

Critical Analysis of Surrogacy (Regulation) Bill 2019

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Abstract

Surrogacy arrangement is famous for child giving technique to infertile couple, as some women are carrying the child for others as they enter into surrogacy arrangements, but such arrangement consist commercial aspect. Thus, it becomes subject of criticism. Here, I specifically argue that, a lot of research work has been published against commercial aspect of surrogacy arrangement across the globe with prohibitionist approach. Such sort of work has also helped to bring enormous awareness among the people about exploitative approach of surrogacy all over the world.

As a result, demand has increased for regulation of surrogacy in India. Therefore, Indian Government has made several attempts for enactment of suitable legislation for its better regulation. The first attempt was made in the year 2008, by drafting, The Assisted Reproductive technology [regulation] Bill 2008, since then it is tabled in the parliament but redrafted several times as per suggestions and recommendations given by public and eminent researchers, civil society members.

Although, only few guidelines and ordinances are working for regulation of surrogacy in India, but Surrogacy arrangement has created so many legal, social, ethical issues pertaining to surrogate mother, children and the parenting respectively. The surrogacy procedures are carried out in absence of proper legislation; therefore, it increases exploitation circumstances of poor woman. Thus, such situation required suitable legislation to resolve these issues. Current legal position shows that Indian government is in dilemma since 2008. Now, presently, surrogacy regulation Bill 2019 is pending in the parliament. This paper highlights various provisions, pertaining to commercial surrogacy, place in the present Bill 2019, as well earlier bills drafted since 2008, with view to analyze changes made during journey of years. This article would also study the government's view regarding giving of surrogacy rights to the infertile couple. Whereas, in this article it has attempted to discuss the dilemma found among surrogacy regulation bills particularly present Bill 2019 tabled in the Parliament. Here, analytical approach is used to study bills provision. Thus, study of bills is necessary to understand, what kind of surrogacy right must approve whether commercial or altruistic or both to the needy Indian citizens.

Keywords: surrogacy arrangement, surrogate mother, legal social issues, legislation, dilemma

Introduction:

Why we need surrogacy legislation such question may arise obviously in mind. But when we think about distress of infertile couple then we feel need and urgency of surrogacy legislation. The Surrogacy is considered as practice where one woman carries the child for another and delivered the same after his/her birth to the intended person. Surrogacy also has defined under regulation bill 2019 that “surrogacy means a practice whereby one woman bears and gives birth to child for an intending couple with the intention of handing over such child to the intending couple after the birth¹. Generally speaking, surrogacy is one of the practices of

Artificial Reproductive Technique, whereby outside fertilize embryo implanted in to the womb of surrogate mother². Therefore, this process is better option for infertile couple to get their genetic child. In this way, it lso lessens the social burden Of childless as well distress of infertile couple. So, I argued that looking to the benefits surrounding to the surrogacy practice, it is essential, to have legal surrogacy rights to the infertile couple. On the other side surrogacy arrangement has created so many legal, social, ethical issues related with surrogate mother, children and the parenting respectively. If, we want to talk about giving right of surrogacy, through legislation then, the first of all, the law maker must ascertain any one aspect of surrogacy for Indian society. In fact, surrogacy has two kinds

traditional and gestational. Again, gestational surrogacy has two forms altruistic and commercial. And Out of these two forms government need to make choice for enacting surrogacy law. This article would study and focus on the government's view regarding giving of surrogacy rights and protection of surrogacy rights to the infertile couple. It is the very crucial dilemmas situation before the legislature.

The government has made several attempts to resolve this situation. Thus, it is necessary to study, what kind of surrogacy right must approve whether commercial or altruistic or both to the needy Indian citizens. Hence, before reaching to the conclusion we need to explore gestational aspects of surrogacy and bills. The Law commission of India in his report suggested that gestational surrogacy is a pregnancy in which one woman (genetic mother) provide the egg, which is fertilized, and another woman (the surrogate mother), carries the foetus and gives birth to the child³. Author Heather E. Dillaway, argues, that the gestational aspect is provided by the woman who carries the foetus to term, nourishes it for nine months, and gives birth to the child.⁴ So, the surrogate mother is considered as the main pillar of this gestational surrogacy. In this type, genetic linkage problem has sorted out by implanting fertilize egg in the womb of surrogate woman so that surrogate mother can't claim genetic right over the child. Therefore, it is legally and biologically safest mode of surrogacy.

The Gestational surrogacy is divided in to two parts by the paying mode. If surrogacy arrangement carried out without monetary compensation to the surrogate mother other than medical expenses then it is called altruistic. And when surrogacy arrangement carried out with monetary compensation other than medical expenses then it is commercial⁵.

Commercial aspects become controversial, for exploitation of poor, disadvantage rural women. Therefore, it becomes subject of criticism. The various scholars have defined it as 'renting womb'⁶ 'baby selling'⁷ 'commodification of motherhood'⁸.

Amrita Pande in her words stated that, in India commercial surrogacy is form of labour and has become a survival strategy and a temporary occupation for some poor rural women further, she

has narrated that feminist have denounced surrogacy as the ultimate form of medicalization, commodification and technological colonization of the female body, and as a form of prostitution and slavery resulting from the economic and patriarchal exploitation of women⁹. In the practice of surrogacy, poor women who are in desperate need of money got attracted to provide womb service in exchange of money such women get exploited physically, emotionally and economically¹⁰. This argument is looks sound and concrete for known reasons that women need to bear all the burden of surrogacy and has to handover the child to the intended parents as soon as takes birth, even some time she paid less after pregnancy¹¹. Most substantial risk related to surrogacy is the implantation of multiple embryos, and pregnancies death¹².

Here, I specifically argue that a lot of scholarly work has been published against commercial aspect of surrogacy across the globe with prohibitionist approach, and commercial surrogacy has also posed legal, ethical issues before the government. Certainly, very few have favoured commercial aspect of surrogacy and accordingly they have expressed their views in support of commercial aspect that the poor women get way to earn money to fulfil their needs¹³. Even they get an opportunity to help others. While some believes commercial surrogacy provides poor women with an opportunity to use their bodies to increase their wealth while providing a service, others see it as outsourcing reproduction through economic exploitation of surrogate mothers¹⁴. In fact, both views have been expressed concern over possible outcome after enactment.

Current legal position shows that Indian government is in dilemma since 2008. And the dilemma is about, 'which option must be suitable and better for Indian culture'. This article would focus and discuss the present dilemma found among surrogacy regulation bills particularly present bill 2019 tabled in Parliament. Here, analytical approach is used to study bills provision

Dilemma of legal provision (pertaining to commercial surrogacy)

Thus, scholarly work has improved awareness among the people about negative impact of commercial surrogacy on the rural poor women.

This leads to growing demand for regulation of surrogacy in India. Earlier commercial surrogacy was largely an unregulated and cheap in India. Similarly, it has been allowed since 2002 through ICMR guidelines. Whereas, India's liberal approach further propelled the entirely unregulated sector to organize itself into a fast-growing profitable venture¹⁵. Malpractices of Surrogacy clinic and ART banks was also seen in exploitation of surrogates. Therefore, in view of regulation and supervision of ATR clinic, the Ministry of Health and Family Welfare, approved these guidelines in the year 2005, as National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India¹⁶.

These guidelines mainly deal's with regulation of surrogacy clinic and are nonbinding because the Indian Government has not adopted them into law¹⁷. It allowed commercial surrogacy arrangement. Hereby, government ignored ground realities about exploitation of women and commodification of surrogacy. Indian feminist and scholars have heavily criticized ICMR guidelines because are ineffective as they did not carry the weight of legislation¹⁸.

Meanwhile Supreme Court of India, in the landmark case Baby Manaji Yamanda vs Union of India¹⁹ accepted the meaning of commercial surrogacy, and formally legalizes commercial surrogacy. Following this case, commercial surrogacy was legal in India in absence of law. Therefore, in view to improve and escape this situation the law commission of India after detail discussion submitted its report to the Government of India in August 2009²⁰. In this report commission recommended active legislative intervention to facilitate correct uses of the new technology. It also stated that the need of the hour is to adopt a pragmatic approach by legalizing altruistic surrogacy arrangement and prohibit commercial ones²¹.

Similar view was also express by Indian judiciary in the case of Jan Balaz vs. Anand Municipality²². In this case the Gujarat High court opined that there is absence of a regulatory statutory law to address issues concerning surrogacy, Further, it stated that legislature has to address various legal ethical issues surrounding surrogacy. It expressed the urgency of adoption of enactment²³.

It was the proper time for the Government to intervene in the practice of surrogacy through law

but Government kept it unanswered. And, allowed the ICMR to continue with preparation of draft bill for surrogacy regulation. On the same occasion ICMR had been working on the regulation of surrogacy since 2005, as result it prepared draft bill 2008 as titled The Assisted Reproductive Technology (Regulation) Bill 2008²⁴. The bill was considered to be in completed as is full of lacunae were noted in the bill. It provides that single person may also go for surrogacy, even acknowledges surrogacy arrangement and its enforceability but nothing about prohibition of commercial surrogacy²⁵. This bill went through serial revision in 2010, 2013 and 2014 as several changes were made by Ministry of Health and Family Welfare, the Ministry of Law and Justice, but left commercial aspect, exploitation of surrogate women unattended in the bill till 2016.

The bill 2010 mostly speaks about registration of clinic with registration authority. It also provides and allowed commercial surrogacy for foreign couple; couple live in relationship and single individual²⁶. It also provides very less amount of rights to surrogate mother. The bill 2014 disqualifies homosexual couples, foreign single individuals and gay couple from having children through surrogate mothers in India.²⁷ It allowed negotiations between surrogate mother and commissioning parents and removed the role of agent and clinic while deciding compensation under surrogacy arrangement²⁸. The bill provisions were inadequate in protecting and safeguarding the rights and health of surrogate women recruited for commercial surrogacy²⁹. Even, it did not address commercial surrogacy, exploitation of surrogates, and commodification of children³⁰. One could speculate that earlier ART BILLS 2014 was stalled because it focused more on the regulation of clinics and technological procedures rather than the ethical and social harms arising from its use³¹. It means there was no law which would curb the commercial aspect of surrogacy technique in India. As a result, large numbers of foreigners were coming to India in search of surrogate mother. Same view was express in public interest litigation which was filed by lawyer Jayshree Wad in 2015 before Supreme Court. She argued that the country has virtually become a baby factory as a large number of

foreigners have been coming to India in search of a surrogate mother³².

In response to the petition Supreme Court express concern over commercial surrogacy and exploitation of women. In this petition Supreme Court called stand of Government on affidavit over commercial surrogacy, in reply Ministry of Health and Family Welfare, Government of India, filed an affidavit before Supreme Court on October 27, 2015, it announced that India” does not support commercial surrogacy and the scope of surrogacy is limited to Indian married infertile couple only, and not to foreigners³³. Following the Supreme Court order, the Ministry of Home Affairs in November 2015 banned foreign nationals from coming to India in search of surrogates; however, commercial surrogacy was still permitted to Indian couple³⁴.

Indian Government had taken this stand to ban surrogacy for foreign nationals for immense pressure from civil society

This overall study shows that dilemma attitude of Indian Government to be or not to be over the commercial aspect of surrogacy. It was the immense pressure from legal and social scholar, civil society member on the Indian Government to take firm stand regarding ban on surrogacy. As we know commercial surrogacy has come forward as money making business for clinics and other related machinery. It had started controversy and debate among the democratic society about exploitation of poor Indian women whose wombs are hired to carry couple’s embryo through to birth³⁵. Therefore, it was significant decision of the government to ban surrogacy for foreigners, it had minimized controversy on the certain point. Similarly, Indian Government faced very much criticism from surrogacy industry and surrogate mother for losing extra income³⁶. On the other- hand feminist scholar argued for complete ban on commercial surrogacy even for Indian infertile couples also.

Therefore, on November 21 2016, the government of India introduced the Surrogacy (Regulation) Bill in the Lok Sabha to fulfilled long standing demand for prohibition of commercial surrogacy. It had also expressly allowed only infertile and legally wedded Indian couples to have children through altruistic surrogacy³⁷. This bill provided with altruistic surrogacy which involve no

monetary compensation other than medical expenses and insurance converge to surrogate woman and expressly banning commercial surrogacy³⁸. Even, any woman who is close relative of intending couple may act as surrogate mother. This, close relative clause restricts exploitation of poor women from renting womb for money.

This bill was examined by the standing committee on Health and Family Welfare which submitted its report on August 10, 2017. The committee gave several recommendations with regard commercial and altruistic surrogacy, to implication of the surrogate being close relative, inclusion of provisions for gamete donation and regulation of abortion.

However, bill lapsed with the dissolution of 16th Lok Sabha. And then it was reintroduced and passed by Lok Sabha on August 5, 2019. But it had to be referred for re-assessment to the select committee on November 21, 2019, as several Rajya-Sabha Members found certain clauses contentious such as allowing only altruistic surrogacy with a near relative as a surrogate³⁹. It is necessary to study other contentious issues with analytical approach. Therefore, have a brief over look in respect of bill 2019.

Highlights of the Bill 2019⁴⁰

Bill explicitly prohibits commercial surrogacy services, such as buying, selling, purchasing, embryo and service of surrogate mother. It is very comprehensive step towards banning the commercial surrogacy that was needed since long back. On the other hand, it encourages altruistic surrogacy, in which surrogate mother gets medical expenses and insurance converge, but no any other monetary incentive of any nature.

These are very significant provisions for preventing exploitation of poor women who are disparately affected by inequality and mostly proven vulnerable for victimization. Generally, poor women incline to become surrogate for financial benefits, so it would stop their way to become victimize by rich people. As per the provision of the bill, only women, who are genetically related to the intended couple, may act as surrogate and even she may donate her egg or oocyte for the same surrogacy procedure. On the other- hand she must have fulfilled following conditions enumerated under this Act.

- 1) Prospective surrogate mother must have an eligibility certificate issued by the appropriated authority mention under this Act.
- 2) She must be married and her age must be between 25 to 35 at the time of surrogacy. And she must have her own child.
- 3) She must be close relative of intending couple under this Act.
- 4) She shall act as surrogate only one time in her whole life.
- 5) She must have a certificate of medical and psychological fitness certificate from registered practitioner for surrogacy procedure.
- 6) No women can act as surrogate by donating her own gametes.

As per above conditions any close relative of intended couple shall act as surrogate mother by fulfilling the prescribe conditions. But the word close relative is not expressly defined under this Act, thus it has become cause of criticism for legal, social scholar.

this bill surrogacy is made available only to the legally married Indian man and woman, when any one of them or both showing inability to conceive after five years of unprotected coitus, under of marriage and it must be certified by appropriated authority mention (enumerated) under this Act. Moreover, intended couple shall get eligibility certificate on fulfilment of following condition.

- 1) Age of intended couple if male must be between 23 to 55 and in case of female must be between 26 to 50, at the day of certification.
- 2) Intended couple must be Indian citizen and must be married for at least five years.
- 3) They must not have their own biological or adopted surviving child, except having but mentally or physically challenged or suffering from fatal illness with no permanent cure.

Such intended married couples shall apply, for getting eligibility certificate, to the appropriate authority. Beside this intended couple must have a certificate of proven infertility from a District Medical Board and an order form judicial first class magistrate concerning the parentage and custody of the child including insurance coverage of such amount a may be prescribe in favour of surrogate mother for a period of sixteenth month covering postpartum delivery complications from an insurance company or from recognized agent by regulatory and development authority.

On the occasion of proven infertility intended couple may avail service of surrogacy clinic or infertility hospital for conducting surrogacy to get child. But under this bill certain regulations and procedure has been prescribed for surrogacy clinic. The surrogacy clinics are unable to carry out surrogacy unless follow the given rules and procedure. This bill has made certain regulations and procedures mandatory for clinic to gain serious consideration while doing and providing surrogacy services. That surrogacy must be for altruistic purpose, and conducted only for proven infertile couple, it should not be for commercial purpose. And again, it should not for producing children for sale, prostitution or for any other form of exploitation. This bill put responsibility on the Director or in charge of surrogacy clinic that he must satisfied with reasons to be recorded in writing about fulfilment of all conditions which are prescribed for intended couple under this bill.

This bill has specified prohibition about encouragement of women for surrogacy, that no relative or even husband of woman shall encourage her for surrogacy procedure other than altruistic and put further prohibition regarding the abandonment of child that no intended couple shall abandon child within India or outside India which is obtain or born out of surrogacy procedure, within India.

Moreover, it provides health provisions with view to safeguard surrogate mothers from health risk which arise while carrying surrogacy pregnancy. The bill prohibits surrogacy clinic, laboratory, person, organization from forcing abortion on surrogate mother. It ensures health protection to surrogate woman by inserting consent clause that her consent must be obtain for surrogacy arrangement in prescribe form and writing within her language that can be understandable to her. On the contrary she can also withdraw her given consent for surrogacy before implanting embryo in her womb. Even before conducting surrogacy procedure it is mandatory, that to explain her all known side effects or after effects of such surrogacy procedure.

It has resolved issues about the parenting by ensuring that the child born out of surrogacy procedure be deemed to be biological child of intended couple and said child shall have all rights

and privileges available to natural child under any law for the time being in force.

This bill also has restricted altruistic surrogacy procedure only for registered clinic. It means registration of clinic is mandatory under this bill even they have to appoint qualified persons for doing surrogacy. Besides this, surrogacy clinics cannot conduct, promote commercial surrogacy in India.

In addition to this, bill has specified certain significant restrictions for the surrogacy clinics to place them within the control of government for monitoring commercial surrogacy.

- (1) No surrogacy clinic, gynecologist shall advertise publish promote about surrogacy with view to induce woman to act as surrogate and for commercial surrogacy.
- (2) No surrogacy clinic, intending couple cause abortion during the period of surrogacy without the written consent of surrogate mother.
- (3) No surrogacy clinic shall store embryo or gamete for the purpose of surrogacy procedure.
- (4) Ban on sex selection for surrogacy.

In the light of above restrictions surrogacy clinic must have to work for ethical surrogacy. Otherwise they have to face criminal action and penalties. As the Appropriate authority monitors work of surrogacy clinic if found unethical and contrary to legal provision then it can cancel registration of surrogacy clinic.

This bill provides establishment of appropriate authority it may be act as a judicial body to receive complaint and dispose accordingly judicial procedure. It is appointed within ninety days from the date of commencement of this Act. It would grant, cancel registration of surrogacy clinic. This bill also establishes National and state surrogacy board. National board would engage in giving advice to the central government on policy matters relating to surrogacy and also focus on monitoring the implementation of the Act. State board would engage in review activities of appropriate authority and monitoring implementation of the Act.

Analysis of Certain Important Provisions of the Bill:

Objective of the bill is to curtail commercial aspect of the surrogacy technique and thereby promote ethical altruistic surrogacy for Indian society. The term couple, and intended couple has

specifically determined certified infertile, legally wedded Indian man and woman, by appropriate authority. This terminology has excluded single person such as widow, divorcee, gay, from the purview of the bill. Many of the legal and social scholars have argued in favour of widow and divorcee that these persons must be included in the bill. Their exclusion from bill causes unfair to them. Even Rajya Sabha select committee Member has recommended in their report about inclusion of these persons.

As per the bill provision the women, who is close relative of intended couple can act as surrogate. But the term close relative no-where define under the bill. It also difficult for intended couple to make search for and depend on close relative woman. Therefore, looking to the difficulties in search of surrogate woman Rajya Sabha select committee has suggested word 'willing woman'. This term lessens the burden of intended couple to make search of surrogate women within close relative. It would also be helpful in avoiding conflict among relationship.

Under this bill surrogacy is made available to couple when any one of them or both showing inability to conceive after five years of unprotected coitus, of marriage. This clause speaks about five years waiting period, it is looking unnecessary, unfair for doing surrogacy if the couple marry in their forties then it will difficult for them to wait for surrogacy. Hence five-year waiting period is very much long to become eligible for avail surrogacy. The criteria should be change by making two years for option for surrogacy.

There is no stipulation about compensation to surrogate woman, as she may require during the pregnancy for taking care of nutritional food requirements, maternity wear, job loss. The bill specifies sixteen-month insurance to surrogate mother, this provision seems insufficient therefore it must be enhanced as per her health requirement.

This bill comes under the several criticisms, but some of them has explicitly describe above and here.

Current Position of the Bill 2019⁴¹

The bill was passed by the Lok Sabha on August 5, 2019. Then after introduce in Rajya Sabha on the 6th November, 2019 for consideration. Wherein Rajya Sabha members found certain clauses

contentious then referred for reassessment to the select committee on November 21, 2019. The committee held nine sittings for detailed examination of the bill that included discussion with various key stakeholders such as the department of health research, National Human Rights Commission, National Commission for Protection of Child Rights. The Rajya Sabha select committee has presented its report on February 5, 2020 with fifteen major changes, to the Rajya Sabha, and then the union Cabinet approved the Surrogacy (Regulation) Bill 2020 with suggested 15 major changes to the Surrogacy (Regulation) bill 2019.

Union Cabinet approved following changes:

Union Cabinet allowed a 'willing woman' to be surrogate mother and deleted close relative clause from the bill 2019. It has also approved removing the definition of 'infertility' as the inability to conceive after five years of unprotected intercourse on the ground that it was too long a period for a couple to wait for a child.

It has accepted views of Select committee that single woman and all India origin couple can avail the surrogacy. The committee also has recommended increasing the insurance coverage for surrogate mother from sixteen month to thirty-six month. Further, committee has recommended keeping an option for compensating the surrogate mother beyond medical expenses and insurance converge that includes taking care of her nutritional food requirements, maternity wear⁴². These are some of the important changes approved by union cabinet on 26 Feb 2020.

Now, bill 2020 has been waiting for assent from President to become Act.

Conclusion:

Capitalistic approach of the society at large forces the poor and underprivileged section to live as service provider hence the plight of surrogate women ignored across the world with view to save the profit of surrogate baby making industry. The India had shown liberal approach towards surrogacy technique

therefore it emerged as a surrogacy hub for couples from different countries. In India surrogacy is unregulated as India does not have surrogacy legislation. India's suspicious approach raises questions, why Indian government failed to enact surrogacy legislation till today, why created dilemma for the past few years over regulation of surrogacy. The answer may be lies under immense pressure from medical lobby prevalent among medical industry.

The exploitation of the poor woman, commercialization of surrogacy, commodification of motherhood these are the crucial issue around the surrogacy technique. Thus, such issues need to be answered through legal framework. The poor rural women get easily attracted and get available for surrogacy on minimum monetary compensation due to financial incapacity. Thus, it becomes a cause of exploitation. It shows their inability to earn money from other work on daily wages. Therefore, it is responsibility of the government to protect them from the exploitation by enacting suitable legislation over surrogacy.

Above discourse justified the government's interference in regulation of surrogacy. Now government has taken firm stand about altruistic surrogacy for Indian society, and successfully removed dilemma situation pertaining to bill. Recently, the government has put forwarded Surrogacy Regulation Bill 2019 in Rajya Sabha, now it is at the edge of passing in the Parliament. Even Union Cabinet has also approved changes suggested by Rajya Sabha Select committee on the february 5, 2020. This bill is reformative in nature that it ensures ethical altruistic surrogacy and prohibits the commercial aspect of surrogacy. The propose law would also benefit widows and divorce women besides infertile Indian couple.

¹ Surrogacy (Regulation) Bill, Lok Sabha (Monsoon)[156 of 2019]

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