

# Impact of Surrogacy (Regulation) Bill, 2016 on Surrogacy in India

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**Abstract:** *The right to found a family is clearly established under International Human Right laws as well as regional Human Right instruments. Procreation of children is an inbuilt element of marriage and family, and this concept is accepted universally all over the world. However some individuals may not be able to have children due to the problems of infertility. In such a situation surrogacy is one of the latest technological advancement for alleviating the wish of individual to have a biological child. Today surrogacy in India is governed predominantly through private contract between the parties. In the absence of regulation of such contract, breach will occur which will result in the exploitation of women. The presentation of the Surrogacy (Regulation) Bill, 2016 on 21<sup>st</sup> November 2016, in the Parliament was a welcoming step towards strengthening the procedure of Surrogacy. This article tries to analyse the impact of the Bill on surrogacy trying to point out the positive and negative aspects of the Bill.*

**Keywords:** family, human rights, infertility, contract, exploitation, surrogacy

## 1. Introduction

*“A child is a beam of sunlight from the infinite and Eternal, with possibilities of virtue and vice, but as yet unstained”*

Lyman Abott

Children are considered the most beautiful gift of God and considered as a sacred treasure to mankind. Every human being has a urging desire to have a natural offspring. The major reason for childlessness is infertility which may be medical or social. Since ancient times, mankind has always tried to find solution to overcome the problem of infertility. Adoption was one of the solutions to this problem. But the complexity of adoption laws and the desire to have a genetic link with the child have led to the concept of surrogacy. Surrogacy is one of the important developments of this new age of science and technology. It is a blessing for those couples who cannot procreate a child through natural course. It makes it possible for childless couples to have a child with genes from either one or both of the parents.

Surrogate is derived from a Latin word “surrogatus” meaning a substitute, that is, a person appointed to act in the place of another. Surrogacy is defined as an” agreement wherein a women agrees to be artificially inseminated with the semen of another women’s husband.<sup>1</sup> She agrees to conceive a child, carry it to term, and relinquish to the couple all her parental rights. Surrogacy is considered as a product of modern medical science but various incidents in ancient mythology show that the concept of surrogacy has been a part of Indian culture since the very beginning.

A well known story is the birth of Kauravas. According to the Mahabharata, Queen Gandhari suffered a miscarriage. The embryo was split into one hundred pieces by the sages and implanted in one hundred kumbhas and subsequently hundred children were born. These kumbhas are equivalent to the present day anonymous surrogate mother. The Old Testament offers the example of Abraham’s infertile wife, Sarah ,who “commissions” her maid Hagar to bear her a child .Similarly, Rachel, the barren wife of Jacob, commissions her maid Bilhah to have a child by convincing Jacob to sleep with her. These examples show that the

glimpses of modern developments in surrogacy can be traced to the ancient mythology.

Surrogacy may be a) “altruistic surrogacy”, where the surrogate receives no payment or restricted reimbursement of reasonable expenses associated with her pregnancy b) “commercial surrogacy”, where the surrogate is paid a fee beyond expenses and costs.

Surrogacy is considered as a very sensitive and emotional issue which has far reaching impact on all the parties involved in it. This new technology has led to various controversies and conflicting legal issues. The moral, ethical and religious objections to surrogacy are based on the premise that life is a creation of God and human beings should not attempt to play God by interfering in the natural processes. Another criticism of surrogacy is that such arrangements reduce women to the value of a commodity. In spite of such criticism it is considered to offer a ray of hope to individuals who have exhausted all possible means of begetting a child. It is a process where there must be sincere cooperation and understanding between the parties.

## 2. Surrogacy Contracts

Surrogacy in India is governed through private agreements between the parties.. A contract is an agreement enforceable by law made between two or more persons, by which rights are acquired by one or more to acts or forbearances on the part of the other or others.<sup>2</sup> In surrogacy contract the intended parents who wish to beget a child through surrogacy enter into a contract with women who are willing to act as a surrogate mother. This contract may be a formal written agreement or a mere understanding between the parties and may or may not involve payment of monetary compensation to the surrogate women for her service. The object and purpose of every surrogacy contract is to protect the rights and interests of all the stake holders involved in the surrogacy arrangements, i.e. the intended parents, surrogate women and the surrogate child. Surrogacy contract can be considered valid and enforceable if it fulfills all the statutory requirements.<sup>3</sup>The contract law provides provisions

<sup>2</sup> Sir William Anson.

<sup>3</sup> Indian Contract Act,1872

<sup>1</sup> Black”s Law Dictionary.

for breach of contract and the remedies for the same. There are chances of breach of contract in surrogacy contract also. Non-fulfillment of promise on the part of any parties would give rise to remedy to the other party. However due to the peculiar nature of surrogacy arrangements it is very difficult to identify an appropriate remedy for any breach in such contract. Unfortunately in India there is no specific law for regulating surrogacy contract.

The introduction of the Surrogacy (Regulation) Bill, 2016 in the Lok Sabha on 21<sup>st</sup> November 2016 was a welcoming breakthrough in the field of surrogacy. The Bill has been passed by the Lok Sabha on December 18, 2018.

#### **Salient features of the Surrogacy (Regulation) Bill, 2016**

- 1) The Bill seeks to ban commercial surrogacy and only allow altruistic surrogacy<sup>4</sup> to intending infertile couple between the age of 23-50 years for female and 26-55 years for male.
- 2) The intending couple should be Indian citizens and legally married for at least five years. They should not have any surviving child biologically or through adoption or through surrogacy. Only parents whose child is mentally or physically challenged or who suffer from life threatening disorder with no cure can opt for surrogacy.
- 3) Surrogate mother must be a close relative of the intending couple. She should be married women having a child of her own, and between the age of 25-35 years. She must possess a certificate of medical and psychological fitness for surrogacy. Such women can act as a surrogate only once.
- 4) Surrogacy clinics can undertake surrogacy related procedure only if registered with the appropriate authority. Such clinics are required to maintain each case record for 25 years
- 5) The Central and State Government shall constitute the National Surrogacy Board and State Surrogacy Board respectively.
- 6) Children born through surrogacy will have the same rights as available to the biological child.
- 7) An insurance coverage of reasonable and adequate amount shall be insured in favour of surrogate mother.

The above provisions of Bill have both positive and negative aspects.

#### **Positive aspect of the Bill**

The Bill proposes that the procedure can be availed only by Indian citizens. This provision is a welcoming fact from the point of view that India is considered as an area of reproduction tourism. The Law Commission of India as pointed out that the surrogacy costs in India is around 1/3<sup>rd</sup> of costs in developed countries like U.S.A. The easy availability of surrogate mother in India has also boosted the surrogacy industry in India. Another advantage of selecting Indian surrogate mother is that Indian women have a methodical lifestyle and they do not indulge in smoking and drinking. This will result in exploitation of poor Indian women by foreigners.

<sup>4</sup>Altruistic surrogacy means the surrogacy in which no charges, expenses, fees, remunerations or monetary incentives of whatever nature except medical expenses is incurred on surrogate mother.

The next positive aspect of the Bill is the provisions relating to insurance coverage in favor of surrogate mother. This reduces the chance of exploitation of the surrogate mother.

The establishment of a National surrogacy Board and a State surrogacy Board is also a positive aspect of the Bill because it will bring about a regulation of the ART clinics conducting surrogacy procedure. Such supervising bodies will reduce the exploitation of the parties to the surrogacy procedure.

#### **Negative aspects of the Bill:**

The shortcomings of the Bill can be summarized as follows;

- 1) The Bill proposes to completely ban commercial surrogacy which may have adverse effect. Though some people believe that taking of payment from surrogacy agreement will make it more ethical, this cannot totally bring a stop to this industry. Such a total ban will only push the industry underground. When there is demand and the supply is stopped black market emerge. So the main question is whether with such a Bill, we can make sure that commercial surrogacy is completely stopped.
- 2) The next glaring defect is that the Bill allows surrogacy only for couples who are legally married for at least five years. This means that the facility is not available to Lesbians, gay, Trans genders, live in partners etc. Various Supreme Court decisions have recognized the third gender.<sup>5</sup> S.377<sup>6</sup> was also struck down as unconstitutional.<sup>7</sup> These decisions clearly show that third gender also have equal rights like any ordinary person. So denying this facility to such person is clear violation of the constitution. Moreover the waiting period of five years for married couples is also a harsh provision because in today's scenario late marriages is the trend. Women concentrate in career and enter marriage life only after settling down in their career. Capability to raise a child must be made the criteria instead of the marital status.
- 3) The condition that the surrogate mother should be a close relative of the intending couple is also considered as a shortcoming of the Bill. The term "close relative" has not been defined in the Bill. This may cause confusion. When a close relative act as a surrogate this will lead to more psychological and hereditary issues. The relatives have to come face to face on many occasions and so the bond between the child and the surrogate mother cannot be completely severed which may lead to many emotional problems between all the parties to the contract. The close relative concept will violate personal space of an individual and also the right to confidentiality.
- 4) Constitution is the foundation and source of powers to legislate all laws in India. All laws should pass the "Golden Triangle Test" devised by the Supreme

<sup>5</sup>Naz Foundation vs Government of Nct of Delhi and others, 160, Delhi Law Times 277

<sup>6</sup>S.377 provides that whoever voluntarily has carnal intercourse against the order of nature with any man, women or animal, shall be punished with imprisonment for life or imprisonment with ten years,

<sup>7</sup>Navtej Singh Johar vs Union of India.

Court.<sup>8</sup>Unfortunately the Surrogacy Bill does not pass the test. Unreasonable discrimination on grounds of sex, nationality and marital status is violative of Art.14.<sup>9</sup>Right to livelihood<sup>10</sup> and right to reproductive autonomy are enshrined under Art.21.<sup>11</sup>Surrogacy industry is a trade for many reproductive clinic and ban on this is violative of Art.19(1)(g).<sup>12</sup>The Golden triangle provides full protection to individuals from any encroachment upon their rights.

[5] Surrogacy in India; What you need to know, accessed on 26/12/2018.<https://surrogate.com/.../international-surrogacy/surrogacy-in-India>

[6] The Surrogacy(Regulation) Bill,2016,accessed on 28/12/2018,[www.prsindia.org/billtrack/surrogacy-regulation-bill-2016](http://www.prsindia.org/billtrack/surrogacy-regulation-bill-2016)

The above discussion emphasizes the fact that the Surrogacy (Regulation) Bill, 2016 has more negative aspect than positive inferences.

### 3. Conclusion

Every individual has the right to take advantage of development in science and technology. Surrogacy is such an aid to childless couple to overcome infertility .But the concept of surrogacy raises various contentious issues relating to the stakeholders involved in surrogacy. In surrogacy “the social, psychological and legal complications increase dramatically as the number of people necessary to conceive a child is increased from the traditional two”. There is no consensus among the international community regarding the legal systems required for surrogacy and therefore different countries have adopted diverse legal framework best suiting their political, religious and cultural interests. Surrogacy is both a threat and opportunity The threat lies in the fact that there is commodification of children and women are exploited and turned into baby producers. The opportunity lies in the fact that it is a blessing to infertile couples to fulfill their desire of having a biological related child. The need of the hour is a statute which strike a balance in fulfilling all the demands of the parties involved in surrogacy. The proposed statute must take into consideration the present social requirements and has to change according to the changing society. Complete ban on commercial surrogacy is not the solution to the problem. It will only give rise to further problems. In the present scenario the Government must re-examine the legal framework and introduce new legal provisions to satisfy the needs of all sections of the society.

### References

- [1] Dr.Aneesh V.Pillai, Surrogate Motherhood and the Law, International and National Perspectives, Regal Publications, New Delhi,2015
- [2] Surrogacy ,Law and Human Rights,e dited by Paula Gerber and Katie O’Byrne,Routledge Taylor and Francis Group.
- [3] Dr. Myneni.S.R., Constitutional law-1,1<sup>st</sup> edition, Asia law House,2013.
- [4] Pollock and Mulla, The Indian Contract Act,1872, 14<sup>th</sup> edition, Lexis Nexis.

<sup>8</sup>Art.14, Art.19 and Art.21 are known as the golden triangle of the Indian Constitution.

<sup>9</sup>.Art.14 provides Equality before law and Equal protection of law

<sup>10</sup> Olga Tellis vs Bombay Municipality

<sup>11</sup> Art.21 provides Right to life and personal liberty.

<sup>12</sup> Art.19(1)(g) provides for freedom of trade and profession.