

THE SURROGACY (REGULATION) BILL, 2016: ANOTHER WAGON OF BAN OR A BOON?¹

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Surrogacy is defined as the “practice whereby a woman carries a child for another with the intention that the child should be handed over after birth”. This method is resorted to when the problem lies in the infertility of the wife who is unable to carry to term. It is an arrangement between a third person called the surrogate and a contracting couple whereby the surrogate carries a baby to term and turns over the child after birth to the contracting couple. The surrogate then relinquishes all parental rights over the child. A distinct method of contraception does not bind the scope of surrogacy. Surrogate motherhood involves at least four situations. *Firstly*, when the method of artificial insemination is used on the surrogate and the child is then surrendered to the sperm donor. *Secondly*, when the surrogate carries IVF created zygote and surrenders the child to the ovum donor. *Thirdly*, the same procedure as the third whereby the husband’s or a donor’s sperm may be used. *Fourthly*, the same procedure as followed in second and third with the child going to a third person typically a sperm donor. This comes up when the husband’s sperm fertilizes the egg used.

Surrogacy in India is as of now considered legitimate because no Indian law prohibits surrogacy, but as a retort, no law to date permits surrogacy either. Hence, surrogacy agreements in India are governed by ordinary contract law, i.e. the Indian Contract Act, 1872, to determine the legality of any such contract or agreements executed in India for different forms of surrogacy arrangements. The enforceability of any such agreement is within the domain of Indian civil procedural laws and the main component of this is in the Indian Code of Civil Procedure. Since there was no law to govern surrogacy in India and there was alarming need to check the malpractices in this issue, the Indian Council Medical Research (ICMR) issued guidelines in 2005. As these guidelines are not statutory so they are not mandatory and do not have any enforceability or justifiability in the court of law in India. Added to these, they do not have any compulsive force too. One of the most debated case on

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surrogacy in India is that of *Baby Manji Yamada v. Union of India and Another*², where the following was highlighted in the Supreme Court:³

'that there is no law governing surrogation in India and in the name of surrogation, a lot of irregularities are being committed. According to it, in the name of surrogacy, a money making racket is being perpetuated. It is also the stand of the said respondent that the Union of India should enforce stringent laws relating to surrogacy.'

However, it may be added that the Supreme Court of India stated that:⁴

'Surrogates may be relatives, friends or previous strangers. Many surrogate arrangements are made through agencies that help match up intended parents with women who want to be surrogates for a fee. The agencies often help manage the complex medical and legal aspects involved. Surrogacy arrangements can also be made independently. In compensated surrogacies, the amount a surrogate receives varies widely from almost nothing above expenses to over \$30,000. Careful screening is needed to assure their health as the gestational carrier incurs potential obstetrical risks.'

It may further be added that the Supreme Court of India, fully realising the existing surrogacy practices prevalent in India, observed:⁵

'5. Surrogacy is a well known method of reproduction whereby a woman agrees to become pregnant for the purpose of gestating and giving birth to a child she will not raise but hand over to a contracted party. She may be the child's genetic mother (the more traditional form for surrogacy) or she may ... as a gestational carrier carry the pregnancy to delivery after having been implanted with an embryo. In some cases, surrogacy is the only available option for parents who wish to have a child that is biologically related to them. The word "surrogate", from Latin "subrogare", means "appointed to act

²(2008) 13 SCC 518

³*Baby Manji Yamada v. Union of India and Another*, (2008) 13 SCC 518

⁴ *Ibid*, para 12, p 153.

⁵ *Ibid*, paras 5-11, pp 152-153.

in the place of". The intended parent(s) is the individual or couple who intends to rear the child after its birth.

6. *In "traditional surrogacy" (also known as the Straight method) the surrogate is pregnant with her own biological child, but this child was conceived with the intention of relinquishing the child to be raised by others; by the biological father and possibly his spouse or partner, either male or female. The child may be conceived via home artificial insemination using fresh or frozen sperm or impregnated via IUI (intrauterine insemination), or ICI (inter-cervical insemination) which is performed at a fertility clinic.*

7. *In "gestational surrogacy" (also known as the Host method) the surrogate becomes pregnant via embryo transfer with a child of which she is not the biological mother. She may have made an arrangement to relinquish it to the biological mother or father to raise, or to a parent who is themselves unrelated to the child (eg because the child was conceived using egg donation, germ donation or is the result of a donated embryo). The surrogate mother may be called the gestational carrier.*

8. *"Altruistic surrogacy" is a situation where the surrogate receives no financial reward for her pregnancy or the relinquishment of her child (although usually all expenses related to the pregnancy and birth are paid by the intended parents such as medical expenses, maternity clothing and other related expenses).*

9. *"Commercial surrogacy" is a form of surrogacy in which a gestational carrier is paid to carry a child to maturity in her womb and is usually resorted to by well off infertile couples who can afford the cost involved or people who save and borrow in order to complete their dream of being parents. This medical procedure is legal in several countries including in India where due to excellent medical infrastructure, high international demand and ready availability of poor surrogates it is reaching industry proportions. Commercial surrogacy is sometimes referred to by the emotionally charged*

and potentially offensive terms "wombs for rent", "outsourced pregnancies" or "baby farms".

10. Intended parents may arrange a surrogate pregnancy because a woman who intends to parent is infertile in such a way that she cannot carry a pregnancy to term. Examples include a woman who has had a hysterectomy, has a uterine malformation, has had recurrent pregnancy loss or has a health condition that makes it dangerous for her to be pregnant. A female intending parent may also be fertile and healthy, but unwilling to undergo pregnancy.

11. Alternatively, the intended parent may be a single male or a male homosexual couple.'

From the mentioned excerpt it can be deduced that the medical procedure of 'commercial surrogacy' is not illegal or banned in India. The very paragraph 9 of the above judgement highlights the same.

The fact is that there is no law governing commercial surrogacy and other related arrangements. In 2005, the Indian Council for Medical Research (ICMR), under the ministry of health and family welfare finalised the National Guidelines for Accreditation, Supervision and Regulation of Artificial Reproductive Technology (ART) Clinics in India, after the extensive public debate that involved all the stakeholders. However, it can be noted the a Draft Bill called the Assisted Reproductive Technology (Regulation) Bill & Rules, 2010 has been prepared by a 12-member committee including experts from Indian Council for Medical Research and from the Ministry of Health and Family Welfare, as well as medical specialists and other experts, has been circulated for comment and posted online for feedback. The Assisted Reproductive Technology (Regulation) Bill and Rules, 2010, propose to legalise commercial surrogacy. The draft bills that were put up subsequently in 2008, 2010 and 2013 had proposed that the scope of ART should be accessible to all, covering single persons and foreign couples too. But a radical change in notion can be witnessed when the draft ART bills of 2014 and 2016 limited surrogacy to only Indian married couples who are infertile. The fate

of the ART Bill, 2016, is unknown, while the cabinet has approved the Surrogacy (Regulation) Bill, 2016.⁶

The Surrogacy (Regulation) Bill, 2016 was introduced by Mr. J. P. Nadda, Minister of Health and Family Welfare in Lok Sabha on November 21, 2016. According to the Bill, 'surrogacy' is defined as "a practice where a woman gives birth to a child for an intending couple and agrees to hand over the child after the birth to the intending couple".⁷ The Bill proposes to regulate surrogacy in India by establishing National Surrogacy Board at Central level, State Surrogacy Boards and Appropriate Authorities in States and Union Territories. The proposed legislation ensures effective regulation of the procedures involved in surrogacy, prohibits commercial surrogacy and allows only ethical surrogacy to the intending heterosexual couples. The main objectives of the proposed Bill are to regulate the surrogacy by establishing various Boards, to prohibit commercial surrogacy and to allow only altruistic ethical surrogacy to the intending couple, to keep a check and ban the sale and purchase of human gametes and embryo as well, to protect the rights of the child/ children born out of surrogacy, to prevent exploitation of surrogate mother and to penalise any of such violating the laws.

In the light of the regulation that has been put forward by the Bill in the practise of surrogacy in India is that it allows only altruistic surrogacy which involves no monetary compensation to the surrogate mother other than the expenses incurred in medical procedure and insurance coverage during pregnancy. On the other hand, the prohibition is on commercial surrogacy which includes monetary benefit or any sort of reward in cash or kind apart from the expenses of medical procedure and insurance coverage during pregnancy. The Bill also makes it clear that surrogacy is permitted only for the following four purposes. *Firstly*, when the intending couples are suffering of infertility which is scientifically proven by any doctor. *Secondly*, the surrogacy is altruistic and there is no involvement of any money. *Thirdly*, the surrogacy performed is not commercial surrogacy. And, *fourthly*, the intention behind the surrogacy is not for sale or purchase of children, prostitution, and sale of organs or any other forms of exploitation. Further, the Bill also specifies the eligibility criteria for the intending couple. They should have proper 'certificate of essentiality' and a 'certificate of eligibility'

⁶Draft surrogacy bill violates fundamental right of people to choose modes of parenthood, <<http://indianexpress.com/article/opinion/columns/surrogacy-bill-ban-commercial-2998128/>>, accessed on December 2016.

⁷ Section 2 (zb) of The Surrogacy (Regulation) Bill, 2016.

issued by the appropriate authority. Only on the fulfilment of certain conditions, the aforesaid 'certificate of essentiality' is issued. These conditions are:- (i) one or both members of the intending couple are to provide a certificate of proven infertility from a District Medical Board; (ii) an order passed by a Magistrate's court testifying the parentage and custody of the surrogate child; and (iii) an insurance policy that covers the surrogate mother. Now, the 'certificate of eligibility' is issued to the intending couple on the basis and fulfilment of the following conditions on the: (i) the intending couple must be Indian citizens and should be married for at least five years; (ii) the female must be between 23 to 50 years old and the male must be 26 to 55 years old; (iii) they should not have any surviving child (be he/she be biological, adopted or surrogate child) and this would not include a child who is physically or mentally challenged or suffers from life threatening disorder or any fatal illness. The regulations may specify other conditions too. Hereby, overseas Indians, foreigners, unmarried couples, single parents, live-in partners and gay couples are not allowed to enjoy the services from surrogate mother. There are certain criteria which are needed to be adhered by a surrogate mother in order to procure a 'certificate of eligibility' from the apposite authority. These conditions are: (i) the surrogate mother is required to be a close relative of the couple in question; (ii) the mother is required to be an ever-married woman who has a child of her own; (iii) she has to have an age between 25 to 35 years old; (iv) it is mandatory for the mother to hold a certificate that attests the medical and psychological fitness to enable her for surrogacy. In addition to this, it also becomes necessary for the central government and various state governments to appoint an appropriate authority or more, in under 90 days of the Bill becoming an Act. The functions of the appropriate authority include; (i) granting, suspending or cancelling registration of surrogacy clinics; (ii) enforcing standards for surrogacy clinics; (iii) investigating and taking action against breach of the provisions of the Bill; (iv) recommending modifications to the rules and regulations. There shall be surrogacy clinics and they cannot undertake surrogacy related procedures unless they are registered by the appropriate authority. Clinics must apply for registration within a period of 60 days from the date of appointment of appropriate authority. The central and the state governments shall constitute the National Surrogacy Board (NSB) and the State Surrogacy Boards (SSB), respectively. Therefore, the NSB is required to perform certain functions such as: (i) working as an advisory panel to the central government on making policies related to surrogacy; (ii) preparing the code of conduct that is to be followed by all the surrogacy clinics; and (iii)

keeping a check on the operation of SSBs. The Bill further states certain offences which have been included to achieve objectives like: (i) prohibition of undertaking or advertising commercial surrogacy; (ii) prevention of the exploitation of the surrogate mother; (iii) forbidding the abandonment, exploitation or disowning of a surrogate child; and (iv) putting a bar on the sale or import of human embryo or gametes, essential for surrogacy. These offences will attract a minimum penalty of 10 years and a fine up to 10 lakh rupees. The Bill specifies a range of offences and penalties for other contraventions of the provisions of the Bill and initiating commercial surrogacy.

Furthermore, the Bill has been also criticised and termed as another wagon of ban as well. Some provisions of the Bill are not in consonance with constitutional provisions. As the services of surrogacy can only be enjoyed by the married Indian couples and others are barred from it on the basis of nationality, marital status, sexual orientation or age, does not appear to qualify the test to stand by the fundamental rights of individuals. Right to life includes the right to reproductive anatomy that includes the right to procreation and parenthood. It is not for the state to decide the modes of parenthood. The Constitution of India also makes it clear that the right of a person to have children, naturally or through surrogacy, cannot have the interference of the State. Infertility cannot be a condition to undertake surrogacy. The proposed law ought to be put in the public domain before the country's parliamentarians debate it.⁸ Thereby it can be put forward that the Bill violates Article 14⁹ and Article 21¹⁰ of the Constitution of India.

Some issues in the Bill can be seen in: **Clause 4 (ii)**¹¹, **Clause 4 (iii) (c)**¹² and **Clause 48 (a)**¹³ of the Bill. The issue here is that, the Clause 4 of the Bill specifies the purposes for which a

⁸Draft surrogacy bill violates fundamental right of people to choose modes of parenthood, <<http://indianexpress.com/article/opinion/columns/surrogacy-bill-ban-commercial-2998128/>>, accessed on December 2016.

⁹ Equality before the law and equal protection of all laws to all persons.

¹⁰ Protection of life and personal liberty of all persons.

¹¹ No surrogacy or surrogacy procedures shall be conducted, undertaken, performed or availed of, except for the following purposes, namely:-

- (a) when either or both members of the couple is suffering from proven infertility;
- (b) when it is only for altruistic surrogacy purposes;
- (c) when it is not for commercial purposes or for commercialisation of surrogacy or surrogacy procedures;
- (d) when it is not for producing children for sale, prostitution or any other form of exploitation; and
- (e) any other condition or disease as may be specified by regulations made by the Board.

¹² An eligibility certificate for intending couple is issued by the appropriate authority on fulfilment of the following conditions, namely: -

- (i) the age of the intending couple is between 23 to 50 years for the female and between 26 to 55 years for the male;
- (ii) the intending couple are married for at least five years and are Indian citizens;
- (iii) the intending couple have no surviving child (biologically or adopted or surrogate); with the exception of a child who is mentally or physically challenged or suffers from a life threatening disorder, as certified by a District Medical Board;

surrogacy procedure may be undertaken and the eligibility conditions that need to be fulfilled by the couple intending to commission a surrogacy. In furtherance of this, the Bill also empowers the National Surrogacy Board to specify the conditions or diseases which are to be set as the grounds for permitting the surrogacy procedure and also the eligibility conditions that required to be satisfied by the couple that is interested in commissioning a surrogacy procedure.¹⁴ It could be argued that the qualifying conditions for surrogacy should be specified in the Bill and not be delegated to regulations.¹⁵

Another issue can be pointed out while reading **Clause 4 (iii)(b)(II)** of the bill which states that “No person, other than a close relative of the intending couple, shall act as a surrogate mother can be permitted to undergo surrogacy procedures as per the provisions of this Act.” As it has been seen that the Bill specifies various conditions, the surrogate mother may obtain an eligibility certificate from an appropriate authority appointed by the government. One of the conditions to be proved by the surrogate mother is that she is a ‘close relative’ of the intending couple who commissions surrogacy. However, the Bill does not define the term ‘close relative’.

With reference to the review process for application of surrogacy, the Bill specifies that in order to initiate a surrogacy procedure, the surrogate mother and the couple intending to commission the surrogacy are required to obtain certificates of eligibility and essentiality from the relevant appropriate authorities at the centre or state. Nevertheless, it can be seen that a time period for the issue of these certificates from the concerned authority has not been mentioned in the Bill. Further, the Bill does not specify a review or appeal procedure in case the application for the certificates is rejected.

Furthermore, by imposing a ban on commercial surrogacy, the Bill might do more harm on women than previously done. As the business of surrogacy involves middlemen also so it will lead to more corruption and black marketing. Added to it, the surrogate mothers will be more vulnerable to exploitation and will be left with no legal recourse once contract is broken. The

(iv) such other conditions as may be specified by the regulations.

¹³ The National Surrogacy Board with the prior approval of the central government may make regulations to provide for the fulfilment of any other condition under which the eligibility certificate for intending couples may be issued by the appropriate authority.

¹⁴ Clause 4 (ii) (e) and 4(iii) (c) (IV) of the Surrogacy (Regulation) Bill, 2016.

¹⁵ Issues for Consideration: The Surrogacy (Regulation) Bill, 2016, <<http://www.prsindia.org/uploads/media/Surrogacy/Issues%20for%20Consideration-%20Surrogacy%20Bill.pdf>>, accessed on December 2016.

revenue and wages of the surrogates shall also be affected to a large extent. It should be considered that if the objective of this Bill is to safeguard the surrogate mothers and the children from such surrogacy, the impetus comes on the legislation to offer a legal mechanism that prohibits the exploitation of the subject-matter and put down penalties on those who fail to honour such contracts. The government should ensure that the surrogates are properly counselled about the medical and economic implications of surrogacy. It should also ensure that all surrogacy contracts must mandatorily cover the medical care, hygiene, and nourishment of the surrogates not just during the pregnancy but also in the post-partum period.¹⁶ However by understanding the true extent of the situation, the Bill is extremely necessary in India (for example, Gujarat, where ‘baby farms’ exist, i.e. underprivileged women are rounded up in scores and given out as surrogates to potential parents) and since there is not stringent law regulating surrogacy, it is a high time to implement one.

¹⁶Why the surrogacy bill is necessary, <<http://www.thehindu.com/thread/politics-and-policy/article9090866.ece>>, accessed on December 2016.