

## **THE SURROGACY (REGULATION) BILL, 2016... : PROTECTIVE LEGISLATION FOR SURROGATE VICTIMS**

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### **ABSTRACT**

In the last month of the year 2018, the Lok Sabha of India passed the Surrogacy (Regulation) Bill; 2016. it aims to ban commercial surrogacy so as to protect innocent women from exploitation. The said law was highly needed in the current state of affairs as there has been unfair use of this scientific technology at the cost of economically vulnerable households. The paper discusses the key provisions of the new law on surrogacy along with its positive impact on surrogate's victims of abuse and exploitation.

**Keywords:** Assisted Reproductive Technique, Commercial *Surrogacy*, Economically Vulnerable Households, and Surrogacy Board etc.

### **I. INTRODUCTION**

*“Surrogacy is an arrangement, often supported by a legal agreement, whereby a woman agrees to become pregnant, carry the pregnancy to due term, and give birth to a child or children, all of this for another person or persons, who are or will ultimately become the parent(s) of the newborn child or children.”<sup>1</sup>*

There are basically following classes of surrogacy

- Gestational surrogacy
- Traditional surrogacy
- Commercial surrogacy
- Altruistic surrogacy

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<sup>1</sup> Available at (<https://en.wikipedia.org/wiki/Surrogacy>)

In *Gestational Surrogacy*, “the child is not biologically related to the surrogate mother, who is often referred to as a gestational carrier. Instead, the embryo is created via in vitro fertilization (IVF), using the eggs and sperm of the intended parents or donors, and is then transferred to the surrogate”<sup>2</sup>

In *Traditional Surrogacy* “the surrogate either undergoes artificial insemination or IVF with sperm from the male or from a sperm donor. The surrogate herself provides the eggs and is therefore genetically related to the child.”<sup>3</sup>

“Altruistic Surrogacy refers to “those surrogacy agreements where the surrogate does not receive monetary compensation. In most altruistic surrogacy agreements, the surrogate is a close relation to the intended parents (family member/close friend)”<sup>4</sup>

“Commercial surrogacy refers to any surrogacy arrangement in which the surrogate mother is compensated for her services beyond reimbursement of medical expenses. Commercial surrogacy is a complicated — and often controversial”<sup>5</sup>

Altruistic surrogacy is both gestational and traditional. As far as traditional surrogacy and altruistic surrogacy is concerned, there was no such felt need of coming law in that sphere. But the unwarranted use of the commercial surrogacy has necessitated the legal intervention to prevent the exploitation of the vulnerable household and innocent female victims. As per the Thomson Reuters foundation, India’s commercial surrogacy industry in 2017 was estimated to be worth \$2.3 billion annually.<sup>6</sup>

## **II. LEGAL STATUS OF COMMERCIAL SURROGACY IN INDIA:**

Profit surrogacy or commercial surrogacy is banned in Canada, Denmark, New Zealand, the UK and Australia, except for the Northern Territory which has no laws on the matter, but they all allow some forms of altruistic surrogacy. Bulgaria, France, Germany, Italy, Portugal and Spain

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<sup>2</sup> Available at (<https://surrogate.com/about-surrogacy/types...surrogacy/what-is-gestational-surrogacy/>)

<sup>3</sup> Gestational Surrogacy vs. Traditional Surrogacy - La Jolla IVF; available at (<https://www.lajollaivf.com › Fertility Treatments>)

<sup>4</sup> Commercial Surrogacy vs. Altruistic Surrogacy; available at (<https://info.worldwidesurrogacy.org/.../commercial-surrogacy-vs.-altruistic-surrogacy>)

<sup>5</sup> What is Commercial Surrogacy? | available at (Surrogate.com; <https://surrogate.com/about-surrogacy/types...surrogacy/what-is-commercial-surrogacy>)

<sup>6</sup> Indian surrogate mothers grab last chance to make babies ... – Reuters, available at (<https://www.reuters.com/...india...surrogacy/indian-surrogate-mothers-grab-last-chanc...>)

prohibit all forms of surrogacy. In India commercial surrogacy till 2002 was not having legal sanction. It was only in 2002 India legalized commercial surrogacy. In this context it is arguable that Reproductive rights are one of the most important human rights of the women. Nobody except the women itself is having the choice of deciding their reproductive capacity and the manner in which this right is to be exercised. But there has been an alarming violation of this right of the women in the form of commercial surrogacy. If we look upon the problem of surrogate mothers; things are even worse and unethical. As in the case of country like India, legalizing commercial surrogacy has opened a unique source of earning for the disadvantaged group of population mainly comprising of Commercial surrogates from economically vulnerable households. These innocent and needy women are booked for nine months, and their payment is made as per the performance. The contract is usually signed in the second tri -semester of the pregnancy .the plight is that in majority of the cases, the surrogate does not even know when she signs the contract or what it contains. The only reason behind this ignorance is either they are illiterate or they are just acting blindly as per the directions of their husbands. They come from rural background and having no say in decision making process of bearing a child or not baring a child. Their husbands act as a middle man between the prospective parents and the surrogate women. During the whole process of pregnancy till delivery they are kept in totally unknown and clandestine accommodation .the ulterior motive is to keep the whole affair secret and avoid any social stigma to the surrogate woman. Is this not a clear cut violation of the right to family and social life of the surrogate woman? This practice of commercial surrogacy has become a commercial racket and challenging moral and ethical values of the country.

One of the most obvious reasons behind flourishing commercial surrogacy in India is its low cost and easily availability of surrogate mothers at economical rate. Moreover Indian clinics offering Assisted Reproductive Technique (ART) are increasing at complete scale to highlight India as most fertile country in surrogate tourism. The harsh realities of commercial surrogacy were also the concern of the Supreme Court. Therefore in Manji's case (Japanese Baby case, where in September 2009, the baby girl was born to Indian surrogate out of Japanese man serum. The couple got divorced and the ex wife did not want to keep the child) the court issued certain guidelines to the legislature directing to pass appropriate law on commercial surrogacy in India.<sup>7</sup>

### **III. THE SURROGACY (REGULATION) BILL, 2016...**

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<sup>7</sup> Refer, The Assisted Reproductive Technology (Regulation) Bill – PRS, **available at** ([www.prsindia.org/uploads/media/vikas\\_doc/docs/1241500084~~DraftARTBill.pdf](http://www.prsindia.org/uploads/media/vikas_doc/docs/1241500084~~DraftARTBill.pdf)). The Law Commission of India has submitted the 228th Report on “NEED FOR LEGISLATION TO REGULATE ASSISTED REPRODUCTIVE TECHNOLOGY CLINICS AS WELL AS RIGHTS AND OBLIGATIONS OF PARTIES TO A SURROGACY. Available at : (Legality - Welcome to Surrogacy Laws India;surrogacylawsindia.com/legality.php?id=%207&menu\_id=71)

This law is applicable to whole of India except the state of Jammu and Kashmir. The main purpose and object of the bill is to constitute National Surrogacy Board, State Surrogacy Boards and appointment of appropriate authorities for regulation of the practice and process of surrogacy and for matters connected therewith or incidental thereto. The new law has been passed by the legislature to control this commercial racket of surrogacy and has given a ray of hope to the vulnerable households. The law has completely banned commercial surrogacy. It legalized only altruistic surrogacy and that too with in close relatives of the proposed woman.

The following are the main highlights of the new law on surrogacy in India.

- The main provision of the new surrogacy law is the establishment of Surrogacy regulation board at both Central and State-level and State Surrogacy Boards and Appropriate Authorities in the State and Union Territories aims to ensure better health and life of the surrogate mother by; Banning commercial surrogacy, bringing in altruistic surrogacy model and Allowing a woman to be a surrogate only once in her lifetime.<sup>8</sup>
- According to the Bill, 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. Only close relatives, not necessarily related by blood, will be able to offer altruistic surrogacy to the eligible couples.<sup>9</sup>
- It also bans unmarried people, live-in couples and homosexuals from opting for altruistic surrogacy. Now, foreigners, even Overseas Indians, cannot commission surrogacy.<sup>10</sup>
- A woman can become a surrogate mother only for altruistic purpose and under no circumstances she will be paid for it, although payment can be made towards medical expenses.<sup>11</sup>
- The law mandates the compulsory registration of All Assisted Reproductive Technology (ART) in India. These clinics can charge for their service rendered in the course of surrogacy, but the surrogate mother cannot be paid.<sup>12</sup>
- All these clinics will have to maintain records of surrogacy for 25 years.<sup>13</sup>

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<sup>8</sup> Chapter V Constitution of National Surrogacy Board; section 14, Constitution of State Surrogacy Board. Section 23; The Surrogacy (Regulation) Bill, 2016

<sup>9</sup> Chapter III Regulation of surrogacy and surrogacy procedures, section 4 , The Surrogacy (Regulation) Bill, 2016

<sup>10</sup> *Ibid*

<sup>11</sup> *Ibid.*

<sup>12</sup> Chapter IV Registration of surrogacy clinics; Section 10,11,12,The Surrogacy (Regulation) Bill, 2016

<sup>13</sup> Chapter VIII Miscellaneous, Maintenance Of Records. Section43. The Surrogacy (Regulation) Bill, 2016

- The ill practices of Commercial surrogacy and thereby abandoning the surrogate child, exploitation of surrogate mother, selling/import of human embryo have been classified as offences under the law. The law ensures that every child born out of surrogacy surrogate will have the same rights of as that of a biological child <sup>14</sup> .
- All these violations are punishable by a jail term of at least 10 years and a fine of up to Rs 10 lakh.<sup>15</sup>

#### **IV. CONCLUSION**

**THE SURROGACY (REGULATION) BILL, 2016** is the first comprehensive legislation on surrogacy. The said law has very well addressed the menace of commercial surrogacy which had become the lucrative business at the cost of the exploitation of innocent susceptible and economically weaker section of the innocent women. The law by providing the establishment of surrogacy boards at central and state level has created an institutional mechanism for the regulation of surrogacy at both central and state level. There is no denial of the fact that surrogacy has been a lucrative business for the needy ones although at the cost of their health and emotional quotient. The new law has no-doubt restricted the unlawful use of this practice by providing heavy penalization and imprisonment. But the practice of commercial surrogacy is weighed down with many critical predicaments. The point is not to ban or to legalize this practice. It goes much beyond the twofold use and misuse of commercial versus altruistic surrogacy. The serious concern is the compelling reasons behind opting out this practice by the needy, weak, innocent and vulnerable households. Be it at the pressure of the husbands or at the instance of the surrogate women itself. Thus it is economic pressure and poor helplessness that causes them to entre in to such kinds of unethical and unhealthy arrangements. Unless this issue is addressed by the government, no law can go in the long way to curb this profitable business as perceived by the needy surrogate victims.

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<sup>14</sup> Chapter III, Prohibition To Abandon Child Born Through Surrogacy, Section 7 The Surrogacy (Regulation) Bill, 2016

<sup>15</sup> Chapter VII, Offences And Penalties, Section 35. The Surrogacy (Regulation) Bill, 2016