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THE SURROGACY (REGULATION) BILL, 2016

Prepared by Smt. Kusum Rawat, Additional Director (23034232) and Shri Rajkumar Patton, Junior Library Assistant of Lok Sabha Secretariat under the supervision of Smt. Kalpana Sharma, Joint Secretary and Dr. P. J. Antony, Director.

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THE SURROGACY (REGULATION) BILL, 2016¹

INTRODUCTION

The Surrogacy (Regulation) Bill, 2016² proposes to regulate surrogacy in India by establishing National Surrogacy Board at the Central level, and State Surrogacy Boards and Appropriate Authorities in the States and Union Territories. The proposed legislation ensures effective regulation of surrogacy, prohibits commercial surrogacy³ and allows ethical surrogacy to the needy infertile Indian couples.

The Salient Features of the Bill are as follows:

- To constitute Surrogacy Boards at the National and State Levels
- To allow ethical altruistic surrogacy to intending infertile couple between the age of 23-50 years and 26-55 years for female and male, respectively.
- The intending couples should be legally married for at least five years and should be Indian citizens.
- The intending couples shall not abandon the child born out of a surrogacy procedure under any condition.
- The child born through surrogacy will have the same rights as are available for the Biological child.
- The surrogate mother should be a close relative of the intending couple and should be between the age of 25-35 years. She can act as surrogate mother only once.
- The National Surrogacy Board shall exercise the powers and perform the functions conferred on it under this Act, and the Surrogacy Boards at the State and Union Territory levels are to perform similar functions.

¹ The Surrogacy (Regulation) Bill, 2016 was introduced in the Lok Sabha by the Minister of Health and Family Affairs, Shri J.P. Nadda on 21 November 2016.

² For Objects and Reasons of the Bill, please see **Annexure-I**.

³ The **228th Report of the Law Commission** of India has recommended for prohibiting commercial surrogacy and allowing ethical altruistic surrogacy to the needy Indian citizens by enacting a suitable legislation.

- The surrogacy clinics shall be registered under the Act after the Appropriate Authority is satisfied that such clinics are in a position to provide facilities and can maintain equipments and standards including specialised manpower, physical infrastructure and diagnostic facilities as may be prescribed in the rules and regulations.
- No person, organisation, surrogacy clinic, laboratory or clinical establishment of any kind shall undertake commercial surrogacy, abandon the child, exploit the surrogate mother, sell human embryo or import embryo for the purpose of surrogacy. Violation of the said provision shall be an offence punishable with imprisonment for a term which shall not be less than ten years and with fine which may extend to ten lakh rupees.

HIGHLIGHTS OF THE BILL

- The Bill aims to regulate surrogacy services in the country, to prohibit the sale and purchase of human embryo and gametes, to prevent commercialization of surrogacy, to prohibit potential exploitation of surrogate mothers and to protect the rights of children born through surrogacy.

BACKGROUND

India has emerged as a surrogacy hub for couples from different countries for the past few years. Incidents of unethical practices, exploitation of surrogate mothers, abandonment of children born out of surrogacy and import of human embryos and gametes have been reported from time to time. There have also been widespread condemnation of commercial surrogacy in India which has regularly been reflected in different print and electronic media for the last few years. As there is lack of legislation to regulate surrogacy, the practice of surrogacy has been

misused by the surrogacy clinics, which leads to rampant of commercial surrogacy and unethical practices in the said area of surrogacy.

Standing Committee Report of the Surrogacy Bill⁴

Key observations and recommendations of the Committee are summarized below:

1. **Commercial vs. altruistic surrogacy:** Surrogacy is the practice where one woman carries the child for another with the intention of handing over the child after birth. The Bill prohibits commercial surrogacy and allows altruistic surrogacy. Altruistic surrogacy involves no compensation to the surrogate mother other than the medical and insurance expenses related to the pregnancy.
 - The Committee recommended a surrogacy model based on compensation rather than altruistic surrogacy. The compensation must take care of several things including the wages lost during the pregnancy, psychological counselling, and post delivery care.
 - The Committee noted that there is potential for exploiting poor women who become surrogates due to the lack of regulatory oversight and legal protection. However, it also noted that the economic opportunities available to surrogates through surrogacy services should not be dismissed entirely. It further stated that under altruistic surrogacy, permitting women to provide reproductive labour for free without them being paid is unfair and arbitrary.

2. **Implications of the surrogate being a ‘close relative’:** Under the Bill, the surrogate can only be a ‘close relative’ of the intending couple. The Committee noted that altruistic surrogacy by close relatives will always be out of compulsion and coercion, and not because of altruism. Such an arrangement within the family may have: (i) detrimental psychological and emotional impact on the surrogate child, (ii) parentage and custody issues, and (iii) inheritance and property disputes. The Committee recommended that the criteria of being a ‘close relative’ should be removed to allow both related and unrelated women to become surrogates. Further, the Committee recommended that the Bill must unambiguously state that the surrogate mother will not donate her own eggs for the surrogacy.

⁴ The Standing Committee on Health and Family Welfare (Chairperson: Prof. Ram Gopal Yadav) submitted its report on the Surrogacy (Regulation) Bill, 2016 on August 10, 2017

3. **Persons who can avail surrogacy services:** The Bill limits the option of surrogacy to legally married Indian couples. The Committee noted that this overlooks other sections of the society who may want a surrogate child. It recommended that the eligibility criteria be widened and include live in couples, divorced women, and widows. Further, this facility must be extended to Non Resident Indians, Persons of Indian Origin and Overseas Citizen of India card holders but not to foreign nationals.
4. **Five year waiting period:** Under the Bill, the intending couple can undertake a surrogacy arrangement following the inability to conceive after five years of unprotected coitus or other medical conditions preventing conception. The Committee recommended that the definition of 'infertility' in the Bill should be as per WHO's definition where it is the inability to conceive after at least one year of unprotected coitus. The Committee observed that the requirement of a five year waiting period violates the right to reproductive autonomy.
5. **Gamete (sperm and egg) donor:** Under the Bill, intending couples can commission a surrogacy only by proving infertility. Thus, gametes from the couple may not be a possibility due to infertility. In such cases, the gametes will be required to be donated by others. The Committee noted that there is no mention of an egg or sperm donor in the Bill. It recommended that the provision for gamete donation must be incorporated in the Bill.
6. **Abortion:** Under the Bill, the approval of the appropriate authority (appointed by the central or state government) is required to undertake an abortion during the surrogacy. The Committee recommended a review of this requirement considering the existence of the Medical Termination of Pregnancy Act, 1971 which regulates abortions. Further, it noted that time is crucial in medical emergencies during pregnancy. In such cases, there may not be enough time to seek permission from an authority for performing an abortion to save the life of the surrogate mother.

STATEMENT OF OBJECTS AND REASONS

India has emerged as a surrogacy hub for couples from different countries for the past few years. There have been reported incidents of unethical practices, exploitation of surrogate mothers, abandonment of children born out of surrogacy and import of human embryos and gametes. Widespread condemnation of commercial surrogacy in India has been regularly reflected in different print and electronic media for the last few years. The Law Commission of India has, in its 228th Report, also recommended for prohibition of commercial surrogacy by enacting a suitable legislation. Due to lack of legislation to regulate surrogacy, the practice of surrogacy has been misused by the surrogacy clinics, which leads to rampant resort to of commercial surrogacy and unethical practices in the said area of surrogacy.

2. In the light of the above, it had become necessary to enact a legislation to regulate surrogacy services in the country, to prohibit the potential exploitation of surrogate mothers and to protect the rights of children born through surrogacy.

3. The Surrogacy (Regulation) Bill, 2016, *inter alia*, provides for the following, namely:—

(a) to constitute the Surrogacy Boards at the National and State levels;

(b) to allow ethical altruistic surrogacy to the intending infertile Indian married couple between the age of 23-50 years and 26-55 years for female and male respectively;

(c) the intending couples should be legally married for at least five years and should be Indian citizens to undertake surrogacy or surrogacy procedures;

(d) to provide that the intending couples shall not abandon the child, born out of a surrogacy procedure, under any condition and the child born out of surrogacy procedure shall have the same rights and privileges as are available to the biological child;

(e) the surrogate mother should be a close relative of the intending couple and should be an ever married woman having a child of her own and between the age of 25-35 years;

(f) to provide that the surrogate mother shall be allowed to act as surrogate mother only once;

(g) to constitute the Surrogacy Board at the National level which shall exercise and perform functions conferred on it under the Act. It is also proposed to constitute

Surrogacy Boards at the State and Union territory levels to perform similar functions in the respective States and Union territories;

(h) to appoint one or more appropriate authorities at the State and Union territory levels which shall be the executive bodies for implementing the provisions of the Act;

(i) to provide that the surrogacy clinics shall be registered only after the appropriate authority is satisfied that such clinics are in a position to provide facilities and can maintain equipments and standards including specialised manpower, physical infrastructure and diagnostic facilities as may be provided in the rules and regulations;

(j) to provide that no person, organisation, surrogacy clinic, laboratory or clinical establishment of any kind shall undertake commercial surrogacy, issue advertisements regarding commercial surrogacy, abandon the child born through surrogacy, exploit the surrogate mother, sell human embryo or import human embryo for the purpose of surrogacy and contravention of the said provisions shall be an offence punishable with imprisonment for a term which shall not be less than ten years and with fine which may extend to ten lakh rupees.

4. The Notes on Clauses explain in detail the various provisions contained in the Surrogacy (Regulation) Bill, 2016.

5. The Bill seeks to achieve the above objectives.

NEW DELHI;

JAGAT PRAKASH NADDA

The 28th October, 2016.

International comparison of surrogacy laws

The Surrogacy (Regulation) Bill, 2016 proposes to regulate surrogacy in India. The Bill (i) allows altruistic surrogacy to certain Indian couples; (ii) prohibits commercial surrogacy; (iii) specifies the eligibility conditions to be fulfilled by surrogate mothers and couples intending to initiate a surrogacy procedure; and (iv) protects the rights of children born through surrogacy.

The table below compares the provisions in the Bill with surrogacy laws in various countries such as Netherlands, UK, South Africa, Greece, and Russia.

Table 1: International comparison of surrogacy laws

Country	India Surrogacy Bill, 2016	Netherlands	United Kingdom	South Africa	Greece	Russia
Type of surrogacy allowed (altruistic or commercial)	<input type="checkbox"/> Altruistic (Commercial surrogacy prohibited).	<input type="checkbox"/> Altruistic (Commercial surrogacy prohibited).	<input type="checkbox"/> Altruistic (Commercial surrogacy prohibited).	<input type="checkbox"/> Altruistic (Commercial surrogacy prohibited).	<input type="checkbox"/> Altruistic (Commercial surrogacy prohibited).	<input type="checkbox"/> Commercial surrogacy allowed.
Payment to the surrogate	<input type="checkbox"/> Medical expenses and insurance coverage.	<input type="checkbox"/> Reasonable expenses related to IVF, the pregnancy, delivery, those expenses not covered by insurance, adoption, insurance and legal charges.	<input type="checkbox"/> Reasonable expenses excluding payment for the benefit of the surrogate mother.	<input type="checkbox"/> Medical expenses and insurance coverage; <input type="checkbox"/> Any loss of earnings for the surrogate mother due to the pregnancy.	<input type="checkbox"/> Expenses related to the pregnancy, the gestation, delivery and the post-partum period; <input type="checkbox"/> Any loss of earnings for the surrogate mother due to the pregnancy.	<input type="checkbox"/> No limit.
<i>Eligibility criteria for commissioning parent(s)</i>						
Requirement of being married	<input type="checkbox"/> Yes	<input type="checkbox"/> No (Single male/female allowed)	<input type="checkbox"/> No (Includes intending parents living in a civil partnership or living simply as partners)	<input type="checkbox"/> No (Single male/female allowed)	<input type="checkbox"/> No (Single woman allowed)	<input type="checkbox"/> No (Single woman allowed)
Citizenship and/or residency	<input type="checkbox"/> Citizenship.	<input type="checkbox"/> Citizenship.	<input type="checkbox"/> Permanent residence.	<input type="checkbox"/> At least one of the commissioning parents needs to be domiciled in the country.	<input type="checkbox"/> Domicile.	<input type="checkbox"/> No requirement.
Existence of a medical reason	<input type="checkbox"/> Must prove infertility i.e. inability to conceive.	<input type="checkbox"/> Congenital absence of a uterus or a hysterectomy and any other condition which makes it difficult for the intending mother to have a child.	<input type="checkbox"/> No requirement.	<input type="checkbox"/> Not able to give birth to a child and such a condition is permanent and irreversible.	<input type="checkbox"/> Intending mother is unable (for medical reasons) to bear a child.	<input type="checkbox"/> Gestation and birth of a child is impossible due to medical reasons.

	India Surrogacy Bill, 2016	Netherlands	United Kingdom	South Africa	Greece	Russia
<i>Eligibility criteria for surrogate mother</i>						
Age	<input type="checkbox"/> 25-35 years.	<input type="checkbox"/> <44 years.	<input type="checkbox"/> Not specified.	<input type="checkbox"/> Not specified.	<input type="checkbox"/> Not specified.	<input type="checkbox"/> 20-35 years.
Relation to commissioning parent(s)	<input type="checkbox"/> Close relative.	<input type="checkbox"/> No.	<input type="checkbox"/> No.	<input type="checkbox"/> No.	<input type="checkbox"/> No.	<input type="checkbox"/> No.
Requirement of being married	<input type="checkbox"/> Yes.	<input type="checkbox"/> No.	<input type="checkbox"/> No.	<input type="checkbox"/> No.	<input type="checkbox"/> No.	<input type="checkbox"/> No.
Number of own children	<input type="checkbox"/> At least one.	<input type="checkbox"/> At least one.	<input type="checkbox"/> No requirement.	<input type="checkbox"/> At least one.	<input type="checkbox"/> No requirement.	<input type="checkbox"/> At least one.
Number of times one can be a surrogate	<input type="checkbox"/> Once.	<input type="checkbox"/> No restriction.	<input type="checkbox"/> No restriction.	<input type="checkbox"/> No restriction.	<input type="checkbox"/> No restriction.	<input type="checkbox"/> No restriction.
Consent of the partner	<input type="checkbox"/> No provision.	<input type="checkbox"/> Not required.	<input type="checkbox"/> Not required.	<input type="checkbox"/> Required.	<input type="checkbox"/> Required.	<input type="checkbox"/> Required.
Legal guardian of the surrogate child	<input type="checkbox"/> Intending couple.	<input type="checkbox"/> Surrogate (Transfer of guardianship through adoption)	<input type="checkbox"/> Surrogate. (Transfer of guardianship through adoption if the intending parents are genetically related to the surrogate baby; otherwise through a court order)	<input type="checkbox"/> Intending parent(s).	<input type="checkbox"/> Intending parent(s).	<input type="checkbox"/> The surrogate mother, if she has provided her egg. <input type="checkbox"/> Intending parent(s) if surrogate mother has not provided her egg.
Imprisonment for engaging in commercial surrogacy	<input type="checkbox"/> Minimum 10 years.	<input type="checkbox"/> Maximum one year.	<input type="checkbox"/> Maximum three months.	<input type="checkbox"/> Maximum 10 years.	<input type="checkbox"/> Minimum two years.	<input type="checkbox"/> No provision.

Sources: A comparative study on the regime of surrogacy in EU member states, European Parliament, 2013; India: The Surrogacy (Regulation) Bill, 2016; 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; PRS.