

## “Surrogacy in India and its Legal Aspects”

*Manali Singh  
School of Law,  
University of Petroleum and Energy Studies,  
Dehradun*

### **ABSTRACT**

The paper focuses on commercial aspect of surrogacy in India.

India has become a fertility tourism hotspot, with an estimated 400 million dollars being spent by couples from abroad, which has raised a red alarm amongst the legislators of the country. In the backdrop of thriving surrogacy market in India, the Surrogacy (Regulation) Bill, 2016 was passed in the Lok Sabha aiming at banning commercial surrogacy in India.

After introducing the topic, the paper clarifies the meaning and concept of surrogacy its kinds and historical background further the paper aims to track the timeline of commercial surrogacy in India, with it being legalized in the year 2002 with the legislation of CGS to its proposed ban with the Surrogacy (Regulation) Bill, 2016. Further this paper aims at critically analyzing the reasons which culminated into India being one of the heavens for childless couples from abroad. Believing that the inherent problem lies in the ‘commercial’ part of the surrogacy, the legislators believe that only allowing altruistic surrogacy will prevent ‘potential exploitation of surrogate mothers, or will it? The paper aims to question. The paper will also discuss the judicial response of India towards surrogacy with primarily focusing on the ‘Baby Manjhi’ case which put India in the spotlight for its policies on surrogacy or lack thereof.

The critics of commercial surrogacy questions the practice on two points, whether it’s women’s choice and freedom and surrogacy should be considered as a service or whether commercial surrogacy should be considered exploitative due to lack of opportunities and stigma against a surrogate mother, which the paper aims to analyze. The paper then concludes with observations on commercial surrogacy in India.

**Keywords:** commercial surrogacy, fertility tourism, Surrogacy (Regulation) Bill, ART bill, Baby Manjhi, altruistic surrogacy

### **INTRODUCTION**

Robert Browning once said “Motherhood: All love begins and ends there”, the right to reproduction is the ultimate right of an individual. The agony of not being able to procreate is an unbearable pain which no individual wants to live through. The society that we live in gives utmost importance to the institution of family. According to the Indian Society of Assisted Reproduction, infertility affects 10 to 14% of the Indian diaspora higher among the Urban couples. During the past decades the science has progressed leaps and bounds in respect to

assisted reproductive technology<sup>1</sup>. Today there are various ways through which an infertile couple can enjoy the gift of procreation such as, IVF, intra- uterine insemination, in vitro maturation, vitrification<sup>2</sup>. Among options available to such couples the most famous option is surrogacy which is achieved through in- vitro fertilization as it allows a genetic link between the parents and the child, further it has a high success rate.

There are credible sources which prove that the practice of surrogacy was prevalent since time immemorial. For example, the Babylonians allowed the practice of surrogacy to avoid infertile couples to divorce. The earliest mention of surrogacy is in the Book of genesis, in which the servant Hagar is mentioned begetting childless Sarah through her husband Abraham<sup>3</sup>. Further it was in the year 1980 that a Michigan lawyer named Noel Keane drafted the first contract of surrogacy. Since then the practice of surrogacy has changed leaps and bounds.

With the globalization of trade in services, and the rise in medical tourism, India has risen as a prime destination for medical services and in the few past years for reproductive services. As corporatized health care pushes medical tourism, the Indian state is also extending its support to this burgeoning sector. Over the past few years India has become a hotspot for “reproductive tourism” with a booming 2.2 billion dollars industry to help infertile couples mostly foreigners<sup>4</sup>. The reason for this is India’s low -cost surrogacy procedures, it’s tax laws and the no definite law controlling surrogacy.

India in the year 2002 legalized commercial surrogacy and joined group of few countries in which surrogacy is legal. But due lack of regulation on the practice of surrogacy, the fertility clinics started entering into unethical practices due to which in the year 2016 a bill was introduced in the parliament aiming to ban commercial surrogacy and only allow altruistic surrogacy, but was never passed. The same bill with some improvements named Surrogacy (Regulation) Bill, 2019 was again introduced in the Parliament in July 2019 and was passed by Lok Sabha in August 2019. Further a new bill which has incorporated the recommendations of the Rajya Sabha Select committee has been approved by the Union Cabinet i.e Surrogacy (Regulation) Bill, 2020.

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<sup>1</sup> NEETA LAL, INDIA’S HIDDEN INFERTILITY STRUGGLES, THE DIPLOMAT (MAY 30, 2018) <https://thediplomat.com/2018/05/indias-hidden-infertility-struggles/>

<sup>2</sup> PROFESSOR STUART CAMPBELL, 5 TREATMENTS IN ASSISTED REPRODUCTIVE TECHNOLOGY, CREATE FERTILITY <https://www.createfertility.co.uk/blog/5-treatments-in-assisted-reproductive-technology>

<sup>3</sup> NAYANA HITESH PILLAI, YUVRAJ DIGVIJAYSINGH JADEJA, HARSHA KARSAN BHADARKA, MOLINA NIKET PATEL, NIKET HITESH PATEL & NILOUFAR RAHAEMATKHAN SODAGAR, INSIGHT INTO DIFFERENT ASPECTS OF SURROGACY PRACTICES, 11(3) J HUM REPROD SCI., 212-218 (2018)

<sup>4</sup> NEETA LAL, REPRODUCTIVE TOURISM IN INDIA: NO CHILD’S PLAY, AISA SENTINEL (JULY 12, 2016) <https://www.asiasentinel.com/econ-business/india-reproductive-tourism/>

**DEFINITION MEANING AND TYPES OF SURROGACY**

<sup>5</sup>The word surrogacy finds its root in the Latin word “subrogare”, which means appointed in place of. It means substitute i.e. appointing a person in place of another for a specific role. In the context of reproduction, it simply intends, a woman becomes pregnant i.e. acts as a surrogate for a couple or a single parent who are unable to procreate. With the invention of In Vitro Fertilization (IVF), surrogacy has become an important assisted reproductive technology wherein in a woman with uterus anomalies can have a child.

Following are few of the definitions of surrogacy for better understanding:

According to Black’s law dictionary, “an agreement wherein a woman agrees to be artificially inseminated with the semen of another woman’s husband.”

The New Encyclopedia Britannica defines- “Surrogate motherhood”, as a practice in which a woman bears a child for the couple to produce children in usual way.

In Medical Parlance- the term surrogacy means using substitute in place of natural mother.

The ART bill defined surrogacy as ‘an arrangement in which a woman agrees to a pregnancy, achieved through assisted reproductive technology, in which neither of the gametes belong to her or her husband, with the intention to carry it to the term, and hand over the child to the person or persons for whom she is acting as surrogate.’<sup>6</sup>

The Surrogacy (Regulation) Bill, 2019 defines ‘surrogacy as 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.’<sup>7</sup>

<sup>8</sup>Any surrogacy agreement entered into is defined by three types of parental roles. First are the intending or the social parents, who are the individuals intending to have a child but could not due to reproductive abnormalities in one or both of them, they are the child’s legal guardians. Second are the biological parents who are genetically related to the child. Lastly is the surrogate mother who ultimately gives birth to the child.

**Types of Surrogacy**

There are various kinds of surrogacy:

1. Natural/ traditional/ partial surrogacy

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<sup>5</sup> S.S. DAS & PRIYANKA MAUT, COMMERCIALIZATION OF SURROGACY IN INDIA: A CRITICAL ANALYSIS, JCC LAW REVIEW, 14-29 (2014)

<sup>6</sup> ASSISTED REPRODUCTIVE TECHNOLOGY BILL, 2008

<sup>7</sup> SURROGACY (REGULATION) BILL, 2019

<sup>8</sup> TERESA K. WOODRUFF, LAURIE ZOLOTH, LISA CAMPO- ENGELSTEIN & SARAH RODRIGUEZ, ONCOFERTILITY

In this kind of surrogacy, the intending father is genetically related to the child by donating the sperm. Also, if two females are the intending parents or a single parent is the intending parent the sperm can be donated by a third male.

#### 2. Gestational/ Full surrogacy

In this kind of surrogacy, the surrogate mother only acts as a carrier of embryo and is not genetically related to the child. The egg and sperm are obtained from the intending parent or anonymous donors.

#### 3. Commercial surrogacy

In this kind of surrogacy, the surrogate mother acts as a surrogate mother for intending couples for monetary benefits.

#### 4. Altruistic Surrogacy

In this kind of surrogacy, no monetary benefits are provided to the surrogate mother and only medical expenses of the surrogate mother are covered by the commission parents. This type of surrogacy is common among family and friends.

### **LEGAL ASPECT OF SURROGACY IN INDIA**

In the year 2000, the guidelines issued by the Biomedical Research on Human Participants on Assisted Reproductive Technology were adopted by the ICMR, along with adopting these guidelines the ICMR also released the “Statement of Specific Principles for Assisted Reproductive Technologies, 2000”.

Further in the year 2002, ICMR took a big step towards the legalization of commercial surrogacy in India by submitting a draft of National Guidelines for Accreditation, Supervision & Regulation of ART clinics, 2002 to the Ministry of Health and Family Welfare. Since, the draft was not legalized by the Government of India, the guidelines had no effect on the legalization of commercial surrogacy in India, though this draft in the year 2005 was modified by the ICMR with the consultation of National Academy of Medical Sciences, ART specialists and the Ministry of Health and Family Welfare.

#### ICMR guidelines, 2005

Though these guidelines were adopted with the aim to regulate Artificial Reproductive Technology clinics in India but they also contained some guidelines to regulate surrogacy in India. Some of the main points of the guidelines are as follows: -<sup>9</sup>

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<sup>9</sup> INDIAN COUNCIL OF MEDICAL RESEARCH, NATIONAL ACADEMY OF MEDICAL SCIENCES (INDIA). NATIONAL GUIDELINES FOR ACCREDITATION, SUPERVIVION AND REGULATION OF ART

1. Capping on the age of surrogate mothers of 45 years of age.
2. No women should be more than thrice a surrogate mother in her lifetime.
3. A relative, friend, or an unknown person can act as a surrogate mother for a couple.
4. If a relative is acting as a surrogate mother than the relative should be in the same generation as the commissioning mother.
5. Requirement of the surrogate mother to register herself as a surrogate mother in her own name and to provide all necessary details in relation to the commissioning parents such as names, addresses etc.

#### 228<sup>th</sup> Law Commission Report:

The law commission of India submitted its 228<sup>th</sup> report in 2009 titled “Need for legislation to regulate Assisted Reproductive Technology as well as rights and Obligations of Parties to a Surrogacy”.

Considering, the ground realities of surrogacy practices in India, the Law Commission in its report gave the following recommendations:<sup>10</sup>

1. Surrogacy arrangement will continue to be governed by contract amongst parties, which will contain all the terms requiring consent of surrogate mother to bear child, agreement of her husband and other family members for the same, medical procedures of artificial insemination, reimbursement of all reasonable expenses for carrying child to full term, willingness to hand over the child born to the commissioning parent(s), etc. But such an arrangement should not be for commercial purposes.<sup>11</sup>

2. A surrogacy arrangement should provide for financial support for surrogate child in the event of death of the commissioning couple or individual before delivery of the child, or divorce between the intended parents and subsequent willingness of none to take delivery of the child.<sup>12</sup>

3. A surrogacy contract should necessarily take care of life insurance cover for surrogate mother.<sup>13</sup>

4. One of the intended parents should be a donor as well, because the bond of love and affection with a child primarily emanates from biological relationship. Also, the chances of various kinds of child-abuse, which have been noticed in cases of adoptions, will be reduced. In case the intended parent is single, he or she should be a donor to be able to have a surrogate child.

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CLINICS IN INDIA. NEW DELHI: MINISTRY OF HEALTH AND FAMILY WELFARE, GOVERNMENT OF INDIA; 2005

<sup>10</sup> SUJAY DIXIT, SURROGACY IN INDIA, LEGAL SERVICE INDIA, <http://www.legalservicesindia.com/article/222/surrogacy-in-india.html>

<sup>11</sup> IBID

<sup>12</sup> IBID

<sup>13</sup> IBID

Otherwise, adoption is the way to have a child which is resorted to if biological (natural) parents and adoptive parents are different.<sup>14</sup>

5. Legislation itself should recognize a surrogate child to be the legitimate child of the commissioning parent(s) without there being any need for adoption or even declaration of guardian.<sup>15</sup>

6. Only the names of the commissioning parents must be mentioned on the birth certificate.

7. Right to privacy of donor as well as surrogate mother should be protected.

8. Prohibition of sex-selective surrogacy.

9. Cases of abortions should be governed by the Medical Termination of Pregnancy Act, 1971 only.

The draft Assisted Reproductive Technology Bill and Rules 2010 was introduced with some modifications in the earlier draft of 2008. The present draft has tried to include some of the limitations of the draft of 2008. The main aim of the draft bill was not to regulate the surrogate industry but how to flourish the surrogacy market.

Next came the Assisted Reproductive Technology (Regulation) Bill, 2014, some of whose provisions are as follows:<sup>16</sup>

1. Only a woman who is between 21 to 35 years of age can act as a surrogate,
2. Mentions conditions under which a foreign couple can seek surrogacy in India
3. Compensation to be paid will be a private arrangement between the commissioning parents and the surrogate, ART clinics have no role to play in it
4. According to the bill, live-in couples, single parents and homosexuals are disqualified from having a child through surrogacy

The main limitations of the bill were that it lacked the provisions for safeguarding the rights of the women going through IVF techniques who are recruited as surrogates. Further it also ignores the role played by the third-party agents who play pivotal role in arranging surrogates.

## COMMERCIAL SURROGACY

Section 2(f) of the Surrogacy (Regulation) Bill, 2019 defines commercial surrogacy as, commercialization of surrogacy services or procedures or its component services or component procedures including selling or buying human embryo or trading in the sale or purchase of

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<sup>14</sup> IBID

<sup>15</sup> IBID

<sup>16</sup> DR. S.S. DAS & PRIYANKA MAUT, COMMERCIALIZATION OF SURROGACY IN INDIA: A CRITICAL ANALYSIS, RESEARCHGATE

human embryo or trading the services of surrogate motherhood by way of giving payment, reward, benefit, fees, remuneration or monetary incentive, except the medical expenses incurred on the surrogate mother and the insurance coverage for the surrogate mother.”<sup>17</sup>

During the past few decades the difficulty and expense of having a baby through surrogacy in the West has driven a considerable number of foreign couples to India where the lack of regulation and a decent medical care means the process is cheap and hassle free. With few of the famous surrogacy centers situated in Bhopal, Surat etc., the surrogacy industry generates 2.2 billion dollars annually.

With an intent of profiting from the booming surrogacy industry in India, commercial surrogacy was legalized in the year 2002. The Central Ethics Committee on Human Research of the Indian Council of Medical Research released principles for assisted reproductive technologies. A bill by a 15-member committee headed by Baidya Nath Chakrabarty. The drafts feature the guidelines for accreditation, supervision and regulation of Assisted Reproductive Technologies Clinics in India. Further it talks about setting up of a body through legislation for accreditation, regulation and supervision of ART clinics in India. But these guidelines have no binding effect therefore were of no use.

If we focus on all the mathematics behind the process of surrogacy in India, an Indian surrogate mother is paid in installments over a period of nine months and if they do not carry the pregnancy to fruition then they sometimes do not get paid at all. Indian fertility clinics charge about 10,000 to 28,000 US dollars for a complete package i.e. from fertilization to the delivery of baby at the hospital. And at the same time the Indian Fertility clinics are becoming competitive not just in pricing but also in retention of surrogates for the process. Anand in Gujarat, Indore in Madhya Pradesh, Pune, Mumbai, Delhi, Kolkata and Thiruvananthapuram are few of the places where many surrogate mothers come from. A considerable number of foreign surrogate mothers are also duly registered with some of the famous clinics in India. The contracts of surrogacy are drawn without any due care of the rights of the surrogate mothers as they are not legally represented since, they hail from the weaker sections of the society. These contracts are exploitative in nature as they do not give the surrogate mothers the grace period if they want to change their mind and have no provisions from compensation if the surrogate mother fails to produce a child.

Every country has different laws in relation to surrogacy practices. India with legalizing commercial surrogacy in the year 2002 joined countries such as Ukraine, Georgia, Russia and few states of United States of America which have legalized surrogacy. Whereas countries such as France And United Kingdom have completely banned surrogacy. At the same time countries such as Belgium and Netherlands have only allowed altruistic surrogacy.

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<sup>17</sup> SURROGACY (REGULATION) BILL, 2019

<sup>18</sup>The Article 17/6 of the Civil Code of France makes the agreement with third person in relation to gestation completely void. Cour de Cassation, being the highest court in France in a landmark judgement declared agreements in relation to foreign surrogacy illegal. Surrogacy contracts are unenforceable according to German Civil Code, also surrogacy contracts are in violation of Article 1 of the German Constitution.

<sup>19</sup>Both Belgium and Netherlands have similar laws relating to commercial surrogacy according to which, only altruistic surrogacy is allowed which can only be performed by only few hospitals in the countries. Due to a smaller number of hospitals available most of the intending couples choose foreign surrogacy.

<sup>20</sup>In United Kingdom, according to Surrogacy Arrangements Act, 1985, surrogacy is illegal. The agreements in relation to surrogacy are not enforceable and the surrogate mother remains legal guardian of the child till the intending parents adopt the child are parental order is made.

<sup>21</sup>In United States of America, states like California allows commercial surrogacy and have one of the most well drafted surrogacy laws. Whereas some states only allow altruistic surrogacy and some completely ban surrogacy.

## **BUSINESS AND ETHICS OF COMMERCIAL SURROGACY**

### **Arguments in opposition of commercial surrogacy**

The debate around whether to see surrogacy as a profession or to see it as exploitation of poor surrogate mothers whose lack of choice is exploited by wealthy commissioning parents is never-ending<sup>22</sup>. Those opposing commercial surrogacy argue that allowing the practice of commercial surrogacy will stem the belief that women are just “baby-making machines” and children being sellable “commodities”. Critics argue that lower remuneration paid to the Indian surrogate mothers reflect their helplessness due to their poor economic background thus against the public policy. But if we were to take this point in consideration then it would mean that if the surrogate mothers are paid considerably with consonance to the remuneration paid to foreign surrogate mothers then the problem could be resolved. But to a problem like this could be resolved with such a simple solution, as it a complex problem then it seems from the face of it.

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<sup>18</sup> SHABEER ALLH & DR. ASHA SUNDARAM, COMMERCIALIZATION OF SURROGACY IN INDIA & ITS LEGAL CONTEXT: A CRITICAL STUDY WITH REGARD TO BABY MANJI YAMADA’S CASE, 120 INTERNATIONAL JOURNAL OF PURE AND APPLIED MATHEMATICS, 4137- 4154 2018

<sup>19</sup> IBID

<sup>20</sup> IBID

<sup>21</sup> IBID

<sup>22</sup> JENNIFER RIMM, BOOMING BABY BUSINESS: REGULATING COMMERCIAL SURROGACY IN INDIA, 30 UNIVERSITY OF PENNSYLVANIA JOURNAL OF INTERNATIONAL ECONOMIC LAW, 1429-1462 (2009)



Surrogacy degrades motherhood by reducing it to a type of farming, objectifying them as “baby making machines”. Moreover, surrogate mothers will be valued on their physical and psychological appearances which is demeaning on whole other level.

The critics of surrogacy practices argue that it is a practice that is against public policy due to the fact that the surrogate mothers who generally belong to the poor sections of the society are paid less in comparison to two perspectives. Firstly, that the services rendered by them deserves far more than the amount that is paid to them and secondly that the remuneration that Indian surrogate mothers receive is less in comparison to the amount received by foreign surrogate mothers. If we imagine a scenario where a surrogate mother is paid a considerable amount which is in consonance with the amount paid to foreign surrogate then also the problem will not be solves, since paying a hefty amount would result in women seeing surrogacy as an easy way of making large sum of money with any extra qualifications. Further this would result in a woman being pressurized by her husband and in- laws to enter into the service for monetary benefits.

Critics of commercial surrogacy also argue that commercialization of surrogacy is a pure example of racism and white privilege. Surrogacy simply does not involve the commoditization of aspects of life, that never ought to be commodified, but rather involves the commoditization of bodies of color for white benefit. If looking at the international aspect of surrogacy it can be construed that providing surrogacy practices at “bargain prices” for wealthy foreigners stems the idea that the resources of a poor or a third world nation exit for the benefit of developed or first world nations<sup>23</sup>. Some argue that African- American women, who have fewer economic choices than Caucasian women, will be hired as gestators because they will accept lesser fees than Caucasian women.

How informed and educated surrogate mothers are also one of the criticisms of commercial surrogacy. Surrogate mothers are generally from the lower strata of the socio- economic structure of the society, there is a bleak chance of them being informed of their rights and effects surrogacy can have, thus this leads to exploitation by fertility clinics. In the case of Re Baby M of United States of America one of the reasons given by the Hon’ble court for striking down a surrogacy contract in the state of New Jersey was that the surrogate mother had received little legal and psychological counselling, forcing her to make an uninformed decision.

### **Arguments in favor of Commercial Surrogacy**

The prime argument on which critics justify the service of surrogacy is that it gives a second chance to such couples who could not have children. Proponents believe that many of the

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<sup>23</sup> ELO LUIK, CROSS- BORDER SURROGACY: EXPLOITING LOW INCOME WOMEN AS BIOLOGICAL RESOURCES?, THE GUARDIAN (28 MARCH 2017, 11:26 BST), <https://www.theguardian.com/science/blog/2017/mar/28/cross-border-surrogacy-exploiting-low-income-women-as-biological-resources>

surrogate mothers who enter into surrogacy arrangements are move by the altruistic aspect of surrogacy, although the monetary aspect cannot be denied.

Those who favor surrogacy believe that surrogacy cannot be called baby selling, it is a kind of contract. Further the genesis of a surrogacy contract is not to sell a child, rather to bear a child. Surrogacy is a kind of service and the money paid to a surrogate mother should be considered as fees for her services rendered just like the fees that is paid to lawyers and doctors for their services. Some critics further argue that declaring a commercial surrogacy contract void is denying a surrogate mother's right to contract, which is constitutional right.

Advocate of surrogacy are against the interference of government within the process of surrogacy, they argue that if an intending couple desire a genetically related child and woman is willing to act as a surrogate mother then government's interference should be none. They argue that a woman's choice to enter into a surrogacy contract and to receive remuneration for the same is her free will and government should not interfere into this.

## **SURRIGACY (REGULATION) BILL, 2020: AN ANALYSIS**

### **BACKGROUND: SURROGACY REGULATION BILL, 2019**

The Surrogacy (Regulation) Bill, 2019 was introduced by the Union Cabinet, in the Lok Sabha on 15<sup>th</sup> of July 2019, with an aim to promote altruistic surrogacy in India.

According to the section 4(ii) of the Surrogacy (Regulation) Bill, 2019, following are the purposes for which surrogacy can be permitted<sup>24</sup> :-

1. Not for commercialization
2. Only for altruistic purposes
3. Not for producing children for sale, prostitution or other form of exploitation
4. For couples who suffer from proven infertility'
5. Any other conditions as specified through regulations.

Earlier the surrogacy bill, 2019 was introduced in the year 2016 which lapsed with the dissolution of the 16<sup>th</sup> Lok Sabha. The bill was examined by the Standing Committee on Health and Family Welfare which submitted its report on August, 2016. Following were few of the recommendations given by the committee:

1. Recommendation on commercial vs altruistic surrogacy
2. Effects of surrogate being a close relative
3. Review on provisions in relation to gamete donation
4. Regulation of abortion.

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<sup>24</sup> RSTV: IN DEPTH- NEW SURROGACY BILL, INSIGHTS ON INDIA (AUGUST 5, 2019), <https://www.insightsonindia.com/2019/08/05/rstv-in-depth-new-surrogacy-bill/>

A Rajya Sabha select committee chaired by Shri Bhupender Yadav was constituted to review the Surrogacy (Regulation) Bill, 2019. The committee presented its report to the Rajya Sabha on 5<sup>th</sup> February with following findings:

1. It is not important that a surrogate mother should necessarily be a “close relative”.
2. A single women i.e a widow or divorced women of Indian origin to be allowed the option of surrogacy.
3. Increasing the time period of insurance cover provided to a surrogate mother from 16 months to 36 months.
4. Omitting the 5-year waiting period for an infertile couple to avail surrogacy as provided in the definition of surrogacy the bill, therefore recommended changes in the definition of the word infertility.
5. The order of custody and parentage as issued by the District Magistrate of a surrogate child to be considered as the birth affidavit of the child.
6. The committee recommended that the ART bill which still awaits the nod of the parliament to be taken up before the surrogacy bill in front of the house, as it deals with the technicality aspect of surrogacy.
7. Committee recommended a compensatory model of surrogacy as altruistic model can lead to exploitation of a surrogate mother

#### SURROGACY (REGULATION) BILL, 2020

The aftermath of the select committee report resulted in the incorporation of the recommendations of the select committee, therefore resulting in the Surrogacy (Regulation) Bill, 2020.

The salient features of the bill are as follows:

1. The bill puts a complete ban on commercial surrogacy and allows altruistic surrogacy with provision for monetary compensation to the surrogate mother for medical expenses and insurance coverage during the pregnancy or any other prescribed expenses.<sup>25</sup>
2. Surrogacy will only be permitted for following reasons:<sup>26</sup>
  - a. Intending couples of Indian origin or an intending woman who suffer from proven infertility
  - b. Altruistic purposes
  - c. Not for commercial purposes
  - d. Not for sale of children, or prostitution
  - e. For any other disease specified through regulations

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<sup>25</sup> SURROGACY (REGULATION) BILL, 2020

<sup>26</sup> IBID

3. The couple opting for surrogacy should have a “certificate of essentiality” and a “certificate of eligibility” issued by an appropriate authority.<sup>27</sup>
  - a. Following conditions are to be met before a certificate of essentiality can be issued to an intending couple:
    - i. Certificate of proven infertility of both or any one of them
    - ii. Order of parentage and the custody of the child issued by a Magistrate’s court
    - iii. Insurance coverage for a period of 36 months with the provision for covering postpartum delivery complications for a surrogate mother.
  - b. Following conditions are to be fulfilled before a certificate of eligibility can be issued to an intending couple:
    - i. The intending couple should be between following age spectrum
      - Wife between 23 to 50 years of age
      - Husband between 26 to 55 years of age
    - ii. The couple should not have a surviving child irrespective of the fact that the child is biological adopted, or surrogate, except if the child is mentally or physically challenged or suffers from a life -threatening disease
    - iii. Other conditions which can be specified through regulations
4. Eligibility criteria for a surrogate mother- following conditions must be fulfilled<sup>28</sup>
  - i. Surrogate mother has to be in close relation to the intending couple
  - ii. Being a married woman with a child of her own
  - iii. Must be in 25 to 35 years of age spectrum
  - iv. Must not be a surrogate mother earlier
  - v. Have a certificate of medical and psychological fitness
  - vi. Surrogate mother cannot provide her own gametes for surrogacy
5. The child so born will be considered as a biological child of the intending couple. Further for the abortion of the surrogate child the intending couple needs to have a written consent of the surrogate mother and authorization for the same from the appropriate authority, which must be in consonance with the provisions of Medical Termination of Pregnancy Act, 1971.<sup>29</sup>
6. The surrogate with will have the option to withdraw from surrogacy before the implantation of embryo in her womb.<sup>30</sup>
7. One or more appropriate authorities will be appointed by the central and state governments whose function will be as follows:<sup>31</sup>
  - i. Granting, cancelling or suspending the registrations of surrogacy clinics

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<sup>27</sup> IBID

<sup>28</sup> IBID

<sup>29</sup> IBID

<sup>30</sup> IBID

<sup>31</sup> IBID

- ii. Taking actions against breach of the act
  - iii. Authority will have the power to accept or reject the applications for certificate of eligibility and surrogate mothers within a period of 90 days.
8. National Surrogacy Board and State Surrogacy Boards shall be constituted by central and state governments. Constitution of National Surrogacy Board is directed under section 14 of the bill and constitution of the State Surrogacy Boards is given under section 23 of the bill.<sup>32</sup>
9. The bill creates certain offences which include:<sup>33</sup>
- i. Penalty for undertaking and advertising commercial surrogacy
  - ii. Exploitation of the surrogate mother
  - iii. Selling or importation of human embryo or gametes
  - iv. Dis-owning or abandoning the surrogate child

The above -mentioned offences are mentioned under section 36 of the bill, whose contravention attracts a penalty of up to 10 years and a fine of up to 10 lakhs rupees.

## **JUDICIAL RESPONSE TO COMMERCIAL SURROGACY**

Indian Cases:

### ***Baby Manji Yamada vs. Union of India & Ors***<sup>34</sup>

This case was the reason that commercial surrogacy practices in India came into limelight. The facts of the case were as follows:

One Japanese couple Ikufumi and Yumi Yamada with a desire of having a child travelled to India in the year 2007 to consult with fertility specialist Dr. Nayna Patel in reference them desiring to hire a surrogate mother. Dr. Nayna Patel arranged a surrogacy contract with Pritiben Patel a Gujarati married woman with children. The doctor implanted the embryo from Ikufumi's sperm and anonymous donor's egg into the surrogate mother's uterus. In June of 2008 the Yamada's divorced only a month earlier from when baby Yamada was to born. Although Ikufumi wanted to raise the child, his ex-wife did not, due to which Ikufumi travelled alone to India to take possession of the baby.

The dilemma in the case was that according to the surrogacy contract neither of the three women were legally responsible for the child i.e. the egg donor being anonymous had no rights, gestational mother's responsibilities ended as soon as the baby was born and Yumi refusing to take child. Baby Yamada a day after her birth was transferred to Arya Hospital in Rajasthan due to a terrorist attack in Ahmedabad, having contracted septicemia and viral infections, baby

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<sup>32</sup> IBID

<sup>33</sup> IBID

<sup>34</sup> BABY MANJHI YAMADA VS. UNION OF INDIA AND ANOTHER, (2008) 13 SCC 521

stayed there for an extended period of time. Once baby Manji's health improved it became unclear who would receive her custody.

Due to the fact that Japanese Civil Code does not recognize surrogate children, the Japanese embassy in India refused to issue a Japanese passport to Baby Manji. Also, according to the Guardian and Wards Act, Ikufumi cannot adopt the baby since there are no provisions in the act according to which a single parent can adopt a child. Further the baby cannot be issued an Indian passport since the application for issuance of passport requires the name of both mother and father and the name of the mother as unclear in this case. Baby was also not issued a birth certificate by the Anand Municipality since Fertility clinic issued a certificate that Yamada was her genetic father but the name of the mother was uncertain.

The Anand Municipality referred the case to national level advice. The court held that commercial surrogacy contracts are legal in India.

The arguments made by the petitioner's i.e. Grandparents of baby were that there was no locus standi of 'Satya NGO' to file a habeas corpus in the Rajasthan High Court, as the petition was filed as a Public Interest Litigation and it was argued that there is no public interest involved.

Satya NGO the respondent in the case argued that lot of malpractices occur in the name of surrogacy in India, it is running as a money -making racket. It requested that government has to make stringent laws to control the practice.

In response to the arguments of the NGO the solicitor general argued that respondent had no locus standi in the case as the National and State Commissions are constituted for the protection of child rights under the Commissions for Protection of child rights Act 2005. Under such circumstances only the commission has the locus standi to inquire or take action in the case.

The petition of the NGO was dismissed on the ground that the respondent had no locus standi because it is not a public interest litigation, and only a relative of the child who has a grievance can file writ. Further the court did not give any order in respect of issuance of passport since the issue was pending before the Central and the State Government. Lastly the court held that commercial surrogacy is legal in India.

The reason why this case became important was that it worked as an eye-opener in the issues of commercial surrogacy in India.

### ***Jan Balaz v. Anand Municipality***<sup>35</sup>

This was another Indian landmark case that centered around nationality and parenthood of children which were born through commercial surrogacy. The facts of the case were as follows:

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<sup>35</sup> JAN BALAZ VS. ANAND MUNICIPALITY AND OTHERS, AIR 2010 GUJ 21

German couple with an intent of having children came to India and entered into a surrogacy contract. Through the surrogacy agreement the twins were born with the intending father's sperms and eggs from an anonymous donor. On the birth certificate of the twins the commissioning father was named as the father and the surrogate mother as the mother. The commissioning parents tried to secure a German passport for the twins but failed due to the fact that German law does not recognize surrogacy as a means of establishing parenthood, after which they tried to secure an Indian passport which was granted to them on the fact that the twin's surrogate mother was an Indian citizen, therefore the kids were Indian citizen hence eligible for an Indian passport. This decision of the High Court was challenged in the Supreme Court.

The issue before the court was that whether a child born in India through surrogacy to a foreign couple having an Indian surrogate mother is an Indian national or not?

The Supreme Court of India requested the Central Adoption resource agency (CARA) an autonomous body under the Ministry of Women & Child Development of Government of India which is responsible for inter- country adoptions and works in accordance with the provisions of the Hague Convention on Inter- country Adoption, 1993 which was ratified by the government of India 2003, to make an one-time exception on humanitarian ground considering the child welfare and facilitate adoption for the twins.

Foreign Cases:-

***In re Baby M***<sup>36</sup>

The Baby M case was one of the first American court ruling on the matter of validity of surrogacy. The facts of the case are as follows: -

The plaintiff and his wife were an American couple who were unable to conceive a child. With the desire of having a child the plaintiff and his wife entered into a surrogacy contract with the defendant. The terms of the contract were that the defendant will act as a surrogate for the couple with the child so conceived being genetically connected with the father, further after the birth of the child the defendant would give away with her parental rights so that the child could be adopted by the plaintiff's wife. Only the commissioning father and the surrogate mother were the party of the contract though the commissioning mother was to get the sole custody if the child in event of the father's death. The terms of the contract were challenged by the surrogate mother in the court of law on the ground that the trial court improperly terminated her parental rights and awarded sole parental rights to the commissioning father and allowed adoption of the child by the commissioning mother.

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<sup>36</sup> IN RE BABY M 109 N.J. 396, 537 A.2d 1227 (1988)

The issue before the court of law was whether there is a valid termination of the defendant's parental rights?

The court held that the contract was invalid as a matter of law as it was against the public policy. The contract was totally unenforceable, and that the statute requires the surrender of child to a public agency. The court further held that no one can contractually abandon one's parental rights and that because the termination was invalid, the adoption was invalid.

## **CONCLUSION**

The journey of commercial surrogacy in India has come a long way, with its legalization in the year 2002 to its proposed ban with the Surrogacy (Regulation) Bill, 2019, and now the Surrogacy (Regulation) Bill, 2020 the question that has baffled everybody is whether the government's move to ban commercial surrogacy was right or whether it could prove to be counter-productive. I am not arguing that the move of Indian government to ban commercial surrogacy was wrong, rather I am emphasizing on the fact that banning commercial surrogacy in India may result in sprouting of many unregistered clinics and middle man who will be willing to go against the law to provide these services to the intending couples, as prospect of making money through surrogacy is a lot more than any other business. The legislature with not giving clear directions in its Surrogacy (Regulation) Bill, 2020 putting the intending couples in the great dilemma who till now were relying on the surrogacy facility available in the country would now consider having a surrogate child in countries where commercial surrogacy is legal. Further by banning commercial surrogacy the legislators are ignoring the fact that there are women who are willing to act as a surrogate by their own agency for the amount of money involved in it rather than working in a windowless industry thus snatching a livelihood from these women. What I call for is not complete ban on the practice of commercial surrogacy rather the legislators should come up with the laws to regulate the practice of commercial surrogacy in India which was rather absent in the previous legislations that regulated surrogacy in India. The contribution of commercial surrogacy to the economy of India is a hard truth that India need to acknowledge, so rather than completely banning it, the more focus should be towards regulating it as sprouting to illegal practices to conduct commercial surrogacy would do no good to anybody. The government should that surrogacy should not be privately regulated rather it should be government regulated. Government should open clinics for surrogacy practices and all the surrogates should only be registered with a government agency rather than private agencies who tend to exploit these women. Further a screening test should be conducted on the background of a surrogate registering with the agency to ensure that she is registering with her own agency and not under the pressure of her relatives. Also, the amount of compensation to be given to a surrogate for her services should be decided and regulated by government, which should be adequate and in consonance to the services provided by the surrogate. Further a background check should be conducted of the intending parents as is done for adoption. At the end I would



like to conclude by saying that it is now time to regulate the practice of surrogacy in India, a clear-cut legislation is the need of hour to regulate surrogacy in India. Commercial surrogacy has both positive and negative effects and if wisely used could bring happiness to millions of couples who could not have children.