

# Analysis of Surrogacy (Regulation) Bill, 2016: A Comparative Study

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**Abstract**— Surrogacy is a method whereby a woman agrees to carry a pregnancy for another person or a couple, who will become the parent(s) of the new born child after birth. There is no such particular arrangements made for monetary compensation. It may or may not be involved. Although if the surrogate receives some amount of compensation or money for the surrogacy, such arrangement is considered to be commercial surrogacy and if she receives no compensation apart from reimbursement of medical and other reasonable expenses it is referred as to altruistic. Surrogacy is controversial around the globe, the legality and costs of surrogacy widely vary between jurisdictions, sometimes resulting in interstate and international laws as well. In 2016 the Surrogacy (Regulation) Bill, which was passed, prohibited commercial surrogacy and allowed for only altruistic surrogacy to needy infertile parents. Also prevented homosexuals, people in live in relationships, single parents from becoming surrogate parents. However this Bill has some systematic flaws, which has made the problems worse. There are few aspects that will be dealt with in this paper. Such as the argument of commercial surrogacy that should be regulated and not banned, Surrogacy rights to be extended to live in relationships and unmarried couples, and the rights also extended to the homosexual community, the legality of the draft Bill by employing the test of constitutionality and the issues related to altruistic surrogacy and exploitation regarding the same.

**Index Terms**— Surrogacy

## I. INTRODUCTION

### A. Surrogacy (Regulation) Bill 2016

The Surrogacy Bill, 2016 mainly aims in banning of commercial surrogacy. The surrogate mothers in desperate need for money will be at further disadvantage if this ban will be imposed. The ultimate reason behind banning surrogacy has been to prevent the women from selling the womb and making it a business. Although this enactment of the Bill shall rather lead to the women giving away their wombs under a prejudiced conditions to the clinics, the bill seeks to register.

The fundamental right to choose the mode of parenthood must be supreme and absolute, as far as it does not violate other person's rights. Even if it is agreed that adoption is better option and should be encouraged as it has its own advantages, still the ban should not be imposed by banning modes of Assisted Reproductive Technology. Although it is not a legally invalid option as long as commercial surrogacy is practiced in line with the proposed Assisted Reproductive Technology Bill, 2014 .

These bans do not necessarily stop the act but it mainly serves the purpose of publishing things into black market. If the commercialisation of surrogacy is banned the position of rights of the surrogate mothers will become worse. The Government also needs to consider the high demand for surrogacy still exists in India. After the ban, surrogacy will still continue but only through black marketing and exploitation. As the people will make ways to present fertile couples as infertile and surrogates as their relatives, as altruistic surrogacy is not banned. The surrogates can be impregnated in India and shift to another country for delivery. These practices will not provide the government with any data relating to surrogacy and lead to inability of the government to regulate it.

Due to extreme poverty existing in this country majority surrogate mothers opt to be in this field and even if ban is imposed, social and economic insecurities will continue. As it will further take away the right to livelihood of such women. Hence education and awareness in this respect should be the agenda, instead of banning commercial surrogacy. On the economical aspect, the regulated commercial surrogacy can further generate huge revenues through medical tourism, prove to be a support system for numerous childless couples and at the same time help surrogate mothers with a considerable source of income.

### B. Rights to be Extended to Live in Relationship and Unmarried Couples

This Bill denies the right of surrogacy to unmarried couples and the couples in 'live-in relationships'. The Supreme court of India, very recently ruled that, "In the modern times, live in relationship has become an acceptable norm. it is not a crime." The children that are born to such couples are also accepted as legitimate under the law. The female partner in relationships is entitled to the same rights as a spouse in marriage. Even after all this the live in parents or the unmarried couples are denied surrogacy rights. The solution is to employ the mechanism that determines child custodial issue for married couple in case of live in relationships. As to the concern is for proper parenting of the child in case of break up , this is such a misplaced concern. If this is the probability of live in relationships to be short lived, even marriages have such probability of being short lived and this is no ground to deny surrogacy rights. This test which is employed for judging the eligibility of married couples

can be developed to judging the eligibility of couples in live in relationships as well and thus, live in relationship couples and the couples that are unmarried should be granted surrogacy rights. In fact since the law anyways allows single women the surrogacy rights, the same logical extension of argument should give such rights to unmarried couples as well.

It's understood that a child needs a responsible father and a mother. However, it is not true that they necessarily should be married to be responsible. Even non genetic parents can be responsible enough to take good care of the child. Not getting married will be the personal choice of an individual. If this concept goes against the Indian ethics, the children from widows should be taken away on the grounds of there being only one surviving parent alive. The death of a parent suddenly does not make another an incapable parent to take care of his or her child. These ethics, in fact lay much more stress on quality parenting rather than just giving birth to a baby and then not performing parental duties.

### C. The Rights Extended to the Homosexual Community

The most controversial implication of the surrogacy Regulation Bill 2016 has been a ban on surrogacy rights to homosexuals. The transparent homophobia of the government which was demonstrated by terming homosexual surrogacy as against "Indian ethics", although homosexuality has gained growing recognition with time by the Indian texts and the judiciary. Section 377 of Indian Penal Code, 1860 (referred to as IPC) which was against Unnatural intercourse, the ban would be justified if even the heterosexual couples who violate Section 377 of IPC. But that question cannot arise now as Section 377 is decriminalised by the Supreme Court. But this is not the case and because there exists no conclusive way to find out, the surrogacy Bill 2016 results in gross injustice to homosexual community.

### D. Legality of the Draft Bill- Test of Constitutionality

The Surrogacy Regulation Bill 2016, even if it passes, it shall fail the test of legality. In case a law treats equals unequally, it should justify the same to hold the test of constitutionality. The surrogacy provisions imposed violates Article 14 of the Constitution of India. The Bill Seeks to discriminate on the basis of marital status, age, sexual orientation and nationality. There should be rationality that needs to exist between the object of such law and actions employed through the means of such discrimination. There appears no such thing between preventing a specific class of couple from exercising their surrogacy rights and prevention of exploitation of women. Thus, the nexus being unreasonable, the constitution is at stake. Further, the right of life under Article 21 of the constitution also includes the right to procreation and parenthood under the right reproductive autonomy. The government cannot interfere in the prerogative of people to choose the mode of parenthood and infertility cannot be a made precondition to surrogacy.

However, the qualifications like the requirement of 5 years of marriage before invoking surrogacy are arbitrary. What

significance does only five year limitation hold and why it is not four or six years is a question that needs an answer. In the case of Maneka Gandhi v. Union of India it strikes out any room for arbitrariness in laws. This arbitrariness goes against the very principle of rule of law enshrined under Article 14. This Bill also contradicts the policies imposed by the Union Ministry of Women and child development since it contradicts the legislative intentions of Juvenile Justice (Care and protection) Act, 2015, which allows foreign parents to adopt children, irrespective of them being married or not. If a person is found capable of adopting a child, why he is found incapable of bearing a child through surrogacy is another question that the Bill needs to answer.

### E. Altruistic Surrogacy

The draft surrogacy Regulation Bill 2016 tabled by the Union cabinet involves a host of serious ethical and legality concerns which are majorly in accordance with comparable legislations in other countries and the law commission of India 228th report. By allowing only altruistic surrogacy through a close relative, who must have given birth to a child already, the draft law imposes a blanket ban on commercial type of surrogacy.

If the only object of this was to protect women from instances of exploitation arising from such surrogacy arrangements, it needs to be answered how nonpayment for the same result in non-exploitation. Defining exploitation subject to exchange of money is a myopic way of looking at the social reality. There is no guarantee that altruistic surrogate mother will not be forced and coerced into bearing a child or children. The advantage of the present situation is the fact that once surrogate mother is paid dues and the baby is delivered, the commissioning parents can keep her out of their lives for good. There shall never be any such questions of bonding between the child and its birth mother since they hardly get any time together. This Bill proposes instances on altruistic surrogacy only through close relatives which will ensure that the child and its birth mother remain in close proximity and in the same sphere all their lives. This shall create complicated situation fraught with emotional and ethical dilemmas. Hence, it's good if there is a certain amount of anonymity in such procedures.

This concept of altruistic surrogacy proposed in the bill greatly limits potential surrogate mothers as well as couples wanting children, since women can become surrogates only once and because couples who cannot discover willing relatives have only one way out, which is adoption. If compare with other nations, altruistic surrogacy is permitted however it is not constrained to close relatives and one time pregnancy. Constraining a woman's surrogacy decision to only one time is largely restricting the salary of the women who survive on this business. Eventually, it comes down to the issue of consent. In the event that a lady wilfully agrees to being a surrogate mother, is given assurance of safe delivery, and the baby is guaranteed of a safe home, why should she be limited to only one surrogacy? Post surrogacy industry boom, a lot of women were dependent on the same, which is not ethically and morally

wrong. The issue that Bill seeks to address here is that the women will be exploited for her body. However in case she is already consenting and is being paid the proper amount, then the issue does not arise. Through the draft Bill, rather than regulating the ways and policies to prevent women's exploitation, the bill eradicated the idea to it's entirely.

The Bill appears to have been framed without addressing the actual concerns of surrogacy arrangements in India and proposal could do more harm than by doing any good by leading to the exploitation. In addition, the donations of eggs are also banned for curbing child trafficking and illegal surrogacy rackets. But it should be realised that such practices will still exist post ban and policies need to be structured in such a way that the issue is resolved without censoring the entire industry itself. The exploitation which results has other dimension attached to it. It can be emotional, arise from the factors relating to informed consent, the dignity of reproductive labour and psychological wellbeing of parties involved in the process. The overarching of commercial surrogacy has been anything but satisfactory in India. Likewise, aspects like surrogate mothers not knowing of the number of embryos inserted or aborted, not being allowed to meet or even see the baby, not knowing the nationality of intending parents and the lack of psychological counselling are factors which are tantamount to exploitation. While these aspects are considering, intervention on the level of policy making is a welcome step. However, banning commercial surrogacy will not provide a solution to the problems which exist.

From the perspective of monetary standpoint, the usage of phrases 'selling a womb' or 'buying a baby' raise many questions on ethical grounds. While the draft Bill allows altruistic surrogacy, in this case surrogate mothers do not receive any financial incentive over and above and the basic expenses of bearing a child. There is also no guarantee that altruistic surrogacy will not involve exploitation by rich infertile couples of the poor fertile women. The various researchers have suggested that receiving payment created a sort of psychological developing a bond with the foetus would be higher in cases of altruistic form of surrogacy. It is almost impossible for any officiating authority to track gifts being exchanged between the parties in the name of paying compensation. Lastly, altruistic surrogacy will put voiceless and oppressed women under highly vulnerable position, which will only disempower them further.

## II. COMPARATIVE STUDY

In countries where commercial surrogacy is allowed, such as Russia, Georgia, Ukraine, Thailand and a few states of United States of America, there are laws that provide for some relief to the surrogates but as it was reported in media circles, its more often than not the intended parents as well as the surrogates are exploited in the name of benefits and its middle men who ultimately reap the monetary benefit. The legislations and guidelines in place are not effectively enforced in such cases.

Other issue that hold in the matter of the child born out of surrogacy. It was widely reported in Indian and foreign media regarding the case of Israeli couple that had faced hurdles in establishing parentage of their child or of the German couples that have faced a long legal battle to get citizenship for their Indian surrogate child. Testing in terms of psychological and health criteria is practiced in the United States of America, although Indian laws focus only on the infectious diseases aspects of matters without due note of the impact of health on subsequent intended parents as well as the surrogate mothers.

Surrogate mother's exploitation is rampant as many women from poor socio economic strata are both attracted and lured to surrogacy with the promise of easy money. These women are left high and dry with the middlemen and ART clinics taking a bulk of the payment and offering no post-delivery care, as stipulated in Indian laws. The Indian Council for Medical research (ICMR) had drafted and enacted a set of guidelines that must be followed by any and all individuals or organisations associated with the field of assisted reproductive techniques or surrogacy. It laid down certain specific protocols to be followed in the process of surrogacy and also specifically mentioned the gestational surrogacy in the accepted modality to be followed in a commercial sense in India. There was detailed provision made for the accreditation and recognition of ART clinics in the country as well as state and district level forums were constituted to monitor these clinics.

Therefore the Assisted Reproductive Techniques Bill was proposed but not yet enacted in the country. The bill was based on the guidelines that was mentioned in the notification by the ICMR, however the case in the ICMR guidelines so is with the proposed bill. There were many issues that were addressed and appropriately moderated yet there is scope for further improvement yet. There were no single point redressal system enacted or that was proposed to be enacted by the law, through which a surrogate mother or the intended parents can seek to solve their complaints. The law mentioned many factors like age, number of embryo implantations, blood transfusion etc. The surrogate was as yet silent on whether a specific demographic criteria must be laid for the intended parents or not. Though the Act has not yet made any distinguishing in the caste, creed, or otherwise the authors feel a minimum standard of care must be exercised in making sure that the intended parents are in fact genuine and not criminal elements, as to check whether they are stable and can support a new member in their family, and finally are those children being treated fairly and without discrimination in their new household. That should be done in a method as followed in the western countries where parents of adopted children are subjected to repeated, but an intrusive verification of their children's welfare. In India this method can be achieved by the integrated child development services ICDS scheme started by the government.

The other legislation that holds interest is the Delhi artificial insemination (Human) Bill 1995 which is effective only in state was initially formulate to control the blooming of various ART

clinics in the state. It has also been replaced now with the ICMR guidelines. As per the guidelines prevalent no punitive action is proposed on the malpractice by the doctors in the clinics. This issue is left to the ambit of the medical council of India (MCI) and the state medical council.

The contract between the parents and the surrogate is considered a legally binding agreement as per the Indian Contracts Act, and the surrogate relinquishes all the rights to the child. In the USA the picture is similar in few states where through disputed cases the matter has been maintained in a status similar to the Indian laws where the surrogate relinquishes all rights to the child. However the rules are different in UK, where the mother can claim right to the baby up to 2 years after delivery and it is the discretion of the court to allow this. Although, due to the USA following federal system of government there are no unifications of the laws centrally. The state of California recognises the act of commercial surrogacy while the state of Washington considers commercial surrogacy unacceptable. In California the traditional surrogacy is allowed but the biological mother is still the legal mother in this case, while the UK and Indian traditional surrogacy is not legally acknowledged.

In the USA the traditional surrogacy is prohibited and its matter of rule that at least one parent must provide one gamete in a gestational surrogacy. The Virginia State however does not register the Intended parents as legal parents on birth of the child but instead requires a legal process to have the name of the Parent changed after permission is granted both prior and after surrogacy is done. In the state of New York any and all surrogacy agreements involving compensation of any kind are considered void and unenforceable similar to the laws in the UK and contrary to the proposed law in India.

### III. CONCLUSION

Surrogacy is a chance for the couples or individuals who are incompetent to give birth at having a child. It is the only way to defeat both biological and social infertility. However, to regulate surrogacy in India stricter laws are required to be made and implemented. Also, there should be laws guaranteeing the safety of the women volunteering for surrogacy and they should be made aware of the benefits available for them by virtue of opting for surrogate motherhood. The women involved should have a right to terminate pregnancy in case any health related issue arises. The concept of surrogacy is rather new to the world

including India and therefore it still has a long way to go to outwardly manifest a legalisation. There is definitely a need for regulation. But the large-scale banning proposed in this bill is akin to trying to cap a volcano. There is no stopping in any technological advancement and no government can wish away the fact that it has been possible for decades now to create babies outside the womb and to successfully implant them in the womb of a female who has no genetic link to the embryo. While there is a need of the regulation, we cannot wish away the advances in medical science and the subsequent impact on surrogacy. We need to have a legislation that, while dealing with the problems associated with surrogacy does not interfere with the reproductive rights of a woman and freedom of choice available to an individual.

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