

RIGHT TO SURROGACY: A CRITICAL APPRAISAL OF THE SURROGACY (REGULATION) BILL, 2016

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Abstract: Law relating to surrogacy in India is debated and is under the initial stages of its formation. Commercial surrogacy in India started in 2002. There has been a continuous demand to regulate the sector as it was a nascent field altogether and there is no law in existence. The demand was more so because of several instances reported in the print and electronic media about the abuse of this scientific advancement. Anand in the state of Gujrat became the hub of surrogacy and several IVF clinics have come into existence which has given an opportunity to several women to become surrogates and earn their part. However it cannot be denied that the same has witnessed lot of instances of misuse and at times has resulted in lot of complications in the absence of any regulation or law as such. Recently the union health minister has introduced the Surrogacy Regulation Bill, 2016 in the Loksabha which is now under the scrutiny of the standing committee of the Lok Sabha. This paper is a critical appraisal of the present bill which puts a blanket ban on commercial surrogacy in India.

Keywords: Commercial Surrogacy, Reproductive Rights, Surrogacy Regulation Bill 2016.

Introduction: Whether allowing surrogacy is manifesting and respecting the reproductive right of every individual or is simply a commodification of human life? Whether allowing surrogacy is returning smiles to those childless couples or even individuals who lost every hope of having their own child or is opening a leeway for exploitation of women and children? Whether surrogacy is a boon for mankind or a bane which plays with the natural cycle of human birth as such? With all these issues and many more the right to surrogacy has become one of the most debatable socio legal questions in the present scenario.

This concept of surrogacy is not new to India as such. It is being practiced since ancient times. However with the advent of science and technology it has seen lot of advancement and changes in mode of its operation. It can either be a Gestational surrogacy or a Traditional one. While in gestational surrogacy embryo created by the process of IVF is implanted into the surrogate mother in traditional surrogacy the surrogate mother is impregnated with the sperm of the intended father making her both the genetic and the gestational mother; the child shares make-up of the commissioning father and the surrogate mother.

Surrogacy in its commercial form has been adopted in India in 2002 and since then it has witnessed a boom particularly in the state of Gujrat. However the legal complications with regards to commercial surrogacy came in to lime light for the first time in 2008 in the Baby Manji Case (2008) wherein a Japanese couple contracted an Indian woman to serve as a surrogate. But before the woman could deliver the child, the couple got divorced. Thus the child was born legally parentless as well as without citizenship. Though the child was finally handed over to her grandmother, it opened questions about a

practice that had continued unabated for a number of years.

Recently the Surrogacy (Regulation) Bill, 2016 has been introduced by Minister of Health and Family Welfare, Mr. J. P. Nadda in Lok Sabha on November 21, 2016 and the same is presently being scrutinized by the Standing committee. The Bill is deemed to be a landmark step towards the regulation of surrogacy practices in India. The Bill emphasizes on banning commercial surrogacy, exploitation of surrogate mothers and the legitimacy of the child born through such surrogacy.

The word 'surrogate' has its origin in Latin word 'surrogatus', which means a substitute, that is, a person appointed to act in the place of another. Thus a surrogate mother is a woman who carries a child in her womb on behalf of another woman, either from her own egg or from the implantation in her womb of a fertilized egg from other woman.

Surrogacy according to the Black's Law Dictionary, means the process of carrying and delivering a child for another person. The New Encyclopaedia Britannica defines 'surrogate motherhood' as the practice in which a woman bears a child for a couple unable to produce children in the usual way.

The Bill defines surrogacy 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. The present draft has banned commercial surrogacy completely and has regulated altruistic surrogacy to a great extent.

Reproductive Rights Of Women: Professor Harold Laski says "Eternal vigilance is the price of liberty" and not a particular principle of law. The present Bill is a burning example of the violations of some basic rights of the individuals in light of some abstract protectionist ideology of the government. Laws is a

necessary evil and the laws are there to protect the rights and liberties of individuals, to regulate human conduct reasonably but not to curtail it to any extent arbitrarily.

Hart says "The individual who has the right is a small-scale sovereign. Individuals shall be left free to take decisions for them and the state shall not act as big brother. The Beijing Platform for Action states that "the human rights of women include their right to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence." CEDAW guarantees women equal rights in deciding "freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights." CEDAW (article 10) also specifies that women's right to education includes "access to specific educational information to help to ensure the health and well-being of families, including information and advice on family planning."

Article 16.1 of the Universal Declaration of Human Rights 1948 also states that "men and women of full age without any limitation due to race, nationality or religion have the right to marry and found a family". The Judiciary in India too has recognized the reproductive right of humans as a basic right. For instance, in *B. K. Parthasarthy v. Government of Andhra Pradesh* (2000), the Andhra Pradesh High Court upheld "the right of reproductive autonomy" of an individual as a facet of his "right to privacy" and agreed with the decision of the US Supreme Court in *Jack T. Skinner v. State of Oklahoma*, which characterised the right to reproduce as "one of the basic civil rights of man". Even in *Javed v. State of Haryana* (2003), though the Supreme Court upheld the two living children norm to debar a person from contesting a Panchayati Raj election it refrained from stating that the right to procreation is not a basic human right.

A blanket ban on commercial surrogacy is a violation of right to personal liberty, right to reproduce, right to procreate, right to privacy and right to have a family and the same can be said to form the fundamental rights of the individuals under Article 14 and 21 of the Constitution of India. In the garb of a mere chance of exploitation these basic human rights cannot be compromised with. The prospective surrogates would now be left at their own fates, who may be forced to indulge into any illegal activities like prostitution etc. It is an important source of employment for those women and their livelihood would get threatened. While majority of the commissioning parents are driven by their desire and love to nurture a baby, there are a few cases of rogue clients. Though this is a sensitive and ethically

confusing debate, there have been cases of baby selling or organ selling. It is also important to highlight the vulnerable position of commissioning parents. Regulation and not prohibition is thus the need of the hour.

Universal Declaration of Human Rights Article 27 provides for the enjoyment of benefits of scientific and technological progress and its application is recognized as a human right and is included in the International Covenant on Economic, Social and Cultural Rights also. Assisted Human Reproductive Technologies including surrogacy is one of such gifts of modern science which can be used for the benefit of mankind.

Critical Analysis: The present bill on one hand has completely banned commercial surrogacy but has allowed for altruistic surrogacy. The same has been restricted to the close relatives only which is yet another area of concern. In the present bill the term Close Relative has not been defined. The Bill specifies that, only a 'close relative' of intended couple can act as a surrogate mother. There may be a chance that the so called close relatives which in itself is ambiguous would not be ready to be surrogate. And even if they are willing to do so they may not be fulfilling the criteria fixed by the bill. Moreover there are chances of some psychological or emotional factors erupting if both the surrogate and the mother would be known to the child.

The waiting period for five years is another unreasonable clause. If the infertility is proved within a period before 5 years say in a couple of years why there is a need to wait for extra period. Again the same can be availed by only Indian citizens and no other, not even the NRIs.

Requirement for the certificate of eligibility is a welcome step as it would lead towards the regulation of surrogacy and protecting the rights of the parties concerned and the welfare of the child. However there is no time period which is provided in the bill for grant of the certificate and no provision is there for appeal or review.

Going through the language of the Bill it is evident that the Bill is not to regulate but to ban surrogacy. The object clause of the Bill states that India has emerged as a surrogacy hub for couples from different countries for past few years. There have been reported incidents of unethical practices, exploitation of surrogate mothers, abandonment of children born out of surrogacy and import of human embryos and gametes. These incidents must have taken place however rather than providing for the protection of the parties concerned and regulating the law related to surrogacy the same has been banned. There has been lot of condemnation of commercial surrogacy in India has been regularly

reflected in different print and electronic media for the past few years as has been said in the Bill.

It is due to lack of legislation to regulate surrogacy, the practice of surrogacy has been misused by the surrogacy clinics, which leads to rampant of commercial surrogacy and unethical practices in the said area of surrogacy but the same could have been regulated by law.

The major drawback which we can see after the perusal of the Bill is the lack of provisions as to the breach of the terms and conditions of surrogacy by surrogate or indented couple during the surrogacy process or afterwards.

The Bill has indeed shown its apathy towards single parents by disallowing the singles to go for a surrogate child. Also the gay couples or homosexuals would not be allowed to have surrogate child. The Supreme Court has recently allowed the petition of Karan Johar for making representations before the committee considering the draft bill, to consider, including a "specific provision" in the Bill so as to facilitate single persons also embrace parenthood through surrogacy. The existing provisions of the bill are not progressive in nature. They are reflecting the stereotypes and unconventional approach which is not in consonance with the modern day rights regime.

The Bill also provides that a lady can become a surrogate only once in her lifetime. The close relative in case of the altruistic surrogacy also should be a married lady between the age of 25 to 35 only. So, unmarried woman or woman between the age of 25 and 35 can never lend their womb for surrogacy after the passage of this Bill

Conclusion: The present bill is regressive in nature and its effect will lower down the high principles of individual freedom and liberty recognized by the

constitution of India. After the commencement of the Surrogacy Bill a lady even if she is willing to become a surrogate mother and wants some monetary benefit out of the same for fulfilling the essentials of her life she will not be allowed to do so. The question is about the livelihood of those woman who are engaged in this act of being surrogates. The conditions for even altruistic surrogacy are such that it would hardly be possible for the intending parents to have a surrogate child. The woman in such cases is not going to benefit financially in any sense and there is high probability of misuse in such cases. Our laws are still discriminating against the homosexuals. We are not considering the rights of single parents. We are not taking advantage of the scientific developments for the benefit of mankind by making such Acts. The bill could have rather provided for better mechanism for drafting surrogacy contracts, some mandatory terms which would have formed the part of the contract, which are not discriminatory or adversely affecting the rights of surrogate women and which in fact assure their interests. There could have been a process, an authority to review such agreements. The government could have regulated the law on somewhat similar lines as in the case of adoption. It could have gone even to the extent of banning foreign nationals but not commercial surrogacy in totality. The clinics could have been brought under the supervision or control of the government authorities. Even the law in UK, which was made long back in 1980's, which is being followed in the present Bill to a great extent is criticized and needs review. Thus if the present Bill is passed in an Act we would be rather weakening our women than strengthening them, we would be going back rather than moving forward in the direction of human development.

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