

## THE SURROGACY (REGULATION) BILL, 2019- A CRITICAL ANALYSIS\*

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### ABSTRACT

*India has become the hub of surrogacy since the in-vitro fertilization technology has come into existence due to which many intending parents who cannot have their own child as well as who does not want to procreate by themselves has made India into a hub of surrogacy due to economical and social factor which is present in the case of surrogate mother and cheap medical facilities. The best example may be the case of Baby Manji and the complications which rose after the birth of Baby Manji and denial by the intending parents to adopt the child and later a judicial pronouncement. Therefore, in the midst of no regulations regarding clinics, surrogacy procedures, surrogacy adoption, etc. Indian government thought to come up with certain regulation regarding protection of surrogate mother, surrogacy process and its related aspects. This article focuses on the background of surrogacy, Baby Manji case, regulations of clinics, surrogacy procedures, adoption and most importantly over surrogacy (regulation) bill, 2019.*

**KEY:** Surrogacy, Baby Manji case, surrogacy (regulation) bill, 2019, clinics, surrogacy procedures, intending parents, surrogate mother.

## 1. Introduction

Surrogacy, in lay man's term, refers to a situation or arrangement where woman agrees to become pregnant and give birth to the child of an intending couple. In the year 2005, the Indian Council of Medical Research (ICMR) laid down guidelines, which made surrogacy legal in India. The primary reason was to promote and boost medical tourism in India. Soon India became a hub of surrogacy, with about 75% of the intending parents, travelling from abroad to look for a suitable surrogate. According to a 2012<sup>1</sup>, the Indian surrogacy industry was valued at 2 billion dollars. However, the same was not backed or regulated by any strict legislation, which ultimately led to a boom in commercial surrogacy, with the surrogate mothers being a victim of "Baby Factories". Throughout the country, thousands of surrogacy clinics and agencies were established which hired poor, illiterate and helpless women to go through pregnancies for little compensation or no compensation at all, in case of failed pregnancies. There were several cases where the intending parents abandoned the child after birth due to a number of reasons. Moreover, in the process of commercial surrogacy or what is also known as "Rent a womb", there were numerous social and legal issues regarding nationality, citizenship, rights of surrogate child.

## 2. Understanding surrogacy - A brief study of the baby Manji case

A writ petition<sup>2</sup> was filed before the Supreme Court under Article 32 of the Indian Constitution. In the year 2007 the biological parents of baby Manji, Dr. Yuki Yamada and Dr. Ikufumi Yamada chose a surrogate mother in Anand, Gujarat. A surrogacy agreement was entered into between the intending parents on one side and the surrogate mother on the other. However, it appeared that later there were some matrimonial issues between the intending parents and the intending mother left for Japan before the birth of the child. The couple got divorced before the child was born. Baby Manji was born on the July 25, 2008. Soon, after the biological father too had to leave as his visa had expired. Baby Manji was also issued a birth certificate in the name of her biological father. She was later shifted to Rajasthan due to the Gujarat riots.

Subsequently, a writ petition was filed which challenged the legality of surrogacy industry in India. The Rajasthan High Court ordered for the child to be produced before the court. The order was challenged by the grandmother of Baby Manji on her behalf, before the Supreme Court of India. The Supreme Court set aside the order of the Rajasthan High Court and observed

<sup>1</sup> Study by the Confederation of Indian Industries (CII).

<sup>2</sup> Baby Manji Yamada v. Union of India, (2008) 13 SCC 518.

that surrogacy was used as an illegal racket in India. An additional prayer for granting the passport of Baby Manji and that her grandmother's visa be extended was allowed by the court. Later, Baby Manji was issued a Certificate of Identification<sup>3</sup> to facilitate her transit to Japan<sup>4</sup>.

In the instant case, the court observed that "Surrogacy is a well known method of reproduction whereby a woman agrees to become pregnant for the purpose of gestating and giving birth to a child she will not raise but hand over to a contracted party."

Similar definitions are found in all legislations dealing with the issue of surrogacy throughout the world. The word "surrogate" has its origin in the Latin word "subrogate", meaning thereby "appointed to act in the place of".

Surrogacy is generally of two kinds -

- **Traditional Surrogacy**- This is also known as the straight method, where the surrogate mother is pregnant with her own biological child where the biological father is possibly her spouse or partner. But the child is conceived with the intention of giving up the child, to be raised by some other person(s). The child may also be conceived by artificial insemination using fresh or frozen sperm or through intrauterine insemination or intra cervical insemination.
- **Gestational Surrogacy**- This is also known as the host method, where the surrogate mother becomes pregnant by the transfer of embryo in her womb. She is not the biological mother of such child. The surrogate in such a case is also called gestational carrier.

#### **Criticism of the Baby Manji Judgment-**

Many courts have talked about surrogacy at different points of time but there has existed huge difference in the manner the judgments on surrogacy have been drafted and the reasoning that different courts have applied in dealing with the issue. The Supreme Court in Baby Manji's decision delegated the responsibility of deciding on the legality of surrogacy on the National Commission for the Protection of Child Rights. On the other hand, the Supreme Court of New

Jersey<sup>5</sup> acted with due diligence and was aware of the repercussions its discussion could have in the society. The similarity between the two is that both the courts were acting without the presence

<sup>3</sup>. Instead of a Passport by the Regional Transport Authority, Rajasthan.

<sup>4</sup>. The Court could have entered into the area of the rights of the grandparent over a surrogate child as was done in the case of Baby Manji. However, this omission could be because she was representing the minor *Baby Manji* and as happens in most cases filed before Indian Courts. Moreover, in the instant case, the relationship of Baby Manji and her grandmother was not a matter of dispute.

<sup>5</sup>. *Re Baby M*, 537 A.2d 1227, 109 N.J. 396 (N.J. 1988)

of any legislation. Further, the Supreme Court of India, while dismissing the counter affidavit filed by M/s Satya, an NGO, which raised the issue of unregulated surrogacy industry in India, in the Baby Manji case, the Supreme Court missed an opportunity to take a stance on such an important contemporary issue. It is also to be noted that the judgment provided that surrogacy is a "well known method of reproduction", generally sought by infertile females. It doesn't mention the aspect of male infertility.

Another prime drawback is that the court failed to provide detailed rules or guidelines on surrogacy related contracts. Also, the court does not clearly mention the need for a law to regulate surrogacy in India.

However, the fact that the judgment was drafted in the backdrop of Gujarat riots, wherein it was said that "a child was stranded was on a foreign land cannot be ignored".<sup>6</sup>

In August 2009, the Law Commission of India delivered the Report No. 228. The Report stated that:

*"The legal issues related with surrogacy are very complex and need to be addressed by a comprehensive legislation. Surrogacy involves conflict of various interests and has inscrutable impact on the primary unit of society viz. family. Non-intervention of law in this knotty issue will not be proper at a time when law is to act as ardent defender of human liberty and an instrument of distribution of positive entitlements. At the same time, prohibition on vague moral grounds without a proper assessment of social ends and purposes which surrogacy can serve would be irrational. Active legislative intervention is required to facilitate correct uses of the new technology i.e. ART and relinquish the cocooned approach to legalization of surrogacy adopted hitherto. The need of the hour is to adopt a pragmatic approach by legalizing altruistic surrogacy arrangements and prohibit commercial ones."*

### 3. The Surrogacy (Regulation) Bill, 2019

The Surrogacy (Regulation) Bill was first introduced in the Lok Sabha on 21<sup>st</sup> November, 2016. It was then examined by a Standing Committee which gave several recommendations relating to implications of a surrogate being close relative, gamete donation and abortion in a case of a surrogacy. However, the bill lapsed due to the dissolution of the Lok Sabha. The Surrogacy

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<sup>6</sup> Ibid

(Regulation) Bill, 2019 was re-introduced in the Lok Sabha<sup>7</sup>.

As per Section 2(zb)<sup>8</sup>, surrogacy refers to “a practice whereby one woman bears and gives birth to a child for an intending couple with the intention of handing over such child to the intending couple after the birth”.

The Bill has been introduced with the objective of –

- i. Prohibiting commercial surrogacy
- ii. Regulation of altruistic surrogacy
- iii. Protect the rights of a child born through surrogacy and to prevent exploitation of surrogate mothers.
- iv. Establishment of registered and certified surrogacy clinics.
- v. Establishment of National and State Surrogacy Boards and to provide for appropriate authority regarding the matter.
- vi. Providing for offences and penalties in relation to surrogacy.

Though the objectives of the Bill are notable and praiseworthy, there are certain inherent defects in the bill, which make it liable for reconsideration once the bill is before Rajya Sabha for vote.

#### 4. Regulation of Surrogacy clinics, surrogacy and surrogacy procedures

As per the provisions of the Bill, once it commences no unregistered surrogacy clinic shall conduct or associate with or help in any manner in the conducting of surrogacy or any procedures relating to surrogacy. No surrogacy clinic, gynecologist, pediatrician, embryologist, registered medical practitioner or any other person for that matter can conduct, aid, undertake or promote commercial surrogacy or any form of surrogacy except at a registered clinic.

The Bill further provides that there shall be no promotion, publication, canvassing, propagation or advertisement-

- Inducing or likely to induce, seeks or aids, a women to act as a surrogate
- To promote commercial surrogacy, whether through electronic media or in any form
- Stating or Implicating that a woman is willing to be a surrogate

It also states that no one shall conduct or cause an abortion during the period of surrogacy without

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<sup>7</sup>. By the Minister of Health and Family Welfare, Dr Harsh Vardhan on the 15<sup>th</sup> of July, 2019.

<sup>8</sup>. The Surrogacy (Regulation) Bill, 2016; Bill No. 257 of 2016

the written consent of the surrogate mother and appropriate authorities, and in compliance with the Medical Termination of Pregnancy Act, 1971<sup>9</sup> and that no one shall store a human embryo or gamete for the purpose of surrogacy, except for legal purposes as may be provided.

It is significant to note that there shall no sex selection for surrogacy. It also provides that the following conditions have to be fulfilled before surrogacy can be conducted, undertaken, performed or availed, only if the intending couple is in possession of a certificate of essentiality issued by the appropriate authority indicating fulfillment of the following conditions-

- Certificate of proven infertility from a District Medical Board
- An order concerning the parentage and custody of the child to be born through surrogacy passed by a court of Magistrate of first class or above, on an application made by intending parents.
- Insurance coverage for the surrogate mother for a period of sixteen months covering post partum delivery complications from an insurance company or agent recognized by IRDA under the IRDA Act<sup>10</sup>,1999.
- Eligibility certificate of surrogate mother and intending couple.

The Act further mandates that, no person shall undergo surrogacy unless-

- All side effects and after effects of such procedures are explained
- A written consent form is obtained from the surrogate mother to undergo surrogacy, in a language she understands.
- Further, a surrogate also has the option to withdraw consent before the implantation of embryo in her womb.
- The intending parents shall not abandon the child, born out of a surrogacy procedure, under any circumstances, including any genetic defect, birth defect or any defect developed later, medical condition, sex or conception of more than one child.
- It also provides a significant provision that a child born out of surrogacy shall be the biological child of intending parents and shall have all the rights of a natural child.

<sup>9</sup>. Act No. 34 of 1971, Ministry of Health and Family Welfare, <https://mohfw.gov.in/acts-rules-and-standards-health-sector/acts/mtp-act-1971>.

<sup>10</sup>. INSURANCE REGULATORY AND DEVELOPMENT AUTHORITY OF INDIA ACT, 1999, [https://www.irdai.gov.in/ADMINCMS/cms/frmGeneral\\_NoYearList.aspx?DF=ACT&mid=4.1](https://www.irdai.gov.in/ADMINCMS/cms/frmGeneral_NoYearList.aspx?DF=ACT&mid=4.1) .



- No person or any establishment shall force the surrogate mother to undergo abortion at any stage of pregnancy, except where it is expressly provided.

##### 5. Eligibility criteria for the surrogate mother and the Intending parents

The Surrogacy Bill severely limits the potential of both surrogates and intending parents by placing stringent conditions, especially the requirement of eligibility certificate.

The Bill, further, lays down certain criteria which must be fulfilled by both the surrogate mother and the intending parents to become eligible for surrogacy in India.

The Appropriate Authority issues eligibility certificate to surrogate mother on the fulfillment of the following conditions, the surrogate must -

- Be a married woman between the age of 25-35 years on the day of implantation.
- Be a close relative of the intending couple
- Not be a surrogate by providing her own gametes
- Not to be a surrogate more than once in her lifetime
- Have obtained a certificate of medical and psychological fitness for undergoing surrogacy.

The Appropriate Authority shall issue a certificate of eligibility to the intending couple on the fulfillment of the following conditions-

- The age of intending couple must be between 23-50 years for female and 26-55 years for male on the day of certification;
- Intending couple to be married for at least five years and be Indian citizens;
- Intending couple must not have a surviving child (biologically or through adoption), except for a child who is mentally or physically challenged, suffers from a life threatening with no cure or a fatal disease;
- In case of such other conditions as may be specified by the regulations.

The issue with the introduction of such strict criteria is that it would not only make it difficult for intending parents to find suitable surrogate mother but also make it difficult for intending parents themselves to qualify as eligible before the appropriate authority. To find a married woman between the ages of 25-35, who is a close relative and has already been a mother of her own child but has never been a surrogate is a difficult job to do. The Bill, also, does not clearly specify who the close relative can be. Thus, it opens the Bill to wide variety interpretations.

Despite that, it is also inhumane to make intending parents wait for 5 years, especially in cases

of previously proven infertility, malformed uterus, PCOS<sup>11</sup> and several other issues which makes it difficult or impossible for an intending couple to conceive. Further, the fact that intending parents do not become eligible if they have a healthy surviving child which can be seen more as a population control measure than one regulating surrogacy.

The provisions of the Bill, are also in violation of the rights of the lesbian, gay, bisexual, transgender and queer (LGBTQ) community and those in “live-in relationships” unless it given a different interpretation before the Rajya Sabha or by judicial activism.

## 6. Conclusion

The Surrogacy Bill, 2019 has been drafted very minutely wherein commercial surrogacy has been attempted to be prohibited but the legislature has forgotten to take into consideration practical aspects which are related to the surrogacy and the prevailing socio-economic situation of the country. Surrogacy laws vary from country to country. Several countries like France, Spain, Portugal, Bulgaria, etc prohibit all forms of surrogacy whereas countries like United Kingdom, Ireland, Belgium, etc allow only altruistic surrogacy. Few countries like India, Russia and United States allow commercial surrogacy also.

Some of the contentious issues under the Bill are that intending couple has to qualify before the appropriate authority, find out married women between the age of 25-35, who is a close relative as well as mother of her own child but has never been a surrogate before. The other unsettled issues are the violation of the rights of the LGBTQ community, public disclosure of embarrassing private facts of the intending couple, etc. These provisions make the regulation of surrogacy more difficult rather than substantiating the need of the society and to curb the commercial surrogacy.

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<sup>11</sup> Polycystic ovary syndrome (PCOS) is a hormonal disorder common among women of reproductive age. Women with PCOS may have infrequent or prolonged menstrual periods or excess male hormone (androgen) levels. The ovaries may develop numerous small collections of fluid (follicles) and fail to regularly release eggs.



The Bill should have ensured the “reproductive freedoms” of economically and socially marginalized groups/community and the question of having close relative as a surrogate is unrealistic approach as per our existing societal norms. Through this Bill, a pragmatic approach has been adopted by legalizing altruistic surrogacy and completely prohibiting commercial ones.