



# **SURROGACY (REGULATION) BILL, 2016: REGULATION OR PROHIBITION?**

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**Abstract--**Surrogacy in India required much needed regulation with India becoming surrogacy capital of the world and facing exploitation of poor surrogates. With the aim of putting an end to the exploitation of poor women who agree to become surrogate mothers for money, the Union Cabinet recently cleared the Surrogacy (Regulation) Bill, 2016. With the issues pertaining 'parentage' arising due to conflict between the surrogate and genetic mothers, refusal of couples to accept the custody of children born with disabilities, need for registered surrogacy clinics, unethical practices defining the system, the Central Government in a strategic move cleared a draft law to make the surrogacy as a system much more transparent and legal. The draft Bill appears to have been framed without addressing the actual concerns of the surrogacy arrangements in India, and could do more harm than good by leading to the exploitation of women. Skeptics have raised the issue of infringement of fundamental rights and intrusion of state over the mode of parenthood. This article aims to highlight key features of the Bill. Further, through this article the author is going to explain whether Bill really going to regulate or ban surrogacy, by way of criticising the Surrogacy Bill.

**Keywords:** *Parentage, surrogate, heterosexual, Fertility, Transplantation, Surrogacy, Commercial, Live-in relationship, Commissioning, equality.*

## INTRODUCTION

Surrogacy<sup>i</sup> is a method of assisted reproduction whereby a woman agrees to become pregnant for giving birth to a child for others to raise. In the past decade, commercial surrogacy has grown tremendously in India.<sup>ii</sup> It is currently estimated to be a \$2.3 billion industry. Before November 2015, when the government imposed a ban, foreigners accounted for 80 per cent of surrogacy births in India. This is because most countries, barring a few such as Russia, Ukraine and some U.S. states, do not permit commercial surrogacy. Many countries in Europe have completely prohibited surrogacy arrangements,<sup>iii</sup> both to protect the reproductive health of the surrogate mother as well as the future of the newborn child. For long India has redeveloped itself as a country which encompasses medical facilities with world class facilities, at prices which was far lesser than most developed countries.<sup>iv</sup> Medical tourism is accepted as a crucial form of tourism in India. However, the proliferation of such an industry has exposed a few darker spots as well and one such issue is the thriving institution of fertility tourism in India popularly called "commercial surrogacy". In surrogacy, a woman carries the child of intending parent/s via different techniques including IVF transplantation. When the same is done by a woman for monetary benefits, it is termed commercial surrogacy.

Commercial surrogacy was allowed in India for the first time in 2002 and since then it has grown into a massive industry within the medical profession. However the legal complications with regards to commercial surrogacy came to the fore for the first time in 2008 when a Japanese couple contacted an Indian woman for surrogacy.<sup>v</sup> The surrogate mother gave birth to a healthy baby girl. By then the couple had separated and the baby was both parentless and stateless, caught between the legal systems of two countries. The child is now in her grandmother's custody in Japan but has not obtained citizenship, as surrogacy is not legal in Japan. Further, in 2012, an Australian couple who had twins by surrogacy, arbitrarily rejected one and took home the other. A single mother of two from Chennai decided to become a surrogate mother in the hope that the payment would help her start a shop near her house. She delivered a healthy child, but her hopes bore little fruit for herself. She received only about Rs.75,000 with an auto rickshaw driver who served as a middleman, taking a 50 per cent amount. After repaying the loans, she did not have enough money. On January 29, 2014, 26-year-old

Yuma Sherpa died in the aftermath of a surgical procedure to harvest eggs from her body, as part of the egg donation programme of a private clinic based in New Delhi. The culmination of these incidents resulted in the draft Surrogacy (Regulation) Bill that was approved by the Cabinet in 2016. It is aimed at curbing unethical and commercial practices and preventing the exploitation of poor women as substitute mothers. Unfortunately, the draft Bill seems to do more harm than good. This research work intends to highlight the key features of the act while criticising the provisions of the act.

#### SURROGACY (REGULATION BILL) 2016 AND ITS IMPORTANT FEATURES

The Union Cabinet recently approved the Surrogacy (Regulation) Bill 2016, banning commercial surrogacy in India. The surrogacy Bill aims to prohibit potential exploitation of surrogate mothers and children born through surrogacy. It has following features.

1. According to the Bill only couples, who have been married for more than 5 years and either of the partners, are diagnosed with infertility<sup>vi</sup> can go for surrogacy.<sup>vii</sup> In other words only Indian couples, who have been married for at least 5 years can opt for surrogacy, provided at least one of them have been proven to have fertility-related issues.
2. Women within the age group of 23 years to 50 years and men aged between 26 to 55 years will be eligible to go in for surrogacy.
3. It bars foreigners, homosexuals, live-in partners,<sup>viii</sup> single persons, NRIs, and gays to use the services of a surrogate mother.<sup>ix</sup>
4. Bill stipulates a range of regressive preconditions to be complied before commissioning surrogacy. The Bill allows "only the close relative of the couple" to act as a surrogate mother for them.
5. A woman can become a surrogate mother only for altruistic purpose<sup>x</sup> and under no circumstances she will be paid for it, although payment can be made towards medical expenses.<sup>xi</sup>
6. It establishes National Surrogacy Board at the central level and State Surrogacy Boards and Appropriate Authorities in the State and Union Territories. The central surrogacy board will be headed by the union health and family welfare minister, while the secretary department of health research will be its vice chairperson. Three members of parliament will be selected as members of appropriate authorities in addition to a representative from a women's group among others.
7. It imposes complete prohibition on commercial surrogacy,<sup>xii</sup> in addition the Bill provides for stringent punishment including imprisonment for ten years for the breach of the provision of the Bill. Inferring from the combined reading of these provisions, it appears that both the offer of payment by the couple to the surrogate mother and receiving of payment by the surrogate mother are punishable with imprisonment and fine under this Bill.<sup>xiii</sup>
8. Under the new Bill, the clinics will have to maintain records of surrogacy for 25 years and they must be registered with the government.
9. It bars such couples who already have a child, including adopted children, from commissioning surrogacy.
10. The surrogate child will have the same rights of as that of a biological child. A surrogate child will not be abandoned by parents.
11. A surrogate mother cannot be mistreated by the clinic or parent couple.
12. Only one surrogacy allowed over lifetime of donor women.
13. It imposes ban on selling and purchasing of human embryo<sup>xiv</sup> and gametes.<sup>xv</sup>

14. The Bill shall apply to whole of India, except the state of Jammu and Kashmir.

#### CRITICAL ANALYSIS OF THE BILL

Although the bill was made and passed with the intention of preventing exploitation of poor women, it has generated a lot of debate around the country. It also seems to be not in consonance with constitutional provisions.

By placing restrictions on the right to have a surrogate child to heterosexual couples alone, the government has negated the equality to single parents and homosexuals.<sup>xvi</sup> This is a clear violation of Article 14 of the Constitution, which assures every Indian citizen “equality before the law or the equal protection of the laws within the territory of India.” By defining limiting eligibility criteria, the Central Government is seeking to deny a host of perfectly suitable individuals who are well within their rights to demand access to surrogacy services. This is certainly a direct contravention of the spirit of our constitution.<sup>xvii</sup>

Additionally, and equally controversially, the Bill fails to recognise and safeguard the equal reproductive rights of all women and men, irrespective of their sexual orientation, marital status, economic standing etc. The bill rightfully seeks to stop the physical, emotional and economic exploitation of Indian women through unethical surrogacy practices, and protect the rights of surrogate children. However, it adopts a highly discriminatory approach by not securing the reproductive rights of individuals who may have an alternative lifestyle, including those currently excluded by the Bill. As equal citizens of a progressive democracy, all Indian women and men should have the freedom to decide matters pertaining to their reproductive rights.<sup>xviii</sup> They should have the right to decide when and how they want to start a family.

Further, Article 21 of the Indian Constitution guarantees protection of life and personal liberty of all persons. The right to life enshrines the right of reproductive autonomy, inclusive of the right to procreation and parenthood, which is not within the domain of the state, warranting interference of a fundamental right. It is for the person and not the state to decide modes of parenthood. It is the prerogative of person(s) to have children born naturally or by surrogacy in which the state, constitutionally, cannot interfere.

Further, as per a Supreme Court ruling, live-in relationships are on a par with marriage and children born out of long-standing live-in relationships are legitimate.<sup>xix</sup> By limiting the option of surrogacy to legally married couples, the government is countering the acceptability of live-in relationships and setting a wrong precedent. Additionally, limiting a woman’s surrogacy choice to only one time is in a large way limiting the income of those who survive on this business. If a woman willingly consents to being a surrogate mother, is assured of a safe delivery; and the baby is assured of a safe home, why should she be limited to only one surrogacy?<sup>xx</sup> After the surrogacy industry boomed, a lot of women were dependent on the same. Additionally, egg donations are also banned, perhaps in order to curb child trafficking and illegal surrogacy racket. However, again a blanket ban will not help in this situation. Policies need to be structured and laws need to be implemented in such a way that the issue is resolved without censoring the entire industry itself.<sup>xxi</sup>

Also, the restriction that the surrogate must only be a ‘close relative’ of the commissioning parents may result in ethical issues wherein the child and the surrogate develop an intimate bond, given that both are known, accessible and related to each other.<sup>xxii</sup> Moreover, if the surrogate wishes for her name to remain undisclosed, how will her privacy be protected when the deal will be happening within the family? Besides, the commissioning couple may face difficulties in finding a close relative who will willingly render the surrogacy service.<sup>xxiii</sup> This may thereby turn surrogacy into a black market business, or lead to the victimisation and coercion of subjugated and oppressed women in marital



homes to bear a child for their relative.<sup>xxiv</sup> A further provision of the Bill allows surrogacy only to legally-married infertile Indian couples, who have been married for at least five years. This is an archaic provision that is reflective of the patriarchal Indian mindset that a woman, if fertile, should bear a child herself rather than resort to scientific marvels that are otherwise available. This plausibly violates the 'right to reproductive autonomy.'<sup>xxv</sup>

The decision about reproduction is essentially a part of a person's personal domain and should be left to the couple. Also, the requirement of a five-year wait after marriage to enter into a surrogacy arrangement and the age restriction of the commissioning parents (for the father to be between 26 and 55 years and the mother to be between 23 and 50) do not set out a robust intelligible differentia and rational nexus with the objects that are sought to be achieved.

With the proposed establishment of National Surrogacy Board and State Surrogacy Board, the Bill proposes to overlook all cases of surrogacy and regulate Hospitals and clinics that offer surrogacy in India. Instead of regulating, it bans commercial surrogacy which may lead this vast industry go underground making the exploitation more easier.(countries like Uk already experienced it) .It will hurt women economically as they will lose their income and livelihood due to ban on commercial surrogacy.

#### CONCLUSION

To be fair, by legalizing surrogacy the government has rightly moved to pull the issue out of the grey area in which it has so far been. However, what is disturbing is the regulatory mechanism that the Indian government has chosen to employ. It is very clear from above discussion that Surrogacy Regulation Bill instead of regulating surrogacy going to ban surrogacy by imposing such conditions. Apart from that by imposing a ban on commercial surrogacy, the Bill might do more harm to women than was previously done. One can say that the demand for surrogacy is not going to suddenly vanish and the proposed Bill will only result in the creation of an illegal market that might make surrogate mothers more vulnerable to. It can be said that although India has not banned surrogacy completely (like Germany, France and Italy), the laws need to be re-looked so that they actually benefit surrogate mothers, prospective parents, and children born from surrogacy. The bill exhibits a lack of understanding of agency which ought to be given to a woman; that a woman should be able to make decisions when the question is with regard to her body. There is no need for the State to be the Big Brother. In a nutshell, the Bill appears focused on banning surrogacy more than regulating it.

I think commercial surrogacy should be regulated, not banned. The government should be open to consultation with all the stakeholders as healthcare industry, medical and scientific community, academicians from law and ethics branches and representatives of sexual minorities before taking the final call. Instead of a ban, the government should bring a regulatory environment for the regulation of surrogacy. There is enough market information to prove that commercial surrogacy in India has not only helped oft-poor surrogates financially but also has generated large revenues for the country by medical tourism and helped thousands of childless people worldwide.

<sup>i</sup> The word "surrogate," is rooted in Latin "Subrogate" (to substitute), which means "appointed to act in the place of"

<sup>ii</sup> There are two types of surrogacy such as altruistic surrogacy and commercial surrogacy.

<sup>iii</sup> Germany, Italy, France countries banned.

<sup>iv</sup> <http://www.theshillongtimes.com/2016/08/30/debate-around-the-draft-surrogacy-regulation-bill-in-india/>, last visited on 31/10/16.

<sup>v</sup> Ibu Sanjeeb Garg, Understanding India's Complex Commercial Surrogacy Debate, <http://thediplomat.com/2016/08/understanding-indias-complex-commercial-surrogacy-debate/>, last visited on 31/10/2016.

<sup>vi</sup> 'Infertility' refers to an inability to conceive after having regular unprotected sex. Infertility can also refer to the biological inability of an individual to contribute to conception, or to a female who cannot carry a pregnancy to full term.

<sup>vii</sup> <http://currentnews.in/must-indian-married-willing-relative-become-surrogate-parents>.



<sup>viii</sup> A live-in partner is someone who lives in the same house as the person they are having a sexual relationship with, but is not married to them.

<sup>ix</sup> External Affairs Minister Sushma Swaraj said foreigners, NRIs and PIOs who hold Overseas Citizens of India cards have been barred from opting for surrogacy as “divorces are very common in foreign countries.”

<sup>x</sup> Altruistic surrogacy generally refers only to those arrangements in which the surrogate does not receive compensation beyond reimbursement for medical costs.

<sup>xi</sup> For more information see Sonali Kusum, The Surrogacy Bill 2016 Needs Complete Overhaul to Safeguard Interests of Stakeholders, Sunday, September 4, 2016, [www.indiamediacaltimes.com](http://www.indiamediacaltimes.com).

<sup>xii</sup> It can be difficult to find a single commercial surrogacy definition; the term generally refers to any surrogacy arrangement in which the surrogate mother is compensated for her services beyond reimbursement of medical expenses.

<sup>xiii</sup> Supra note xi.

<sup>xiv</sup> An embryo is called a fetus at a more advanced stage of development and up until birth or hatching.

<sup>xv</sup> <http://www.governancenow.com/news/regular-story/everything-you-need-know-draft-surrogacy-bill>, last visited on 31/10/16.

<sup>xvi</sup> <http://www.thehindu.com/thread/politics-and-policy/article9090866.ece>.

<sup>xvii</sup> Ibid.

<sup>xviii</sup> See Kapil Sibal, Unequal by Law, Indian Express, September 12, 2016.

<sup>xix</sup> A bench of Justice MY Eqbal and Justice Amitava Roy said continuous cohabitation of a couple would raise the presumption of valid marriage and it would be for the opposite party to prove that they were not legally married.

<sup>xx</sup> Malavika Ravi, A Critical Analysis of the Surrogacy Regulation Bill 2016, <http://feminisminindia.com/2016/08/31/critical-analysis-surrogacy-regulation-bill-2016/>, last visited on 31/10/16.

<sup>xxi</sup> Ibid.

<sup>xxii</sup> <http://thewire.in/64656/why-the-government-needs-to-rethink-the-surrogacy-bill/>, last visited on 2/11/2016.

<sup>xxiii</sup> Ibid.

<sup>xxiv</sup> <https://thelawblog.in/tag/surrogacy-regulation-bill-2016/>, last visited on 2/11/2016.

<sup>xxv</sup> Ibid.