



## Surrogacy: Venture of the womb

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### Abstract

Surrogacy is a contract in which a woman carries a baby for another couple. It is a boon for couples who wish to have their own children but are unable due to infertility. The baby comes into existence through borrowed womb of the surrogate mother. This paper is a critical analysis of the Surrogacy (Regulation) Bill, 2018. The bill was presented on November 21, 2016. It was passed in Lok Sabha December 19, 2018. The bill bans commercial surrogacy and allows altruistic surrogacy. This paper focuses on the impact of this bill through analysis of its' negative and positive aspects.

**Keywords:** surrogacy, infertility, surrogate mother, womb, altruistic, commercial

### Introduction

GOD'S greatest gift to mankind is a child. A child is considered to be a sacred treasure. The beautiful capacity of procreating a life is vested by nature within a woman. Every human being desires to have a natural offspring. Parenthood is the most joyous and a life changing experience. Everywhere across the world, primary importance has been given to the institution of family. When two individuals enter into a matrimonial bond, they create a new family which becomes complete with the birth of their children. The basic idea behind the institution of marriage is regulating of sexual behavior and procreation of children. Since the beginning of time, children have been considered to be a necessity for the continuance of family lineage.

"There is a unique PAIN that comes from preparing a place in your HEART for a child that NEVER COMES" (DAVID PLATT) Due to many reasons a section of society is unable to procreate children. The absence of a child is an excruciating pain. Inability to have children can lead to depression and also marriage breakdown. According to the Indian Society of Assisted Reproduction, infertility currently affects about 10 to 14 percent of the Indian population, with higher rates in urban areas where one out of six couples is impacted. Nearly 27.5 million couples actively trying to conceive suffer from infertility in India <sup>[1]</sup>. Adoption was one of the easiest solutions to fulfill the desire of children. But the desire of people to be genetically linked with the child gave the concept of surrogacy.

SURROGATE has been derived from Latin word 'surrogatus' which means substitute. According to Black's Law Dictionary, 'an agreement wherein a woman agrees to be artificially inseminated with the semen of another woman's husband.' The New Encyclopedia Britannica defines- 'Surrogate motherhood' as the practice in which a woman bears a child for the couple to produce children in the usual way. Section 2(b) of the The SURROGACY (REGULATION) BILL, 2018 says, "altruistic surrogacy" means the surrogacy in which no charges, expenses, fees, remuneration or monetary incentive of whatever nature,

except the medical expenses incurred on surrogate mother and the insurance coverage for the surrogate mother, are given to the surrogate mother or her dependents or her representative. and section 2(f) "commercial surrogacy" means commercialisation of surrogacy services or procedures or its component services or component procedures including selling or buying of human embryo or trading in the sale or purchase of human embryo or gametes or selling or buying or trading the services of surrogate motherhood by way of giving payment, reward, benefit, fees, remuneration or monetary incentive in cash or kind, to the surrogate mother or her dependents or her representative, except the medical expenses incurred on the surrogate mother and the insurance coverage for the surrogate mother <sup>[2]</sup>.

### History

The practice of surrogacy dates back to biblical times. The first mention of surrogacy can be found in "The Book of Genesis" in the story of Sarah and Abraham. The story dates back to 2000 years before Jesus Christ was born. Sarah persuaded her maid Hager to bear their child by sleeping with Abraham. Abraham who was 86 years old was still able to have a child. In 1910 BC Hager gave birth to Ishmael, the first child born through surrogacy <sup>[3]</sup>.

In Mahabharat, Gandhari delivered a solid material rather than a child. Maharishi Vyas divided the material into 100 pans. This was how 100 Kauravas were born. The world's first IVF baby, Louise Brown was born in UK on July 25, 1978. India's first IVF was Kanupriya, born in Kolkata on October 3, 1978.

### Paramount Case Law

#### Baby Manji Yamada V. Union of India <sup>[4]</sup>

India. A Japanese couple entered into a surrogacy contract with an Indian mother pursuant to which baby Manji was

<sup>1</sup> <https://thediplomat.com/2018/05/indias-hidden-infertility-struggles/>

<sup>2</sup> [http://164.100.47.4/BillsTexts/LSBillTexts/PassedLoksabha/257-C%20\\_2016\\_Eng.pdf](http://164.100.47.4/BillsTexts/LSBillTexts/PassedLoksabha/257-C%20_2016_Eng.pdf)

<sup>3</sup> <https://surrogate.com/about-surrogacy/surrogacy-101/history-of-surrogacy/>

<sup>4</sup> Baby Manji Yamada vs. Union of India and Another (2008) 13 SCC 518

born. The father tried to take the baby to Japan but the Japanese Embassy in India refused to grant a Japanese passport and visa to the baby. Mr. Yamada then filed for an Indian passport which requires a birth certificate<sup>[5]</sup>. But a birth certificate requires the name of the father as well as the mother. There was ambiguity in mother's name because Manji had 3 mothers- commissioning, surrogate and the egg donor mother. A birth certificate was not granted since there was confusion and uncertainty in mother's name. Hence, the Indian passport was also refused. The grandmother of the baby flew from Japan to take care of the baby as the father had to fly back due to visa expiration. The grandmother filed a petition under article 32 in the Supreme court, which relegated her to the National Commission of Child Rights Act, 2005. Ultimately it was decided to send the baby to Japan in the care of her father and grandmother<sup>[6]</sup>.

The Surrogacy (Regulation) Bill, 2018

This bill numbered 257-C of 2016 has been passed by Lok Sabha on December 19, 2018. The bill contains 8 chapters and 51 clauses. The bill on becoming Act will be applicable to the whole of India except the state of Jammu and Kashmir. The salient features of the bill are-

- The bill seeks to ban commercial surrogacy
- The bill allows only altruistic surrogacy
- Only such clinics can undertake surrogacy which have been registered with appropriate authority.
- The bill states that both the Central as well as the State government shall constitute a National and State Surrogacy Board.
- No clinic should induce a woman to act as a surrogate, promote commercial surrogacy, advertise commercial surrogacy in print or electronic media or any other form<sup>[7]</sup>.
- The bill prohibits storage of human embryo or gamete for surrogacy. However, they can be stored for legal purposes like IVF, sperm bank and medical research.
- Eligibility criteria for couples seeking a child through surrogacy-
  1. Both should be citizens of India and have been married for at least 5 years.
  2. The female should be in the age group of 23-50 years and the male should be in the age group of 26-55 years on the day of certification.
  3. The couple should not have any surviving child (adopted, biological or surrogate), except if the child is physically or mentally challenged or suffering from a fatal illness<sup>[8]</sup>.
  4. They should obtain a medical certificate stating one of them or both are infertile.
    - Eligibility of surrogate mother-
      1. Should be a close relative of the couple
      2. She was or is married and has at least one child of her own
      3. Should be of the age group of 25-35 years
      4. Should not have been a surrogate mother earlier
      5. Obtain a medical certificate declaring her fit for surrogacy

<sup>5</sup>[https://www.researchgate.net/publication/281710247\\_Commercialization\\_of\\_Surrogacy\\_in\\_India\\_A\\_Critical\\_Analysis](https://www.researchgate.net/publication/281710247_Commercialization_of_Surrogacy_in_India_A_Critical_Analysis)

<sup>6</sup> Malhotra Anil, Malhotra Ranjit; Surrogacy In India; Universal Law Publishing Co.; 2013 edition; page-175

<sup>7</sup> <https://www.prsindia.org/thepersblog/surrogacy-regulation-bill-2016-all-you-need-know>

<sup>8</sup> <https://www.prsindia.org/thepersblog/examining-anti-trafficking-bill-2018>

### Positive aspects of the bill

Some of the remarkable features of the bill are as follows-

1. The bill prohibits the clinic or the intending couple or any other person from indulging in any form of sex selection for surrogacy<sup>[9]</sup>.
2. Similar rights are available to children born through surrogacy as that of biological children.
3. An insurance coverage of reasonable amount has to be insured for the surrogate mother<sup>[10]</sup>.
4. Section 4(b IV) of the bill says "no woman shall act as a surrogate more than once in her life time." This prevents the exploitation of woman and also safeguards their health<sup>[11]</sup>.
5. The bill completely bans commercial surrogacy and only has provisions for altruistic surrogacy.

### Negative aspects of the bill

The Surrogacy (Regulation) Bill, 2018 has the following shortcomings

1. Only couples who have been married for at least 5 years are allowed to have a baby through surrogacy. This is the most striking defect in the bill. Even after the regulation of section 377, surrogacy is not allowed for lesbians, gay, transgenders and bisexuals.
2. There are no provisions in the bill for the rights of single parent or those who are in live in relationships for surrogacy.
3. According to the bill, the surrogate mother should be a close relative of the couple. But the term 'close relative' is not defined anywhere in the bill. Also acting of close relative as a surrogate can lead to many psychological and emotional issues.
4. The bill does not allow foreign citizens to indulge in the practice of surrogacy in India. There are provisions in the Bill only for Indian citizens. There are no provisions in the bill for NON- INDIAN citizens<sup>[12]</sup>.
5. Constitution is the source to legislate all laws in the country as it is the supreme law of the land. All laws have to pass the "GOLDEN TRIANGLE TEST" devised by the Supreme Court. Unfortunately, this bill does not pass the test. There is unreasonable discrimination on grounds of sex, marital status and nationality which violates article 14 of the Indian Constitution. Right to livelihood and right to reproductive autonomy are enshrined under Art.21. Surrogacy industry is a trade for many reproductive clinics and ban on this is violative of Art.19(1)(g). The Golden triangle provides full protection to individuals from any encroachment upon their rights<sup>[13]</sup>.

### Conclusion

"Of all the rights of women, the greatest is to be a Mother" - Lin Yutang the greatest joy to a woman is being a mother. Every woman has a right to avail the opportunity, if not naturally then through scientific techniques, and experience

<sup>9</sup>[http://164.100.47.4/BillsTexts/LSBillTexts/PassedLoksabha/257-C%20\\_2016\\_Eng.pdf](http://164.100.47.4/BillsTexts/LSBillTexts/PassedLoksabha/257-C%20_2016_Eng.pdf)

<sup>10</sup> <https://www.ijsr.net/archive/v8i2/ART20194994.pdf>

<sup>11</sup>[http://164.100.47.4/BillsTexts/LSBillTexts/PassedLoksabha/257-C%20\\_2016\\_Eng.pdf](http://164.100.47.4/BillsTexts/LSBillTexts/PassedLoksabha/257-C%20_2016_Eng.pdf)

<sup>12</sup> <https://www.ijsr.net/archive/v6i6/ART20174242.pdf>

<sup>13</sup> <https://www.ijsr.net/archive/v8i2/ART20194994.pdf>

the bliss of motherhood. Surrogacy is a boon to couples who are unable to have their own children. As of now there is no set rules and regulations in regards to surrogacy. Surrogacy in India is still A LAW IN THE MAKING. Though there are various positive aspects of the bill but the negative aspects outweigh the pros. The bill was made in 2016 and since then there have been tremendous changes which need to be taken into consideration before enforcing it. The bill needs revision in various aspects such as, provisions need to be made for the LGBT community as section 377 of The Indian Penal Code has been partly scrapped and they have been given recognition. The bill is an admirable step towards regulating the process of surrogacy but it is in dire need of revision as it ignores some of the most important aspects and sections of the society. India has become a booming industry for commercial surrogacy. More than \$2.3 billion are generated every year through commercial surrogacy. The bill puts a complete ban on commercial surrogacy and allows only altruistic surrogacy. Rather than completely banning commercial surrogacy provisions should be made for regulating the process. A large number of women benefit from this practice as they are able to generate some income. Commercial surrogacy is not entirely a bad practice. It is beneficial for both the couple and the surrogate as the childless couple get their child and the surrogate who is in need of money gets income. But this practice needs major regulation to prevent the exploitation and harassment of women. The law makers need to re examine the legal frameworks and make suitable changes in the bill to satisfy the needs of all.

## References

1. <https://thediplomat.com/2018/05/indias-hidden-infertility-struggles/>
2. [http://164.100.47.4/BillsTexts/LSBillTexts/PassedLoksabha/257-C%20\\_2016\\_Eng.pdf](http://164.100.47.4/BillsTexts/LSBillTexts/PassedLoksabha/257-C%20_2016_Eng.pdf)
3. <https://surrogate.com/about-surrogacy/surrogacy-101/history-of-surrogacy/>
4. Baby Manji Yamada vs. Union of India and Another. 2008; 13:518
5. [https://www.researchgate.net/publication/281710247\\_Commercialization\\_of\\_Surrogacy\\_in\\_India\\_A\\_Critical\\_Analysis](https://www.researchgate.net/publication/281710247_Commercialization_of_Surrogacy_in_India_A_Critical_Analysis)
6. Malhotra Anil, Malhotra Ranjit. Surrogacy in India; Universal Law Publishing Co edition. 2013, 175
7. <https://www.prsindia.org/theprsblog/surrogacy-regulation-bill-2016-all-you-need-know>
8. <https://www.prsindia.org/theprsblog/examining-anti-trafficking-bill-2018>
9. [http://164.100.47.4/BillsTexts/LSBillTexts/PassedLoksabha/257-C%20\\_2016\\_Eng.pdf](http://164.100.47.4/BillsTexts/LSBillTexts/PassedLoksabha/257-C%20_2016_Eng.pdf)
10. <https://www.ijsr.net/archive/v8i2/ART20194994.pdf>
11. [http://164.100.47.4/BillsTexts/LSBillTexts/PassedLoksabha/257-C%20\\_2016\\_Eng.pdf](http://164.100.47.4/BillsTexts/LSBillTexts/PassedLoksabha/257-C%20_2016_Eng.pdf)
12. <https://www.ijsr.net/archive/v6i6/ART20174242.pdf>
13. <https://www.ijsr.net/archive/v8i2/ART20194994.pdf>