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# **CRITICAL ANALYSIS OF SURROGACY AND ITS LEGAL IMPLICATIONS IN INDIA WITH SPECIAL REFERENCE TO SURROGACY (REGULATION) BILL 2016**

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**Abstract:** India is always a favorite country for those wanting a surrogate child, for here the service is available at very cheap value compared to other country. In 2002, the Indian Council of Medical Research laid down guidelines for surrogacy, and made the practice legal, but it was lacking legislative support. In case of *Baby Manji vs. Union of India* the Supreme Court recognized surrogacy as a positive practice. A draft ART (Assisted Reproductive Technology) Bill was formulated in 2010, but was never passed as a law. In light of this, the Surrogacy (Regulation) Bill, 2016 was introduced in Lok Sabha in November. The cabinet approved bill, however, has not been passed yet. The major scheme under the bill is to completely abolish commercial surrogacy. This provision is aimed to control the business of surrogacy that encourages exploitation. The Bill is the prohibiting single parents, homosexuals, live-in couples from becoming commissioning parents. The bill also disallows childless or unmarried women to be surrogate mothers.

In present paper attempt is made to explain the concept of surrogacy, types of surrogacy, current scenario of surrogacy in India and critical analysis of surrogacy law in India with special reference to Surrogacy (Regulation) Bill 2016 which has proposed various changes in existing system of surrogacy along with some recommendations.

**Keywords:** Surrogacy, Draft, Law, Parents.

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**Introduction:** Couples wedding day begins family and birth of a child grows it further. Children are God's best present. They give lots of meaning to one's life. Without them, a family seems to be incomplete. They are a source of joy and happiness. The feeling of becoming mother and father is priceless. The significance of having children is very badly felt by parents who cannot have child or are infertile. There are various reasons due to which couple cannot have child. Sometimes due to illness or medication women can't carry pregnancy, sometimes due to age or some physical defect also begetting child is difficult. Besides this there are other reasons like same sex marriage couples could not have child, some women think that they will lose their beauty on giving birth to child and thus avoid pregnancy and now a day's even unmarried persons are willing to go with single parenting. For all these people surrogacy is ray of hope. India is always a favorite country for those wanting a surrogate child, for here the service is available at very cheap value compared to other country. In 2002, the Indian Council of Medical Research laid down guidelines for surrogacy, and made the practice legal, but it was lacking legislative support. In case of *Baby Manji vs. Union of India* the Supreme Court recognized surrogacy as a positive practice. A draft ART (Assisted Reproductive Technology) Bill was formulated in 2010, but was never passed as a law. In light of this, the Surrogacy (Regulation) Bill, 2016 was introduced in Lok Sabha in November. The cabinet approved bill, however, has not been passed yet. The major scheme under the bill is to completely abolish commercial surrogacy. This provision is aimed to control the business of surrogacy that encourages exploitation. The Bill is the prohibiting single parents, homosexuals, live-in couples from becoming commissioning parents. The bill also disallows childless or unmarried women to be surrogate mothers.

In present paper attempt is made to explain the concept of surrogacy, types of surrogacy, current scenario of surrogacy in India and critical analysis of surrogacy law in India with special reference to

Surrogacy (Regulation) Bill 2016 which has proposed various changes in existing system of surrogacy along with some recommendations.

### **What is Surrogacy?**

The word 'surrogate' means 'substitute'. Surrogacy is one of the technique by which infertile couples can achieve their dream of having a child. Surrogacy is "an arrangement in which a women agrees to carry a pregnancy that is genetically unrelated to her and her husband, with the intention to carry term and hand over the child to the genetic parents for whom she is acting as a surrogate"<sup>1</sup>. Nature has given capacity to procreate a child to woman. But, unfortunately some women could not give birth to child due to certain physiological conditions. The desire to become a mother leads them to look for alternative solutions like Artificial Reproductive Technology (ART), In-Vitro Fertilization (IVF), Intra-Uterine Injections (IUI), etc. In most of the surrogacy arrangements genetic material of parents is used and child is carried by surrogate mother. The surrogate voluntarily rents out her womb to carry the child for other woman with an intention of the helping the childless couple with a specific understanding to hand over the child after the delivery. There are various motivating factors and reasons for surrogacy like self-fulfillment, a desire to help others, a liking to become pregnant and also for commercial purposes.<sup>2</sup>

**Types of Surrogacy:** Surrogacy can be formal based on a contract or can be informal based on understanding between the parties. Surrogacy can also be altruistic or commercial. Various types of surrogacy are as follows:

**Traditional Surrogacy:** In traditional surrogacy, the surrogate mother is impregnated naturally or artificially, but the resulting child is genetically related to the surrogate mother.

**Gestational Surrogacy:** In gestational surrogacy, the pregnancy results from the transfer of an embryo created by in-vitro fertilization (IVF), in a manner so the resulting child is genetically unrelated to the surrogate.<sup>3</sup>

**Altruistic Surrogacy:** When no monetary compensation is given other than medical and any other reasonable expenses, such surrogacy is deemed to be altruistic in nature.

**Commercial Surrogacy:** When the surrogate receives monetary compensation along with medical expenses for carrying the child, it is referred to as commercial surrogacy and dealing with all the paperwork etc.<sup>4</sup>

**Surrogacy in India:** Surrogacy in India is estimated to be a \$ 2.3 billion industry, but surrogate mothers are paid less than a tenth of what they get in the US<sup>5</sup>. India is considered as good option for surrogacy due to various reasons viz. rapidly increasing IVF clinics, absence of proper legislation, and the availability of poor women willing to rent out their wombs. With the passage of time, India has positioned itself as a pioneer in International Surrogacy Arrangements, helping thousands of international couple achieving parenthood<sup>6</sup>. The first reported surrogacy in India, took place in 1994 in Chennai. In 1997, an Indian woman acted as a surrogate for money and this is considered as the first reported instance of commercial surrogacy in India. During the past one decade the number of children born through surrogacy in India has increased enormously. It is pertinent to point out that the first case of commercial surrogacy in India that occurred in 1997 generated a huge debate on the legality of surrogacy practices. In this case, Nirmala the surrogate woman agreed to act as a surrogate for a couple from Chandigarh due to reasons of financial necessity. This incident received a lot of public attention and generated various debates on the issues surrounding surrogacy practices. However the response of the legal system to the issue of surrogacy has been very slow<sup>7</sup>.

**Legal Regime of Surrogacy in India:** In 2000, the Indian Council for Medical Research adopted Ethical Guidelines for Biomedical Research on Human Participants, in which they prescribed certain guidelines to deal with ART in general. These 2002 Guidelines were further updated and adopted by ICMR in 2005. The provision relating with surrogacy practices in India was provided in these guidelines. Presently this

ICMR guideline is the only regulatory framework available in India to deal with surrogacy practices. These guidelines are not binding and its adoption and application is voluntary. These guidelines have not addressed various issues of surrogacy practices. Then in 2008 Indian Government has formulated The Assisted Reproductive Technology (Regulation) Bill and Rules, 2008

In 2008, the Supreme Court held that commercial surrogacy was permissible in India in Manji case<sup>8</sup>. Baby Manji was commissioned by Japanese parents and was born to a surrogate mother in Gujarat. The parents divorced before the baby was born. The genetic father wanted the child's custody, but Indian law barred single men from it, and Japanese law didn't recognize surrogacy. The baby was ultimately granted a visa<sup>9</sup>. More need was felt for having legal framework for surrogacy in India. This was the reason of the Assisted Reproductive Techniques (Regulation) Bill. The Law Commission of India's 228th Report in 2009 given suggestions to the ART Bill<sup>10</sup>.

In *Jan Balaz v. Anand Municipality & Others*<sup>11</sup>, a German father filed a case against the passport authority for the refusal of passport to his child born out of surrogacy. Passport was denied on the ground that mother's name was not mentioned and father was unable to mention name of the mother. However court granted an exit permit to the children. Court focused on need of law on this topic.

### **Critical Evaluation of Surrogacy Law with Special Reference to Surrogacy (Regulation) Bill 2016:**

Surrogacy provides relief to the infertile married couple, and also provided an opportunity for a wider group of socially infertile people to beget a child. Earlier, childless couples alone required the help of surrogacy. But now single woman or man want to have children and seek the help of surrogacy method. Surrogacy is also gaining popularity because of its use in recent times by various celebrities like Shah Rukh Khan, Karan Johar, Tushar Kapoor etc. However the increased use of surrogacy has generated a great controversy regarding its legality due to the involvement of various human rights and legal issues. The practice of surrogacy has also been questioned on ethical, moral and social grounds. Various criticisms against surrogacy with special reference to new bill of 2016 are as follows:

- Surrogacy has been criticized on the ground that it violates the human rights and dignity of surrogate mother and it would lead to commodification, exploitation, prostitution and slavery of women.
- Surrogacy may affect rights of child and may lead to baby selling, sex
- Selection and creation of designer babies.
- The approach of various countries towards surrogacy also differs depending upon their social, economic, cultural, religious and political views. As a result, the law relating to surrogacy all over the world also differs
- Although in 2005, ICMR issued guidelines for accreditation, supervision, and regulation of ART clinics in India, these guidelines are repeatedly violated.
- The cross border surrogacy leads to problems in citizenship, nationality, motherhood, parentage, and rights of a child.
- In India, there is no provision of psychological screening or legal counseling of Surrogate mother which is mandatory in USA.
- The Surrogacy (Regulation) Bill 2016 bans foreigners including NRIs to seek an Indian Surrogate mother.
- Bill allows heterosexual married Indian Couples with 'proven infertility' for surrogacy. This will keep out Homosexual couples, live-in-relation partners and single men and women.
- As per Bill the couple should be married at least five years before approaching surrogate mother. A woman has to be between 23-50 years of age and man should be 26-55 years old. There is no reason to compel the intended couple to wait for a period of five years for availing the surrogacy service.
- Commercial surrogacy is banned under the bill. The ban on commercial surrogacy is due to a chance of exploitation of surrogate mother. The best way to prevent such exploitation is a strong regulation. Therefore, the ban is irrational and is a direct encroachment on the couples right to reproduction
- The Bill specifies that, only a 'close relative' of intended couple can act as a surrogate mother. However, the Bill does not define the term 'close relative'.
- If couple already have child they can't approach a surrogate mother.

- Surrogacy is allowed only once. If the couple already have a surrogate child they can't approach surrogate mother second time.
- Bill is silent about maternity relief for surrogate mother and intended mother.
- The Bill is silent about the issue of a beach of terms and conditions of surrogacy by surrogate or intended couple during the surrogacy process or afterwards.

**Conclusion:** This Bill is an attempt of Government to regulate surrogacy in India. It has several impactful measures and intends to bring positive changes in surrogacy arrangements. As every coin has two sides, the Surrogacy Bill, 2016 also has two sides. Before passing this legislation it needs to be scrutinized properly. Instead of repealing commercial surrogacy to control malpractices there should be a check on commercial surrogacy. For this national and international debates are to be arranged before the passing of the Bill.

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