
SURROGACY REGULATION BILL 2016: A CRITICAL ANALYSIS

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ABSTRACT

India has emerged as a surrogacy hub for all these couples from different countries, who have difficulty in attaining parenthood biologically. In the light of all these union cabinet of government of India has given approval to “*Surrogacy regulation bill 2016*”, which will ensure effective regulation of surrogacy by establishing National surrogacy Board at the central level. This bill totally ban commercial surrogacy in India. The paper presents a detailed analysis surrogacy regulation bill 2016. Although this bill has been introduced to regulate surrogacy services and to stop exploitation of surrogate mother, yet this bill raise many social, ethical and legal issues which need to be addressed there are no legal provision directly dealing with surrogacy except guidelines given by Indian council for medical research 2006.

Keywords: *Surrogacy commercialization, Indian council for medical research, surrogacy regulation bill 2016*

INTRODUCTION

Surrogacy can be defined when other women carries the child and give birth to him when the couples want a child who are not blessed to produce him themselves. Surrogacy is also appropriate for the person who has an impossible condition or there is a very much danger situation for mother to get pregnant.

Surrogacy is that topic which is in talks from the ancient times and is been known to almost every societies of the world. Surrogacy means to carry the child for the other woman who is not capable of producing the one, due to certain complexities. The major types of surrogacy are

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Natural Surrogacy, Gestational Surrogacy, Commercial Surrogacy and Altruistic Surrogacy. India allowed commercial surrogacy in the year 2002, but, it has not got the legal status in the country by the legislature. In the year 2008, the Honorable Supreme Court of India, by giving the positive decision in the favor of surrogacy on the case *Baby Manji Yamada vs. Union of India (UOI) and Another 2⁴* which has thrown the light on the surrogacy to get the legal context in the country.

INDIA’S SURROGACY LAWS

The booming business of Surrogacy was not regulated by any legislations or guidelines’, which resulted in many unethical practices.

In 2005, Indian Council for Medical Research gave its Guidelines on Assisted Reproductive Technology procedures. Though, these guidelines have no legal standing.

In order to streamline the procedures for surrogacy further, the Law Commission of India submitted the 228th report on Assisted Reproductive Technology procedures discussing the importance and need for surrogacy, and also the steps taken to control surrogacy arrangements.

Salient Features of the Law Commission Guidelines: Surrogacy arrangement will continue to be governed by contract amongst parties, which will contain all the terms and conditions encompassing the surrogacy procedure and mandates that such an arrangement should not be for commercial purposes.

A surrogacy arrangement should provide for financial support for surrogate child in the event of death of the commissioning couple or individual before delivery of the child, or divorce between the intended parents and subsequent willingness of none to take delivery of the child.

A surrogacy contract should necessarily take care of life insurance cover for surrogate mother.

One of the intended parents should be a donor as well, because the bond of love and affection with a child primarily emanates from biological relationship. In case the intended parent is single, he or she should be a donor to be able to have a surrogate child.

Legislation itself should recognize a surrogate child to be the legitimate child of the commissioning parent(s) without there being any need for adoption or even declaration of

⁴ Baby Manji Yamada v UoI and Anr., 13 SCC 518 (Ind. 2008).

guardian. The birth certificate of the surrogate child should contain the name(s) of the commissioning parent(s) only.

Right to privacy of donor as well as surrogate mother should be protected. Sex-selective surrogacy should be prohibited. Cases of abortions should be governed by the Medical Termination of Pregnancy Act 1971 only.

In 2008, two-week-old Baby Manji Yamada was left stateless after the separation of Japanese commissioning parents during the pregnancy period and both of them refused to accept the baby. After a long legal battle, the custody was granted to the baby’s grandmother.

In the above legal case, the Supreme Court of India in its ruling clarified that commercial surrogacy is permitted in India with a direction to the Legislature to enact appropriate law governing surrogacy in India.

However, as more and more surrogacy rackets, legal intricacies and cases of exploitation of surrogates came to light, need was felt to make the regulations on surrogacy sterner.

In 2010 a draft Assisted Reproductive Technologies (Regulations) Bill was prepared.⁵

Salient Features of ART (Regulations) Bill-2010:

The Draft Bill gave gays, singles the legal right to have surrogate babies. It defines a ‘couple’ as two persons living together and having a sexual relationship.

A woman in the age-group of 21-35 can become a surrogate mother. She will be allowed five live births, including her own children. She will not be allowed to donate oocytes more than six times in her life.

In case of a single man or woman, the baby will be his/her legitimate child.

A child born to an unmarried couple using a surrogate mother and with the consent of both parties shall be the legitimate child of both of them.

⁵ Bindel, J. (2015). Commercial surrogacy is a rigged market in wombs for rent. Retrieved December 25, 2019, from <https://www.theguardian.com/commentisfree/2015/feb/20/commercial-surrogacywombs-rent-same-sex-pregnancy>.

During the gestation period, the couple will bear the surrogate’s expenses and give monetary help to her. The couple may enter into an agreement with the surrogate. Foreign couples must submit two certificates — one on their country’s surrogacy policy and the other stating that the child born to the surrogate mother will get their country’s citizenship.⁶

Foreign couples have to nominate a local guardian who will take care of the surrogate during gestation.

ART banks, accredited by the government, will maintain a database of prospective surrogates as well as storing semen and eggs and details of the donor.

State boards will give accreditation to ART banks — private and government. The board will have a registration authority which, in turn, will maintain a list of all In-vitro Fertilizations (IVF) centers and monitor their functioning.

Surrogacy (Regulation) Bill-2016 proposed to be passed by the present government has made commercial surrogacy illegal in India.

The lack of regulations has raised a number of ethical concerns, particularly regarding the exploitation and abuse of surrogate mothers.

Hence, comprehensive legislation regulating surrogacy and ART clinics is actually the need of the hour.

Surrogacy (Regulation) Bill-2016

The draft Surrogacy (Regulation Bill) 2016, passed by the Health Ministry, was cleared by the Union Cabinet on the 24th of August 2016; and is now all set to be introduced in the Parliament soon.

The new law will be notified ten months after it is cleared by the two Houses to allow mothers, who are already pregnant then, to have the surrogate baby. It will apply to the whole of India, except Jammu and Kashmir.

The major provisions of the Bill are as follows:

1. Surrogacy will not be allowed for –

⁶Desai, K. (2012). Indian surrogate mothers are risking their lives. They urgently need protection. Retrieved December 25, 2019,

- a. Homosexual couples
- b. Single parent
- c. Couples in live-in relationships
- d. Foreigners
- e. Couples with children
- f. Attempts at commercial surrogacy

2. Egg donation is banned.

3. Commercial surrogacy, abandoning the surrogate child, exploitation of surrogate mother, selling/ import of human embryo have all been deemed as violations that are punishable by a jail term of at least 10 years and a fine of up to Rs 10 lakh.

4. It also makes it illegal for doctors to do procedures that hurt the surrogate mother and the baby’s physical and mental health

Critical Analysis of the Surrogacy (Regulation) Bill-2016

In India, Infertility is generally known as a social stigma. It is hypothesized that the agony and trauma of infertility is best felt and described by the infertile couples themselves. Surrogacy is the union of science, society, services and person that make it a reality. Surrogacy leads to a win-win situation for both the infertile couple and the surrogate mother. The Assisted Reproductive Technology has helped millions of infertile couples to have a child, who has their genetic links through surrogacy.

Those couples who have medical complications and pregnancy could result in threat to life of the mother; surrogacy comes to their rescue, which is generally used as the last resort.

It is now a worldwide accepted reality that every person is unique and should be given the liberty to live his/her life according to personal choices.

A natural corollary to the said statement is that single parents, same-sex couples or even women who are pursuing high commitment careers could also make their parenthood dream a reality through surrogacy.

However, the Bill is highly discriminatory and against the very tenets of “equality”, as it discriminates between married and unmarried couples, between heterosexual and homosexual couples, between single parents and double parents, between divorcee and non-divorcee, between foreigner couples and Indian couples.

It is agreed that celebrities of the likes of Shahrukh Khan and Tushar Kapoor may be etching a style statement by having a surrogate child. They could have very well adopted a child if they felt that urge.⁷

In order to highlight that some of the directives mentioned in the Bill are a bit out of context like, allowing a couple with a mentally or physically challenged child to go for surrogacy may result in neglect of the first child who actually needs more attention. Rather than safeguarding surrogacy through strict and transparent mechanisms, government has introduced a Bill to ban surrogacy.⁸ The surrogacy law can still be exploited by wrongfully using the “close relative” clause for surrogacy. Besides, if surrogacy is banned, a black market will surely emerge where middle-men would reap the financial benefits and women would lose both income and access to adequate prenatal care.

Nonetheless, Surrogacy Bill will curb unethical practices and protect and prevent the exploitation of surrogates by middle-men, but at the same time will also hurt so many of them who were making a living out of it. Estimates put the value of the practice in the country known as the “*surrogacy hub*” of the world at \$2 billion. This colossal amount of revenue and foreign exchange that was coming into the state exchequer through surrogacy will now come to a nix.

CONCLUSION

In the final conclusion I would like to say that, it is very well understood that formalizing and legislating clearly defined regulations to prevent unethical practices in the domain of surrogacy are an immediate need.

⁷Ekman, K. (2016). All surrogacy is exploitation- the world should follow Sweden’s ban. Retrieved December 25, 2019, from The Guardian Online: <https://www.theguardian.com/commentisfree/2016/feb/25/surrogacy-sweden-ban>

⁸Brugger, K. (2012). International Law on Gestational Surrogacy Debates. Fordham International Law Journal, 35(3), 668.

Concurrently, while drafting these legislations, there is also a need to be perhaps more flexible and identify various categories that can be accommodate for accord of permission to undergo Assisted Reproductive Technology. The rules and regulations must be stringent, but discretionary in nature.

However, to impose an outright ban on surrogacy may be a very harsh step, especially when we look at millions of couples who are unable to have the joy of becoming parents.