

The Surrogacy (Regulation) Bill, 2016

Introduction

India has emerged as a surrogacy hub for couples from different countries for past few years. For the same reason India has earned the epitaph of the world capital of surrogacy and particularly the village of Anand in Gujarat, is popularly known as the 'cradle of the world'¹. India's first gestational surrogacy took place in 1994 in Chennai. In India, it is estimated that the number of births through surrogacy doubled between 2003 and 2006 and estimates range from **100 to 290 each year** to as many as **3,000** in the last decade. At present, India has an In Vitro Fertilisation (IVF) industry with **\$2.4 billion with 1000 clinics** producing an estimated 25,000 babies a year. It is stated that surrogacy generates **US\$2.3 billion** annually in India. As per the 2009 Law Commission Report, the artificial reproduction treatment industry is **INR 25,000 crore** industry. In India, the entire medical procedure, stay, legal contracts, etc. costs around **INR 12-18 lakh** in a reputed clinic. And the surrogate mother receives **INR 2-3 lakh**.

In 2002, the Indian Council of Medical Research (ICMR) laid down guidelines for surrogacy, which made the practice legal, but did not give it legislative backing. These guidelines laid down a framework for the accreditation, supervision and regulation of surrogacy clinics in India. This led to a booming surrogacy industry in India where surrogacy remained in the legal grey sphere. The necessity of legal protection for the baby and parties involved in the process of surrogacy was highlighted through the Supreme Court cases of Baby Manji vs Union of India and Jan Balaz vs Anand Municipality.

Baby Manji Yamada vs Union of India & Anr on 29 September 2008

In 2007, Dr. Patel working at the Akanksha Infertility Clinic, arranged to have a surrogate baby by Ms. Pritiben Mehta for a Japanese couple Ikufumi and Yuki Yamada. The intending couple soon developed marital problem and filed divorce during Baby Manji's birth. Thus, the baby was under the care and supervision of her paternal grandmother in the clinic in Anand. A Jaipur based NGO filed a Writ petition in High Court of Rajasthan challenging the legality of surrogacy and criticised it as feeding an illegal industry in India and stressed the need for the enactment of a law. The baby was then let for Japan in the care of her genetic father and grandmother. The biggest impact of the Baby Manji decision has been that it spurred the government to enact a law regulating surrogacy.

¹ Surrogacy, By Kuttuajeesh, May 2013, <http://www.studymode.com/essays/Surrogacy-1684520.html>, accessed on 03rd May 2017.

Jan Balaz vs. Anand Municipality & Ors on 11 November 2009

In 2009, a German couple, Jan Balaz & Susan Anna Lohlad entered into a contract with a surrogate mother named Marthaben Immanuel Khrishti. The surrogate mother gave birth to twins under supervision of Dr. Nayanaben Patel. The problem began for the twins when both Germany authorities & Indian Govt. refuse to grant the toddlers citizenship and visas on ground of surrogacy not recognised in Germany. The situation was stable when the couple took the inter-country adoption process supervised by Central Adoption Resources Agency (CARA).

These cases highlighted the total disregard for the rights of the surrogate mother and child and lead to attempts to control commercial surrogacy. A draft ART (Assisted Reproductive Technology) Bill was formulated in 2008 by the ICMR, but was never passed as a law. This was followed by the 228th Law Commission Report on ‘The need for legislation to regulate assisted reproductive technology clinics as well as rights and obligations of parties to a surrogacy’ which stated that *“the need of the hour is to adopt a pragmatic approach by legalizing altruistic surrogacy arrangements and prohibiting commercial ones.”* The rationale behind this prohibition was to prevent the commodification of a mother’s womb and child’s life.

In the light of the above scenario, it had become necessary to enact a legislation to regulate surrogacy services in the country, to prohibit the potential exploitation of surrogate mothers and to protect the rights of children born through surrogacy. Therefore, the Ministry of Health and Family Welfare introduced the Surrogacy (Regulation) Bill, 2016 to ensure effective regulation of surrogacy, prohibit commercial surrogacy and allow ethical surrogacy to the needy infertile Indian couples. In this context, the brief analyses the Surrogacy (Regulation) Bill, 2016 with respect to its objectives, salient features, international comparison and highlights the shortcomings that needs to be addressed through concrete discussion among the policymakers of the nation.

The Surrogacy (Regulation) Bill, 2016

On 24th August, 2016, the proposed draft Surrogacy (Regulation) Bill, 2016 was passed by the Union Cabinet and was introduced by Minister of Health and Family Welfare, Mr. J.P Nadda in Lok Sabha on November 21, 2016. 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 intending couple.

The Bill proposes to regulate surrogacy in India by establishing National Surrogacy Board at Centre level, State Surrogacy Boards and Appropriate Authorities in States and Union Territories. The major objectives of the Bill are to *regulate surrogacy services in the country, to provide altruistic ethical surrogacy to the needy infertile Indian couples, to prohibit commercial surrogacy including sale and purchase of human embryo and gametes, to prevent commercialization of surrogacy, to prohibit potential exploitation of surrogate mothers and protect the rights of children born through surrogacy.*

Salient Features

The Bill seeks to provide stringent legislative framework to issues under Surrogacy. Mentioned below are the salient features of the Bill²:

- **Criteria for Intending Couple:** The Bill states that the intending couples should be legally married for at least five years and should be Indian citizens and cannot have any surviving child biologically or through adoption or through surrogacy earlier except when they have a child and who is mentally or physically challenged or suffer from life threatening disorder with no permanent cure. Also, the Bill states that the intending couples would not be allowed to abandon the child, born out of a surrogacy procedure under any condition.
- **Regulate Surrogacy:** The Bill allows altruistic ethical surrogacy to intending infertile couple between the age of 23- 50 years and 26-55 years for female and male respectively but prohibits commercial surrogacy. As per the Bill, no person, organisation, surrogacy clinic, laboratory or clinical establishment of any kind can undertake commercial surrogacy, abandon the child, exploit the surrogate mother, sell human embryo or import embryo for the purpose of surrogacy. Violation to the said provision would lead to an offence punishable with imprisonment for a term which would not be less than ten years and with fine which may extend to ten lakh rupees.
- **Eligibility Criteria for Surrogate Mother:** As per the Bill, to receive a certificate of eligibility from concern authority, surrogate mother should be a close relative of the intending couple, be an ever married woman having a child of her own, should be between the age of 25-35 years, and possess a certificate of medical and psychological fitness for surrogacy. She can act as surrogate mother only once. The surrogate mother will carry a child which is genetically related to the Intending Couple and should be married women having a child of her own.
- **Appointment of Appropriate Authority:** The Bill states that the Central and State Governments shall be appointing one or more appropriate authorities within 90 days of the Bill becoming an Act. The important functions of the appropriate authority will revolve around; (i) enforcing standards for surrogacy clinics; (ii) investigating and taking action against breach of the provisions of the Bill; (iii) recommending modifications to the rules and regulations; and (iv) granting, suspending or cancelling registration of surrogacy clinics.
- **Approval for Establishment of Surrogacy Clinics:** Unless registered by the appropriate authority, Surrogacy clinics cannot undertake surrogacy related procedures. Clinics must apply for

² The Surrogacy (Regulation) Bill, 2016

registration within a period of 60 days from the date of appointment of appropriate authority. The surrogacy clinics shall have to maintain all records for a period of 25 years.

- **Establishment National and State Surrogacy Boards:** According to the Bill, the central and state government shall be constituting the National Surrogacy Board (NSB) and the State Surrogacy Boards (SSB), respectively. NSB shall exercise the powers and shall perform functions conferred on the Board under this Act. The NSB and SSB shall be the policy making bodies and appropriate authority will be the Implementation Body for the Act. The Board shall consist of the Minister in-charge of the Ministry of Health and Family Welfare, as the Chairperson, Secretary to the Government of India in-charge of the Department dealing with the surrogacy matter, as Vice-Chairperson and three women Members of Parliament, of whom two shall be elected by the House of the People and one by the Council of State as Members.
- The child born through surrogacy will have the same rights as are available for the biological child.
- An order concerning the parentage and custody of the child to be born through surrogacy, is to be passed by a court of the Magistrate of the first class.
- An insurance coverage of reasonable and adequate amount shall be ensured in favour of the surrogate mother.
- Transitional Provision-Subject to the provisions of this Act, there shall be provided a gestation period of ten months from the date of coming into force of this act to protect the wellbeing of already existing surrogate mother.

Shortcomings of the Bill

While the salient features highlight the strength of the Bill in providing an inclusive law, there are certain key issues, which create further gaps in catering the main aim of the Bill.

- The Bill raises questions over the reproductive rights of a woman. The right to life protects the right of reproductive autonomy, including the right to procreation and parenthood. These rights are 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 interfere³. Thus,

³ 'Why India needs a fertile debate on Surrogacy Bill?' by Mr. Anil Malhotra; <https://www.dailyo.in/politics/commercial-surrogacy-bill-india-adoption-infertility-parenting-pregnancy/story/1/12598.html>, accessed as on 16th April, 2017

constitutionally, state cannot interfere and the bill is also violative of the right of productive autonomy as stated in the [case of B.K Parthasarathi Vs Government of Andhra Pradesh](#)⁴.

- Restricting limited, conditional surrogacy to married Indian couples and disqualifying other persons on the basis of nationality, marital status, sexual orientation or age does not appear to qualify the test of equality (Article 14), or of being a reasonable classification, satisfying the objective sought to be achieved. The bill deprives single parents, homosexuals of availing the bliss of parenthood through surrogacy.
- The Bill specifies that in order to initiate a surrogacy procedure, the surrogate mother and the couple intending to commission the surrogacy are required to obtain certificates of eligibility and essentiality from the relevant appropriate authorities at the centre or state. However, the Bill **does not specify a time period** by which the appropriate authority will grant these certificates. Further, the Bill **does not specify a review or appeal procedure** in case the application for the certificates is rejected⁵.
- As per **Clause 4 (iii)(b)(II)** of the Bill, the definition of ‘**close relative**’ has not been stated in the Bill. One of the condition to be proved by the surrogate mother is that she is a ‘close relative’ of the intending couple who commissions the surrogacy. However, the Bill does not define the term ‘close relative’.
- The Bill is silent on the issue of breach of terms and conditions of surrogacy by surrogate or intended couple during the process of surrogacy or afterwards.
- In the Bill, the time period stated to avail surrogacy is after 5 years of marriage. It is to be noted that medical infertility is usually defined as the inability to achieve pregnancy after or two years of trying to conceive a child through regular sexual intercourse. Hence, there is no reason to compel the intended couple to wait for a period of five years for availing the surrogacy service.

Conclusion

It is essential to note that the Bill aims to prevent unethical practices in the domain of surrogacy as an immediate need. There is a need to be perhaps more flexible and identify various categories that can be

⁴ <http://www.insightsonindia.com/2016/12/01/insights-issues-surrogacy-regulation-bill-2016/>, accessed as on 13th May, 2017

⁵ ‘The Surrogacy (Regulation) Bill, 2016: A Critical Appraisal’ by Dr. Aneesh V. Pillai, <http://www.livelaw.in/surrogacy-regulation-bill-2016-critical-appraisal/>, accessed as on 13th May 2017

accommodate for accord of permission to undergo ART. However, to impose an absolute ban on surrogacy may be a harsh step, especially when one looks at millions of couples who are unable to have the joy of becoming parents.

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