



## The Assisted Reproductive Technologies Regulation Bill, 2010 : A Hope Ray to Regularise Surrogacy in India- A Human Right Perspective

### KEYWORDS

Surrogacy, human rights

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**ABSTRACT** *It takes someone really brave to be a mother, someone strong to raise a child and someone special to love someone more than herself.....Lilly*

*The above lines suits best to the biological mothers. But unfortunately, if she is unable to conceive for some medical reason then, she has to go for other options to enjoy her motherhood. One of the options which is growing day by day is surrogacy. Like all achievements in the sciences, the technologies proposed for the application of these achievements can be either good or bad, depending upon the motives, the methods adopted, and the consequences. Likewise, this technology too can be used either to promote the good of the human person/s and of society, or for its debasement and ruin. To regularise Surrogacy in India, THE ASSISTED REPRODUCTIVE TECHNOLOGIES REGULATION BILL, 2010 is in existence which is yet to get nod for the implementation as legislation. Like other technology, this bill also has its own pros and cons violating human rights.*

*This proposed paper deals with the meaning of surrogacy, whether it is a boon or a bane to childless couple? The criteria which have to be taken into consideration, by both the surrogate mother and the couple before opting for surrogacy? The law which speaks about surrogacy and surrogacy from the view point of human rights.*

### Introduction:

There is a saying every creeper should have a flower and every woman a child... which clearly shows the importance of a child in every family. One of the primary objectives of marriage is the "procreation of child". This objective has meaning only if a woman is able to conceive. Otherwise the couple has to go for other means to get a child. In this situation, "surrogacy" has come as a boon to every childless couple. To regularise Surrogacy in India, THE ASSISTED REPRODUCTIVE TECHNOLOGIES REGULATION BILL, 2010 is in existence which is yet to get nod for the implementation as a legislation. Like other technology, this bill also has its own pros and cons violating human rights. But then, Is really a surrogacy a boon? What are the criteria which have to be taken into consideration, by both the surrogate mother and the couple before opting for surrogacy. Is there any law which speaks about surrogacy? Will it violate the human rights in anyway?

### Definition of Surrogacy:

Surrogacy is the act of a woman, altruistic by nature, to gestate a child for another individual or couple, with the intent to give said child back to his parents at birth.<sup>3</sup> Surrogate mother is a woman who bears a child for another person, often for pay, either through artificial insemination or by carrying until birth another woman's surgically implanted fertilized egg.<sup>1</sup>

### Types of Surrogacy:<sup>4</sup>

#### 1. Traditional Surrogacy:

Traditional surrogacy refers to the process where a woman uses her own eggs and is artificially inseminated with another man's sperm (not her husband or partner). The surrogate carries and delivers the baby, and then gives the baby to the intended parents. The surrogate is not considered the baby's mother. Most states find traditional surrogacy to be illegal and have laws forbidding the formation of traditional surrogacy contracts.

#### 2. Gestational Surrogacy:

Gestational surrogacy refers to the process where a woman is impregnated through in vitro fertilization using another woman's eggs and another man's sperm. The surrogate carries and delivers the baby, and then gives the baby to the intended parents (usually the egg donor and sperm donor). Gestational surrogacy is usually favored over traditional surrogacy because the surrogate is not biologically related to the baby. Most states that have laws allowing surrogacy contracts only allow gestational surrogacy.

### "Assisted Reproductive Technologies (Regulation) Bill, 2010: A brief analysis

Like all achievements in the sciences, the technologies proposed for the application of these achievements can be either good or bad, depending upon the motives, the methods adopted, and the consequences. Likewise, this technology too can be used either to promote the good of the human person/s and of society, or for its debasement and ruin.

Now we shall examine the proposal to make surrogate motherhood legal in India, which is contained in the draft Bill: "Assisted Reproductive Technologies (Regulation) Bill, 2010." This bill was drafted to provide for a national framework for the accreditations, regulation and supervision of assisted reproductive technology clinics, for prevention of misuse of assisted reproductive technology, for safe and ethical practice of assisted reproductive technology services and for matters connected therewith or incidental thereto.

The Preamble to the Bill states, inter alia, "The last nearly 20 years have seen an exponential growth of infertility clinics that use techniques requiring handling of spermatozoa or the oocyte outside the body, or the use of a surrogate mother. . ." The Preamble justifies the introduction of this Bill on the ground that "Besides the fact that every couple has the right to have a child, in India infertility widely carries with it a social stigma."

The formation of National Advisory Board<sup>5</sup> is proposed

to necessities to exercise the functions such as to recommend modification from time to time in the attached rules and schedules where relevant in regard to the following, and performs any other functions and tasks assigned to it by the Central Government such as to recommend: <sup>6</sup>

- (a) minimum requirements related to staff and physical infrastructure for the various categories of assisted reproductive technology clinics;
- (b) regulations in respect of permissible assisted reproductive technology procedures;
- (c) regulations in respect of selection of patients for assisted reproductive technology procedures;
- (d) encouragement and promotion of training and research in the field of assisted reproduction;
- (e) encouragement of the establishment and maintenance of a national database in respect of infertility;
- (f) guidelines for counselling and providing patients with all necessary information and advice on various aspects of assisted reproductive technology procedures;
- (g) ways and means of disseminating information related to infertility and assisted reproductive technologies to various sections of the society;
- (h) regulations in respect of research on human embryos;
- (i) proforma for obtaining information from donors of gametes and surrogate mothers, consent forms for various procedures, and contracts and / or agreements between the various parties involved, in all of the languages listed in the Eighth Schedule of the Constitution;
- (j) policies from time to time on assisted reproduction;

The Bill proposes to the formation of State Advisory Board as well<sup>7</sup>. The Bill proposes to contain the procedure for registration of all assisted reproductive technology clinics and it clearly mentions the requirement of particulars/informations that has to be filed along with the application. It prohibits any assisted reproductive technology clinic performing any of the functions without a certificate of accreditation issued by the State Board.

The Bill confers duties to an assisted reproductive technology clinic<sup>8</sup> such as: Duty of the assisted reproductive technology clinic to obtain written consent, duty of the assisted reproductive technology clinic to keep accurate records, duties of assisted reproductive technology clinics using gametes and embryos, etc. It also prohibits pre determination of sex thereby giving justice to gender. The Bill also provides for sourcing<sup>9</sup>, storage, handling <sup>10</sup>and record keeping for gametes<sup>11</sup>, embryos and surrogates. It has provided certain regulations regarding research on embryos. The Bill also provides with the rights and duties of the patients, donors, surrogates as well the children born out of surrogacy thereby protecting their rights. The Bill provides with penalties in case of any violations of any provisions of the proposed law.

Under the Bill assisted reproductive technologies, including surrogacy, shall be available to married and unmarried couples as well as single persons. Surrogacy agreements would become legally enforceable and a surrogate mother shall relinquish all parental right over the child. The birth certificate issued in respect of a baby born through surrogacy shall bear the name/s of intended parent/s. All expenses related to pregnancy shall be borne by the intended parents. A surrogate may also receive additional monetary compensation for bearing a child, so commercial surrogacy becomes explicitly allowed. Only Indian citizens aged 21–35 could become surrogates. If a potential surrogate is married, her husband's consent would be required. A surrogate will not be allowed to undergo embryo transfer for the same commissioning couple or individual more than three times. No woman shall act as a surrogate for more than five successful live births, including her own children. Under the bill only gestational surrogacy would be allowed; a surrogate shall not donate her oocytes to the intended parent/s. The Bill makes it illegal for Indian women to travel abroad to become surrogates.

The Bill makes it impossible for foreign intended parents from countries where surrogacy is forbidden to arrange for their reproductive program in India. It stipulates that a letter from the embassy or foreign ministry must be provided that clearly and unambiguously states that their respective country permits surrogacy and that the child born through surrogacy in India would be granted entry. Foreigners seeking surrogacy in India must appoint a local guardian responsible for taking care of the surrogate during the pregnancy and after the birth. A surrogate shall be duty-bound not to engage in any act that would harm the fetus, so the option of fetal reduction or abortion is a decision that can only be made by her doctor or intended parents. The Bill is awaiting approval from the Law Ministry, after which it will be discussed by the Indian Parliament (Times of India 2011).

#### **Problems of surrogacy in India: A human right perspective**

The government is yet to bring in legislation to regulate the rent-a-womb business which is thriving in India. Surrogacy in India is unregulated although the Indian Council of Medical Research (ICMR) has set "national guidelines" to regulate surrogacy are just guidelines. All that this means is that surrogate mothers need to sign a "contract" with the childless couple. There are no stipulations as to what will happen if this "contract" is violated. Contract is made like any other business leaving human values behind thereby violating human rights.

There is no doubt that both the biological parents and the surrogate mothers benefit from surrogacy but the lack of a law is gaping opportunity for exploitation. There are so many stories about how young girls from orphanages were being 'hired out' for surrogacy and they themselves never got any money. And even if the mothers do get the money, poor women often have little choice.

Pregnancy affects a woman's health and one cannot know all the long-term consequences of repeated pregnancies like damage to cardiovascular health. Pregnancy can also aggravate existing health conditions and a poor uneducated woman in India may not fully comprehend the risks, either short-term or long-term, if she is aware of her health problem that is.

A baby soaks up nutrition from its host's body and though the 'mother' might have a better diet during the pregnancy because of the money and care provided by the biological parents, her health may not be that good enough to begin with. In India women are not as healthy as they are in the developed countries due to poorer nutrition levels since childhood. Poor women who rent out their womb do not care or even think about the effects of pregnancy related problems. And even if middle class women go for it, the motive is money and that makes them vulnerable to exploitation. There are instances of desperately poor women in India selling their own babies because they can't feed the rest of their family!

There are other negative aspects of surrogate motherhood. There are some who feel that if surrogate motherhood becomes a legal 'business' then soon educated working women will start hiring wombs to prevent a break in their career! To take an extreme scenario, baby 'factories' could spring up!! A scene from a horror movie, which fortunately will not see the light of day as most countries have realised the downside of surrogacy.

A poor country like India badly needs a law on surrogacy and it badly needs to make payments to surrogate mothers illegal. The poorer the country, the more fear of exploitation. If in the long term the mother pays a heavier price, all short-term benefits have no meaning. The combination of poverty, illiteracy and the lack of power that women have over their own lives in India are a deadly combination. Surrogacy compromises the dignity of the child by making the child the object of a contract—a commodity. It further compromises the

dignity of the mother, even if her participation is voluntary, by merely treating her as a 'womb for hire'.

Surrogacy and the act of intentional parenthood create a situation in which as many as five people can claim a parental status over the resulting child: the contracting parents, the genetic mother and father, and the surrogate.<sup>12</sup> This reality fragments the reproductive function of marriage, resulting in several consequences: "First, it separates sex from reproduction; second, it separates motherhood from pregnancy; and third, it separates the unity of one couple in the involvement of a third person within the potential family relationship."<sup>13</sup> Though some researchers are quick to point out that, in post-modern society, traditional families are no longer the singular norm,<sup>14</sup> it is virtually uncontested that a child fares best when raised in a home with married, biological parents.<sup>15</sup> Many contracting couples, desperate to have children, are also prepared to pay premium prices for specific physical attributes and good looks.<sup>16</sup>

#### Indian Judiciary on Surrogacy:

In a landmark judgment in a case which had no precedents in the country, the Gujarat State High Court in India conferred Indian citizenship on two twin babies fathered through compensated surrogacy by a German national in Anand district. Raising a lot of questions related to surrogacy, the bench observed, "We are primarily concerned with the rights of two newborn, innocent babies, much more than the rights of the biological parents, surrogate mother, or the donor of the ova. Emotional and legal relationship of the babies with the surrogate mother and the donor of the ova is also of vital importance." After considering the case laws related to surrogacy of countries like Ukraine, Japan and the USA, the court decided the case at hand by inclining to recognize the surrogate mother as the natural mother of the children. And since the woman is Indian, the children were granted Indian citizenship and passports under the legal provisions<sup>17</sup>. However as India does not allow full fledged dual citizenship<sup>2</sup>, the children will have to convert to Overseas Citizenship of India<sup>3</sup> if they are also going to be taking foreign citizenship of their biological parent's country. So far no case has been come before court regarding surrogacy.

In 2008, the Supreme Court of India in the Manji's case<sup>18</sup> (Japanese Baby) has held that commercial surrogacy is permitted in India. That has again increased the international confidence in going in for surrogacy in India.

#### Report of the Law Commission of India:<sup>19</sup>

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."<sup>4</sup> The following observations had been made by the Law Commission:

[1] Surrogacy arrangement will continue to be governed by contract amongst parties, which will contain all the terms requiring consent of surrogate mother to bear child, agreement of her husband and other family members for the same, medical procedures of artificial insemination,

reimbursement of all reasonable expenses for carrying child to full term, willingness to hand over the child born to the commissioning parent(s), etc. But such an arrangement should not be for commercial purposes.

- [2] A surrogacy arrangement should provide for financial support for surrogate child in the event of death of the commissioning couple or individual before delivery of the child, or divorce between the intended parents and subsequent willingness of none to take delivery of the child.
- [3] A surrogacy contract should necessarily take care of life insurance cover for surrogate mother.
- [4] One of the intended parents should be a donor as well, because the bond of love and affection with a child primarily emanates from biological relationship. Also, the chances of various kinds of child-abuse, which have been noticed in cases of adoptions, will be reduced. In case the intended parent is single, he or she should be a donor to be able to have a surrogate child. Otherwise, adoption is the way to have a child which is resorted to if biological parents and adoptive parents are different.
- [5] Legislation itself should recognize a surrogate child to be the legitimate child of the commissioning parent/s without there being any need for adoption or even declaration of guardian.
- [6] The birth certificate of the surrogate child should contain the name/s of the commissioning Parent/s only.
- [7] Right to privacy of donor as well as surrogate mother should be protected.
- [8] Sex-selective surrogacy should be prohibited.
- [9] Cases of abortions should be governed by the Medical Termination of Pregnancy Act 1971 only.

#### Conclusion:

No doubt India currently is in heavy need of laws which can regulate and can have a check on the surrogacy activity in India because in India it is now increasing as a industry and here many clinics are providing these services to foreign couples who don't want to compromise their carrier and they find it more easy to give their eggs and sperms and which is then fused clinically and then planted in the womb of the women ready to give her womb on rent ,and Indian clinics are acting like agents and in order to provide such services they charge good amount from foreigners. The report of the Law commission if followed will ease the problems of surrogacy in India and the law has to come at the earliest as a hope ray for surrogacy activity in India. Commercial surrogacy in India, though legalized, is still considered a black mark socially. It is not just an aid to the Indian economy, but also a help to those who live a below-standard life. At the same time, the Indian government should carry out the legal requirements that ensure a woman rendering her womb has complete knowledge about the procedure, understands the contracts well, and knows what her body will be going through. Otherwise, there is no doubt regarding violations of human rights. For these reasons The Assisted Reproductive Technology Bill, 2010 should be enacted as early as possible.

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