



SURROGACY BILL 2016- AN ANALYSIS OF ITS LEGAL VALIDITY

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ABSTRACT

Motherhood is the prime phase of a Female's life. Majority of the Females across the World is fortune enough to rejoice such Motherhood, but some are not. Such Woman were made to feel disgrace about themselves by the Society for not accomplishing her purpose of being a Female. For those Women who are not able to conceive naturally, the method of Surrogacy is the best remedy as by this method, one could get a Child of their own blood. Within 20 years of its invention the Surrogacy was welcomed by majority of the woman all over the World including India. But there were no legislated laws for Surrogacy in India for many years, which paved way for the Illegal nature of that method, I.e. Commercialization of Surrogacy. The Indian Council for Medical Research (ICMR) provided some guidelines for the Surrogacy in 2005, but they were not as effective as a legislated law.

The Indian Parliament after witnessing the several issues arising of Surrogacy, passed a Bill for Surrogacy in 2005 for the first time and consequently passed the Bills for a number of years, but none were enacted as an Act. Finally, the Parliament passed a recent Bill for Surrogacy in 2016. But this Bill of 2016 was outraged by many people of India for its feature of emphasizing restrictions to Foreigners, Homosexuals and Unmarried Single Individuals from opting Surrogacy. The other feature of the Bill to be largely debated is that the provision of only a close relative of the Intending Parent could act as a Surrogate Mother.

Thus this paper has done a doctrinal research on the examining the Nature and concept of Surrogacy, analyzing the key issues of the Bill, evaluating its consequences and suggesting some remedies.

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INTRODUCTION

Females are the mother of creation. It is the prime reason, for the women to be considered as the divine source of life on Earth. The word *feminine* which denotes the opposite gender of male is a Latin word with its very own meaning of *nursing, breastfeeding*. Motherhood is a joy to every woman on Earth. Without attaining the part of motherhood a woman's life is considered to be incomplete. Majority of the women across the world cherishes such a blissful journey of their life. i.e. Motherhood. But, some are not fortune enough to rejoice motherhood. Such women were considered as a disgrace to the society in the ancient times. They were ill-treated and even physically and mentally tortured by their In-laws for not being able to give birth to a child (most preferably male child) to form the next generation of their family. Then women on the other side do feel disgrace of themselves for not fulfilling the purpose of their life. Adoption was not an often preferred solution as most of the families want the offspring of their family to be related to their blood. Only few couples opted for adoption. The Surrogacy method emerged as a boon to all

such women who were unable to reproduce naturally. It was the most welcomed solution for both the Men and Women where one of them is either Impotent or Infertile respectively, and to their families as through this method they were be able to extend their generation by their own blood. Within 20 years of its invention, it gained drastic preference from couples all over the world. The process of Surrogacy includes the find of a suitable Surrogate Mother according to the needs of the Intending or Commissioning Parents. Then a Contract was signed between the two parties regarding the terms and conditions and Rights of the Surrogate Mother, Commissioning Parents and the Surrogate Child.

Of all the Countries in the World, India was one of the few nations where the demands for Surrogate Mothers were high. Due to the high rate of Illiteracy and Poverty, it eventually entered the list. Nothing remains as good as it is when it was created or originated. As the saying goes "*A Coin has Two Sides*", by the passage of time it takes several shapes of which the ultimate result will be bad. According to the principle of Economics, the Demand of a Product is directly proportional to its Price.

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Likewise, when the demand for the Surrogacy increased gradually, the fee payable to opt the treatment also increased gradually.

When increase of the Monetary benefit was one aspect of the negativity of the Surrogacy, then the other aspect was that, the method where a child was gifted to such parents who were not able to conceive naturally, gradually changed into a process of designing the child according to their needs and wishes. Both of these negative aspects paved the way for the methods of illegality in the Surrogacy. The concept of Surrogate Agencies emerged which arranged all the contracts between the Commissioning Parents and the Surrogate Mother without giving a chance to meet each other personally. When the Commissioning Parents started to demand for Surrogate Mothers with specific color, texture, beauty, skills in order that the baby to be born possess such qualities and skills; the concept of commercialization emerged.

Commercial Surrogacy was seen as the Illegal aspect of Surrogacy in the eyes of law, as it changes the very own nature of such a Natural Treatment to an Artificial method of design of babies. In order to prohibit such forms of illegality in Surrogacy, the Indian Council for Medical Research (ICMR) passed certain guidelines to be adopted while performing the Surrogacy. But the main drawback for the commercial nature of Surrogacy to prevail for such a long term in India was due to the prolonged delay of the Legislative organ of the Indian Government in passing a respective legislation. Though, there were guidelines given by the ICMR and some of the precedents of the Judiciary, they were not that much effective as a Legislation.

The Indian Parliament after witnessing the major issues involved in the Commercial Surrogacy passed a Bill in 2016 to provide certain provisions for Surrogacy and to prohibit the Commercialization of Surrogacy. But the provisions of the Bill have certain drawbacks.

Thus this paper studies about the concept of Surrogacy, examines the ICMR guidelines and analyses the Surrogacy Bill 2015.

Theoretical background

Surrogacy is defined as a process where a woman consents on entering into a contract with the couples who opt for the method, to carry their child either through Traditional Surrogacy (genetically involves the Surrogate mother) or through Gestational Surrogacy (the Surrogate mother is not involved genetically) and who also agrees to relinquish all her rights over the Surrogate child which is to be born¹. Thus Surrogacy involves not only the Mental and Emotional stability of the Commissioning Parents in accepting the Surrogate Child, but also equally involves the same from a Surrogate Mother in relinquishing the child that he carried for months.

The approximate birth rate this year across the world is 67,023,700². Of that not all the child are born through natural pregnancy. Some are born through the method of Surrogacy.

¹Dr.RanjanaKumari, *Surrogate Motherhood- Ethical or Commercial*, CENTRE FOR SOCIAL RESEARCH (June. 23, 2017, 7:30 PM), <http://wcd.nic.in/Schemes/research/dtd14092015/DelhiMumbaiSurrogacystudyFinalreport.pdf>.

²June. 23, 2017, 7:35 P,<http://www.worldometers.info/world-population/>.

Infertility- the impact factor of Surrogacy

Across the World over 60-80 million couples are infertile and of that over 15-20 (25%) are from India³. The World Health Organization in its report at the end of 2012 stated that one in every four couples in the developing countries is infertile. Various reasons like Malnutrition, Unhealthy food habits, stressful lives etc. are responsible for the increasing infertile rate in the developing countries. The couples in the modern lifestyle plans to have their child after some years since their marriage due to their career goals and to enjoy their lives for some time. But the women fails to realize that over this delayed period they would age naturally and with the increase in their age, their fertility rate would start to drop down gradually. Over 40% of infertility is attributed to the Males and over 40% of infertility is attributed to the Females. So it is evident that both Male and Female has equal rate of infertility.

Apart from these various reasons regarding the lifestyle of the couples, there are even various vital biological factors in regarding to the Males and Females for the increasing infertility. The food that we consume in the present days are lacking with their vital natural nutrients that are essential for the human body in order to stay healthy, is also a stimulating factor for the increasing infertility. The hybrid fruits and vegetables are made to ripen or to even grow artificially and vaccination does not contain any of the vital vitamins. The various biological factors responsible for the increasing infertility is discussed below.

Table 1 Causes of Infertility of Women in India ¹

S. No	Causes	Yes in %	No in %
1.	Pelvic Inflammatory Diseases	7.4	92.6
2.	Uterine diseases	16.8	83.2
3.	Advanced Maternal Age	29.0	71.0
4.	Ovulation disorders	20.6	79.4
5.	Premature Ovarian Failure	16.8	83.2
6.	Poor egg quality	47.0	53.0
7.	Problems in Uterus or Fallopian Tube	37.5	62.5
8.	Surgery	1.4	98.6
9.	Sub Mucosal Fibroids	5.0	95.0
11.	Chemotherapy	0.2	99.8
12.	Medications	0.7	99.3

The above table indicates that poor egg quality is the major cause for the infertility of women in India with the highest cause percentage of 47%.

The Chemotherapy which is believed to be the major stimulating factor of infertility of women stands as the least cause factor with a percentage of only 0.2%. The identified factors are those which occurs in rarest of the rare cases due to some genetic disorders.

Of the above diseases, some has their respective treatments as a cure and some don't. In some cases, even when the treatment is available it may not be effective in some women due to some reasons. Hence for all those women Surrogacy acts as the best solution in having a child of their own.

³Amrita Baranwal"et al."NeelmaKunwar, SmitaTripathi, *Causes of Increasing Rate of Female Infertility in India*, 4 IJSR 237 (2015).

Arguments in favor of Surrogacy

The often point used as in favor of Surrogacy is that through the process of Surrogacy both the ends of the contract is met with a benefit. In terms of the legal nature of contract to be valid the following requirements like, two parties who are capable of entering into a contract under the Indian Law, a valid consideration for both the parties to be benefited and free consent from both the parties in entering into the contract. All these requirements are to be in accordance with the provisions of The Indian Contract Act, 1872. When, these requirements are taken into account in respect of the Surrogacy contracts, both the Commissioning and the Surrogate Mothers are to be legally capable to enter into the contract, the consideration of the contract would be a Child for the Commissioning Parents and Money for the Surrogate Mother, both the Commissioning Parents and the Surrogate Mother are also supposed to give their free consent in entering into the contract. The Surrogate Mothers most often use the money which they would gain out of the contract for their personal purposes. Hence, Surrogacy is viewed as a life changing source for the Commissioning Parents and as an economically benefit for the Surrogate Mothers.

Arguments against Surrogacy

In a country like India where the society is filled with religious and ethical beliefs vests certain moral principles upon the Chastity of the Women. Thus in India the Surrogate Mothers are viewed as a social taboo and they are not supported by their families in majority cases. The factors like Poverty, Illiteracy etc. pushes the Surrogate Mothers to agree for such contracts.

The increasing demand for specified Surrogate Mothers with specific qualities like color, texture, health, and even skills in order for the baby to possess certain good qualities inculcates commercialization in Surrogacy.

The Surrogate Mothers are often mis-led with misstatements and assurances as they are most probably illiterate and are from economically weaker sections of the society. Thus, Surrogacy is viewed as a one sided beneficiary method where the Commissioning Parents are the actual beneficiaries and not the Surrogate Mothers. It makes the woman to be viewed as a Child bearing machine.

Legislative Background

The guidelines provided by the Indian Council for Medical Research (ICMR) followed by the Assisted Reproductive Technology Bill in 2005 were the first ever guidelines and legal provisions regulating the process of a legal Surrogacy. Though the Bill was not passed as Legislation in the further time, they were taken into consideration in deciding the validity of the then Surrogacy agreements.

Judicial Background

The *Baby Manji*⁴ case was the landmark case for the Judiciary and the ICMR to take an initiative in providing guidelines for the Surrogacy. In this case a Japanese couple intended to obtain a child through Surrogacy from an Indian Surrogate Mother.

⁴Dr.RanjanaKumari, *Surrogate Motherhood- Ethical or Commercial*, CENTRE FOR SOCIAL RESEARCH (June. 24, 2017, 7:45 PM), <http://wcd.nic.in/Schemes/research/dtd14092015/DelhiMumbaiSurrogacystudyFinalreport.pdf>.

During the course of pregnancy the couple got divorced, yet the Male Intending Parent was interested in taking the custody of the Surrogate Child. But he faced severe legal issues as, according to the Indian Laws, single men could not take custody of a child. On the other hand neither the Female Intending Parent nor the Surrogate Mother was interested in obtaining the custody of the child. The Japanese Government ultimately gave the Child a one year temporary visa on humanitarian ground and she was given her custody to her grandmother.

When the Surrogacy agreement between that Intending Parents and the Surrogate Mother, was revealed it was found that there was no legal contract between the parties.

Hence, the various legal issues involved in the above case, stood as an impulse factor to legislate or to frame certain guidelines that are to be followed in the process of a Surrogacy in order for it to be termed as a valid Surrogacy.

The Indian Council for Medical Research (ICMR) guidelines 2005

The basic aspects of the Surrogacy method covered by these guidelines are as follows. The Surrogate Mother should not be below 21 years of age and should not act as a Surrogate Mother for more than 5 children in her life including her own children⁵.

If the transmission of egg into the Uterus of the Surrogate Mothers fails in the first time, then with her consent she could undergo three transmissions but not more than that. She is not supposed to be an Oocyte donor. In case of a Married Surrogate Women, the consent of her Husband is essential.

All the medical expenses of the Surrogate Mother during the gestation period are to be taken care by the Commissioning Parents.

The foreigners could opt for Surrogacy in India under certain conditions⁶. The Surrogate Mother could receive Monetary Compensation for the Surrogate Contract. She is supposed to relinquish all her rights over the Surrogate child⁷.

By these guidelines even an unmarried couple, single women, single man could become the legitimate parents of a Surrogate Child. Here a genetically related women of the Commissioning Parent could act as their Surrogate when she of the same generation of the Commissioning Parents⁸.

The Surrogacy Bill 2016

The Surrogacy Bill of 2016 is the recent Bill proposed by the Indian Parliament for regulating the provisions of Surrogacy.

Definitions

Under this Bill, the term *Commercial Surrogacy*⁹ is defined under *Section-2(f)* as, "Commercial Surrogacy means

⁵Dr.RanjanaKumari, *Surrogate Motherhood- Ethical or Commercial*, CENTRE FOR SOCIAL RESEARCH (June. 24, 2017, 7:45 PM), <http://wcd.nic.in/Schemes/research/dtd14092015/DelhiMumbaiSurrogacystudyFinalreport.pdf>.

⁶Dr.RanjanaKumari, *Surrogate Motherhood- Ethical or Commercial*, CENTRE FOR SOCIAL RESEARCH (June. 24, 2017, 7:45 PM), <http://wcd.nic.in/Schemes/research/dtd14092015/DelhiMumbaiSurrogacystudyFinalreport.pdf>.

⁷Dr.RanjanaKumari, *Surrogate Motherhood- Ethical or Commercial*, CENTRE FOR SOCIAL RESEARCH (June. 24, 2017, 7:45 PM), <http://wcd.nic.in/Schemes/research/dtd14092015/DelhiMumbaiSurrogacystudyFinalreport.pdf>.

⁸Dr.RanjanaKumari, *Surrogate Motherhood- Ethical or Commercial*, CENTRE FOR SOCIAL RESEARCH (June. 24, 2017, 9:15 PM), <http://wcd.nic.in/Schemes/research/dtd14092015/DelhiMumbaiSurrogacystudyFinalreport.pdf>.

⁹Dr.RanjanaKumari, *Surrogate Motherhood- Ethical or Commercial*, CENTRE FOR SOCIAL RESEARCH (June. 24, 2017, 9:15 PM),

commercialization 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 it 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."

The term *Couple*¹⁰ is defined under *Section-2(g)* as, "Couple means the legally married Indian man and woman above the age of 21 years and 18 years respectively."

The term *Intending Couple*¹¹ is defined under *Section-2(r)* as, "Intending Couple means a couple who have been medically certified to be an infertile Couple and who intend to become parents through Surrogacy."

The term *Surrogacy*¹² is defined under *Section-2(zb)* as, "Surrogacy means 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 birth."

The term *Surrogate Mother*¹³ is defined under *Section-2(ze)* as, "Surrogate Mother means a woman bearing a child who is genetically related to the Intending couple, through Surrogacy from the implantation of embryo in her womb and fulfills the conditions as provided in sub-clause (b) of clause (iii) of section-4."

Regulations for Surrogacy and Surrogacy Procedures

The Regulations for Surrogacy and its Procedures has been discussed under Chapter-IV of the Bill. Some of the important provisions are as follows¹⁴.

Section-4(b)- provides the conditions for a Woman to act as a Surrogate Mother.

1. Of the of the above section states that only a married woman whose having children of her own between the age of 25-35 years on the date of implantation shall act as a Surrogate Mother or to help in Surrogacy by donating her egg or Oocyte.
2. Of the above section states that only a close relative of the Intending Couple could act as a Surrogate Mother.
3. Of the section states that no woman is allowed to donate gametes in the process of helping for Surrogacy and is not allowed to act as a Surrogate Mother for more than once in her lifetime.

Section-4(c) of the Bill provides regulations for the eligibility certificate to be obtained from the appropriate authority explained under this Bill, by the Intending Couple in order to opt for Surrogacy.

of the above section states the required age for the Male and Female to become a valid Intending Couple under this Bill and the Bill firmly establishes that they are supposed to be Indian Citizens.

Section-7 of the Bill states that a Surrogate child should be abandoned by the Intending Couple born through the Surrogacy whether within or outside India for any reason, including but not restricted to any genetic defect, birth defect, subsequent developing defect, sex of the child, conception of more than one child.

Analysis of the Bill

The Surrogacy Bill of 2016 is passed with the main objective of prohibiting the Commercial Surrogacy. But it has also restrained a normal woman other than the close relative of the Surrogate Mother in becoming a Surrogate Mother, foreigners from opting Surrogacy in India, unmarried woman in becoming a Surrogate Mother, Homosexuals and a Unmarried couples in opting Surrogacy. When the Bill was opened for public opinion, the Bill was supported for prohibiting the Commercial Surrogacy, but many people opposed for establishing the above restraint. Thus, the analyses of the above restraint are discussed in detail below.

Discriminatory exclusionary against Foreigners, Same Sex partners (LGBT), Single individuals

Under the definitions of *Couple* under Section-2(g) and *Intending Couple* under Section-2(r); the Regulations for Surrogacy and its Procedures established under Section-4(c)(I), it is evident that only the Indian married Couples could opt for Surrogacy in India.

The definition of the term *Couple* and *Intending Couple* precisely refrains the Homosexuals and single individuals to be an Intending parent of a Surrogate Child. But, when considering the guidelines provided by the Indian Council for Medical Research (ICMR), 2005, the above restrictions were not available and all the above mentioned refrained people were legally allowed to opt for Surrogacy in India.

The Supreme Court of India has held that the Right to Life and Personal Liberty enshrined under Article-21 of the Indian Constitution is extended to all individuals including the foreigners¹⁵.

The Supreme Court after referring to the International Human Rights Conventions has held that Right to Health and Medical Care comes under the purview of Article-21 read with Articles-39(e), 41 and 43 of the Constitution of India¹⁶.

It has also been held by the Supreme Court that The Right to Life under Article-21, also includes the aspect of 'Right to Privacy' and 'Right to Family Formation'¹⁷. The various International Conventions upholding an Individual's right in deciding, choosing and forming a family as a Universally declared Right are, The International Conference on Population and Development (ICPD), Universal Declaration of Human Rights (UDHR), International, Covenant on Economic, Social and Cultural Rights, 1996 (ICESCR)¹⁸.

[http://www.prsindia.org/uploads/media/Surrogacy/Surrogacy%20\(Regulation\)%20Bill,%202016.pdf](http://www.prsindia.org/uploads/media/Surrogacy/Surrogacy%20(Regulation)%20Bill,%202016.pdf).

¹⁰June. 24, 2017, 9:15 PM, [http://www.prsindia.org/uploads/media/Surrogacy/Surrogacy%20\(Regulation\)%20Bill,%202016.pdf](http://www.prsindia.org/uploads/media/Surrogacy/Surrogacy%20(Regulation)%20Bill,%202016.pdf).

¹¹June. 24, 2017, 9:15 PM, [http://www.prsindia.org/uploads/media/Surrogacy/Surrogacy%20\(Regulation\)%20Bill,%202016.pdf](http://www.prsindia.org/uploads/media/Surrogacy/Surrogacy%20(Regulation)%20Bill,%202016.pdf).

¹²June. 24, 2017, 9:15 PM, [http://www.prsindia.org/uploads/media/Surrogacy/Surrogacy%20\(Regulation\)%20Bill,%202016.pdf](http://www.prsindia.org/uploads/media/Surrogacy/Surrogacy%20(Regulation)%20Bill,%202016.pdf).

¹³June. 24, 2017, 9:15 PM, [http://www.prsindia.org/uploads/media/Surrogacy/Surrogacy%20\(Regulation\)%20Bill,%202016.pdf](http://www.prsindia.org/uploads/media/Surrogacy/Surrogacy%20(Regulation)%20Bill,%202016.pdf).

¹⁴June. 25, 2017, 11:15 AM, [http://www.prsindia.org/uploads/media/Surrogacy/Surrogacy%20\(Regulation\)%20Bill,%202016.pdf](http://www.prsindia.org/uploads/media/Surrogacy/Surrogacy%20(Regulation)%20Bill,%202016.pdf).

¹⁵Hans Muller of Nuremberg v Superintendent, 1955 367 AIR; 1955 SCR (1) 1284

¹⁶CESC Ltd v Subash Chandra Bose, AIR 1992 SC 573; 1991 (2) SCALE 996.

¹⁷Kharak Singh v State of Bihar, AIR 1963 SC 1295.

¹⁸<http://ili.ac.in/pdf/paper1.pdf>, 3:00pm, 25/06/2017.

An individual's right in forming his family and using certain assistive medical measures in enforcing his right is a right guaranteed under the Article-8 of the European Convention on Human Rights (ECHR)¹⁹.

When the provisions of this Bill are compared with the above mentioned judgements and Conventions, it is precise that the restriction enforced by the Bill over the Foreigners in opting for Surrogacy in India is in violation of such Rights.

Article-51(c) of the Indian Constitution enforces the responsibility of the Indian Government to respect the International Treaties and Obligations. Thus under Article-51(c), India is obliged to enforce the obligations of the International Treaties which she has ratified. India has ratified the Covenant on Economic, Social and Cultural Rights, 1996 (ICESCR) on April 1979²⁰.

On the other hand the provisions of the Bill in refraining the Homosexuals from becoming a legal parents of a Surrogate Child is controversial to one of the most sensational issues of the modern world. i.e. the Rights of the LGBT.

While debates and protests are going for the legalisation of their rights in India and other countries, certain countries like United States has legalised their rights. The Surrogacy laws of certain nations like California Surrogacy Law, 2013, United Kingdom (UK), The Human Fertilization and Embryology Act, 1990 and Canada Assisted Reproductive Act, 2004 have recognized the rights of Homosexuals to opt for Surrogacy. The Bill by such restriction has indirectly infringed the basic rights guaranteed to human under UDHR. One of the most controversial point of this Bill is that this is the first time the Government of India's intention of opposing the Rights of the LGBT has been come to lime light. The explicit provision of the Bill banning the Homosexuals from opting Surrogacy has revealed two points; one, this is the first time the Government has used the term "Homosexuals" and that the government is not in the favor of such rights. Second, the government is also stating that the community might cease to exist.

Thus the provisions of this Bill under the said sections are discriminatory and exclusionary for two reasons. First, the Bill has infringed the basic right of a human to form a family which forms the core concept of right to life without providing justifiable reasons and explanations; Secondly, establishing discriminatory grounds on the basis of Sex, Marital status, Nationality to gain the assessment of a Medical Treatment for those people who share the basic necessity of health and medical issues to seek such treatments. Medical assistance is the core concept of human aid and it should be ensured to all potential seekers and not on the basis of discriminatory grounds.

Regulations for Surrogacy and its Procedures

Under the definition of the term *Surrogate Mother* under Section-2(ze) and the provisions established in Chapter-IV for woman to be recognized as a Surrogate Mother under this Bill in Section-4(b)(I), (II), it is evident that only those woman who are a close relative to the Intending Couple could act as a Surrogate Mother. When these provisions are compared with the provisions of The Indian Council for Medical Research

(ICMR), 2005 they are contrary to those, as the ICMR allowed any healthy woman to act as a Surrogate Mother.

The family system of the current generation has changed from a Joint Family System to a Nuclear Family System. Only few families are still under the concept of Joint Family System, where the intensity of the bonding and sharing of kindness, care, love etc exist.

In a restricted family of Nuclear Families such intensified nature of bonding and sharing is really difficult to be seen or even to expect. Among the presence of such Family status, expecting a Close Relative to act as a Surrogate Mother will be very seldom.

Further, the Bill has failed to give a prescribed definition for the term 'Close Relative' on who is supposed to be treated as a Close Relative, what should be the extent of generation gap for a person to be termed as a Close Relative.

On the other hand, it is a biological fact that when children are born between a couple of close relations, then the baby will be having a high probability of being born with certain physical and mental defects. The marriages between close relatives are prohibited by the Indian law in the basis of the fact that the child born through the conjugal relations between close relatives will be affected with health issues.

Heart problems tops the list, followed by nervous disorders, limb anomalies etc. A detailed analysis of the issue involving over 11,000 children, born out of consanguineous relationships, 386 of them are affected with health defects²¹.

The problem is that when two people from the same family enters into the conjugal life then their baby will be having the high chance of risk of inheriting the diseases of the family through the family genes, whereas when two people from different families enters into the conjugal life then the chance of inheritance of the family diseases will be less. Thus when the conjugality of such couples could result in the birth of physically or mentally affected child, then when a close relative sharing the same blood and genes of the Intending Couples acts as the Surrogate Mother, then the chance of the Surrogate Child in inheriting the family diseases through their family genes would also be high when compared to the Surrogate Child being born through a Surrogate Mother from the general society.

Further, the provisions states that the Surrogate Mother could donate her eggs and Oocytes for the service of Surrogacy; but has failed to restrict the number of attempts for which a woman could donate her eggs and oocytes. When this is compared with the guidelines of The Indian Council for Medical Research (ICMR) 2005, the Surrogate Mother could donate her eggs only for three times in her lifetime. She was not allowed to donate her Oocyte. Thus the present Bill has provided provisions in controversy to the ICMR guidelines but has not given any reasonable explanations for such provisions.

Restricting the Unmarried Individuals from opting Surrogacy seems to be an inappropriate provision as they are legally recognized for adoption under the Indian laws for adoption.

¹⁹ Dickson v The United Kingdom, (2008) 46 EHRR 41; (2007) ECHR 1050.

²⁰ June. 25, 2017, 4:10 PM, http://nhrc.nic.in/documents/india_ratification_status.pdf.

²¹ D. Balasubramanian, *The Biology of First Cousin Marriages*, THEHINDU, July 11, 2013, <http://www.thehindu.com/sci-tech/health/the-biology-of-first-cousin-marriages/article4902050.ece>.

Under the Adoption laws of India, an unmarried person could even adopt a child in gender opposite to his/her gender with a prescribed age limit of 21 years. When, Surrogacy for an unmarried person is equal to that of the nature of an Adoption, then there is no need felt for enforcing such restriction over the unmarried persons under this Bill. By providing such restrictions, it is like indirectly emphasizing the inability of the single parents in raising their children.

Hence, refraining them from opting Surrogacy is unnecessary without being justified with reasonable explanation. Thus from the above analysis it is revealed that the provisions of the present Bill of 2016 had resting provisions in contrary to the guidelines of the ICMR, 2005 which was the first ever guidelines to be given for the regulation of Surrogacy.

The restrictions on the Intending Couple on the grounds of Nationality, Sex, and Marital Status are contravening to the provisions of Universal Human Rights and the Bill has failed to give reasonable explanations for such restriction. The restriction that only a close relative of the Intending Couple could act as a Surrogate Mother for the couple is contrary to the biological or natural birth of children through the conjugal lives of close relatives.

Recommendations

1. A term 'Close Relative' should be replaced with the term of a 'healthy Indian woman' as child born between consanguineous relationships between members of close relatives could affect the child to be born with several health defects.
2. The term 'Close Relative' should at least be provided with a precise definition in order to establish firmly as to who should be a Close Relative and what should be the extent of generation gap between the Surrogate Mother and the Intending Couple.
3. The provisions refraining the Foreigners, Homosexuals and Unmarried Individuals should be relaxed as it is contrary to the basic human rights conferred to a human under the Convention of UDHR.
4. Provisions should be established for the restriction on the number of times a Surrogate Mother could donate her eggs and Oocyte.
5. The definition for the term 'Surrogate Mother' given under Section-2(ze) should be modified in accordance with the 1st recommendation.

CONCLUSION

The basic objective of the Surrogacy is to act as a remedial measure for those Couple who are unable to conceive naturally. It is a form of medical aid to be benefited by potential seekers across the world who shares the same health issue.

Hence restricting the grounds of its application on the basis of Nationality, Marital Status, Sexuality violates the basic motive of such medical remedy and the basic nature of Right enforced for humans under the various International Conventions. Further, allowing only a woman of Close Relation of the Intending Couple to act as their Surrogate Mother, could increase the chance of risk of the Surrogate Child in inheriting the genetic disorders of their family which is in accordance to the biological status of consanguineous relationships between close relations. Thus, the provisions and definitions should be altered accordingly in order to establish uniformity in the Medical Assistance of Surrogacy for infertile couples.

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