

“Commercial Surrogacy in India”

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Abstract

India was the hub of commercial surrogacy from the last few decades but due to the recent development in law of surrogacy in India, the commercial surrogacy have been banned in India. The government contends that it does not support commercial surrogacy in order to protect the rights of surrogate mothers. Commercial surrogacy had established itself as an industry in India, after the institution of ban on the commercial surrogacy merits, demerits and reasoning behind the ban became the highly debated topic and which raised concerns to understand the commercial surrogacy pertaining to India. The research paper aims to explore the commercial surrogacy in India with reference to the history of commercial surrogacy in India, the earlier regulation or non-regulation of commercial surrogacy and the present situation pertaining to the commercial surrogacy in India. The research work also throws light upon the reasons of commercialisation of surrogacy in India and also tries to answer that why India was the hub of commercial surrogacy. The present research work also elaborate in brief the types of surrogacy.

Additionally, the paper explores the recent developments in the laws of surrogacy in India and gives special emphasis to the ‘THE SURROGACY (REGULATION) BILL, 2019’. The paper also tries to find out the merits, demerits and the reasons and intention of the executive behind the banning of commercial surrogacy. The life and health of the women gets adversely affected due to the commercialisation of surrogacy and the same issue have been also elaborated in the research work. The constitutionality pertaining to the ban to commercial surrogacy have also been dealt within the research paper. Other different incidental aspects of commercial surrogacy have also been thrown light upon.

Keywords: commercial surrogacy, THE SURROGACY (REGULATION) BILL, 2019, women, constitutionality, India.

SURROGACY: SAGA CONTINUES FOR LEGAL BALANCING

Introduction to Surrogacy: Definitional Issues

None of the existing law in India defines surrogacy. The etymology of the term “surrogate” is taken from the Latin word “surrogatus” (past participle of surrogate) implicates “a substitute”: a person supposed to act in the place of other person. According to the Black’s Law Dictionary, the word surrogacy means that “the process of carrying and delivering a child for another

person” and the “Surrogate parent” defined as “the term applied to a parent who is not a natural parent of the child but assumes the role of”¹. The Britannica encyclopedia defines the “Surrogate motherhood” as the “practice in which a female i.e. (the surrogate mother) carries a baby for a couple who are unable to produce their own children in the natural way, usually because the wife is unable to procreate or we can say that she is not fertile or otherwise unable to undergo pregnancy”. In purported customary surrogacy, the surrogate mother is made pregnant through manual semen injection with the sperm of the spouse. In a type of surrogacy i.e. gestational surrogacy, the spouse's ova and the husband's sperm are exposed to in vitro treatment, and the subsequent incipient organism is embedded in the surrogate mother.² Typically, in either method, the surrogate surrenders every single parental right, yet this has been not yet challenged and is not rebutted yet. The practice of surrogacy, though not mysterious in earlier times, came to universal consideration in the mid-1970s when there was the decrease in the number of the children for adoption were available and as there was scientific growth in the area of embryology made all those methods viable alternative to the long, hectic and uncertain procedures of the adoption.. Surrogate motherhood has raised up a number of issues, for example, the matter of pay for administrations (which, taken to the extraordinary, has ramifications of thinking about kids as a ware) and the privileges of the majority of the people included should any part of the method go astray”³. The Report of the Committee of Inquiry into Human Fertilization and Embryology or the Warnock Report (1984) explains the term surrogacy as the practice where a female takes and carries a child which is not hers, and she take it for other person with the motive that the same child would be given to the intended parents after the birth. However, this report uses “surrogacy” as a term which implicates both **gestational as well as commercial** surrogacy. “In commercial surrogacy understandings, the surrogate mother goes into a contract with the intending couple or a solitary parent to hold up and take the burden of the of pregnancy. Consequently of her consenting to convey the term in which she is pregnant, she is paid by the agent recruited for the same. The standard charge is around \$26,000 to \$31,000 in India which is around 1/3rd of that in super developed nations like the USA. This has made India a favorite hub for the foreign couples who seek a financially savvy treatment for infertility and an entire part of the industry of medical tourism has prospered on the surrogate practice.

¹ <http://thelawdictionary.org/surrogate-parent/> accessed on 5th October 2019

² The Black' Law Dictionary categorizes surrogacy into two classes: ‘gestational surrogacy’ and ‘traditional surrogacy’. They are defined as follows: Gestational surrogacy: A pregnancy in which one woman (the genetic mother) provides the egg, which is fertilized, and another woman (the surrogate mother) carries the fetus and gives birth to the child. Traditional surrogacy: A pregnancy in which a woman provides her own egg, which is fertilized by artificial insemination, and carries the fetus and gives birth to a child for another person (Ibid.).

³ <https://www.Britannica.com/topic/surrogate-motherhood> (LAST UPDATED: 5-10-2019) accessed on 5th October 2019.

Surrogacy and Adoption: Comparison

Before the development of technology of surrogacy i.e. Assisted Reproductive Technology also known as (ART), the only way available to the couples or to the intended parents who were infertile to get a child was only through adoption.⁴ Here the question raises that asks the need of surrogacy if the adoption method is available to the intended parents to get a child. This contention seems to influence the law in many nations where through this argument the legislature have forbidden the practice of surrogacy in the state. We can take the example of a state ‘Michigan’ situated in mid-eastern of united states the infertile couples are who are childless are encouraged to adopt instead of going for the method of surrogacy.⁵ However, the view adopted here in the case is not that practical — it is very simple to say that adoption is a lengthy and expensive process and it also have lots of legal complications and consequences. Adoptions usually need the people to be married, of a definite age, and generally married a definite range of years before they're even thought of for adoption.⁶ Also, in adoption there is no genetic relationship in between the parents and the child which can lead to less emotional attachment with the child leading to the bitterness in the relationship of the child and the parents in various ways. But these typical scenarios does not comes in the surrogacy. Surrogacy carries a blood relationship in between the intended parents and the child so as to creating the natural bonds of love and affection. This can be seen as biggest accomplishment of surrogacy over adoption.

The government of a state can motivate the intending parents in a liberal desired nature so that they consider adoption over the surrogacy method but they cannot be forced to refrain from the surrogacy and go for adoption method.

Assisted Reproductive Technology (ART)

The terminology Assisted Reproductive Technology is defined under the ART (Regulation) bill, 2010 as “ All of the techniques which make an effort to obtain a pregnancy by carrying or manipulating the sperm of men or the oocyte outside the body of the human being and transferring the gamete or the embryo into the reproductive tract.”⁷ I can also be said that Assisted Reproductive Technology are a group of those technologies which gives assistance in the conception and pregnancy. It also included in itself many of the different methods for example intrauterine insemination to other variants of Invitro Fertilization (IVF) which is very commonly recognized as “test tube baby” technology. And so modern reproductive technology gives many methods of non-natural or artificial conception techniques and artificial insemination and IVF is

⁴ Test tube triumph & tragedy— Nobel for UK scientist stirs memory of a Bengal doctor, The Telegraph.

⁵ MICH COMP LAWS S. 722; Doe v. Attorney General, 487 NW 2d 484 (Mich Ct App 1992).

⁶ Legalization of Commercial Surrogacy and The ‘Rent-A-Womb’ Culture: Is India’s Stand Sound Enough?, 2 NSLJ (2013) 54 at page 57.

⁷ See, The Assisted Reproductive Technology (Regulation) Bill, 2010, Section 2(c).

one of them. In the case of Artificial Insemination, the genetic material of the male i.e. semen is forced into the body through injection into the female's body. This method of insemination is mostly adopted where the male counterpart is infertile.⁸ So, this method of injecting of the semen of male into the body of female is popularly known as Artificial Insemination by the male (AIH). It is of essential nature here to mention that only the injecting of semen into the female body is artificial but rest of the part is purely as natural as the normal female carries a child in her womb.

Commercial Surrogacy in India

The origins of commercialized surrogacy in Indian history can be traced back to October 3, 1978; the day when Baby Kanpuriya (the world's second and India's first IVF baby) was born. The first child through surrogacy in India was born on 23rd June 1994. In 2004 commercial surrogacy received enormous attention when a women who was the Indian citizen gave birth to a child via surrogacy for her daughter. Later, Oprah featured an American couple pursuing surrogacy in India during her daytime television show because of which commercial surrogacy gained more attention.

The major case in India related to surrogacy came in 2008 before Supreme Court of India. The case is popularly known as *Baby Manji Yamada case*⁹. In this case it was observed by the Hon'ble apex court that "commercial surrogacy reaching industry proportions is sometimes referred to by the emotionally charged and potentially offensive terms like wombs for rent, outsourced pregnancies or baby farms". In India as there was no law on the surrogacy it was presumed that it is legal but also it is to be considered that there was no law which permitted or regulated the practice of surrogacy. However, the changing face of law is now going to usher in a new rent-a-womb law as commercial surrogacy was legalised in India in 2002.¹⁰ The Indian council of medical research (ICMR) established guidelines to overlook the use of Assisted Reproductive Technology (ART) in 2005 which was named as 'National guidelines for accreditation supervision and regulation of ART clinics in India. But these guidelines are silent on many major issues and therefore, "exploitation, extortion and ethical abuses in surrogacy trafficking are rampant, go undeterred and surrogate mothers are misused with impunity".¹¹

Although the first surrogate-born baby was born in 1994 it was only in the year 2002, India legalized commercial surrogacy. In India commercial surrogacy is a part of the trend known as Medical tourism. couples from various other nations travel to India to receive different types of medical treatments. For example, cardiac care, joint replacement or cosmetic surgery because of the low-cost price. Commercial surrogacy has been precisely renamed as reproductive subcontracting. India has emerged as the center of commercial surrogacy or the "surrogacy

⁸ M. Srinivas, "Assisted Reproductive Technology: Legal Issues," 4 Andhra Law Times.

⁹ *Baby Manji Yamada v. Union of India*, (2008) 13 SCC 518.

¹⁰ Commercial Surrogacy: Is It Morally and Ethically Acceptable in India? (2011) PL December S-11 at page S-12.

¹¹ Kshitij Bansal, "The Legality of Surrogacy, Legal News and Views" Vol. 25, No. 3.

capital of the Globe” attracting couples not only from within the country but from other countries as well.

The industry of commercial surrogacy has come a long way with around 3000 clinics across India providing the service to childless couples. According to the Indian Council of Medical Research (ICMR), approximately 2000 children are born every year with the help of the ongoing commercial surrogacy. Surrogacy is a \$ 2.3 billion industry in Indian subcontinent, according to the Confederation of Indian Industry. A 2012 study backed by the United Nations found that the estimated turnover of the commercial surrogacy industry in India was to be greater than \$400 million in a year (The Times of India). Growth in the number of couples opting for surrogacy and the acceptance of same sex marriage gave impetus to the already thriving industry.

Assisted reproductive technology (ART) has made great accomplishments and development in furthering many individuals’ dreams of becoming parents. It has come to fully embrace ART in many of its forms— especially with regards to a wedded couple's utilization of technology like in vitro fertilization (IVF). It is to be of much importance to note that more morally and ethically controversial forms of ART have gained sway. Surrogacy arrangements, sometimes ago was related to the black market, and it is now well recognized as valid and are legally enforceable in more than a dozen states.¹²

Surrogacy is an arrangement in which a woman agrees to bear a baby of a person (s). Surrogacy becomes commercial when the surrogate is paid money for her services which is beyond medical expenses associated with the pregnancy. Today commercial surrogacy is a multi-billion industry, a business which is being carried out in various parts of the world and is growing at a considerable rate. Across the world, many couples who are childless due to infertility or other health problems (for example, absence or congenital deformity of the uterus or any medical condition that makes pregnancy potentially life threatening) or are not showing that much of interest in carrying a baby for various reasons are opting for Assisted Reproductive Technologies. For example, artificial insemination, In Vitro Fertilization & others. Among which gestational surrogacy is the most preferred. Before going further, we need to understand surrogacy in medical terms. Majorly there are two types of surrogacy which is practiced today:

1. Genetic surrogacy (also known as conventional surrogacy)
2. Gestational surrogacy (It is also known as Full surrogacy)

Genetic Surrogate or Traditional Surrogacy: Genetic surrogacy involves the insemination of surrogate's eggs with the intended father's sperm. Most of the times, it happens in cases where the female partner of the couple is unable to bear a child due to health problems or when a single

¹² See Sarah Mortazavi, It Takes a Village to Make a Child: Creating Guidelines for International Surrogacy, 100 GEO. L.J. 2249, 2258–60 (2012) (categorizing states that either permit, regulate, or ban “commercial” and/or “altruistic” surrogacy contracts).

person or homosexual couple want to have a baby. In this case the child carries the genes of the surrogate mother. Hence, she is also the biological mother of the child by the fact.

Gestational Surrogate: Gestational surrogacy includes the implantation of a fetus utilizing either the eggs or sperm of the intended couples, a given egg treated with sperm from the intended father or an embryo is made utilizing the eggs and sperm of the donors. The child doesn't carry the genes of surrogate mother as she is not his/her biological mother.

Reasons behind the emergence of India as The Hub

There are primarily four reasons behind the emergence of India as the center of commercial surrogacy. Firstly, flexible and lenient rules and regulations. Secondly, low cost. Thirdly, world class medical facilities and lastly, easy availability of the surrogates.

A. Lenient Rules and Regulations

Commercial Surrogacy was made legal in India in the year 2002. Certain guidelines were laid down by the 'Indian Council of Medical Research (ICMR)' under National Guidelines for Accreditation, Supervision and Regulation of Assisted Reproductive Technology Clinics in India in the year 2005. The practice is carried out according to these guidelines. Some of the major guidelines are; the child born out of the process of surrogacy should be adopted by the parents who are genetically related to the child and not by the biological mother, surrogacy by assisted conception to be considered for couples who cannot carry a baby to term, payment to surrogates to cover all expenses associated with pregnancy, advertisement regarding surrogacy to not be made by ART clinic, the age of the surrogate i.e. the female who would be carrying the child in the womb should not be more than 45 years of age, in case a relative is acting as a surrogate for a couple then the relative should be of same generation, a prospective surrogate should be medically tested to avoid any infection to the baby and neither the surrogate nor her husband should have illicit and extramarital relationship with anyone in the last six months and lastly a woman may not act as a surrogate more than thrice in her lifetime.

Often it is argued that the above-mentioned guidelines are in favor of the intended parents and the ART clinics. The guidelines try to ensure that the intended parents get a healthy baby without any hassle by ensuring that the surrogates are healthy and even go to the extent to prying into their personal lives which is highly undesirable. The guidelines helped clinics to run their business without any hassle. For the surrogate there is not much in these guidelines. There is no provision of counseling. What must be the age of the surrogate has not been laid down. Although later, women between 21-35 years of age were allowed to be surrogate.

In the year 2008, ICMR came with Assisted Reproductive Technology Bill and Rules (a draft). It was more detailed in nature, paying attention to different aspects of commercial surrogacy. The suggestions made by Law Commission of India for the first time suggested commercial

surrogacy to be treated like any other legal contract. An attempt was made so to take the consideration of the interests of intended parents, surrogate and baby born out of method of surrogacy. Along with couples, single people were also allowed to opt for surrogacy; who face many problems while adopting a child, surrogacy thus came as a big relief to them. Suggestions were made to secure the future of the surrogates and babies born out of the surrogacy arrangement also.

The Law Commission of India submitted its 228th report on dated 5th August 2009 on the practice of commercial surrogacy, titled “Need for Legislation to Regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of Parties to a Surrogacy”. Some of the major suggestions made were providing financial support to the child, life insurance for the surrogate, privacy to the person who donated the sperm as well as surrogate, prohibiting sex selective surrogacy, one of the intended parents to the donor as well and cases of abortions to be governed by the Medical Termination of Pregnancy Act 1971 only. In the year 2010 a bill was drafted. The Bill was an improvement on the last draft and a part of the bill contained more detailed rules to regulate commercial surrogacy. Rules were laid down for different stakeholders involved; the surrogates, the intended parents of the child, the baby born out of the arrangement and the clinics providing the service. Later the bill was revised. However it could not be placed on the table in the Lok Sabha.

B. Low Cost

In the developed world commercial surrogacy is exorbitantly expensive. For example, in the USA, the cost may reach up to \$ 80,000. In India, the same procedure costs around \$ 12,000 (usually paid to a medical tourism agency or a surrogacy broker).

C. World Class Medical Facilities

India today has world class medical facilities due to which people from across the world are rushing to India for treatment. Additionally, India has English speaking medical staff and the cost for any treatment is lower than what is charged in the developed world. As a result of which something called “medical tourism” has emerged and is being promoted as well. Commercial surrogacy can also be called a part of this newly emerging medical tourism.

D. Easy Availability of Surrogates

According to a report by Government of India, 21.9% of the total population was living below the national poverty line till the year 2011. Although there has been a decline experienced in the percentage of population living below the national poverty line in India (In 1993, 45.3% of the population lived below the national poverty line), yet there is a huge section of the population which is still living a life of abject poverty. According to The World Bank,

1. India has made extraordinary development in plummeting absolute poverty and it has been seen since the 2000s. Between FY 2011/12 and 2015, poverty level declined from 21.6 to an estimated 13.4 percent at the international poverty line (2011PPP\$1.90 per person per day), continuing the earlier trend of healthy decline in poverty levels. Aided by vigorous monetary growth, more than 91 million people came out of the extreme poverty and their standard of living was also inclined during this period. Despite this wonderful success, poverty remains prevalent in India. In 2015, latest data was accumulated and it was found that 176 million were living in extreme poverty.

It is a well-known fact that women are the most affected by poverty. According to the Beijing Platform for Action, 1995 "...while poverty influences family as a whole in general, due to the gender based division of work and obligations regarding family unit welfare, ladies do not bear a proportionate weight attempting to manage household consumption and production under conditions of increasing scarcity." (The Beijing Declaration and Platform for Action). The women are not remunerated for it and their efforts go socially unrecognized which affects their decision-making power in the family. Poverty also affects women in other ways. There are more chances of domestic violence, child marriage, sexual exploitation, lack of education.

2. Poverty has the potential to increase the violence, women and girls living in poverty face multiple forms of inequalities and face aggravated risk of violence as a result. Poor females are 2.5 times more likely to marry during their adolescent than those living in the wealthiest conditions. Ladies and girls living in destitution are increasingly defenceless against sexual abuse, including trafficking. What's more, the individuals who experience household or personal accomplice brutality have fewer choices to leave fierce connections, because of their absence of pay and assets. (UN Women)

Hence, it would not be of much to say that in India poverty and lack of opportunities create conducive conditions for women to opt for surrogacy which pays them well. As a result of which surrogates are easily available in India. Additionally, couples looking for a surrogate generally prefer a woman who is not into drugs, has her own family and India offers exactly what they are looking for the above-mentioned reasons India emerged as the centre of commercial surrogacy. Couples, unable to conceive naturally or because of other reasons started rushing to India for a surrogate in order to have a baby. Hence, commercial surrogacy emerged as a major economic opportunity for women with poor economic background as they were able to earn much more than they could otherwise. However, with time stakeholders started facing some major problems due to the absence of codified laws to regulate the industry of commercial surrogacy.

Difficulties Faced by Children Born Out of Commercial Surrogacy

Surrogacy prompts issues of citizenship, motherhood, parentage, and rights of a child. There have been occasions when children have been denied citizenship of the state of intended parents

resulting in either a very long battles in the court of law (For example, There was a case of German couple with twin surrogate babies or the Israeli gay intended couples who had to go for the DNA testing to prove parentage) or having an uncertain future in an orphanage. There have also been cases in which babies born out of a commercial surrogacy arrangement have been left by the intended parents even though they were genetically related to them. For example, an Australian couple entered into a surrogacy arrangement with an Indian woman living in India. Twins were born, a boy and a girl. However, the couple decided to leave with only one of the twins as they already had one baby of their own. The decision was made on the basis of child's gender.

Apart from problems related to their citizenship children are also vulnerable to physical and psychological problems. Since majority of the surrogates undergo cesarean surgery to deliver the baby, the baby is vulnerable to health hazards like obesity, celiac disease, asthma, type I diabetes, higher sensitivity to allergens. Detachment from the woman who gave birth to them can have serious psychological impact on them.

However, despite all the problems, the commercial surrogacy industry kept on expanding even though commercial surrogacy has been criticized by many. Neha Wadekar in her article *Wombs for Rent: A Bioethical Analysis of Commercial Surrogacy in India* called for a complete ban on commercial surrogacy long back because for her it violates the bioethical principles. She further argues "...with a free market economy, and combination of public and private healthcare sectors, a moderate or regulated version of surrogacy would be difficult to achieve. I believe that it is crucial to preserve the rights and dignities of these Indian women and that commercial surrogacy in India must be banned in order to end the potential exploitation that is occurring."¹³

Anton van Niekerku and Leize van Zyl from a moral perspective. in their article *The Ethics of Surrogacy: Women's Reproductive Labour* have argued that the practice of surrogacy has chances of causing moral harms to the party involved in such arrangements, as conflicts can arise over the parental rights of the baby born through such arrangement. (Niekerku and Zyl, 1995).

Clara Watson in her article *'Womb Rentals and Baby-Selling: Does Surrogacy Undermine the Human Dignity and Rights of the Surrogate Mother and Child?'* has denounced surrogacy. Watson argues that there is the presence of exploitation in the normal routine in all forms of surrogacy, whether literal slavery and trafficking or the unequal balance between commissioning couple and the contracted surrogate. She justifies her argument by quoting Kasja Ekman who questions, "how can we substantiate a situation in which rich persons use poor people as breeders, inject them full of hormones, take babies away from them and leave pocket money in exchange?" (Watson, 2016).

¹³ Wadekar, & Neha. (2011). *Wombs for Rent: A Bioethical Analysis of Commercial Surrogacy in India*. *TuftsScope The Journal of Health, Ethics and Policy* (online), 10(3), Retrieved from: http://www.nehawadekar.com/wp-content/uploads/2015/01/Neha-Wadekar_Writing-Sample-1_Surrogacy-Published.pdf.

However, there are many in favor of commercial surrogacy. The most common argument given in its favor is that it helps childless people by “completing” their family and helps the poor surrogates financially. Martha Nussbaum sees it as an opportunity for those women who have commercial surrogacy as the only option. She is of the opinion that the surrogates can empower themselves through commercial surrogacy. She sees no harm in using one’s body to earn as all of us do that in one way or the other. She further argues that there should be contracts to secure the employment of the surrogate mothers in order to enhance their economic autonomy and personal dignity (Nussbaum, 1998).

Surrogacy Regulation Bill 2019

The commercial surrogacy is forbidden by the surrogacy regulation bill 2019. According to section 2(zc) of the Surrogacy bill “surrogacy can be defined as a practice in which a woman bears a child for an intending couple with an intention of giving the child to them after the delivery of the child.

Regulation of surrogacy: The proposed bill puts a complete ban on commercial surrogacy and allows surrogacy done for altruistic purposes. Altruistic surrogacy is a kind of surrogacy in which no compensation is provided to the surrogate mother other than her medical expenses. Commercial surrogacy includes surrogacy or its connected procedures undertaken for a financial profit or reward (in money or kind) surpassing the essential medical expenses and sum of money.

Purposes that surrogacy is permissible: Surrogacy is permitted once it is:

- for intending couples that suffer from evidenced infertility;
- altruistic;
- not for industrial purposes;
- not for manufacturing kids available, whoredom or different varieties of exploitation; and
- For any condition or unwellness such as through rules.

Eligibility criteria for commissioning parents: The commissioning parents ought to have a ‘certificate of essentiality’ and a ‘certificate of eligibility’ issued by the suitable authority which may be fixed by the appropriate government.

A certificate of essentiality is issued under following conditions: (i) a certificate of evidenced physiological condition of one or each of the members of the intending couples from a District Medical Board; (ii) Associate in Nursing order of parentage and custody of the surrogate kid gone a Magistrate’s court; and (iii) sum of money for an amount of sixteen months that covers post-delivery complications for the surrogate.

The certificate of eligibility to the intending couple is given upon following conditions fulfilment of the subsequent conditions: (i) the commissioning parents must be registered Indian voters and married for a period of 5 years; (ii) the wife must be between 23 to 50 years of age and husband

must be between 26 to 55 years of age (iii) they must not be having a child (biological, adopted or surrogate) with exception to a child suffering from a life threatening disease or a mentally or physically disabled child; and (iv) different conditions which will be such as by rules.

Eligibility criteria for surrogate mother: to get a certificate of eligibility from the suitable authority, the surrogate mother has to be:

- a close relative of the intending couple;
- a better half having a toddler of her own;
- twenty-five to thirty-five years old;
- a surrogate just one occasion in her lifetime; and
- Possess a certificate of medical and psychological fitness for surrogacy. Further, the mother cannot offer her own gametes for surrogacy.

Appropriate authority: The central Associate in nursing state governments shall appoint one or a lot of acceptable authorities among ninety days of the Bill turning into an Act. The functions of the suitable authority include;

- (i) Granting, suspending or cancelling registration of surrogacy clinics;
- (ii) Ensuring that the rules and regulations are enforced in the surrogacy clinics;
- (iii) Provisions for investigating and taking action for the breach of the bill;
- (iv) Recommending modifications to the principles and rules.

Registration of surrogacy clinics: Surrogacy clinics are banned from undertaking surrogacy services without registering with an appropriate authority. All the surrogacy clinics are required to register within 60 days of appointment of the appropriate authority.

National and State Surrogacy Boards: The central and also the state governments shall represent the National Surrogacy Board (NSB) and also the State Surrogacy Boards (SSB), severally. Functions of the NSB embrace,

- assisting the central government on the policy matters relating to surrogacy
- providing a code of conduct for surrogacy clinics; and
- Supervising the functioning of SSBs.

Parentage and abortion of surrogate kid: A child born to a surrogate mother must be considered as the biological child of the commissioning parent. For the abortion of the surrogate child a written consent must be obtained from the surrogate mother and from the suitable authority. This authorization should be in compliance with the Medical Termination of maternity Act, 1971. Further, the mother can have Associate in nursing choice to withdraw from surrogacy before the embryo is established in her uterus.

Offences and penalties: The offences under the Bill include:

- Advertising or commissioning commercial surrogacy;
- Exploitation of the surrogate mother;
- abandoning, exploiting or disowning a surrogate child; and
- Importing or sale of human embryo or gametes for surrogacy.

Committing the above-mentioned offences can attract a penalty of upto 10 lakhs rupees and an imprisonment of up to 10 years. The Bill specifies a spread of offences and penalties for different contraventions of the provisions of the Bill.

In the year 2012, Justice K.S. Puttaswamy, in a landmark judgement held that women's right to make reproductive choices is guaranteed under Article 21 of the Constitution of India, thus as inalienable as the other fundamental rights. Pragma Vats, who is an activist and works for an international NGO contends that, "as women we must be able to make decisions about our own body, it's all about freedom of expression and choice". The mustn't encroach upon this freedom.

The new Surrogacy (Regulation) Bill, 2019 does not deviate a much from this point though puts a condition upon this freedom that only heterosexual legally married couples can choose surrogacy. Now this provision leads to exclusion of single people, divorcees, live-in couples, widows, homosexual couples etc. There is another condition which states that the couples should have been married for more than five years and they must have the certificate issued to them of infertility by the appropriate authority so to hire a surrogate. It also says that under altruistic surrogacy no financial benefits should be there other than the medical expenditures and insurance of the surrogate mother.

Analysis of the proposed bill

According to the researcher, if you are depriving anyone from availing surrogacy, based on sexuality, caste, religion, etc. it's a violation of the human rights. The proposed bill prohibits same sex couples or homosexual couples from becoming parents via surrogacy, which is denial of justice to the minority of the subcontinent. It is to be remembered that Gays are born too from heterosexual acts of humans.

The Surrogacy Bill of 2019 orders that a married woman aging of 25 and 35 who has a child of her own blood can become a surrogate or can donate her eggs. This makes the case for altruistic surrogacy by stating that the surrogate mother must be close kin of the parents to be and must only become a surrogate once during her life. This also many times makes unable the intending couple to find a surrogate due to variety of reasons i.e. societal etc.

There also have been concerns which were raised over unfettered fertility services provided in India which includes IVF, draft of a law by Indian Council of Medical Research, the Artificial Reproductive Technology Bill to make sure that "services provided are ethical in its nature and

that the medical, societal and legal rights of all those concerned are protected"--is yet to be presented in Parliament. Surrogacy is part of it.

Is the bill constitutionally valid?

This bill fails to adhere the Golden Triangle test devised by the Supreme Court to inspect the constitutionality of laws. This test aims to ensure the basic fundamental rights of individual are not taken away by the state.

1. This proposed law hampers Article 14 of the Indian Constitution, which guarantees "equality before the law and equal protection of laws to all citizens. "Allowing altruistic surrogacy to only legally married couples of Indian nationality and debarring others on the grounds of nationality, marital status, and sexuality invading upon the right to equality for being an unreasonable classification. The question here arises that if the intention of the bill was to prevent surrogate mothers from exploitation then such restriction cannot be justified.

2. Secondly, by prohibiting the right to choose surrogacy for homosexuals & unmarried couples, the Bill reflects the mind-set of the majority of Indian diaspora that stigmatizes the idea of homosexuality and unmarried people living together. This creates an orthodox in the society.

3. Proposed Bill violates the "right of living and livelihood" given under Article 21 of the Constitution.

Supreme Court of India has interpreted the right to reproductive independence to mean that the parents have the right to choose the mode of parenthood they want, either naturally or via surrogacy in this case. Lastly, the proposed Bill is lewd of Article 19 of the Constitution, and Article 19(1)(g) specifically, which guarantees the "freedom of trade and profession".

Breach of international treaties and compulsions

The Proposed Bill of Surrogacy also breaks several protections to human life, well-being and poise enshrined in the various international treaties ratified by India. Interfering with the reproductive rights of the people, the proposed Bill oversteps upon the "Right to construct a family" cherished in Article 16 of the Universal Declaration of Human Rights. Special Rapporteur on the Right to Health by UN has also emphasized the importance of self-determinations and prerogatives pertaining to generative, maternal, and sexual right, including the right to family planning services for the accomplishment of the highest possible standard of physical and mental wellbeing, this proposed law further interrupts the state's core responsibility to ensure equal treatment and non-discrimination in attaining the reproductive health service by curbing the access to altruistic surrogacy.

Conclusion

India has been the hotspot for commercial surrogacy mainly on four grounds: - easy availability of surrogates, world class medical facilities, low cost and compassionate guidelines. As a result of which people not only from within India but also from other countries are running to India looking for a surrogate mother. India emerged as the centre for commercial surrogacy the backers (surrogate mother, commissioning parents and the baby born) continued to face problems. Surrogates face problems which are economic, social, legal and medical in nature. The major problem faced by the parents to be, living in foreign land is taking the baby back to their country. Many new-borns out of surrogacy had faced the problem of nationality. Despite all the hurdles the industry of commercial surrogacy has been increasing and flourishing. The major argument given in its favour is that it helps both the childless couples and the surrogates. It gives the childless couple a child and helps the surrogate financially.

The whole Bill has been drafted without making a justiciable rationale and taking prior views from the stakeholders. It excludes the homosexual to get a child from the surrogacy method in spite of the fact in the recent judgement it have been established by the Hon'ble Supreme Court of India that homosexuality is no more an offence¹⁴. The bill does not in fact includes the homosexuals but excludes them which is not in the consonance with the law of the land itself and is contrary to it in its very nature. There may be variety of scenarios where the couples are unable to find any close relative for the surrogacy to be fulfilled and then in those cases they would not be allowed to procure a child which is also bad in its fundamental nature and is violative of their fundamental rights. Thus, this proposed law can create disastrous impact rather than moral correction in the country.

The government must reanalyse the proposed bill and amend the policy regarding surrogacy so as to take step towards inclusion of the intending couples and enable every deserved person to get a child through surrogacy if really needed. Exclusion of the homosexuals or establishing very rigid procedure would ultimately lead to dissatisfaction of the general people and their will additionally it would also harm the economy.

¹⁴ Navtej Singh Johar v. Union of India, (2018) 10 SCC 1.