

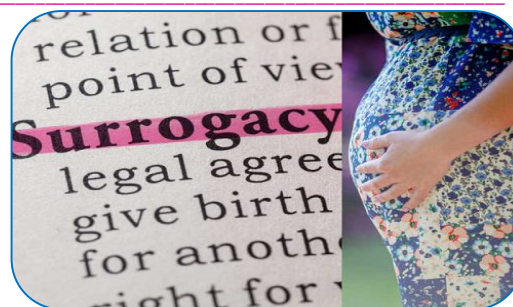


## COMMERCIAL SURROGACY: CIVIL WRONG OR CRIMINAL OFFENCE

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### ABSTRACT

Surrogacy or rent a womb, on the face appears to be a social gesture where a lady is willing to carry the baby in her womb for the couple who are incapable to procure the child due to various reasons of infertility. Surrogacy is also considered as best sought out options for those who do not want to cutout from their normal life and still able to make family which considered to be unethical practice. With Surrogacy (Regulation) Bill, 2016, banning commercial renting of wombs and allowing only "altruistic surrogacy".<sup>1</sup>

According to the Bill, all except legally married Indian couples who otherwise would not be able to conceive will be barred from opting for surrogacy. Besides, only a close relative can become a surrogate for "medically proven infertile" couples.

**KEY WORDS :** social gesture , surrogacy birth , Surrogate motherhood.

### INTRODUCTION

There are numerous views regarding the issues of "surrogacy birth" in various countries. Lack of uniformity in the principles being followed in different nations across but this phenomenon of surrogate birth.<sup>2</sup>has been always the talk of town when even celebrities has started showcasing the use of the new technology with regards to birth of their child. In contemporary world, a parent's surrender of a child for a fee, known as babyselling, is a crime all over the world. Many countries have regulations limiting orprohibiting commercial surrogacy and restricting the benefits of intermediaries involved in transfer of child. Although,gestational surrogacy is partially legal in several countries around the globe, in most countries it is not possible going to another country to avoid the local restrictions.

Surrogate motherhood can be viewed as a classic sociallegal problemwhich showcased the issues relating to rights of surrogates, rights of child, or exploitation of surrogates. In 1987, for legalizing surrogacy the many attempts were made across the world, there were numbers of proposals for dealing with problem of surrogacy motherhood, the Baby M case influenced the type of policy responses proposed in the year immediately following the dispute.<sup>3</sup>

Against the background of pre-existing guidelines and draft regulations that governed the assisted reproductive technologies, the ART Bill(Assisted Reproductive Techniques) is designed to shut

<sup>1</sup><https://www.livemint.com/Politics/hARv5G5wm1Fo2QQqQ4313J/Lok-Sabha-passes-surrogacy-bill-in-likely-boost-for-adoption.html>

<sup>2</sup>Reetu and Basabdutta, "Surrogate Birth" AIR 2009 Jour 109.

<sup>3</sup>Susan Markens, *Surrogate Motherhood and the Politics of Reproduction* 22 (2007).

the door on commercial surrogacy arrangements in India, bringing to an end the indirect exploitation of women.

The options available for overcoming infertility increased with the advancement of new medical technologies using in vitro fertilization (IVF) in the 1980s. However, along with the refinement of techniques and new possibilities, including gamete donation and surrogacy, came questions about the nature of parenthood, treatment of embryos, and exploitation of women<sup>4</sup>. Moral justification and ethical debate about harm to women, family structures, and children were swept aside in the hubris of this medical conquest of infertility as doctors focused on providing solutions rather than on their social implications or consequences<sup>5</sup>

Infertility clinics flourished in the 1990s, riding the wave of a global demand for IVF and surrogacy services at lower costs in an unregulated environment; and India became stuck with the dubious reputation of being the “most favoured” destination for fertility options—a certain backroom notoriety that Indian medical tourism had certainly not intended to project<sup>6</sup>. Objections on ethical grounds, in response to reports of exploited egg donors and surrogates, were brushed off as uninformed, moralistic, and detrimental to hapless infertile patients who were finally able to experience the joys of parenthood<sup>7</sup>

### PROVISIONS OF THE SURROGACY (REGULATION) BILL, 2016

The Surrogacy (regulation) bill, 2016 was introduced in Lok Sabha on 21st November, 2016 and on 12th January, 2017 it was referred to standing committee. Thereafter on 10th August 2017 the committee submitted its report to Lok Sabha and on December 19<sup>th</sup> Lok Sabha passed the bill on the basis of the submitted report.

The Surrogacy (Regulation) Bill, 2016 main focus was on prevention of commercial surrogacy and promotion of altruistic surrogacy. The bill also safeguards the surrogate mother rights and child rights and safeguards them against exploitation. Surrogacy is a way by which an infertile married couple who are eligible in accordance with the provisions of the bill under section 4 of said legislation, can now bear a child with help of a surrogate mother eligible as per provisions of the bill. However the surrogate mother will not be given any financial benefit or compensation for renting her womb to intended couple except her medical and insurance expenses during pregnancy.

The proposed legislation provides for registration of surrogacy clinic and establishment of National and State surrogacy board and Appropriate Authority. Moreover the provisions of the act are made with strict observation and also provides eligibility criteria for the couples to be intending parents and provision to be surrogate need to be a close relative of the intending parent. In addition, the intending parents has to prove their infertility beyond doubt and must also prove that they fulfil the following conditions.

- "They are Indian residents who have been hitched for at any rate five years;
- They are in the age gathering of 23-50 years (female accomplice) and 26-55 years (male accomplice);
- A therapeutic declaration expressing that either or the two accomplices are barren;

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<sup>4</sup>Medew J. Surrogacy's painful path to parenthood. *The Age*. 2013 Mar 23 [cited 2016 Nov 10]. Available from: <http://www.theage.com.au/national/surrogacys-painful-path-to-parenthood-20130322-2glhn>

<sup>5</sup>Spar DL. *The baby business: How money, science, and politics drive the commerce of conception*. Boston, Massachusetts: Harvard Business School Press; 2006.

<sup>6</sup>Witzleb N, Chawla A. Surrogacy in India: Strong demand, weak laws. In Gerber P, O'Byrne K, editors. *Surrogacy, law and human rights*. Farnham, UK: Ashgate Publishing; 2015. p.167-91

<sup>7</sup>Bindel J. *Outsourcing pregnancy: A visit to India's surrogacy clinics*. *The Guardian*. 2016 April 1 [cited 2016 Oct 21]. Available from: <https://www.theguardian.com/global-development/2016/apr/01/outsourcing-pregnancy-india-surrogacy-clinics-julie-bindel>

- They don't have any enduring youngster (regardless of whether organic, embraced or surrogate), with the exception of if the enduring kid is rationally or physically tested or experiences a deadly disease;
- A court request concerning the parentage and guardianship of the youngster to be brought into the world through surrogacy;
- Insurance inclusion for the surrogate mother.

Additional eligibility conditions that the intending couple need to meet may be specified by regulations. It could be argued that the qualifying conditions for surrogacy should be specified in the Bill and not be delegated to regulations.”<sup>8</sup>

As per section 4(b) (I) the surrogate mother, apart from proving that she is a close relative of the couple intending the surrogacy, also has to prove all the following conditions:

- She was or is hitched and has her very own offspring;
- She is 25 to 35 years of age;
- She has not been a surrogate mother previously;
- She has a restorative testament of her readiness for surrogacy.

The Bill expresses that any kid resulting from a surrogacy strategy will be the organic offspring of the aiming couple and will be qualified for all rights and benefits that are accessible to a characteristic youngster. It additionally gives that the aiming couple and the surrogate mother can experience a surrogacy strategy just at surrogacy centers that are enlisted with the administration. To start the methodology, the couple and the surrogate mother need to have testaments to demonstrate that there are qualified. These authentications will be conceded by an administration authority (fitting power) if the couple and the surrogate mother satisfy every one of the conditions referenced previously. The Bill doesn't indicate a timeframe inside which the position needs to give the testaments. Further, the Bill doesn't indicate a survey or bid system in the event that the application for the testaments is dismissed.

### OFFENCES AND PENALTIES UNDER THE SURROGACY (REGULATION) BILL, 2016

The Lok Sabha has recently passed the Surrogacy (Regulation) Bill, 2016<sup>9</sup>, primarily intended to prohibit commercial surrogacy, and additionally, constituting National and State level Surrogacy Board to regulate altruistic surrogacy. Section 35 of the Bill provides for a minimum jail term of 10 years for commission of activities enlisted under clauses (a) to (f) of the said provision, which includes advertising and undertaking commercial surrogacy.

The enactment is a resultant of a long-pending demand from the four-corners of the society to regulate the business of surrogacy that has seen various instances of physical and economic exploitation of the surrogate mother, who normally hails from lower income families. Noteworthy to refer is the 228th Report of the Law Commission of India<sup>10</sup>, a *suo moto* attempt of the Commission, which had recommended to prohibit commercial surrogacy after acknowledging the complexities found in the law. Both, the Legislature and the Law Commission, have completely overlooked the growing size of the industry, which has been recorded to be of \$2 billion per year by the Confederation of Indian Industry in a 2012 study<sup>11</sup>. The statistics become significant, given the growing number of nations Prohibiting Commercial surrogacy<sup>12</sup>, which might further expand the already expanding medical tourism in India.

<sup>8</sup><https://www.prsindia.org/theprsblog/surrogacy-regulation-bill-2016-all-you-need-know>

<sup>9</sup><https://www.thehindubusinessline.com/news/national/lok-sabha-passes-surrogate-bill/article25781949.ece>

<sup>10</sup><http://lawcommissionofindia.nic.in/reports/report228.pdf>

<sup>11</sup><https://www.livemint.com/Politics/iJaMugwI57XmKANE1juUnO/Cabinet-clears-bill-on-surrogate-motherhood.html>

<sup>12</sup><https://www.reuters.com/article/us-india-women-surrogacy-factbox/fatcbox-which-countries-allow-commercial-surrogacy-idUSKBN1530FP>

However, since the surrogacy hub gave huge foreign exchange to our Indian economy but it does not justify or rather prove its legality if it is vested with social vices. The issue of surrogacy was widely spreader by very famous case which raised the question of rights of surrogate child, his nationality, his acknowledgement as biological child of intending parents and his right of not been abandoned. In the case of, Baby Manji Yamada V. Union of India<sup>13</sup>, the delivery of the child was adversely delayed owing to a matrimonial dispute between a Japanese parent and administrative regulations regarding grant of visa; and in the other instances, an Australian couple abandoned one of the twins born as they already had a child of the same sex. Following these instances, India had banned foreigners from hiring a surrogate mother in 2015. In December 2018, after deliberation ranging to approx. 2 years, the Lok Sabha has extended this ban to all persons involved in commercial surrogacy, irrespective of their citizenship and nationality. Voices were raised from all the corners of the country against the ban, which raise suspicion about the trafficking of child, trafficking of women for the purpose of surrogacy, possible loss of livelihood and many other justifications.

The New legislation provision are drafted considering the root culture of our nation and values and thus stringent rules are framed where penal provisions are embedded as a part of sanction of law. The draft law has a provision for a jail term of up to 10 years and a fine of ₹ 10 lakh for violations such as abandoning a child and choosing commercial surrogacy. "The decision is big and is in the interest of all women and children. In the Bill, altruistic surrogacy is legalized and commercial surrogacy is criminalized. The Bill also specifies that any person who takes the aid of a doctor or a surrogacy clinic in order to conduct commercial surrogacy will be punishable with imprisonment for a minimum term of five years and a fine that may extend to five lakh rupees. Offences such as (i) undertaking or advertising commercial surrogacy; (ii) exploiting or abandoning the surrogate mother or child; and (iii) selling or importing human embryo or gametes for surrogacy will attract a minimum penalty of 10 years and a fine up to 10 lakh rupees.

## CONCLUSION

Criminalizing commercial surrogacy also gave rise to new rage of crimes which are not only seen as socio economic problem but also considered as new white color crime. In furtherance of making the commercial surrogacy a crime it is also worth noting that in country like India where judiciary is showcasing a drift by bringing the law reforms, it is to be seen that with new legislation of surrogacy where surrogacy for same sex couples or unmarried couple is ban, itself leads to contradictory laws, where on one hand Supreme court legalize the rights of LGBT group and on other hand it entrench the right of parenthood from such couples. More over this new legislation is also appears to be unconstitutional on the ground that it violates the provision of Article 14 and Article 21 with respect to equality and liberty. Right to equality also includes equal opportunities given to select medical treatment as per the requirement and to avail the benefits of new technology as desired. Even in case of Right to life, it also include right to choose the method of reproduction technology available to avert their plight of infertility and right of parenthood which is an essential element and has physiological impact on lives of couples.

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<sup>13</sup>(2008) 13 SCC 518