

# IMPACT OF NEW SURROGACY BILL: IS IT VIOLATIVE OF RIGHT TO PRIVACY

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**Abstract:** Procreation of children is considered as important element of Marriage in all religion. In India Marriage is considered as sacrament and it completes its sanctity with the birth of children in legal web lock. In to days world of globalization where new technologies and competition has made the life of people cumbersome and technical but has given rise to many new lifestyle disease, one among is the problem of infertility.

The ever-rising prevalence of infertility world over has lead to advancement of assisted reproductive techniques (ART). Herein, surrogacy comes as an alternative when the infertile woman or couple is not able to reproduce. Surrogacy is an arrangement where a surrogate mother bears and delivers a child for another couple or person. In gestational surrogacy, an embryo, which is fertilized by in vitro fertilization, is implanted into the uterus of the surrogate mother who carries and delivers the baby. In traditional surrogacy, the surrogate mother is impregnated with the sperms of the intended father artificially, thus making her both genetic and gestational mother. Surrogacy may be commercial or altruistic, depending upon whether the surrogate receives financial reward for her pregnancy.

**Keywords:** Surrogacy, gender, Right to privacy, Commoditization, Right to life

## Introduction

“The Boy asked his mother ‘where did I came from? Did You pick me up from anywhere? Mother replied laughing and crying , hugging the boy to herself ‘ You were the desire in my Heart”

Rabinder nath Tagore

## Right to Life : Right to be Mother

Motherhood is not just a state of being a mother but it is an emotional feeling which can't be just describe in words. It is a bond which evolves with time as the child grow. God has made a creature called women who when hears such words” that she gone be a mother after few

months” becomes a fascinating youth. It is a wonderous adventure. Through this venture a mother and associated family members explore some things new and different. Mothers are the protector which provide best shelter to their young ones. It has been stated in our mythological books that “a woman becomes complete when she becomes a mother”. It is a journey not just from when the child comes in mother’s womb but it is a long-life trail. It is just a few blinks which quickly changes a human being nature and here an unending motherhood generates. It is a chaptered journey from test strips to ultrasound screen and to monthly check ups and so on. After birth vaccinations and hospitalizations are the learning walk ways for parents to administer.

### **Constitutional invalidity of the proposed law**

The Surrogacy Bill fails to adhere to the “Golden Triangle” test devised by the Indian Supreme Court to inspect the constitutional validity of the laws enacted by the Government. This test of reading equality, liberty, and freedom of rights conjunctively aims to ensure that the basic fundamental rights of individuals are not encroached upon by the State.

Firstly, the proposed law infringes Article 14 of the Indian Constitution, which guarantees “equality before the law and equal protection of laws to all persons.” Restricting altruistic surrogacy to only married Indian couples and disqualifying others on the grounds of nationality, marital status, and sexuality impinges upon the right to equality for being an unreasonable classification. Given that the Bill is motivated by a desire to shield women from exploitation and prevent commodification of the birth process, the restriction also fails to bear any nexus with the intended objectives of the legislation.

Further, by disallowing the right to choice vis-à-vis surrogacy for homosexuals and unmarried couples, the Bill reinforces the majoritarian Indian morality that stigmatizes the idea of homosexuality and unmarried people living together. Here, it is pertinent to note that being a homosexual or residing in a live-in relationship is not illegal per se in the country, and limiting the access of altruistic surrogacy is a clear instance of discrimination against these minorities.

Secondly, the Bill violates the “right of livelihood” and “right to reproductive autonomy” enshrined under the broad framework of Article 21 of the Constitution. The ban on commercial surrogacy threatens the livelihood of many poor women in the country who have been able to educate their children, establish businesses, and financially support their families through surrogacy. The number of such women, many of whom are sole breadwinners, is estimated to be more than 100,000.

Further, the Indian Supreme Court has interpreted the right to reproductive autonomy to mean that the parents have the prerogative to choose the mode of parenthood, either

naturally or through surrogacy in this case. Normatively and constitutionally, the method of procreation and parenthood lies outside the domain of the State, and any interference in this choice will warrant an infringement of this Fundamental Right.

Thirdly, the proposed law is foul of Article 19 in general, and Article 19(1)(g) specifically, which guarantees the “freedom of trade and profession” in India. The surrogacy industry is the source of bread and butter for not only the surrogate mothers but also the numerous surrogacy clinics in the country. A blanket ban on commercial surrogacy cannot be justified as a reasonable restriction because it jeopardizes the interests of multiple stakeholders in this multi-billion-dollar industry.

Instead of imposing a ban, the commercial surrogacy market should be regulated for the protection of the vulnerable in the surrogacy contract. A balanced path by the Government would be the adoption of a rights-based approach addressing the concerns of the surrogate mother, children born out of surrogacy, and other stakeholders in the surrogacy market. India needs a centralized system that could regulate the surrogacy market by addition of supplementary checks and balances, transparency, and registration of surrogacy contracts. This would also eliminate the middleman, ensuring that the entire compensation reaches the surrogate mother.

### **Rule of Law in threat: Will of people do not prevail**

The new Bill proposes a complete ban on commercial surrogacy, restricting ethical and altruistic surrogacy to legally wedded infertile Indian couples, married for at least 5 years only. Further, the husband must be between 26 to 55 years of age and the wife must be between 23 to 50 years of age. New surrogacy Bill 2016 Super imposed over the will of the people

New Surrogacy (Regulation) Bill 2016 is in line to curb commercialization and commodification of children born through surrogacy. Surrogacy(Regulation) Bill,2016 indeed having a welfare approach based on moral and cultural background of India but in 21<sup>st</sup> century where we talk about globalization and new techniques, this Regulation is violative of basic Human Rights. Surrogacy (Regulation) Bill, 2016, do not stand the test of constitutional validity.

“Former Attorney General of India Mr. Soli Sorabjee, also said that the bill imposes restrictions that are in “violation of basic rights of privacy and fundamental rights of reproductive autonomy.”<sup>1</sup>

Commercial surrogacy in India was legalized in India in 2002 and outlawed in 2018.<sup>2</sup> During the nearly two decades it was legal, India was a major provider of surrogacy for both domestic and international intended parents. The availability of medical infrastructure and potential surrogates, combined with international demand, fueled the growth of the industry.<sup>3</sup> Surrogate mothers received medical, nutritional and overall health care through surrogacy agreements.<sup>4</sup>

While the bill is yet to be tabled in the Parliament, the Indian government — for the next 10 months — has allowed continuing pregnancies commissioned by existing surrogacy agreements so that the commissioned babies are carried to term. The final version of the bill approved by the Cabinet is not in public domain, and there are serious concerns about the five restrictions imposed on the prospective parents and commercial surrogate mothers by the new law.

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“The most controversial part of this new bill is that even overseas Indians, foreigners, unmarried couples, single parents, live-in partners and gay couples are barred from commissioning surrogacy. Only a close married blood relative, who themselves have their own children and is not an NRI or a foreigner, can be a surrogate mother once in a lifetime. Indian couples with biological or adopted children are prohibited to undertake surrogacy. Under the surrogacy contract, the commissioning parents will be allowed to only pay the

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1 Visited on 15<sup>th</sup> June 15, 2018 [www.thehindu.com](http://www.thehindu.com) › News › National  
<http://www.thehindu.com/news/national/%E2%80%98Surrogacy-Bill-violative-of-privacy-rights%E2%80%99/article16437493.ece>

2 "Surrogacy Regulation Bill Passed In Lok Sabha: 10 Points". *NDTV.com*. Retrieved 11 April 2019.

3"India's baby farm". *The Sun-Herald*. 6 January 2008. Retrieved 6 January 2008.

4 Kannan, Shilpa (18 March 2009). "Regulators eye India's surrogacy sector". *India Business Report*. BBC World. The Associated Press (31 December 2007). "Indian women carrying babies for well-off buyers, 'Wombs for rent' pleases women and customers, but raises ethical questions". *CBC News*. Canadian Broadcasting Corporation.

medical expenses and not compensate the surrogate mother is any other way. Commercial surrogacy, amongst other offences, will entail a jail term of at least ten years and a fine of up to Rs 10 lakh.”<sup>5</sup>

“While concerns have been expressed about the exploitation of commercial surrogate mothers & their reproductive health, Dr Shivani Sachdev Gour, a Delhi based IVF expert said that the industry can be regulated. “When the adoption industry can be regulated why not the surrogacy industry? If the government maintains that majority of the women are exploited, mechanisms can be put in place to address that because majority of the parents wanting a family by way of surrogacy will no longer have any options when this law comes into force,””<sup>6</sup>

### **Conclusion**

Procreation means a biological process by which women gives birth to a child. Women biologically created by Nature to procreate young ones and if this ability is detached from them, it gave deep physiological impact on their lives but to lessen this impact, technology is the safeguard, there are various techniques like ART,IVF etc and among such techniques one such is surrogacy.

With the approval of new bill 2018, the cabinet does not appear to be in consonance with articles 14 and Article 21 of the constitution. The restriction to use surrogacy procedure only to married Indian couples and disqualifying nationals of other nations , restriction on marital status, sexual orientation or age , does not appear to justify the test of equality and does not appear to have any consonance with intended objective of new legislation. Further right to life includes right to parenthood and state can not infringed the right to choose their partners and of parenthood from their nationals.

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<sup>5</sup> <https://indianexpress.com/article/opinion/columns/surrogacy-bill-ban-commercial-2998128/> visited on 15th june 2018

<sup>6</sup> <https://indianexpress.com/article/opinion/columns/surrogacy-bill-ban-commercial-2998128/> visited on 15th june 2018

