpired to be the fulcrum for surrogacy among couples of different countries. In India when a wife becomes a mother only then her womanhood is said to be completed. A man is catechized on his masculinity and sexual potency if his wife is unable to conceive a child. An infertile woman is considered to be ominous. Surrogacy comes as a means of rescue for such barren woman.



Meaning of surrogacy : Surrogacy is a conventional technique of reproduction whereby a woman accedes to be pregnant for the impulsion of gestating and carrying a child of infertile couples in her womb and then handling the child to such couples as per the contract.

Types of surrogacy : There are four types of surrogacy

1. Traditional surrogacy: Under traditional surrogacy the surrogate uses her egg and sperm of another man to give birth to a child who is genetically related to her.
2. Gestational surrogacy: Under the gestational surrogacy fertilized eggs from another woman are implanted into the surrogate's uterus and child so born is genetically unrelated to the surrogate.
3. Altruistic surrogacy: Under altruistic surrogacy women by her own free –will volunteers to be a surrogate mother and is not paid any money.
4. Commercial surrogacy: Under commercial surrogacy a woman is paid to carry someone else's child.

Legal framework : Surrogacy is licit in India as no Indian law interdict surrogacy. Indian Contract Act is pertinent for determining the legitimacy of surrogacy agreements and such agreement is enforced through section 9 of Code of Civil Procedure (CPC). The biological parents can be appointed and declared as the guardian of the surrogate child if they file an application under the Guardians and Wards Act 1890 for the same. The Indian Council of Medical Research (ICMR) in 2005 had provided certain guidelines for accreditation, supervision and regulation of ART Clinics in India. Proscription of commercial surrogacy and countenance of ethical altruistic surrogacy for the indigent citizen of India through enactment of a decorous law has been recommended by the Law Commission of India in its 228th report. There is no legislation in India that directly deals with the surrogacy. Under the chairmanship of Prime Minister Shri Narendra Modi the Union Cabinet has approved the introduction of the “Surrogacy (Regulation) Bill, 2016”.



Surrogacy regulation (bill) 2016 : There has been a squall of strife over the moves of government of India for restricting the child surrogacy. Government contemplates surrogacy industries as a rent to womb industries where impoverished young woman is exploited.

The Surrogacy (Regulation) Bill, 2016 is propounded to regulate surrogacy in India and address the ethical and legal issues involved therein. The Bill provides that the child born by way of surrogacy will enjoy same rights that a biological child is entitled to enjoy. Only the married Indian infertile couples between the ages of 23-50 years in case of woman and 26-55 years in case of man and who have been married for at least five years and who do not have an existing child will be eligible for surrogacy as per the Bill. Bill provides that only a woman between the ages of 25-35 years who is a close relative of such married couple can act as a surrogate mother and bans her from acting as surrogate for more than once.

But the detractor says that the proposed Bill will limit options for childless couples and women who carries other people’s babies as a way out of poverty. The Bill seeks to bar foreigner, single and same sex couples from availing or rendering surrogacy services in India and only close relative is eligible to act as a surrogate. So is the Bill designed for stopping the exploitation of poor women or are their other factors to apply.

The Bill will proscribe all forms of commercial surrogacy. The couple who want to surrogate child should be legally married. Unmarried couples, single parent’s, couples in live – in-relationship and homosexual couples, foreigners, OCI’s will not be authorized to go for altruistic surrogacy. Altruistic surrogacy is where women by her own free –will volunteers to be a surrogate mother and is not paid any money. Commercial surrogacy is when a woman is paid to carry someone else’s child. Indian surrogacy industry is worth more than \$ 1 billion every year. India is considering nationwide ban on commercial surrogacy as surrogacy industry takes advantage of poor women and families. By surrogacy women womb is turned into saleable commodity. This is the most inhuman side of capitalism that we can think of. It is the job of the state to protect the fragile. Penurious women would like to expand their range of option or choices and not limit their range of option or choices. Commercial surrogacy is legal in Ukraine, Russia, etc. As per the Bill surrogate mother is entitled to payment of only medical expenses and surrogacy if carried for business purposes or if it involves any commercial arrangement will



entail a jail term of at least 10 years and a fine of up to Rs 10 lakh. Objective of the Bill is to end exploitation of indigent women who due to poverty become surrogate mothers in want of money. Government move to restrict child surrogacy through the introduction of the Bill is appreciable but the Bill contains draconian provisions in relation to eligibility of people for rendering or availing surrogacy services in India which makes it dubious.

With the passage of time definition of the term “family” has changed and now restricting single parent, live-in couples and homosexuals, foreigners from rendering or availing the surrogacy services is archaic. What comprises a family is dubious? For a desirable source of income, the society depends on some of the contemporary elements that the Bill nullifies.

To pronounce that homosexual couples are flabby to raise a child is loaded with tribulations. Bill violates few provisions of Constitution of India. Equality before law and equal protection of law to all citizens is guaranteed by Article 14 of the Indian Constitution. Consequently, the Bill is invidious on the basis of status of marriage, sexual orientation and age.

In *B.K. Parthasarathi v. Government of Andhra Pradesh* the court held that Article 21 of Indian Constitution includes ‘the right to have reproductive choices that is inclusive of the right to procreation and parenthood. Mode of parenthood should be decided by couples and not by the state.

The proposed Bill has a provision that couples should have tried natural modes of childbirth before accessing surrogacy which won’t be permitted as the first option. This goes against the individual autonomy guaranteed to all citizens by the Constitution. By way of adoption happiness can be brought in life of a childless couple and an orphan child can get a family. The future of an orphan child can be secured through adoption.

Conclusion : A comprehensive legislation for addressing the multifaceted legal snag allied with surrogacy is required. The impact surrogacy has on society is inexplicable involving conflict of interest among various section of society. Law has to intercede in this convoluted issue for operating as fervent guardian of individual autonomy.



The Surrogacy Regulation (Bill) 2016 has triggered out a country wide debate in two aspects. One of course is in the value of the industry itself and other in human dimensions. The dimensions of thousands of parents who benefitted from surrogate mother as they were unable to produce their own children and woman who carries other people’s babies as a way out of poverty. Law has to intercede to facilitate correct uses of the new technology i.e. ART. Surrogacy Act is the need of the hour for legalizing surrogacy and regulating it and for understanding the inexplicable impact that surrogacy has on society. Proscription of Surrogacy on hazy basis without appropriate appraisal of social ends and objective that is served through it would be absurd.

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