



## THE SURROGACY (REGULATION) BILL, 2016: ANALYSIS AND SUGGESTED CHANGES

### I. Issue **Restrictive eligibility criteria for surrogacy. The Bill allows only married couples to avail surrogacy**

**Relevant clauses** **Section 2(g)** defines “couple” as the **legally married Indian man and woman** above the age of 21 years and 18 years respectively.

**Comment** Recognition and respect needs to be accorded to the reproductive right of each person to reproductive health and the right to form a family. Restricting it only to married couples is discriminatory and violative of the right to life and right to equality guaranteed to all persons under Articles 21 and 14 of the Constitution of India. The Surrogacy (Regulation) Bill 2016 denies surrogacy to couples in a **live-in relationship**. The Supreme Court of India, very recently, ruled that, “*In the modern time, live-in relationship has become an acceptable norm. It is not a crime.*” Even the children that are born to such couples are accepted as legitimate under the law.

**Recommendation** Amending S. 2(g)  
*Deletion of “couple” and replacing it by “any person” to mean person who is single including divorced, widowed, unmarried or a couple, either married or in a relationship in the nature of marriage, regardless of their sexual orientation and who intend to be legally bound as the parent of a child or children born out of surrogacy.*

### II. Issue **Surrogate mother being a close relative**

**Relevant clause** **Section 4 (iii) (b) (II)** stipulates that “no person, **other than a close relative of the intending couple**, shall act as a surrogate mother and be permitted to undergo surrogacy procedures as per the provisions of this Act”.

**Comment**

- The current Bill does not define who can be a close relative.
- It must be borne in mind that, given the patriarchal and exploitative nature of families, **women may be coerced** into becoming surrogates.
- Medical complications may also arise from having a close relative as a surrogate. If the surrogate mother is genetically related to the couple, and is allowed to donate her egg for the surrogacy, it may result in **congenital anomalies** for the surrogate child. According to the World Health Organisation, when biological parents are related by blood, the prevalence of rare genetic congenital anomalies increases.

**Recommendation**

- *Deletion of “no person, other than a close relative of the intending couple”*
- *Addition of “any person certified to be medically fit for surrogacy by a medical practitioner”*



### III. Issue **Altruistic surrogacy**

**Relevant clause** **Section 2(b)** defines altruistic surrogacy as “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.”

**Recommendation** Intended parents must pay for all the costs that are incurred in the surrogacy procedure at the surrogacy clinic and she must not be liable to incur any of the costs related to this procedure undertaken by her at the behest of the intended parents.

### IV. Issue **Allowing surrogacy in cases where surviving child of “intending parent” is disabled or suffers from certain illnesses.**

**Relevant clause** **Section 4 (iii) (c) (III)** stipulates an exception with regard to entering into a surrogacy arrangement by “the intending couple who have a child and who is **mentally or physically challenged or suffers from life threatening disorder or fatal illness with no permanent cure** and approved by the appropriate authority with due medical certificate from a District Medical Board”

**Comment**

- **Childlessness is being equated with having a disabled child.** Moreover, this clause espouses a certain instrumentalist view of having children, who are to be able-bodied.
- In case of children who are fatally ill or diagnosed with “life threatening disorder”, there is a further assumption, almost an encouragement, for parents to initiate surrogacy.

**Recommendation** Deletion of this clause as it is **discriminatory** and in clear violation of the rights of disabled children to be treated with dignity.

### V. Issue **Abortion during surrogacy**

**Relevant clause** **Section 3(vi)** states that “no surrogacy clinic, registered medical practitioner, gynaecologist, paediatrician, human embryologist, intending couple or any other person shall conduct or cause abortion during the period of surrogacy without the written consent of the surrogate mother and on authorisation of the same by the appropriate authority concerned:

Provided that the authorisation of the appropriate authority shall be subject to, and in compliance with, the provisions of the Medical Termination of Pregnancy Act, 1971”

**Comment**

- The provisions of the clause are appreciable as they clearly state that no person, organisation, clinic, etc. shall force the surrogate mother to abort at any stage of surrogacy.
- However, the clause also mentions “...except in such conditions as may be prescribed”. However, the surrogate mother’s right to decide on continuation or termination of the pregnancy is solely her prerogative and decision and should not be compromised under any circumstances.



- The Bill does not specify the time period by which such authorisation for abortion has to be given.

**Recommendation** *Addition of a proviso that “Notwithstanding anything contained in clause (vii) of section 3, the surrogate will have absolute right to decide on continuation or termination of the pregnancy and should not be compromised under any circumstances. Such decision shall not affect the surrogate mother adversely in terms of availing insurance amount covering medical bills including medical assistance, treatment, medical procedures, any psychological counseling charges, transport expenses, loss of earning, post termination of pregnancy care and any other ancillary procedures thereafter.”*

## VI. Issue **Written informed consent**

**Relevant clause** **Section 6 (ii)** prescribes that no person shall seek or conduct surrogacy procedures unless he has “obtained in the prescribed form, the written informed consent of the surrogate mother to undergo such procedures in the language she understands.”

- Comment**
- There is no mention of a written contract or agreement between the intending couple and the surrogate. Such a written contract is important to protect the rights and responsibilities of both the parties in the surrogacy arrangement.
  - The consent format should also include details of insurance and compensation along with the detailed information on the side effects and after effects of the procedures to the surrogate mother in the language she understands.

**Recommendation** The following safeguards must be added to Section 6 (ii):

- No person shall conduct, participate and engage in any surrogacy or surrogacy procedure unless there is an agreement in writing between the parents commissioning the surrogacy and surrogate mother.
- No such surrogate agreement is valid unless:
  1. The agreement shall be entered into in the Republic of India.
  2. The agreement includes a written informed consent of the surrogate mother in the language she understands. Such informed consent form must consist of information on all risks, procedures, compensation and payment of expenses.
  3. The agreement must include details of the insurance, onus of payment of compensation and medical expenses.

## VII. Issue **Storage of human embryo or gamete and guidelines for research**

**Relevant clause** **Section 3(vii)** states that “no surrogacy clinic, registered medical practitioner, gynaecologist, paediatrician, human embryologist, intending couple or any other person shall store a human embryo or gamete for the purpose of surrogacy: Provided that nothing contained in this clause shall affect such storage for other legal purposes like sperm banks, IVF and medical research for such period and in such manner as may be prescribed.”



- Comment**
- Any medical research involving human embryo or gamete has to be approved by an ethics committee and ought to follow the National *Guidelines for Biomedical and Health Research Involving Human Participants, 2017, formulated by the Indian Council for Medical Research.*
  - It should be with the informed consent of the person whose embryo or gametes are being used for such research.

**Recommendation** *Addition of Explanation to S.3 (vii)*  
 “For purposes of the proviso in clause(vii), storing human embryo or gamete for any medical research, should be only after such medical research is approved by an Institutional Ethics Committee and relevant Central Government Authority, with proper informed written consent of the donor and according to the guidelines laid down in National *Guidelines for Biomedical and Health Research Involving Human Participants, 2017, formulated by the Indian Council for Medical Research*”

### VIII. Issue **Retrieval of oocytes**

**Relevant clause** **Section 8** provides that “The number of oocytes or embryos to be implanted in the surrogate mother for the purpose of surrogacy, shall be such as may be prescribed.”

- Comment**
- The retrieval of a larger number of oocytes presents serious repercussions and danger to the woman.
  - The surrogate mother has the right to complete information well in advance about the number of oocytes that are to be retrieved.
  - Additionally details about the procedures, the possible adverse events or serious adverse events must be communicated to her in verbal as well as in written form, prior to eliciting her consent and undertaking the procedure.
  - In the case of embryos to be implanted, the number has not been included; no more than two embryos should be transferred to the surrogate mother. The risks with embryo transfer (ET) should be explained in detail. No foetal reduction should be permitted.
  - The number of attempts for surrogacy procedure should be clearly stated and the number of cycles be limited and the clause should not be left ambiguous as is the case with this Bill.

**Recommendation** The number of oocytes that can be retrieved be restricted to three.

### IX. Issue **Insurance coverage**

**Relevant clause** **Section 2(q)** provides that insurance means “an arrangement by which a company, individual or intending couple undertake to provide a guarantee of compensation for specified loss, damage, illness or death of surrogate mother during the process of surrogacy.”

**Section 4(iii)(a)(III)** prohibits initiation or performance of surrogacy or surrogacy



procedures unless the intending couple has a certificate of essentiality issued by the appropriate authority about the fulfilment of certain conditions including, “an insurance coverage of such amount as may be prescribed in favour of the surrogate mother from an insurance company or an agent recognised by the Insurance Regulatory and Development Authority established under the Insurance Regulatory and Development Authority Act, 1999”

### Comment

- **Duration of insurance coverage:** Substantial evidence exists that point to the possibilities of long term health consequences on the surrogate mother during as well as beyond the period of surrogacy. However the Bill makes provision for insurance only during the process of surrogacy.
- **Responsibility for providing insurance coverage:** The Bill prescribes insurance coverage for surrogate mother, but however does not specify who should be purchasing the insurance policy and paying the premium. Further, the provisions of the Bill do not encompass a situation where the insurance company has refused to pay compensation or any medical expenses. The onus of payment of compensation and any medical expenses ought to be cast on the parents commissioning surrogacy.
- **Expenses to be borne during surrogacy:** The Bill is silent about the expenses to be born during the process of surrogacy..
- **Compensation in case of death of surrogate mother:** The Bill is also silent on the amount of compensation in the event of death of the surrogate mother while undergoing procedures of surrogacy or in the course of surrogate pregnancy or while giving birth to the surrogate child. Since the government envisages altruistic surrogacy arrangements within close relatives, it is furthermore important to specify the need for such compensation as it might be difficult for the surrogate mother’s next of kin to demand such compensation from their close relative.

### Recommendation

- Insurance policy has to be in favour of the surrogate mother, the premium has to be paid by the parents’ commissioning surrogacy. In the event the insurance company refuses to pay, the onus will be on the parents commissioning surrogacy to cover the above expenses and compensation.
- The guarantee of payment must extend beyond the period of surrogacy to account for effects on health that may arise out of surrogacy but manifest thereafter.
- Insurance policy has to cover the following:
  - Compensation and expenses of medical care in case of any injury or any health complications arising out of undergoing procedures of surrogacy such as donating her egg or oocyte, even if such procedure does not result in pregnancy.
- The surrogate mother should also be compensated for:
  - Cost of Medical procedures/diagnostics/ medicines, food, nutrition, health and dietary supplements.
  - A compensation to cover out of pocket expenses, loss of earning.
  - Post partum care including psychological counseling charges, food, nutrition and free health supplements and free diagnosis for one year from



the date of delivery.

- The surrogacy agreement must contain a clause for payment of compensation in the event of death of the surrogate mother while undergoing procedures of surrogacy or in the course of surrogate pregnancy or while giving birth to the surrogate child.