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Surrogacy (Regulation) Bill 2020, its Social and Economic Impact and A Way Forward

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ABSTRACT

Surrogacy is a burning issue in India because of the newly proposed legislation. A surrogate woman bears a child for another woman who is unable to conceive. She can be called the birth giver who, conceives the child, gestates, and delivers it on behalf of another woman who will be construed as the real mother after the child is born. Before 2015, India was a big hub for surrogacy and at that time, there were no laws regulating the same. It was because of the case of Baby Manji Yamada v. Union of India in 2008, that supered the Government to enact a law for regulating the surrogacy. With a surge in reports of exploitation of surrogate mothers, the unethical practices involved in it, and abandonment of children born out of surrogacy, the Government felt the need to prohibit commercial surrogacy and all the exploitation going on in the name of Surrogacy. The Surrogacy Bill 2020 was introduced in the year 2016 in the Lok Sabha after banning commercial surrogacy in 2015, which aims to achieve non-exploitation of surrogate mothers as well as children and regulates and instructs certain conditions to carry out surrogacy. This article presents a detailed analysis of The Surrogacy (Regulation) Bill 2020. It focuses on the social and economic impact of the bill and the way forward for the shortcomings of the bill. It takes a lot of strength and courage to give away a child after bearing it for the full length of pregnancy. This is the beauty of humanity and we need more people with the heart of surrogates to make this world a happy place to live.

Keywords: Surrogacy Bill 2020, Impact, Way forward.

I. INTRODUCTION

The word “surrogate” has been derived from the Latin word “Subrogate” which means “appointed to act in the place of” or to substitute. It refers to a woman who becomes pregnant and gives birth to a child to give the kid away to another person or couple, known as the "intended" or "commissioning" parents. It refers to a woman who becomes pregnant and gives birth to a child to give the kid away to another person or couple, known as the "intended" or

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"commissioning" parents.

Because of the 'Baby M case,'³ 1986 is remembered as a watershed moment in surrogacy. A couple in New Jersey hired a surrogate to carry their child. The surrogate turned down the monetary offer after the delivery of a girl and preferred to keep the child with her.

India originally allowed commercial surrogacy in 2002 and has since been a global hotspot for surrogacy for international intended parents due to a long-term relaxation of any legal framework, limits, and regulations, ensuring a legally uncomplicated road to parenting for overseas intended parents.

Surrogacy can be either commercial or altruistic, depending on whether the surrogate is paid for the pregnancy. It is referred to as commercial if the surrogate receives money for the surrogacy arrangement, and it is referred to as altruistic if she receives no remuneration other than repayment of her medical and other pregnancy-related expenditures, as well as insurance coverage for her.

II. METHODS OF SURROGACY

There are generally two methods of Surrogacy that are adapted on basis of the genetic origin of the egg:

1. Traditional Surrogacy:

In traditional surrogacy, the surrogate's egg is fertilized with the donor's sperm or intended father's sperm. The pregnancy is achieved by intrauterine insemination (IUI) or intracervical insemination (ICI) which are generally performed at fertility clinics. The Surrogate is the biological mother of the child who carries the child for the whole term of her pregnancy and then delivers the child to be raised by others i.e., by the intended father and his spouse. The traditional method is also known as the straight method or genetic method.

2. Gestational Surrogacy:

In gestational surrogacy, pregnancy is achieved by in vitro fertilization (IVF). The embryo is created by fertilizing the egg of the intended mother or a donor and sperms of the intended father or a donor in a laboratory and once they are fertilized it is transferred into the surrogate mother. The surrogate mother is called the gestational carrier and she is not the biological mother and has no genetic link with the child.

³ 537 A.2d 1227, 109 N.J. 396 (N.J. 1988)

III. CLASSIFICATION OF SURROGACY ARRANGEMENT

Surrogacy can be classified into altruistic and commercial surrogacy on basis of whether the surrogate mother receives any financial reward for carrying the child or not.

1. Altruistic Surrogacy

The surrogate mother receives no financial payment for expecting the child during the whole pregnancy period. However, the expenses incurred during pregnancy like medical expenses, maternity clothing, special dietary and other related expenses may be paid by the intended parents. This arrangement usually happens when the surrogate mother is a relative of the intended parents.

2. Commercial Surrogacy

The surrogate mother receives a financial reward for carrying the child during the entire length of pregnancy. The surrogate is paid much more than medical expenses and other basic expenses. This kind of surrogacy is preferred by an affluent infertile couple who can afford it or by people who borrow money from someone to fulfill their dream of being a parent.

In *Baby Manji Yamada v Union of India & Anr.* AIR 2009 SC 84, a Japanese Couple had entered into a surrogacy contract with an Indian woman, and by virtue of which Baby Manji was born. The father filed an application for an Indian passport which requires a birth certificate for its issuance. The authorities had refused to grant a passport because the birth certificate was not issued because ambiguity arose in the case of the mother's name as baby Manji had three mothers- the commissioning mother, the egg donor, and the surrogate. The problem was solved when the Japanese government had provided a one-year visa to Manji on humanitarian grounds. It was because of this case that Supreme Court through its observation recognized commercial surrogacy in India and supered the government to enact a law regulating surrogacy.

IV. THE SURROGACY BILL 2020

In *Jan Balaz v. Anand Municipality*, the Gujarat High Court upheld the Supreme Court's ruling that commercial surrogacy is legal. According to the Supreme Court, commercial surrogacy is permissible in India because there is no statute forbidding womb-lending or surrogacy arrangements. The Law Commission of India suggested that surrogacy be governed through appropriate law in its 228th report, which was presented in 2009. The Law Commission suggested that only altruistic surrogacy be legalized, while commercial surrogacy is prohibited entirely. The Surrogacy (Regulation) Bill, 2020 (Surrogacy Bill) is a piece of ethical, moral,

and social legislation that protects both the surrogate mother's rights and the rights of the child born through surrogacy. It aims to establish a national surrogacy board, state surrogacy boards, and the appointment of suitable authorities to oversee the surrogacy process and practice. One of the most notable characteristics of the bill is that it maintains the ban on commercial surrogacy. The bill primarily wants to restrict altruistic ethical surrogacy to infertile Indian married couples aged 23-50 for women and 26-55 for men. Couples must be Indian citizens, non-resident Indians, Indian-origin individuals, or Indian-origin foreign nationals.⁴ Because some surrogacy procedures can result in infertility, the surrogate must be married and have a kid. Surrogacy is not available to single women however it is available to widows and divorced women who get a certificate of recommendations from the National Surrogacy Board.

According to Clause 4 (ii)(a) of Chapter III relating to Regulation of Surrogacy and Surrogacy Procedures of the 2020 Bill⁵, there shall be no surrogacy or surrogacy procedures conducted, undertaken, executed, or availed of unless the following conditions are met:

- When one of the intended parents has a medical condition that necessitates gestational surrogacy
- On an application made by the mentioned parties in such form and manner as may be prescribed, a couple of Indian origins or an intending woman who wishes to use surrogacy shall acquire a certificate of recommendation from the Board.
- A certificate from a District Medical Board stating that either or both members of the intending couple or intended woman have a medical indication for gestational surrogacy.
- An insurance policy in the amount and in the manner prescribed in favor of the surrogate mother for a period of 36 months covering postpartum delivery complications from an insurance company or an agent recognized by the Insurance Regulatory and Development Authority established under the Insurance.
- No woman shall provide her own gametes as a surrogate mother.
- A woman may not act as a surrogate mother more than once in her life.

V. SOCIO-ECONOMIC IMPACT

Surrogacy is God sent gift for numerous childless couples. The Surrogacy Bill 2020 tries to

⁴ Bhupender Yadav's report on <https://www.hindustantimes.com/analysis/the-new-surrogacy-bill-protects-the-interests-of-all/story-F4DJy6L5QsfYk57npKVB3H.html>

⁵ Need for legislation to regulate assisted reproductive technology clinics as well as rights and obligations of parties to a surrogacy on <https://lawcommissionofindia.nic.in/reports/report228.pdf>

ensure that neither the surrogates nor the child is exploited in any sense for giving lifetime happiness to infertile couples. The bill impacts the social and economic conditions of people in many ways;

The bill has banned commercial surrogacy in India allowing only altruistic surrogacy. This means that the surrogate won't receive any financial aid for delivering the child. This regulation disregards the probable deprivation of earning of surrogate as she will be unable to work during the later stages of pregnancy and she would have to adapt to a regulated lifestyle. Though the bill proposed to give insurance coverage to surrogate mothers but there are no provisions for compensating the surrogate for the loss of income in later stages of pregnancy. The surrogate mother should have been compensated for her noble act of kindness by reimbursing the amount of loss of wages during the pregnancy which she would have received if she was not pregnant. A general formula must be adopted to reimburse the surrogate for the loss of income during the pregnancy as many members of the family might be dependent on her for their maintenance too.

The Supreme Court in *Suchita Srivastava Anr v. Chandigarh Administration*⁶ held that right to make reproductive choice comes under the ambit of the right to personal liberty guaranteed by Article 21 of the constitution. This bill restricts surrogacy to married couples (heterosexuals). It prohibits unmarried persons, homosexuals, and other members of the LGBTQ+ community from opting for surrogacy. This restriction impacts negatively on the whole society and is a sheer violation of the right to equality which is guaranteed under Article 14 of the Constitution.

Even those who are not prohibited from opting for surrogacy need a certificate of infertility from a medical board which states that it is biologically impossible for the couple to have a child in any other possible way other than surrogacy. This condition excludes from its purview cases where women are not infertile but there involves a humongous amount of risk in pregnancy or those women who don't want to go through pregnancy because of career-related commitments. This condition violates the right of females to make the reproductive choice which comes under the ambit of Article 21 of the Constitution.⁷

It is rightly said that there is nothing more beautiful than someone who goes out of their way to make life beautiful for others.⁸ A surrogate is a blessing in disguise for infertile couples. The sacrifice that a surrogate mother makes cannot be put into words. Carrying a child for the whole

⁶ <https://indiankanoon.org/doc/1500783/>

⁷ *Suchita Srivastava Anr v. Chandigarh Administration*

⁸ Mandy Hale

length of pregnancy and then abandoning it and giving it to be raised by others can prove to be very depressing for surrogate mothers. This can have a deep psychological impact on the surrogate mothers and could be emotionally draining too. Indeed, the joy a surrogate gives to a childless couple cannot be compensated in terms of money but it is necessary to reimburse her for her highest act of kindness in some other form.

VI. WAY FORWARD

India's transition into a revolutionary phase has brought about a lot of evolution in people's mentality and progressive development of scraping stereotypical patriarchal mindset of the people. The proposed surrogacy bill is a black taint on the accelerating growth of equality in our country. The proposal of banning commercial surrogacy and allowing only altruistic surrogacy is somewhat restrictive in nature concerning the right to reproduction under Article 21. Altruistic surrogacy strips the surrogate women of their right to make reproductive choices and livelihood.

According to the study backed by the United Nations in July 2012 ⁹estimated the business at more than \$400 million a year, with over 3,000 fertility clinics across India. India being a developing nation, with a major population uneducated and poor, surrogacy could have been a great means of livelihood, to sustain herself and her family.

A complete ban on commercial surrogacy is not a solution to the govt's concern of protecting surrogate women and children from exploitation. Instead, a compensated model of surrogacy should be implemented where the surrogate mother is reimbursed for the loss of income caused by the pregnancy and also for physical and emotional hardships faced by her during the pregnancy. A uniform formula should be adopted to protect the surrogate women from exploitation and reimburse her for the loss.

The bill does not seek its extension towards the LGBTQ+ community thereby creating discrimination between them and the heterosexual people of our society. Even in the 21st century, the LGBTQ+ community is being confined to all the basic rights and privileges that are enjoyed by heterosexual people, and instead, they are buried under the mountain of orthodox and transphobic behavior of society. So, for the benefit of society at large, the people of the LGBTQ+ community should be permitted to raise a child as an outcome of surrogacy. Appropriate Legislations are required to bring about this much-needed change in society.

⁹ <https://www.reuters.com/article/us-india-surrogates-idUSBRE98T07F20130930>

The pre-requisite of obtaining a certificate of infertility violates the right to privacy as guaranteed under Article 21 of the Constitution and as also ruled in the case of Justice K. S. Puttaswamy v. Union of India.¹⁰

For the people who are not infertile but have some other health issue and are not able to procreate a child, this constrain does not serve justice to such people. In *B. K. Parthasarthi v Govt. of A.P*¹¹, the right to make a reproduction is essentially a very personal decision called the 'right of reproductive autonomy and is a facet of 'right to privacy and the intrusion of the state into such a decision-making process has to be scrutinized by the Courts. The decision of requirement of infertility certificate should be abolished and the decision to opt for surrogacy should only and only be dependent on the medical conditions of the intending parents. A medical report should be an appropriate ground for opting for surrogacy.

There is no restriction on the number of children conceived by a fertile couple but the current bill prohibits a surrogate from opting for surrogacy more than once. This prohibition violates the women's right to make a choice of reproduction and her right to liberty and livelihood. Every woman should be allowed to surrogate if she is medically fit to be one and if she is within the age limit prescribed for surrogacy. Option to be a Surrogate should be a personal choice and not a restrictive one and not regulated by law of the land.

VII. CONCLUSION

The surrogacy bill has been passed by the lower house of the parliament i.e. Lok Sabha. However, for the bill to become an Act, it needs assent from the upper house i.e. Rajya Sabha, and eventually from the President of the Country. There still rests a scope of amendment in the bill for the betterment of the people as well as for the implementation of liberty and good conscience through the process of law.

Surrogacy is a beautiful process and the joy to be a parent for a childless couple is heavenly. The surrogates can truly be called God in face of humans for such couples and their sacrifices are commendable. It is hence rightly said you have not lived today until you have done something for someone who can never repay you."¹²

¹⁰ (2017) 10 SCC 1

¹¹ 2000 (1) ALD 199, 1999 (5) ALT 715

¹² John Bunyan