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THE SURROGACY DEBATE IN INDIA

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“The parents construct the child biologically, while the child constructs the parents socially.”

Law Commission of India, Report No. 228, August 2009

Surrogacy, understood universally, as also defined in the Indian National Guidelines for regulation of IVF clinics (“**National Guidelines**”), means:

“an arrangement in which a woman agrees to carry a pregnancy that is genetically unrelated to her and her husband, with the intention to carry it to term and hand over the child to the genetic parents for whom she is acting as a surrogate”.

India enjoyed an ubiquitous reputation of being the surrogacy hub of the world, until last year when non-Indians were banned from undergoing surrogacy in India. India was (and is) well suited to be a surrogacy hub in keeping with its population, a steady presence of qualified doctors and experts, good clinics/hospitals and willing surrogates in abundance for financial reasons.

With regular reports on exploitation of surrogate mothers, there has been a social opposition in India to many aspects of surrogacy arrangements. Surrogacy arrangements are broadly of two types – ‘commercial surrogacy’ or ‘altruistic surrogacy’, the main difference being the value of consideration. While the commercial surrogacy is for money and is usually frowned upon, the altruistic surrogacy is for free (subject to reasonable expenses) and is seen as an act of kindness by the surrogate mother.

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India does not have any parliament enacted legislation regulating surrogacy. The National Guidelines, evolved in 2005 by the Indian Council of Medical Research and the National Academy of Medical Sciences, are not a replacement for a Parliament enacted law. After many years of internal discussions and debate, the Indian Union Cabinet has recently sent the new Surrogacy (Regulation) Bill, 2016 (“**Surrogacy Bill**”) to the Parliament of India for its approval.

The Surrogacy Bill reopens many debates while proposing a ban on ‘*commercial surrogacy*’ and seeking to legalize only ‘*altruistic surrogacy*’, with the surrogate mother being chosen from amongst close relatives. Further, it seeks to permit surrogacy only to Indian couples who remain childless after five years of marriage, falling within specified criteria while banning surrogacy arrangements for special groups, such as live-in partners, single parents, homosexuals, etc.

Below are certain key aspects of the Surrogacy Bill that are expected to be debated from legal, social and scientific view points before the bill is passed as a law:

- Close Relative?: The Surrogacy Bill proposes that the surrogate mother should only be a ‘*close relative*’. This is not only contrary to the National Guidelines, but also brings in a series of concerns. ‘*Close relative*’ is not yet defined. Perhaps a definition needs to be introduced, specifying additional aspects such as the branch of family (husband or wife), degree of separation, generation, etc. Not prescribing such stipulations may lead to increased risk of congenital anomalies in the surrogate child along with religious and social issues such as both parents being blood relatives, etc. The pre-condition requiring the surrogate mother to be a married woman already having a biological child may be a hurdle in choice of surrogate mother(s).

Furthermore, the assumption of availability of close relatives volunteering to be ‘*altruistic surrogate mother*’ may be incorrect as similar assumption with respect to availability of organ donors is said to have failed.

- Confidentiality: A key aspect of surrogacy arrangements is confidentiality, as confidentiality gives certainty to such relationships and emotional protection to the child. Surrogacy arrangement with a close relative is an antithesis to confidentiality. Breach of confidentiality may not be unusual when the surrogate mother is a close relative. The reaction of a surrogate child when such child becomes a teenager or an adult would be unpredictable and can have disastrous social and emotional consequences for the subject individual as well as the whole family.

Furthermore, if the surrogate mother already has a child, as stipulated by the Surrogacy Bill, such existing child would normally be curious about her/his mother’s pregnancy and would most likely know forever her/his actual relationship with the surrogate child. One cannot bind a child to confidentiality.

- Blanket prohibition on commercial surrogacy: Without scientific, legal and social logic, a ban would only give rise to underground market. The counter effect of a ban mostly would be inhuman conditions for the surrogate mothers and abandoned children. The scope of surrogacy therefore needs to be enlarged, perhaps to allow commercial surrogacy with conditions which ensure free consent, care and protection of the surrogate mother.

- Adoption versus Surrogacy: While adoption of a genetically unrelated child is allowed, surrogate child from anyone (not being a close relative) is not permissible. The option of surrogacy is in a way ruled out for couples not having close relatives.

India also has an intriguing social fabric, which often witnesses the families severing the ties in cases of inter-caste or inter-religion marriages. While such marriages are arguably healthy for a heterogeneous society in the long term, such couples may find it impossible to get help from a close relative for a surrogacy arrangement.

- Ban for special groups: The primary reason for banning commercial surrogacy for special groups appears to be that a child needs and safe a secure home environment. Of course, “walk-in walk-out” relationship between parents may not be conducive for a child. Institution of marriage, on the other hand, prescribes a procedure for separation and divorce, where care and custody of child is judiciously considered, as possible.

Surrogacy arrangements can however be reconsidered and allowed for legally recognized special groups (such as live-in relationships, single parents and also married couples having a biological child but unable to conceive another one) subject to certain conditions that ensure safety and care of the child.

Same sex relationships on the other hand do not have a legal recognition in India, and such relationships in fact amount to a criminal offence. As such, it is legally impossible to permit surrogacy to such individuals, till such time their inter se relationship gains legal recognition.

- Inheritance, maintenance, etc.: The National Guidelines recognizes the surrogate child as a legitimate child and briefly deal with legal rights of the surrogate child to parental support, inheritance etc. Likewise, the Surrogacy Bill would need to extensively deal with aspects of inheritance, maintenance, successions etc., and should ensure that the surrogate child and/or parents are not deprived of any and all privileges granted under separate legislations in this regard. Especially in the case where the surrogate mother would be a close relative such issues of parental control and other legal rights should

be expressly dealt with to avoid any future claims, concerns, or worst - litigation. Individual legislations may also require appropriate amendments.

Conclusion:

“Law does not define society, it reflects society” – by Tom White.

In the same stroke, it can be said that, in its current form, the Surrogacy Bill reflects the social and political ideology and not so much the scientific and legal reasoning and logic.

It appears that:

- Banning of commercial surrogacy is a counter-blast to the incidents of exploitation of women in commercial surrogacy arrangements, while avoiding the rather difficult task of regulating such commercial arrangements;
- Confidentiality of surrogacy arrangements is a vital aspect which has been ignored;
- The term ‘close relative’ need to be defined such that it scientifically avoids possibility of congenital anomalies in the surrogate child;
- Legalization of homosexuals is anyway a *‘hot potato’* issue. However, till such time homosexuality is legalized in India, surrogacy permissions to homosexuals seems legally impossible;
- Live-in partners are somewhat at the receiving end as the live-in arrangements are still frowned upon in India, despite the live-in couples gaining certain legal rights and recognition. Surrogacy permission may be given to them, counter balancing it against the requirement of a child to have a stable home environment.

Hopefully, many of these issues would be debated over the next few months, before the Surrogacy Bill takes the shape of a parliament enacted law.

The Surrogacy Bill nevertheless is a good effort and indicates a political will to regulate the sector which is in urgent need of a matured, well considered and well thought out law.

Feedback

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