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**Commercialization of Surrogacy in India:
A Critical Study of the Surrogacy (Regulation)
Bill 2016**

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Akansha Gupta¹


¹Assistant Professor, Jemtec School Of Law, Jims Engineering Management Technical
Campus, Greater Noida, India

Email.ID-serviceheb@gmail.com, akanshaguptaitm17@gmail.com

ABSTRACT

India is flourishing market for surrogacy to couples from different countries due to vast availability of surrogate women as well as relatively low cost of procedure. Moreover the lack of any legislation to regulate surrogacy has led to wider acceptance of commercial surrogacy throughout India. However there are few concerns which need to be addressed such as exploitation of surrogate woman, abandonment of surrogate child which led to growth of the legislation in this sector. The Surrogacy (Regulation) Bill 2016 though seem a promising tool in controlling surrogacy but it also carries some flaws such as bill is in contradiction to Right of Equality and Right to Life, it also imposes a ban on commercial surrogacy rather than controlling it. Thus this research paper tends to provide critical analysis of this bill so as to know whether it would be able to regulate surrogacy as well issues related to it. It also addresses to specific questions such as is banning commercial surrogacy in India a right decision or not and would altruistic surrogacy be a viable option for surrogacy in India.

Keywords: Altruistic surrogacy, fundamental Rights, viable, exploitation

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INTRODUCTION

Children are the most precious gifts to married couples. Married Couples experiences a great joy when they get to know that they are entering a new phase of life i.e. becoming parents. God has gifted this beautiful capacity of carrying a child to women and every woman enjoys such experience. Unfortunately due to some illness or disease or infertility sometimes women are not able to carry the child in womb. In such situations Surrogacy comes as rescue and gave the parents the joy of having their genetically born child through some other women. Surrogacy has served as a boon to those couples who are infertile to have their own children. Surrogacy is an assistive reproductive technique in which one woman carries the child of other women in her womb and gives the child to married couple. There are two types of surrogacy based on financial compensation.

Altruistic surrogacy is the one in which surrogate mother does not receive any compensation for carrying the child of other women in her womb except medical expenses and surrogate mother is necessarily a close relative whereas in commercial surrogacy, surrogate mother receive compensation from couple whose baby they carry in her womb and any women can be surrogate mother not necessarily a close relative².

There has been a rapid rise of commercial surrogacy in India after the case of Baby Manji Yamada v Union of India and Another³. In this case Supreme Court legalized commercial surrogacy and also highlighted the need for laws to control such surrogacy. Thus this case played an important role in making India a hub of commercial surrogacy not only across the country but also across the world. Another factor which contributed to the growth of surrogacy is cost of whole medical process which is low as compared to other countries. Thus surrogacy served as a catalyst for medical tourism as well as provided employment to poor women in India.

As every coin has its two sides so the Commercial surrogacy has its ill effects such as exploitation of poor women as sometimes they are forced to be surrogate mother by their family for money. To make matters worse for them they do not receive the money after giving birth to a child, as married couple get divorced or are not willing to accept the child. In such a situation not only women is exploited but child is also left abandoned as in case of Jan Balaz v Union of India⁴.

Moreover in whole process women health also gets affected. Commercial surrogacy is also referred as unethical by larger fraction of people in India and this whole process is referred as 'renting of womb'⁵.

² Girish Muruges, "Critical Analysis of the Surrogacy (Regulation) Bill, 2016", 04 International Journal of Legal Developments and Allied Issues.(2018)

³ (2008) 13 SCC 518

⁴ AIR 2010 21

⁵ Katherine B. Lieber, "Selling the Womb: Can the Feminist Critique of Surrogacy Be Answered", 68 IND LJ 112 (1992).

Lack of laws in India have led to ill effects of commercial surrogacy and thus need was felt to develop laws regulating commercial surrogacy for the first time in case of *Baby Manji Yamada v Union of India and Another*⁶ . This case legalized commercial surrogacy but also at the same time ask the legislature to frame regulations to protect the rights of parties to surrogacy.

During this case Assistive Reproductive Technology bill 2008 was pending in parliament but increasing trend of havoc created by commercial surrogacy forced law commission to step in and thus the Law Commission of India has submitted its 228th Report on “Need for legislation to regulate Assisted Reproductive Technology Clinics as well as rights and obligations of parties to a surrogacy. This report proposed a ban on commercial surrogacy and sanctions for violating the legislation. Thus 2008 ART bill got revised and again framed as ART BILL 2010. This bill also had some defects such as it legalized commercial surrogacy and there was no provision regarding citizenship of surrogate children if commissioning happened to be citizens of other country where commercial surrogacy is illegal. Again bill was revised and framed as ART bill 2013 but this bill never passed and got lapsed. In 2014 again ART bill 2014 was drafted which also supported commercial surrogacy and in addition to these prescribe regulations for supervision of ART clinics. In 2015 a notification was passed by government through which foreign residents were banned to apply for commercial surrogacy in India. Thus there are constant attempts by authorities to frame laws to control surrogacy but failure in such attempts has held to more exploitation of women.⁷

Finally at the end the present bill, The Surrogacy (Regulation) bill 2016 was proposed which prohibited commercial surrogacy and allowed altruistic surrogacy and that to with limitations and sanctions so as to prevent exploitation of women and children.

But how far this bill would actually help in preventing exploitation of women caused due to surrogacy is still under a doubt due to several arbitrary clauses which will be discussed in later part of research paper.

This research paper is divided into three parts; the first part basically talks about essence of The Surrogacy (Regulation) bill 2016, second part provides a critical analysis of surrogacy bill 2016 and last part talks about challenges that lay ahead in future as this bill is already passed in Lok Sabha.

LESSENCE OF THE SURROGACY (REGULATION) BILL 2016:

The Surrogacy (Regulation) Bill 2016 received the assent by the Cabinet on August 24, 2016 and after that it was introduced to lok sabha on 21 December 2016 and it was passed by Lok Sabha on 19 December 2018 and now it is pending in Rajya Sabha. The important features of the bill are as follows:

⁶ Supra note 2 pg 2

⁷ Pyali Chaterjee “Role of law relating to commercial surrogacy in India and protection of surrogate mother,6 International Journal of Recent Scientific Research , Issue, 9, pp.6187-6192, September, 2015

1. The bill permits only altruistic surrogacy in India which means surrogate would not receive any compensation other than medical expenses for going through surrogacy process.
2. It also mentions eligibility criteria for couple who can opt for altruistic surrogacy such as married couple should be Indian citizens and married for at least five years with no child of their own. They should be within age group of males 26-55 and females 23-50. Married Couple should be infertile then only they can opt for surrogacy otherwise not.
3. Moreover it also mentions eligibility criteria for a surrogate mother such as she should be close relative of the married couple and women should be married and is of age between 25-35 and having atleast one child of her own.
4. The bill also prescribes the punishments of imprisonment for a term, which is not less than 10 years and fine up to 10 lakh rupees for undertaking surrogacy for a fee, advertising it or exploiting a surrogate mother. Thus putting a complete ban on commercial surrogacy.
5. It also includes provisions related to welfare of child such as the child born out of surrogacy will be deemed to be the biological child of the commissioning couple.
6. Some provisions are framed in favor of surrogate mother such as the central and state governments will appoint authorities who would provide eligibility certificates to the intending parents and the surrogate mother. Such authorities will also regulate fertility clinics that arrange for surrogacy.
7. If surrogate pregnancy has to be medically terminated, the written consent of the surrogate and approval of the appropriate authority will be required, in addition to complying with the Medical termination of Pregnancy Act, 1971.⁸

Thus by analyzing the important provisions of Bill it is understood that bill has tried to limit surrogacy in India to prevent exploitation cases rather than controlling it in present form. Another Part of research paper would make it clear that this bill would only increase exploitation rather than decreasing it.

II. CRITICAL ANALYSIS OF BILL

This bill has certain advantages such as it would ban commercial surrogacy which was leading to exploitation of women on larger scale. It has also banned foreign national to be part of surrogacy and thus India would no longer be a hub of international surrogacy if this bill turns into an Act. Another advantage is that parentage and citizenship of children born out of surrogacy is clear and transparent.⁹

⁸For more information look at(<https://www.livelaw.in/columns/is-banning-commercial-surrogacy-the-right-thing-to-do-141862>)

⁹ Section 7 of The Surrogacy(Regulation) Bill 2016

The intending couple shall not abandon the child, born out of a surrogacy procedure, whether within India or outside, for any reason whatsoever, including but not restricted to, any genetic defect, birth defect, any other medical condition, the defects developing subsequently, sex of the child or conception of more than one baby and the like: Provided that any child born out of surrogacy procedure, shall be deemed to be a biological child of the intending couple and the said child shall be entitled to all the rights and privileges available to a natural child

This provision tend to assure welfare of child as well as give answers to series of issues that arose in the case Jan balaz v Union Of India regarding the parentage and citizenship of child born out of commercial surrogacy. This bill if turned into a law would be the first fully fledged Act passed to control surrogacy in India. It may be useful in short run but in longer run this bill would definitely lead to more severe problems.

1. Commercial surrogacy should be regulated and not banned.

One view that motivate legislature to pass ban for commercial surrogacy is “Rich people outsource pregnancies to poorer women because their wives cannot go through labour pain. We have to put complete stop to celebrities who are commissioning surrogate children like a hobby, despite having biological ones¹⁰”. Commercial Surrogacy needs to be banned as it is viewed as buying and selling of babies for money. People are choosing the easier option to become parents.

Another view which proposes a regulation to control commercial surrogacy rather than banning it completely is “The women, she argues, are not mere wombs but workers who make a difficult but best choice out of a limited and constrained pool of employment opportunities. Viewed through this lens surrogates become laborers in a labour market rather than right-less and voice-less entities whose rights are in urgent need of protection from exploitation rather than to altogether ban the activity involved¹¹.”

Thus some women choose surrogacy as employment option with their choice. They find happiness in giving child to infertile couple and gain money rather than working in factories. Banning the commercial surrogacy would take away their employment as well as their choice of profession. Thus laws should be introduced to regulate exploitation and definitely banning altogether commercial surrogacy is not a correct solution.

Paying the women for surrogacy should not be considered as unethical by lawmakers but instead view as another profession for women for which reward should be given. The pain that surrogate woman goes through during nine months requires reward when it is done for another woman.¹² If commercial surrogacy is banned poor people would again be unemployed and moreover medical tourism in India would also receive a setback.

Banning the commercial surrogacy is not correct solution to control surrogacy. Banning would only increase complications or say exploitations but not decrease it. For example when there was increase

under any law for the time being in force.

([https://www.prsindia.org/uploads/media/Surrogacy/Surrogacy%20\(Regulation\)%20Bill,%202016.pdf](https://www.prsindia.org/uploads/media/Surrogacy/Surrogacy%20(Regulation)%20Bill,%202016.pdf))

¹⁰ For more information look at: (<https://www.bloomberquint.com/opinion/surrogacy-regulation-bill-cause-for-congratulation-or-concern#gs.eAgxaDAf>)

¹¹ibid

¹² Stanford University. (2008). Surrogate Motherhood in India. Moral and ethical implications. Retrieved on March 2, 2018 from <https://web.stanford.edu/group/womenscourage/Surrogacy/moraethical.html> and <http://www.acog.org/Resources-And-Publications/Committee-Opinions/Committee-on-Ethics/SurrogateMotherhood>

of sale of human organs in the Indian market causing exploitation of poor people, a step was taken by legislature which was to ban the sale of human organs through passing of Transplantation of Human Organs Act. But this ban never controlled such sale of organs but instead give rise to illegal sale of organs in the black market.¹³ Same would be result of this surrogacy bill which would increase black market for commercial surrogacy across the borders. Thus it can be rightly said “An equally difficult and risky venture is being promoted through altogether banning commercial surrogacy and vastly restricting altruistic surrogacy at the same time¹⁴.”

2. Altruistic surrogacy is not a viable option for the people of India.

This bill allows altruistic surrogacy that too with several restrictions which is ultimately leading to growth of adoption than surrogacy in India. Too much eligibility conditions for the surrogate women as well as for intending couple make it difficult for the intending couple to have a baby of their own¹⁵. If they go for altruistic surrogacy then they have to choose a close relative who can be surrogate mother to their child. The word close relative is again not defined in the Bill and this would definitely lead to spring of cases in Supreme Court in years to come to decide whether surrogate mother is a close relative or not. Moreover due to inclusion of close relative in the bill now intending couple would be forced to disclose their infertility to family members which would embarrass them. Moreover in such a scenario not only intending couple is at a disadvantage position but surrogate women also suffers as they continue to have emotional bond with surrogate child after parting it to intending couple as they live in same family.

Moreover the main reason for banning commercial surrogacy and opting altruistic surrogacy was that it was leading to exploitation of poor women as rich women forced them to be surrogate mother of their child but this situation can also arise in case of altruistic surrogacy where family members may force close relative to be surrogate mother of intending couple. So how far would this bill will be able to control exploitation is still doubtful.

Altruistic surrogacy would only increase market for adoption of babies rather than controlling the exploitation of women. Moreover one of restriction for a couple to opt altruistic surrogacy is that that they should be married for 5 years¹⁶. This restriction is itself arbitrary and no justification such as marriages do not break after 5 years can save such restriction.

In such a scenario neither the complete ban on commercial surrogacy is justified nor altruistic surrogacy seems a viable option for surrogacy for intending couple, thus in all this bill would cause destruction of growth of surrogacy in India and severe violation of rights which is certainly not object of the bill.

¹³ Supra note 2 pg 2

¹⁴ Supra note 10

¹⁵ Section 4 of the surrogacy regulation bill 2016(for more information look at [https://www.prindia.org/uploads/media/Surrogacy/Surrogacy%20\(Regulation\)%20Bill,%202016.pdf](https://www.prindia.org/uploads/media/Surrogacy/Surrogacy%20(Regulation)%20Bill,%202016.pdf))

¹⁶ Ibid

3. Violation of fundamental rights:

Beside these defects the bill is also criticized on other grounds as well such as this bill is based on patriarchal thought or say ancient period where the people did not believe in living relationship or transgender rights. With these thoughts in the mind legislators have restricted altruistic surrogacy to infertile married couples only. First of all this thought doesn't fit in the 21st century where Supreme Court has recognized transgender rights¹⁷, living relationship¹⁸, and single mother to adopt a child. This would only lead to discrimination based on sex, marriage and nationality. The Supreme Court also highlighted in recent case of recognizing transgender as the third gender says "Discrimination on the basis of sexual orientation or gender identity includes any discrimination, exclusion, restriction or preference, which has the effect of nullifying or transposing equality by the law or the equal protection of laws guaranteed under our Constitution."¹⁹ Thus if they are given legal recognition, then they should not be denied of any fundamental rights of the constitution such as right to reproduce or right to privacy²⁰. Thus bill provisions would be breaching constitutional provisions such as Article 15²¹ and Article 14²² due to which this bill can face a challenge of being ultravires to the constitution and hence should be declared invalid.

Moreover not only Article 14 and Article 15 would be violated by bill but Article 21 would also come into picture. Right to reproduce²³ is intrinsic of right to privacy which is now recognized as fundamental right inbuilt under Article 21²⁴ of the constitution and not allowing any other women to be surrogate mother except close relative would hit Article 21 and again bill would be ultravires on this perspective.

Moreover the intending couple side should have a choice whether they want to bear a child or they want to have their child by fulfilling the terms and conditions of the contract (commercial surrogacy), they should have a choice of parenthood. It is their personal matter and state should not interfere in it. Thus, whether a woman wants herself to reproduce or other woman to reproduce is her choice and

¹⁷ National Legal Services Authority v. Union of India and others (2014) 5 SCC 438

¹⁸ Indra Sarma v. V.K.V. Sarma, CrI. App. No. 2009 of 2013; Decided on 26-11-2013 (SC): 2013 (14) SCALE 448

Devidas Ramachandra Tuljapurkar v. State Of Maharashtra & Ors, 2015 Indlaw SC 361.

¹⁹ Navtej Singh Johar v. Union of India, WP (CrI.) No. 76/2016, order dated 12-07-2018

²⁰ K.S. Puttaswamy and another v. Union of India and others 2017 10 SCC 1

²¹ Article 14 in The Constitution Of India 1949: Equality before law The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth

²² Article 15 in The Constitution Of India 1949: Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth: (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them

²³ B.K. Parthasarathi v. Government of Andhra Pradesh, AIR 2000 AP 156

²⁴ Supra note 17

restrictions to one woman to avail that choice and other not would lead to violation of her right to privacy.²⁵

Thus the restrictions around altruistic surrogacy would be unacceptable to a larger mass of people as it violates basic structure of constitution (equality and Right to life.). Lok sabha should have given a thought to these articles of constitution before passing the bill.

Lastly excessive delegation of powers is there to other respective bodies to decide which intending married couple would go for surrogacy is in itself arbitrary.

Thus it seems that the Bill appears to have been framed without addressing the actual concerns of surrogacy arrangements in India and the proposal could do more harm than good by leading to more exploitation.²⁶

III.CONCLUSION

In India, surrogacy is not only a blessing to infertile married couple but also a blessing to poor woman as well who get employed on basis of commercial surrogacy. Thus a law is required to regulate the commercial surrogacy and not present bill which imposes a complete ban on commercial surrogacy. Lot of changes is required so that this bill can regulate surrogacy related issues properly in present form. First of all, provisions for controlling commercial surrogacy to be introduced, secondly homosexual couples, and single parent must be allowed to opt for such surrogacy. All the women who want to be surrogate mother should be allowed, restriction such as close relative should not be there. With these changes in bill, it will be able regulate surrogacy as well as prevent exploitation of parties associated with surrogacy. Thus surrogacy should not be viewed as renting of womb but gifting a womb to another who can't be mother herself, and giving money in return is just reward you deserve for being a surrogate mother.

²⁵ Prabhanjan Kumar Singh, CRITICAL EVALUATION OF DRAFT SURROGACY (REGULATION) BILL, 2016, 4 Jamia Law Journal, 2017

²⁶ For more information look at:(<https://www.youthkiawaaz.com/2019/01/surrogacy-regulation-bill-2018-8-questions-that-we-should-be-asking/>)