

SURROGACY BILL 2020: AN ANALYSIS

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ABSTRACT

“However motherhood comes to you, it’s a miracle”.

-Jodi Picoult.

There came a bill called The Surrogacy (Regulation) Bill, 2020 for the regulation of the practice of surrogacy throughout the country where a woman gives birth to a child and hands it over to the couple wanting a child. The purpose and intention of the author of the present paper is to discuss about the practice of surrogacy generally and in India, its history, background. Further purpose is to analyze the bill, its various provisions. How is it relevant and required in the modern times? The Bill consists composition of various authorities such as NSB¹ and SSB². The paper further talks about the need for the implementation, pros and loopholes in the Bill. The take and viewpoint of judiciary is also been taken in consideration while discussion. The basic research methodology is being used in the paper. Various cases, the abovementioned bill and some other literature are studied.

Keywords- Surrogacy, India, Constitution of India, NSB, SSB, Commercial, PIL, Rights, Parenthood

INTRODUCTION

“The greatest good is what we do for one another”

-Mother Teresa.

¹ National surrogacy board.

² State surrogacy board.

The process where a woman carries a baby in her womb for someone else or to give away to a needy couple at the delivery is called Surrogacy. Woman who carries the child is called surrogate mother. It is a practice followed throughout the world in a way or other. It can also be said that it is an unconventional way of getting a child. It also known to be a contract made between the parties who are surrogate mother and to be parents of that surrogated baby. At some places it is also known as 'contract pregnancy'. This practice is generally classified in two first is commercial surrogacy and the second is altruistic surrogacy. In the former kind of surrogacy money is taken in lieu of a child whereas in the later form usually only reimbursement for bearing a child is made. It is done gratuitously. Commercial surrogacy is prohibited in many countries. The concept of Surrogacy in India is not new in ancient or vedic history it has mentions for example sons of Gandhari and many more. Then in later eras the surrogacy became taboo, no woman from a good family would do it, a woman was not supposed to surrogate,

people did not want a surrogate child, and even if they did the child did not get that respect in society. But as the time passed and people started getting liberal their thoughts were liberalized, they started taking surrogacy to be practical need. Now it is a boon for childless couple. After having a long journey the bill is here.

There are two kinds of surrogate mothers one is Traditional surrogate and the other one is Gestational surrogate.



In 2002 commercial surrogacy was legalized in India. This made India a hub for surrogacy and people from all over the world would prefer the country. People were attracted due to

relaxation of hard and fast legal rules regarding surrogacy. Foreign exchange rates also contributed as it made services of this country cost effective. Guidelines for the purpose were made by Indian Council of Medical Research. After this several guidelines and Bills came so as to make proper and systematic provisions for the practice. Before the new bill the Surrogacy (Regulation) Bill, 2016 was passed to make altruistic and domestic surrogacy legal, but Parliamentary session got adjourned and lead to the lapse of the bill. History of surrogacy in India goes back to year 1978 when India's first and world's second baby named Kanupriya Durga was born through IVF i.e., in vitro fertilization. But the first legal obstacle comes upon surrogacy in 1986, in Baby Manji Yamada Vs. Union of India³. After giving birth to the child the surrogate decided to keep the baby with her, it took time of two years long legal process for intended parents to take over the child's custody. Though the couple got the custody but since then many legal question arose on surrogacy and been arising.

The current bill was introduced in the Lok Sabha July 15th 2019, passed August 05th 2019. Bill was referred to a committee formed in the Rajya Sabha on November 21st 2019. Report submission was made on February 5th 2020. The amended (Regulation) Bill 2020 can be said to be a reformed version of the draft which was passed in August 2019.

There is one leading case relevant to the Surrogacy Jan Balaz vs. Anand Municipality⁴, The High Court of the Gujarat held that Regulations though are required for the surrogacy related issues such as Guardianship, responsibilities of the fertility clinic, rights of the surrogate mothers etc. Position of law does not change it remains the same and enforceability of surrogacy contract is not affected by public welfare and policy. The new Bill of 2020 is there for gap out these lacunae.

PROVISIONS OF THE SURROGACY (REGULATION) BILL, 2019-20

There are various provisions and reforms made in the bill but major reforms will be discussed in this research. First thing to be discussed will be types of surrogacy which can be practiced and which cannot be.

³ SCC 369, 2008.

⁴ AIR 2020 Guj 21.

(Section2-10)

This portion of the bill provides various definition later used in the bill. E.g., Commercial surrogacy and altruistic surrogacy. This portion of the bill is also about parentage. Intending couple or woman will be the biological parents of the child. The permission of surrogate mother will be required for the purpose of abortion of the child. Appropriate authority will authorize the abortion which should be in accordance with the Medical Termination of Pregnancy Act, 1971.⁵

Prohibited or banned category of surrogacy

1. People in live-in Relationships
2. For Homo sexual.
3. Single parents
4. Unmarried couples
5. Commercial surrogacy.
6. NRIs, Foreigners, PIOs.

Certificates, of Essentiality and eligibility

This covers the proven infertility of one or both of the intending couple, order of the Magistrate court for parentage and custody of the child, insurance risk,

In eligibility foremost thing is that the couple should be citizen of India also married for at least 5 years and should not have any surviving child except for the mentally or physically unsound child.

Authorities

There shall be two tier systems i.e., NSB⁶ and SSB⁷.

Functions of the abovementioned shall be such as:

1. Registration of surrogacy clinics, its granting or cancellation.

⁵ Medical Termination of Pregnancy Act, 1971, No. 34, acts of Parliament, 1971(India).

⁶ National Surrogacy Board.

⁷ State Surrogacy Board.

2. Standards for the clinics.
3. Investigation and taking action in case of violation of the provisions.

Further rules and regulations of the bill-

Question comes of the child born out of the surrogacy procedure, the bill further elaborates that the child born out of the surrogacy procedure deems to be the biological child of the intending parents. It also has assured the safety of sex of the child. Sex selection of the baby shall be a punishable offence.

JUDICIAL APPROACH

Article 14

This guarantees equality before law and equal protection of the law. Recently Supreme Court of India in pursuance of Article 14 and other Fundamental Rights Struck down section 377 of the Indian Penal Code, 1860 in the case Navtej Singh Johar Vs. Union of India⁸ which decriminalized the consensual relations between the adults of any sexual orientation. Also third gender has been recognized by the court in the judgment of National Legal Service Authority of India vs. Union of India⁹.

So it can be said that the current bill is opposite to this approach of judges as it denies the rights of couple who are homosexual to have a child through surrogacy. Same inequality goes with the case of single persons etc, the restriction is on the basis of marriage which is not reasonable.

Article 19 and 21

A blanket ban on commercial surrogacy should not be made as it would be violative of freedom of trade and profession, though reasonable restrictions can be put. Also Constitution in Article 21 talks about right to life and personal liberty which also includes right to privacy, hence to procure a child or not to procure is one's very private and personal decision which state should have no interference into. So the new bill and golden triangle are not really going hand in hand.

⁸ 2018.

⁹ 2014.

Striking features of the bill are here in under

- Ethical altruistic surrogacy is allowed.
- A 'willing woman' is allowed to be a surrogate mother.
- There is extension of insurance coverage for surrogate mother for 36 months.
- Two certificates are made mandatory for the intending couple first is certificate of essentiality and certificate of eligibility for the purpose of surrogacy.
- A prohibition is put on the commercial surrogacy which also includes selling and purchasing of gametes and human embryo.
- National Surrogacy Board at the central level and state Surrogacy Board at the state level are established.

GOVERNMENT VIEWPOINT

There are reports which claim that due to increasing demand surrogate mothers are exploited and forced to enter into the practice due to monetary issues and poverty. According to CII¹⁰ surrogacy is billions industry. It has become a fashion. As nowadays trafficking is increasing, commercial surrogacy has become a good reason for the trafficking. The government for many purposes such as an exit from previous bill which allowed commercial surrogacy brought this new bill.

POSITIVE ASPECTS OF THE BILL-

Condition of practice of surrogacy is improved through this bill to an extent. To setup a structured law and proper authorities to regulate the practice lawfully was required, which this law does. The provision for certificates leaves no room various illegalities that can occur. Protection to the surrogate together with the child born out of surrogacy is given and duties of intending parents are specified. Surrogacy clinics are to be mandatorily recognized and registered which helps in keeping the check on medical malpractice. Provision is also there to prohibit the sex selection of the child.

¹⁰ Confederation of Indian Industries.

CRITICISM OF THE BILL

Commercial Surrogacy-

One loophole can be that instead of banning the commercial surrogacy some precautionary provisions could be inserted. Commercial surrogacy can be executed for positive purposes with cautious takes. Banning the commercial surrogacy will anyways not stop it rather make a new parallel where it will take place illegally.

DISCRIMINATION-

It sounds discriminatory about the availability of the surrogacy practice. Some sections of society are excluded from the bill that too without proper explanation which makes it look like personal document. People excluded come from LGBT community, foreigners etc.

CONCLUSION AND SUGGESTION

In the modern times together with the revolution and evolution of science and technology a huge change in the lifestyle of human being is arising. Reproductive science is evolving. Concept of motherhood has changed; it includes biological, genetic, social and surrogate mother. Surrogacy has become a need in modern society, it a great option for the couple who can't bear the child due to some reason. It is a pressure from family and society on couple to bear a child but when they face problems such as infertility their life becomes miserable to live. Therefore surrogacy is a boon and has to be settled legally. It has become an important part which cannot be avoided but requires a suitable law and legal regulation of the practice.

Furthermore the above discussed bill is quite an attempt to manage and control the surrogacy practice in the country. Surrogacy regulation Bill, 2020 includes widowed and divorced persons apart from infertile couple. Insurance cover of surrogate mother has also been increased from sixteen months to thirty six months.

There are certain things which could be made better or can be changed such as:

- An assurance can be given to the surrogate mother of monetary compensation including insurance.
- Effective implementation of the Bill should be looked after.
- Commercial surrogacy can be allowed though with the strong vigilance and punitive provisions as reasonable restrictions.

