



## IMPACT OF STATUTORY DEVELOPMENT ON CONSTITUTIONAL RIGHTS

By Satakshi Awasthi  
From School of Law, University of Mumbai

### Abstract:

*The Constitution of India has guaranteed various rights to the citizens of India. Though the rights are granted with an intention to protect the citizens, not every citizen is being protected by them. The law has been misused over the years, which has led to the need of introducing new statutes.*

*The statutory developments are implemented with a view of safeguarding the constitutional rights.*

*The Surrogacy (Regulation) Bill, such Bill are of very important nature introduced in the Parliament, in the last year, in order to stop the abuse of law with respect to surrogate mothers, their children.*

*The introduction of the bill has been a tedious process as the guidelines to introduce the Bill were provided years ago, but due to the vague provisions and criticisms faced, the Bills had to be introduced again.*

*Though the intention of the Bill is to safeguard the rights, the government and the law makers have ended up construing the provisions in an ambiguous manner. The rights of surrogate mothers though granted, are still not absolute. The misuse of law can still take place. This needs to be stopped as they have suffered and it is the duty of the government to implement stricter policies, so that no one will be able to take unnecessary advantage of them.*

## INTRODUCTION OF THE SURROGACY (REGULATION) BILL, 2020

### Introduction

The Surrogacy (Regulation) Bill 2020 has been approved by the Union Cabinet which was presided over by Prime Minister Narendra Modi. The amended bill is a reformed version of "The Surrogacy Regulation Bill, 2019". It was a much-awaited response to the Indian citizens who were calling for a serious action to be taken in the field of surrogacy. The Surrogacy regulation bill, 2019 was passed by the Lok Sabha on 5<sup>th</sup> of August 2019. The bill was pending in the Upper House and is on its way in becoming a statute.

Nature has given the ultimate gift to women to propagate a new life within themselves. Unfortunately, due to some corporal problems and biological issues, some women may be unable to bear a child. The desire of having a child drives the couples having medical setback to look for an alternative such as IVF (in vitro fertilization), Artificial Reproductive Technology, Intra Uterine Injections and Surrogacy.

Emphasizing on the concept of surrogacy, nowadays it has become a very famous concept and is widely accepted by people all over the world. This is also leading to exploitation of women in many ways, especially in India, which was once a hub of surrogate mothers. Surrogacy helps couples who have sheer intention to become parent. The concept has a number of risks associated with it and the most vital one being the abuse of surrogate mother. Surrogacy in India alone holds an industry worth \$400 billion annually and as mentioned, India being a hub of surrogacy, approximately 25,000 children are



born through surrogacy each year and there are more than 3000 clinics for the same. This has also led to child trafficking.

Clinics generally charge patients between \$10,000 and \$28,000 for the complete package, including fertilization, the surrogate's fee, and delivery of the baby at a hospital in India.<sup>1</sup>

#### Surrogacy Bill, 2020

The Surrogacy Regulation Bill, 2020 aimed at banning the commercial surrogacy and allows altruistic surrogacy which was also a main aim for The Surrogacy Regulation Bill of 2019. The Surrogacy Bill 2020 allows any willing women to become a surrogate mother and also proposes that widow or divorced women can also willingly become a surrogate mother and take benefits from this provision besides the infertile couples. The National Surrogacy Board at the Central Level and State Surrogacy Board at the State Level and appropriate authorities in states and Union Territories respectively to be established. The Proposed insurance coverage which was 16 months in the earlier version is now revised to 36 months. The Bill also states that Commercial Surrogacy will be strictly prohibited and also the auction and purchase of human embryo and gametes will be a punishable offence. Ethical Surrogacy is being allowed to the Indian married couples and Indian single woman which also includes a Widow and a Divorcee aged between 35 to 45 years will be allowed to become a surrogate mother on fulfillment of aforementioned criteria.

#### Surrogacy Bill, 2019

The surrogacy bill marks the end of persistent debates regarding practice of surrogacy in India. Minister of Health and Family welfare, Dr. Harsh Vardhan introduced the Surrogacy (Regulation) Bill on 15<sup>th</sup> July 2019. The Bill defines surrogacy as *modus operandi* where one woman bears and gives birth to a child for an intending couple with the intention of handing over the child after birth. This bill specifically safeguards the interest of the Surrogate Mother, prohibits commercial surrogacy, and gives a framework as to how exactly and in what conditions surrogacy is currently allowed in the nation.

In early 2000s, the government legalised commercial surrogacy which means becoming a surrogate mother in return for monetary benefit. This made news worldwide which led to thriving of the industry of foreign surrogacy and tourism. Thus, India got a tag of being a “baby outsourcing” destination.<sup>2</sup> The commercialization of surrogacy not only degraded but also exploited women, as majority of them were poor and had no means to earn for a living. This enactment led to various commercial firms gaining profits through guiding foreign tourists to find a surrogate mother, arranging passport and visas for the surrogate child and helping them with paper work. Not only this but it also affected the women reproductive capacity and brought a famous concept of "renting out womb" for the intended couple to be blessed with a child.

#### Commercial Surrogacy

<sup>1</sup>Priya Shetty, India's unregulated surrogacy industry, *The Lancet*, Volume 380, (10 November 2012), [https://doi.org/10.1016/S0140-6736\(12\)61933-3](https://doi.org/10.1016/S0140-6736(12)61933-3)

<sup>2</sup>Ellen Goodman, The outsourcing of baby making, *The Mercury News*. (April 10, 2008, 19:35 PM) <https://www.mercurynews.com/2008/04/10/the-outsourcing-of-baby-making/>



“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>3</sup>

#### *Altruistic Surrogacy*

“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.<sup>4</sup>

#### Indian Council for Medical Research Guidelines

The ICMR proposed its draft “National Guidelines for the Accreditation, Supervision and Regulation” of ART Clinics in India, in 2002, which mentioned commercial surrogacy arrangements. The Ministry of Health and Family Welfare approved these guidelines in 2005.

Commercial arrangements were not prohibited, and these guidelines were ineffective as they did not carry the weight of

legislation. In response, the ICMR drafted the ART Bill in 2008. This Bill went through several revisions in 2010<sup>5</sup>, 2013, and 2014 as it moved through the Ministries of Health and Family Welfare, Law and Justice, and the Cabinet, successively.

The Indian Council for Medical Research had given guidelines in the year 2002, approved by the government in 2005, regulating Assisted Reproductive Technology procedures.

The Law Commission of India submitted the 228th report on Assisted Reproductive Technology procedures discussing the importance and need for surrogacy, and also the steps taken to control surrogacy arrangements.

#### *Observations made by the Law Commission:*<sup>6</sup>

- 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.
- 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

<sup>3</sup>The Surrogacy (Regulation) Bill, 2019, Bill No. 156-C of 2019, Section 2(f)

<sup>4</sup>The Surrogacy (Regulation) Bill, 2019, Bill No. 156-C of 2019, Section 2(b)

<sup>5</sup>The Assisted Reproductive Technology (Regulation) Bill – 2010

<sup>6</sup>Olinda Timms, Ending commercial surrogacy in India: significance of the Surrogacy (Regulation) Bill, 2016, Indian Journal of Medical Ethics, (5 March 2018), <https://doi.org/10.20529/IJME.2018.019>



subsequent willingness of none to take delivery of the child.

- A surrogacy contract should necessarily take care of life insurance cover for surrogate mother.
- 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. Otherwise, adoption is a means which is resorted to if biological (natural) parents and adoptive parents are different.
- 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.
- The birth certificate of the surrogate child should contain the name(s) of the commissioning parent(s) only.
- Right to privacy of donor as well as surrogate mother should be protected.
- Sex-selective surrogacy should be prohibited.
- Cases of abortion should be governed by the Medical Termination of Pregnancy Act 1971 only

These guidelines became a curse rather than a boon for the rights of surrogate mother and the child. According to the above-mentioned guidelines, a woman will get monetary benefits for becoming a surrogate mother and the money that she will receive will be decided by an arrangement between the couple and mother. The father will donate his own semen and the gametes for fertilisation will be provided by another woman whose identity will remain anonymous during the whole procedure of surrogacy.

The surrogate mother will be infused with the zygote and after a period of nine months, she will have to relinquish all the parental rights to the surrogate child.

Although these guidelines were given by the Indian Medical Council, still the bloom in the industry of commercialized surrogacy was so rapid that the government had to intervene in between and eventually had to ban the commercial surrogacy in the year 2015. Also, this mode of surrogacy became so famous all over the world that the government had to intervene in this misuse of law. The main urge for the change in the law came after the relevant case of *Baby Manji Yamada vs. Union of India* (2008) 13 SSC 518. In the year 2007, Manji Yamada, a baby girl was born through surrogacy by Pritiben Mehta who was arranged as a surrogate mother for a Japanese couple named Ikufumi and Yuki Yamada. Pretiben was infused using a fusion of sperm of Yamada and an anonymous Indian woman's egg. Post infusion the couple filed for divorce and only a month prior to the delivery of the child, it so happened that the couple got separated and the future of the new born was left in murky. The father wanted to take the child to Japan, but there was no provision for a case like this in India as it was tough to decide as to whose child baby Yamada is, the woman who donated the egg, Pritiben (her surrogate mother), or Yuki Yamada who donated his sperm. Neither the Indian government was providing any measures nor was the Japanese government approving to bring the child back home.

However, the decision of Supreme Court allowed the child to leave the country with grandmother Emiko and on humanitarian grounds the Japanese government gave the



child one-year visa<sup>7</sup>. The Japanese government permitted the visa after the Supreme Court permitted a travel certificate in September 2008.

The Supreme Court of India in 2008 held surrogacy permitted in India after Baby Manji's case increased the international poise of going for surrogacy in India.

### Evolution of the Surrogacy Bill

#### *The Surrogacy (Regulation) Bill, 2016*

The Surrogacy Bill 2016 was proposed on 21<sup>st</sup> November 2016 in Lok Sabha and the bill was passed on 19<sup>th</sup> December 2018. Legislation of the bill was drafted by the former external minister Lt. Sushma Swaraj along with a group of ministers who proposed the bill with a view to allow only married Indian couples to try for surrogacy of altruistic kind. This inference was made after going through various cases of surrogacy as inferred from the above judgment of Baby Manji Yamada and other similar cases were studied from India and abroad. These cases were a matter of sheer complication either due to nationality or abandonment of child. One more case amongst those after Baby Yamada was the distressing case of Baby Dev<sup>8</sup>. The baby boy was born along with his twin sister to an Indian surrogate mother, who was commissioned for surrogacy to an Australian couple. After the delivery, when the couple came to India, they decided to take only the baby girl and leave the boy, giving a

reason that they cannot afford to raise both children and that they already have a boy at home, so taking the girl child will "complete their family," thus leaving the boy behind. It was a disheartening situation because the Australian couple were very much aware of the fact that the baby boy would be left stateless, not having citizenship in either of the country due to the Indian surrogacy law. These were the various issues which led to the enactment of Surrogacy law of 2016.

The bill was a major optimistic landmark for the surrogacy law in India. The bill emphasized on prevention of commercial surrogacy and promotion of altruistic surrogacy. It prevented exploitation of both the surrogate mother and child and also the establishment of registered surrogacy clinics and formulating a National and State surrogacy board and Appropriate Authority. Therefore, the procedure of surrogacy can only be carried out where there is no monetary benefit to the surrogate mother except the insurance expenses during pregnancy period.

#### *Provisions of the Surrogacy (Regulation) bill 2016<sup>9</sup>*

- The bill was applicable to all the states of India except Jammu and Kashmir.
- The bill provided the right of surrogacy to only Indians and abolished it for the NRI, PIOs and Foreigners.

<sup>7</sup>Baby Manji Yamada v. Union of India and Anr. (2008) 13 SCC 518.

<sup>8</sup> Samantha Hawley, Suzanne Smith, India Surrogacy Case: Documents show New South Wales couple abandoned baby boy despite warnings, ABC News, (13 April 2015, 02:09 pm), [https://www.abc.net.au/news/2015-04-13/australian-](https://www.abc.net.au/news/2015-04-13/australian-couple-abandon-baby-boy-in-india-surrogacy-case/6387206)

[couple-abandon-baby-boy-in-india-surrogacy-case/6387206](https://www.abc.net.au/news/2015-04-13/australian-couple-abandon-baby-boy-in-india-surrogacy-case/6387206)

<sup>9</sup>Advocate Dev P Bharadwaj, Surrogacy In India, Legal Service India, <http://www.legalserviceindia.com/legal/article-782-surrogacy-in-india.html>



- National Surrogacy Board and State Surrogacy Board were formulated.
- The couple intending for surrogacy should be aged between 23 to 50 years and are married for at least 5 years.
- The women can only surrogate once in her lifetime and should be between age group of 25 to 35.
- Homosexuals and single parent were not allowed for surrogacy and also barred couples who already had children.
- The bill provided provision for the custody and also the penalty and imprisonment if the person violated any law prescribed.
- You can approach only a close relative for surrogacy.

#### *Drawbacks in 2016 Bill*

Even though this bill covered the majority of portion and was in a positive direction, still there were many loopholes. The bill was targeted against the LGBT community<sup>10</sup> and single parent as their right to have a child got violated. The bill was also criticised because it allowed only a close relative to become surrogate which could have disturbed personal space. Article 21<sup>11</sup> was also getting violated as it was denying deserving people of parenthood. There were poor women who were earning a living through surrogacy and due to the new provision, their revenue got effected. India being a country which gives importance to family orientation and practicing orthodox beliefs, peer pressure

<sup>10</sup>India bans gay foreign couples from surrogacy, The Telegraph, (18 January 2013, 2:57PM GMT) <https://web.archive.org/web/20190327195336/https://www.telegraph.co.uk/news/worldnews/asia/india/9811222/India-bans-gay-foreign-couples-from-surrogacy.html>

may be one reason behind problems in marriage. And most importantly, it did not mention any provisions for those who wanted to opt for a second child through surrogacy. So, to fill these loopholes a new bill was proposed, “The Surrogacy Regulation (2019) Bill”, the 2016 Regulation Bill lapsed with dissolution of the 16th Lok Sabha.

#### *The Surrogacy (Regulation) Bill, 2019<sup>12</sup>*

- The Bill forbids commercial surrogacy and allows altruistic surrogacy. Altruistic surrogacy does not involve any monetary compensation or any reward to the surrogate mother other than the medical expenses and insurance coverage during the course of pregnancy.
- The Bill permits surrogacy if it is fulfilling the eligibility criteria that is: for intending couples who suffer from verified infertility; altruistic surrogacy; not for monetary benefit; not for producing children for auction, prostitution or other forms of exploitation.
- The intending couple should have a ‘certificate of essentiality’ and a ‘certificate of eligibility’ issued by the appropriate authority.
- The central and state governments shall constitute the National Surrogacy Board (NSB) and the State Surrogacy Boards (SSBs), respectively.
- Further, the surrogate mother cannot provide her own gametes for the process of surrogacy.
- A certificate of essentiality will be issued to the intending couple upon fulfilment of the

<sup>11</sup>The Constitution of India, Article 21

<sup>12</sup>The Surrogacy (Regulation) Bill, 2019, PRS Legislative Research, <https://prsindia.org/billtrack/surrogacy-regulation-bill-2019>



following conditions that is, a certificate of proven infertility of either or both of the partner(s); an order passed by a Magistrate's court of parentage and custody of the surrogate child; and insurance coverage for a period of 16 months covering post-delivery complications for the surrogate mother; such other conditions that may be specified through regulations.

- The certificate of eligibility to the intending couple is issued upon the fulfilment of the following conditions that is, the couple should be an Indian citizens and be married for at least span of five years; the age should be in between 23 to 50 years old (wife) and 26 to 55 years old (husband); they should not have any surviving child (biological, adopted or surrogate), except if the child is mentally or physically challenged or suffers from a life-threatening disorder; and such other conditions that may be specified through regulations.
- To obtain a certificate of eligibility from the appropriate authority, the surrogate mother has to: be a close relative of the intended couple; be an ever-married woman having a child of her own; be 25 to 35 years old; not have been a surrogate mother earlier; and have a certificate of medical and psychological fitness
- A child born out of a surrogacy procedure will be deemed to be the biological child of the intending couple. An abortion of the surrogate child requires the written agreement of the surrogate mother and the authorisation of the appropriate authority.
- This authorisation will have to be compliant with the Medical Termination of Pregnancy Act, 1971.<sup>13</sup>
- Further, the surrogate mother will have an option to withdraw from surrogacy before the embryo is implanted in her womb.
- The central and state governments will appoint one or more appropriate authorities.
- The functions of the appropriate authority include: granting, suspending or cancelling registration of any surrogacy clinics; enforcing standards for surrogacy clinics; and investigating and taking action against complaints of breach of the Act. The authority is required to consider and grant or reject the applications for certificates of eligibility to the intending couples and surrogate mothers within a period of 90 days from the date of application. The appropriate authority comprises the Joint Director of the state Health Department, an officer of the state Law Department, a medical practitioner, and an eminent woman.
- Surrogacy clinics cannot undertake surrogacy or its related procedures unless they are granted registration by the appropriate authority. Clinics must apply for registration within a period of 60 days from the date of appointment of the appropriate authority. This application will be accepted or rejected within 90 days. No human embryo or gamete can be stored by a surrogacy clinic for the purpose of surrogacy.
- The Bill creates certain offences which include: undertaking or advertising commercial surrogacy; exploiting the surrogate mother; selling or importing human embryo or gametes for surrogacy, and abandoning, exploiting or disowning a surrogate child. These offences will attract a penalty of up to 10 years and a fine of up to 10 lakh rupees.

*Drawbacks in 2019 Bill*

<sup>13</sup>The Medical Termination of Pregnancy Act, 1971 (Act No. 34 of 1971)



- The bill did not discuss about NRIs who are abroad, who intend to have a child after coming back to home country.
- The unmarried couples and the LGBT community who want to have a child through surrogacy are again left out.
- Allows only Altruistic surrogacy, this concept fails in some countries.
- The surrogate mother should be paid for it while risking their lives and in return they should be getting an insurance for the course of their pregnancy.

#### International Surrogacy

- Commercial surrogacy is prohibited in various countries such as India, Netherlands, United Kingdom, South Africa, and Greece. These countries only practice Altruistic surrogacy.
- Countries like Russia exercise commercial surrogacy.
- The above-mentioned countries practicing Altruistic surrogacy allow only medical expenses,<sup>14</sup> rational expenses and insurance to the surrogate mother unlike Russia which gives any amount of monetary benefit having no limits.
- There is a provision for penalties in the countries where commercial surrogacy is banned such as imprisonment, fine or both.
- The eligibility criteria of surrogate mother in India is totally different than any other country, the surrogate mother has to be a close relative, should be married, have at least one child of her own, cannot become a surrogate mother in her lifetime after one

surrogacy. All these criteria only exist in India no other country has any such provisions.

- There is no provision for the consent of partner in India to become a surrogate mother but South Africa, Russia, Greece requires consent of partner whereas in Netherlands and United Kingdom, it is not required at all.
- The intending or commissioning partners needs to be married only in India, no such provision is available in any other country, any person be it single or married can become a commissioning parent without getting married.

This is a comparative study on the regime of surrogacy in EU member states, European Parliament, 2013; **India:** The Surrogacy (Regulation) Bill, 2019; **Netherlands:** Dutch Society of Obstetrics and Gynaecology guidelines; **United Kingdom:** Surrogacy Arrangements Act, 1985; **South Africa:** Chapter 19, Children's Act, 2005; **Greece:** Article 1458 of the Greek Civil Code; **Russia:** Article 51-52, Family Code, 1995; Federal Law on the Fundamentals of Protection of Citizens' Health in Russian Federation 2011.<sup>15</sup>

#### Conclusion

The Surrogacy (Regulation) Bill, 2020 has by far been in the best interest of surrogate mother and child. The market of infertility has widely spread and so the requirement for a stringent law regarding surrogacy is risen. The exploitation of women and trafficking of children born through surrogacy was rapidly

<sup>14</sup>Kishwar Desai, India's surrogate mothers are risking their lives. They urgently need protection, The Guardian, (05 June 2012, 20:30 BST), <https://www.theguardian.com/commentisfree/2012/jun/05/india-surrogates-impoverished-die>

<sup>15</sup>Issues for Consideration The Surrogacy (Regulation) Bill, 2019, PRS Legislative Research, <https://prsindia.org/node/842647/chapters-at-a-glance>



increasing which had to be stopped by implementing various provisions and amendments. The Surrogacy Regulation Bill 2020, must not have brought these hitches to the complete termination but somewhere it has helped the society by accepting the concept of surrogacy and by enabling the intended couples to get a child through surrogacy and also by making a provision by which any willing women can become a surrogate mother on fulfilment of certain criteria's.

The number of Public Interest Litigations filed in the Supreme Court has resulted in the decline of the number of incidents wherein the rights of women and children were disregarded due to Commercial Surrogacy. The new provisions for surrogacy has curb the exploitation and has also made the authorities formulate and practice the Surrogacy Laws in India in a much better way. These laws are benefitting the surrogate mother, prospective parents and children born. The Government is taking effective initiatives for the larger good of people, but the policies have to be stricter so that no one would be able to violate them.

\*\*\*\*\*

