

---

**INTERNATIONAL JOURNAL OF ADVANCED LEGAL RESEARCH**

---

**DEMYSTIFYING THE JOURNEY OF SURROGACY LAWS IN INDIA: SURROGATE MOTHERHOOD ON THE ANVIL?**

- Manisha Arora & Sanjeevani Dixit<sup>1</sup>

**ABSTRACT**

Infertility is ordinarily treated as a social disgrace in India where the families have a strong desire for a son to carry forward their lineage. An aggrieved couple is generally held accountable for not discharging its biological duties of parenthood even without being at fault. The tremendous advancement in the field of medicine paved the way for surrogacy around the world which aided the infertile couple to reproduce with the help of technical assistance and third-party intervention. Surrogacy is a practice by which another woman agrees to gestate for the infertile couple who, eventually, takes the legal custody of the child. This is also known as mothering by proxy. In the current Indian scenario, with the estimated valuation of over USD 2 Billion, the surrogacy market is at the verge of shutting down with the approval of Surrogacy (Regulation) Bill 2020 which will radically overhaul the law by banning commercial surrogacy and allowing only altruistic surrogacy but with stringent regulations. This article highlights the journey of the surrogacy laws in India with considerable focus on the loopholes in preceding legislations in addition to their foreseeable misuse. It further elaborates how the surrogacy regulations have time and again failed to pass the constitutional muster and hence, caused prejudice to the interests of parties involved.

---

<sup>1</sup> Students at Damodaram Sanjivayya National Law University, Visakhapatnam & Institute of Law,irma University.

For general queries or to submit your research for publication, kindly email us at [editorial@ijalr.in](mailto:editorial@ijalr.in)

## INTRODUCTION

“Children are considered to be the gift of God. Getting a child is a wonderful experience for the family. In this divine picture of life, lucky are those who are gifted with a beautiful family consisting of a lover, parents, grandparents, and the most special and welcomed one, the new member of the family, the baby. But some are not lucky enough to have their dream come true as they suffer from infertility, which is nothing less than a nightmare for them. In such situations, they feel darkness everywhere, as they do not have a complete family. Not having any alternative aggravates their plight. Advancement of new technology leads to the evolution of “surrogacy” techniques which comes as a ray of hope in their never-ending darkness”.

In this globalized world, outsourcing is quite expensive.<sup>2</sup> India is considered to be one of the topmost globalized countries in the present times as it is tremendously benefitted from its modus operandi i.e., by creating innumerable jobs in various sectors such as software, education, etc. In the last few decades, globalization is supplemented by another sector i.e., surrogacy, which provides an alternative to infertility. Infertility is ordinarily treated as a social disgrace in a country like India where the families have a strong desire for a son to carry forward their lineage. An aggrieved couple is generally held accountable for not discharging its biological duties of parenthood even without being at fault. The tremendous advancement in the field of medicine paved the way for the introduction of In-Vitro Fertilization, oocyte and sperm donation and surrogacy practices around the world which aided the infertile couple to reproduce with the help of either technological assistance or third party intervention.<sup>3</sup> All the allied practices except surrogacy have hardly lead to any critical opprobrium since their inception into the medical world. Although surrogacy has caused an extraordinary resurgence in the fertility industry in the countries having the growing economy, it is equally a matter of concern because of its repercussions on the reproductive health.<sup>4</sup> The practice received considerable condemnation at various junctures as it resulted in exploitation of the vulnerable women of economically weaker sections by the rich class, as they receive remuneration to effectuate a task

---

<sup>2</sup>UpmaGautam&AnanditaYadav, The Surrogacy Bill (Regulation) Bill 2016: Pitfalls and Challenges, The Journal of Legal Awareness (2016), [https://www.researchgate.net/publication/318074013\\_The\\_Surrogacy\\_Regulation\\_Bill\\_2016\\_Pitfalls\\_and\\_Challenges\\_ahead](https://www.researchgate.net/publication/318074013_The_Surrogacy_Regulation_Bill_2016_Pitfalls_and_Challenges_ahead).

<sup>3</sup> K.K. Choudhary et al., Advances in reproductive biotechnologies, NCBI (Apr. 18, 2016), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4864481/>.

<sup>4</sup> Bronwyn Parry & Rakhi Ghoshal, Regulation of surrogacy in India: whenceforth now?, NCBI (Oct. 8, 2016), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6195148/>.

For general queries or to submit your research for publication, kindly email us at [editorial@ijalr.in](mailto:editorial@ijalr.in)

they would otherwise decline. Considering its historical background, the practice was initiated in the times when Niyoga Dharma was followed where the temporary alliance was generated for procreation of children in case if the husband was infertile.<sup>5</sup> The Supreme Court has defined the practice of Surrogacy as a “well-known method of reproduction whereby a woman agrees to become pregnant for the purpose of gestating and giving birth to a child she will not raise but hand over to a contracted party.”<sup>6</sup>

In the current Indian scenario, with the estimated valuation of over USD 2 Billion<sup>7</sup>, the surrogacy market is at the verge of shutting down with the approval of Surrogacy (Regulation) Bill 2020 which will radically overhaul the law by banning commercial surrogacy and allowing only altruistic surrogacy but with stringent regulations. Recently, in February 2020 the Union Cabinet has nodded the introduction of Surrogacy (Regulation) Bill, 2020 to regulate the surrogacy practice in India by embodying the major recommendations proposed by the 23-member Select Committee of the Upper House.<sup>8</sup> This Bill is yet to receive approval from both the houses of the Parliament followed by the assent from the President. This article elucidates the journey of the surrogacy laws in India with considerable focus on the loopholes in preceding legislations along with their foreseeable misuse and how they, time and again, have failed to pass the constitutional muster. But, before delving into such intriguing aspects of surrogacy we shall first understand what is surrogacy, how it is performed and what are its nature and types.

The word “Surrogate” has been inferred from the Latin term ‘surrogatus’ meaning a substitute.<sup>9</sup> A surrogate mother is “a woman who gives birth to a baby for another woman who is unable to have babies herself”, as defined in the Oxford dictionary.<sup>10</sup> Surrogacy refers to the practice in which a woman agrees to gestate a baby for the infertile couple who then takes the legal custody of that child. This is also known as mothering by proxy.<sup>11</sup> A surrogate mother can also

---

<sup>5</sup> ED Times, Surrogacy And Artificial Insemination Were Also Practiced During The Times Of Mahabharat, Youth Ki Awaaz (Oct. 9, 2018), <https://www.youthkiawaaz.com/2018/10/surrogacy-and-artificial-insemination-are-ancient-practices-seen-even-during-mahabharata-t/>.

<sup>6</sup> Baby Manji Yamada v. Union of India & Anr., (2008) 13 SCC 518.

<sup>7</sup> Simran Aggarwal & Lovish Garg, The New Surrogacy Law In India Fails To Balance Regulation And Rights, LSE (Nov. 23, 2016), <https://blogs.lse.ac.uk/humanrights/2016/11/23/the-new-surrogacy-law-in-india-fails-to-balance-regulation-and-rights/>.

<sup>8</sup> Cabinet Approves Surrogacy Bill, The Hindu (Feb. 26, 2020, 3:40 PM), <https://www.thehindu.com/news/national/cabinet-clears-surrogacy-regulation-bill/article30921456.ece>.

<sup>9</sup> Aparajita Amar & Arjun Aggarwal, The Emerging Laws Relating Surrogacy: A Procreational Right For Single Parent, Transgenders And Foreigners, SCC Online (Apr. 10, 2018), [https://www.sconline.com/blog/post/2018/04/10/the-emerging-laws-relating-surrogacy-a-procreational-right-for-single-parent-transgenders-and-foreigners/#\\_ftn8](https://www.sconline.com/blog/post/2018/04/10/the-emerging-laws-relating-surrogacy-a-procreational-right-for-single-parent-transgenders-and-foreigners/#_ftn8).

<sup>10</sup> Black's Law Dictionary, Bryan A. Garner, 8th Edn. 2004, p. 4529.

<sup>11</sup> Deepmala Mishra, Surrogacy in India: Legality, 3 IJSRM 2258, 2258-2262 (2015).

For general queries or to submit your research for publication, kindly email us at [editorial@ijalr.in](mailto:editorial@ijalr.in)

be referred to as a woman who ‘rents her womb’.<sup>12</sup> It has been broadly divided into two categories that are traditional surrogacy and gestational surrogacy. In the gestational surrogacy, “the embryo is fertilized by using the in-vitro fertilization method and is then implanted into the uterus of the surrogate mother who then carries and delivers the baby. The surrogate mother in gestational surrogacy does not have any genetic relationship with the baby as it was not her egg used during the fertilization process.” However, in traditional surrogacy, “the surrogate mother is impregnated with the sperm of the intended father artificially, who carries the baby, give birth to that baby and then hand it over to the intended couple. Here, that surrogate mother will be considered as both the gestational and the biological mother of the baby.”<sup>13</sup> Furthermore, the surrogacy can be of commercial or altruistic nature depending upon whether it was commissioned or was out of goodwill. Commercial surrogacy means commercialisation of services and procedures or buying and selling or trading or even purchasing of human embryo or gametes by way of fees, remuneration or any other incentive being given to the surrogate mother or her relatives excluding the insurance and the medical expenses incurred on her.<sup>14</sup> This was mainly referred to the buying and selling of motherhood and hence opined as unethical. To protect the poor from being abused by the rich, the altruistic surrogacy came into the limelight. Altruistic surrogacy is simply defined as the surrogacy where the surrogate mother was not reimbursed after the relinquishment of a child, for carrying out surrogacy although all the medical expenses, accommodation, diet and clothing expenses are paid to her after the completion of the process.

As aforesaid, in the early times, surrogacy was done in exchange of money and hence, received a lot of criticisms. With the changing times, the demand for surrogacy increased. These services were provided by developed countries to developing countries like India. By the virtue of this process, an intending couple (one who is medically certified to be infertile and have a desire to raise a child through the process of surrogacy)<sup>15</sup> is provided with a third party gamete, which involves a sperm and an oocyte. Oocyte naturally ovulates from in the genital tract of a female, hence the gamete transfer takes place, and then the in-vitro fertilisation. This process was later on altogether known as ART or Assisted Reproductive Technologies.<sup>16</sup> Soon

---

<sup>12</sup> Joseph Palzman, “Womb for Rent” Gestational Surrogacy Contracts - A New Path for Outsourcing Service Contracts, WPMUCDN (May 2010), [https://cpb-us-e1.wpmucdn.com/blogs.gwu.edu/dist/5/1304/files/2018/06/Womb-for-Rent-Outsourcing-Service-Contracts\\_2010-vgrm7r.pdf](https://cpb-us-e1.wpmucdn.com/blogs.gwu.edu/dist/5/1304/files/2018/06/Womb-for-Rent-Outsourcing-Service-Contracts_2010-vgrm7r.pdf).

<sup>13</sup> Deepmala Mishra, *supra* note 11.

<sup>14</sup> UpmaGautam&AnanditaYadav, *supra* note 1.

<sup>15</sup> *id.*

<sup>16</sup> Jeff Wang & Mark V Sauer, In vitro fertilization (IVF): a review of 3 decades of clinical innovation and  
For general queries or to submit your research for publication, kindly email us at [editorial@ijalr.in](mailto:editorial@ijalr.in)

after, the ART clinics for operating all the allied techniques including surrogacy in India got established, leading to the heated discourse involving legal and ethical concerns of surrogacy. A major point that came into the picture is the moral standpoint of a surrogate mother as the surrogate mother not only has emotional intimacy with the child but also have her biological traits in it.

## **SURROGACY LAW: EVOLUTION AND DEVELOPMENT**

### **COMMERCIAL SURROGACY LEGALISED IN 2002**

Surrogacy is regarded as legitimate as no law prohibits it. To determine its legality surrogacy laws are controlled by the Indian Contracts Act 1872. In 2002, India became the first country to legalise commercial surrogacy.<sup>17</sup> Since the legalisation, there was an increase in demand of surrogacy for the couples with serious reproductive abnormalities, who could not biologically produce their own children. Within a year of legalisation, a British couple gave birth to a child through surrogacy, where the surrogate belonged to India. This led to the entrance of India into the commercial surrogacy industry. Prospective parents from the United States and Europe were drawn to India's surrogacy industry "as the word spread of India's mix of skilled medical professionals, relatively liberal laws and low prices"<sup>18</sup>. With the boom in this industry, surrogacy became one of the stable sources of income for women. This consequentially led to an increase in the market. The industry is estimated to have grown to \$2 billion.<sup>19</sup> Within a short time, it became popular in India because of the advances in the reproductive medicine, a large pool of impoverished women and low cost as compared to the developed countries like United States, Canada and Australia. This led to the abuse of the legalization of surrogacy as it enabled the unethical practices, exploitation of surrogate mother and abandonment of the child by the intended couple. Several rackets were caught and burst that were involved in illegal importing of human embryos and gametes. Previously, there was no proper legislation regarding surrogacy which led to consistent exploitation. With the legalisation, came the guidelines of Indian Council of Medical Research, but it lacked legislative backing. Dr. Nayna Patel, the founder of Akanksha, the first surrogacy clinic in India, in favour of commercial surrogacy, said that "the surrogate gets the blessings of the couple and financial support; the couple gets the baby- a win-win situation for all. Surrogacy allows a woman to help another

---

technological advancement, NCBI (Dec. 2006), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1936357/>.

<sup>17</sup>Surrogacy bill gets the Cabinet nod, The Hindu (Aug. 24, 2015, 4:25 PM), <https://www.thehindu.com/news/national/Surrogacy-bill-gets-the-Cabinet-nod/article14591267.ece>.

<sup>18</sup>Amelia Gentleman, India Nurtures Business of Surrogate Motherhood, N.Y. TIMES (Mar. 10, 2008), <https://www.nytimes.com/2008/03/10/world/asia/10surrogate.html>.

<sup>19</sup>Simran Aggarwal & Lovish Garg, *supra* note 6.

For general queries or to submit your research for publication, kindly email us at [editorial@ijalr.in](mailto:editorial@ijalr.in)

woman.”<sup>20</sup>

1. **Availability Of Surrogacy At Lower Costs:** In India, surrogacy was available at lower costs, which made it easily accessible to the world. But it also led to the exploitation and unethical practices. It was quite easy to rent a womb in India. The main reason why the majority approached India for these services was the availability of surrogates at much lower costs due to the country’s poverty. The majority of surrogates in India are poor, illiterate and are not aware of their rights as a surrogate. For some them, it is the only source of earning livelihood for their family. This forces them to become ‘reproductive slaves’. As per some of the critics, outsourcing pregnancy leads to the commodification of human life. According to the qualitative research conducted in 2017 in the two major cities in India, Delhi and Mumbai the usual fee for Surrogacy is \$25,000 to \$30,000, which is around 1/3<sup>rd</sup> of the developed countries like the USA.<sup>21</sup>
2. **Increasing The Value Of Women In The Society Or Their Exclusion:** A surrogate mother is either judged as bad for selling her child or as a noblewoman, helping the couple who could not produce the child of their own. After this noble cause, they are often seen as prostitutes, which leads to ostracizing them from society. In India surrogacy is believed to be against societal norms on moral grounds. Many surrogate women are unable to return home, often seen as ‘reproductive slaves’, who used their body for profit.<sup>22</sup> But they continue these services to support their families. The Indian Council of Medical Research brought new guidelines in 2005, to overcome the problems of surrogacy and the issues of the industry.

### **GUIDELINES ISSUED BY THE INDIAN COUNCIL OF MEDICAL RESEARCH IN 2005**

The Indian Council of Medical Research (ICMR) made the first attempt to make a law related to the regulation of surrogacy in India. It introduced the National Guidelines for Accreditation, Supervision and Regulation of ART (Assisted Reproductive Technology) Clinics in India, for the establishment of ART clinics that will look into the working of surrogacy, infertility, and In-Vitro Fertilization (IVF), which inter alia, prescribed the conditions that ART clinics need to comply with.<sup>23</sup> The guidelines were modified timely and made to get passed in the Parliament

---

<sup>20</sup>Nayna Patel & Mohan Rao, *Is Surrogacy a Legitimate Way Out of Poverty*, NEW INTERNATIONALIST (Nov. 1, 2014), <https://newint.org/sections/argument/2014/11/01/argument-surrogacy-poverty>.

<sup>21</sup> Amelia Gentleman, *supra* note 18.

<sup>22</sup>Nayna Patel & Mohan Rao, *supra* note 18.

<sup>23</sup>Radhey S. Sharma et al., *Indian Council Of Med. Research, National Guidelines For Accreditation, Supervision*  
For general queries or to submit your research for publication, kindly email us at [editorial@ijalr.in](mailto:editorial@ijalr.in)

in the years 2005, 2008 and 2014 but failed every time. In 2009, the Law Commission of India in its 228<sup>th</sup> report proposed the establishment of stringent legislation for the regulation of ART Clinics and also for the protection of the rights of the parties involved in surrogacy. It further proposed the idea of ‘altruistic surrogacy’ and the ban on ‘commercial surrogacy’. The panel then recommended certain more wholesome changes and asked to bring the ART Bill first considering it to be a need of an hour, as there are no specific clinics established in India for surrogacy as such and the ART clinics offer the surrogacy services in India.

Multiple loopholes were surfaced in the guidelines. The 2005 ICMR guidelines, firstly, did not have any legislative backing. The clinics had no protocols and the standard for the costs that are generally practised in the absence of law. The Law Commission Report mainly focuses on the rights of the intending couple but remains quiet on the rights of the surrogates. The Report focuses on providing the financial support to the surrogate child in the exceptional cases, such as the death of the intending couple, but for the surrogates, it only includes taking care of her life insurance. Guidelines further include certain limitations for a surrogate which are as follows:

1. A woman cannot be a surrogate for more than thrice in her lifetime.
2. A woman acting as a surrogate should not be over the age of 45.
3. A surrogate needs to undergo the required medical tests, to ensure that she is capable of undergoing a successful pregnancy of full term.

According to the guidelines, the conditions of “the agreement for surrogacy” must be fulfilled. The surrogate mother after the birth of the child has to hand it over to the intending couple as per the agreement. The biological parents have a ‘legal obligation’ to accept the child as delivered.<sup>24</sup> The surrogate should maintain the privacy of the intended couple as per the terms and conditions.<sup>25</sup> She also has the right to terminate the pregnancy at her will, and if she chooses to do so she must refund the expenses incurred on her.<sup>26</sup>

---

And Regulation Of Art Clinics In India, ix, xi (2005).

<sup>24</sup>*id* at 92, 94.

<sup>25</sup>*id*.

<sup>26</sup>*id* at 93.

For general queries or to submit your research for publication, kindly email us at [editorial@ijalr.in](mailto:editorial@ijalr.in)

## PROBLEMS REGARDING CITIZENSHIP AND ABANDONMENT ISSUES RELATED TO THE SURROGATE CHILD CAME TO THE FOREFRONT IN 2008

There are two principles of acquiring citizenship:

1. The first way is Jus Soli, or “the right of the soil”, it refers to the citizenship of the people who are born within their own country.
2. The second way is Jus sanguinis, or “the right of the blood”, by this, citizenship is acquired by the descent or determined by the nationality of the parents.

There were many issues regarding the status of the surrogate child under the citizenship law. These involved inconveniences such as the long process of paperwork and transportation. But one of the major problems was statelessness, that occurs when the citizenship laws of the surrogate’s country are not compatible with the citizenship requirements of the intended couple. In some situations, the child may not be a citizen of the intended parent’s country because of the prohibited surrogacy laws, nor he could be a citizen of the surrogate’s country as she is not genetically related to the child. This would make him right less and stateless. The case of Baby Manji<sup>27</sup> was the first one to draw attention towards the citizenship and abandonment issues in commercial surrogacy. Briefly stating the facts, in 2008, a baby was born out of a surrogate mother in India. The intending couple belonged to Japan and were divorced before the birth of the baby. The father being a single parent could not adopt the child and (she) the child was also not allowed to leave India due to the lack of documentation. The grandmother then filed the petition in the Supreme Court of India, to permit the child to move to Japan. The Court observed that the surrogate child could be related or unrelated to the prospective parents, and “the intended parent could be a single male or a male homosexual couple”.<sup>28</sup>

Another case regarding citizenship was that of Jan Balaz twins.<sup>29</sup> If the child is commissioned through a surrogate mother it is the duty of the commissioning parents to take the child. But in this case, though the source of sperm was Germany, the government failed to recognize the twins as its citizen. These concerns were considered by the government in the subsequent legislations to draw up the flawless framework for regulating the surrogacy practices in India.

---

<sup>27</sup>Baby Manji Yamada, *supra* note 5.

<sup>28</sup>*id.*

<sup>29</sup>Jan Balaz v. Anand Municipality &Ors., AIR 2010 Guj 21.

For general queries or to submit your research for publication, kindly email us at [editorial@ijalr.in](mailto:editorial@ijalr.in)

## INTRODUCTION OF ASSISTED REPRODUCTIVE TECHNOLOGIES BILL, 2010

The Assisted Reproductive Technologies Regulations Bill was drafted in 2010.<sup>30</sup> Its preamble refers to infertile as “the most highly prevalent medical problem”.<sup>31</sup> The Bill did not involve any scientific explanation and only stated that the purpose of the law is to avoid any kind of social, medical or legal issues that are unethical, but it did not talk about the exploitation of the donors and the surrogates. The Bill ensured that the legitimate rights of all are protected and most of the benefit is given to the infertile couple. The legislation was however opined to be detrimental as it promotes the abuse of a surrogate woman in a lot of ways, such as they may suffer from AIDS and fetal reduction. The main aim of the Bill was to regulate the unregulated ART Clinics that have had rapid growth in the past 20 years. The Bill clearly states that surrogacy is neither the work nor the labor in India, and it leads to the exploitation of the surrogates.

## THE SURROGACY (REGULATION) BILL 2016: A COMPREHENSIVE FRAMEWORK

To overcome the afforested problems, the Surrogacy (Regulation) Bill, 2016 was drafted. This Bill was cleared in a cabinet meeting of the NDA government on 24<sup>th</sup> August 2016.<sup>32</sup> The Bill is based on the (Human Fertilization and Embryology Authority) guidelines if the UK and 228<sup>th</sup> Law commission report of 2009.<sup>33</sup> There was a lot of demand from many organizations and poorer sections for a law to ensure that the surrogates are not subjected to the exploitation in this multi-million dollar industry. This Bill is considered to play an important role in regulating surrogacy. It suggested putting an absolute ban on the commercial surrogacy. The Surrogacy Regulation Bill, 2016 only permits altruistic surrogacy, in which no fees or any other incentives of any kind is charged except insurance or medical expenses that are incurred on her.<sup>34</sup> This Bill gave a new definition to surrogacy, and it became a practice in which a surrogate woman gives birth to a child and later on hands it over to the intending couple, to prevent the abuse of poor women who become surrogates to earn their livelihood. Therefore, the Bill allows moral surrogacy and denies the business surrogacy. A mandatory clause was added which says that

---

<sup>30</sup> The Assisted Reproductive Technologies (Regulation) Bill 2010 (Draft), Ministry of Health & Family Welfare, Govt. of India, New Delhi & Indian Council of Medical Research New Delhi, <http://icmr.nic.in/guide/ART%20REGULATION%20Draft%20Bill1.pdf>.

<sup>31</sup>*id.*

<sup>32</sup>Cabinet approves introduction of the Surrogacy (Regulation) Bill, Press Information Bureau (2016), [www.pib.nic.in/newsite/PrintRelease.aspx?relid=149186](http://www.pib.nic.in/newsite/PrintRelease.aspx?relid=149186).

<sup>33</sup>Law Commission of India, 288th Report on Need For Legislation to Regulate Assisted Reproductive Technology Clinics as Well as Rights and Obligations Of Parties To A Surrogacy (August, 2009).

<sup>34</sup>Gautam&Yadav*supra* note1.

For general queries or to submit your research for publication, kindly email us at [editorial@ijalr.in](mailto:editorial@ijalr.in)

the surrogate mother should be a close relative, who is married and should also have a child of her own. For a lady to be a surrogate she has to be in the age group of 24-35 years and shall be married or have a child of her own. Also, it should be confirmed that she has not been a surrogate before and should possess a surrogacy certificate to the couple. The child born out of surrogacy will have the same privileges as that of the normal child. The intending couple should be the Indian citizens, married for at least five years and at least one of them should be infertile. The surrogate child will be considered to be biologically related to the intended couple and only the medical expenses will be incurred on the surrogate mother. The authorities appointed by the State and the Central government will grant eligibility certificates to the intended couple and the surrogate. Undertaking the commercial surrogacy, advertising and abuse of the surrogatemother will be punished with imprisonment for ten years and a fine up to Rs ten lakh. Though this Bill provides a framework for the regulation of good surrogacy practices, there are certain criticisms of the bill. The ban on commercial surrogacy is one of the major flaws. The term “close relative” is nowhere mentioned in the bill. The surrogate has to undergo nine months of painful process. As per the Bill, un-married individuals, gay or live-in couples are not allowed to get a child through this process. The Bill does not talk about providing maintenance in the case of any health issues. And as only the medical expenses are incurred on the surrogate she would gain nothing from the process. Women undergo a lot of emotional changes during the pregnancy, due to which she may develop emotional attachments for the child even though she is mentally prepared for the same. The bill nowhere talks about providing rehabilitation facilities to the surrogate. There have been a lot of citizenship issues in the past. Hence there should be a proper framework to deal with them.

This case was also an origin of Assisted Reproductive Technologies Act of 2014. The cost of surrogacy in India was generally \$18000 to \$30000, out of which only \$8000 were given to the surrogate mother.<sup>35</sup> The main reasons why foreigners approached India for surrogacy was that the surrogate mothers were easily accessible due to the country's poverty.<sup>36</sup> They were available at lower costs hence it was quite easy to ‘rent a womb’ in India as for the surrogate mothers it was the only source of earning their livelihood, which also led to their exploitation. This issue was observed by the Law Commission of India.<sup>37</sup> Unsatisfied with the situation a petition to ban the commercial surrogacy was moved by the Indian government in 2015. One of the major

---

<sup>35</sup>Recent Status of Commercial Surrogacy in India, India Law Offices, India Law Offices, <http://www.indialawoffices.com/legal-articles/recent-status-of-commercial-surrogacy-in-india>.

<sup>36</sup>*Id.*

<sup>37</sup> Mehta, *supra* note 6.

For general queries or to submit your research for publication, kindly email us at [editorial@ijalr.in](mailto:editorial@ijalr.in)

reasons to ban commercial surrogacy was that the surrogate mothers were being exploited. They did not have their health insurance and were also paid less. In order to curb this, surrogacy Bill was passed by the Lok Sabha and it issued the following guidelines

1. IVF, ART or any other surrogacy clinic will not force human embryo for offering surrogacy services.
2. Visa should be issued to intending foreign couples who have an intention of commissioning surrogacy services in India, only if, firstly the foreign couple is legally married and has sustained at least for two years, secondly, the child/children born to that foreign couple through the Indian surrogate mother will be permitted entry into that particular foreign nation.
3. Foreigners Regional Registration Officers (FRRO) should not give permission to Overseas Citizen of India (OCI) for commissioning of surrogacy in India.
4. If the visa is granted after issuing the circular it may also be cancelled and this cancellation would be immediately informed thereafter.

#### **2017: RECOMMENDATION BY PARLIAMENTARY STANDING COMMITTEE TO ALLOW COMMERCIAL SURROGACY**

The Parliamentary Committee was set up by the government to look into the matter of surrogacy. It suggested removing the ban on commercial surrogacy. There were a lot of difficulties in getting approval of most of the IVF clinics. The Committee argued that if bearing the child is labour then it must be paid.<sup>38</sup> It also agreed that a woman may act as a surrogate only once in her lifetime, so that they may not make a career out of it.<sup>39</sup> The committee agreed that these services should be given only to the Indian married couples, but widows, married women, cohabiting unmarried couples should also be made eligible for the same. However, it did not acknowledge the providing of these services to the homosexual couples. The Committee also suggested the National Surrogacy Board include a Registrar, with the full knowledge of surrogacy arrangements so that he can inform the concerned parties about the agreement as well as the implications. Thereafter, the 2016 Bill was approved to be amended in March 2018. The Bill was passed by the Lok Sabha but lapsed when Rajya Sabha failed to vote for it.

---

<sup>38</sup> Rajya Sabha Rep. No. 102, 14-15 (Aug. 10, 2017), [http://164.100.47.5/newcommittee/reports/Eng\\_93\\_ - lishCommittees/Committee%20on%20Health%20and%20Family%20Welfare/102.pdf](http://164.100.47.5/newcommittee/reports/Eng_93_ - lishCommittees/Committee%20on%20Health%20and%20Family%20Welfare/102.pdf).

<sup>39</sup>

For general queries or to submit your research for publication, kindly email us at [editorial@ijalr.in](mailto:editorial@ijalr.in)

<https://www.ijalr.in/>

**THE SURROGACY (REGULATION) BILL, 2019**

The Bill was reintroduced by the Minister of Health and Family Welfare, Dr. Harsh Vardhan in Lok Sabha on 15 July 2019.<sup>40</sup> The Bill prohibits commercial surrogacy and allows only altruistic surrogacy to the couples married for more than five years. There are certain conditions for altruistic surrogacy laid down in this Bill:

1. The childless couple who have been married for five years and suffer from infertility are within the age group of 23-50 for women and 26-55 for men.
2. The couple should not have any surviving child. This would not include any physically, mentally challenged or a child suffering from any kind of life-threatening disease.
3. The surrogate must be the close relative of the couple. The term 'close relative' must be clearly defined in the Bill.
4. The surrogate must be under the age group of 25-35 years and in no circumstances should be above 45 years.
5. A woman can only act as a surrogate once in her lifetime.

All the above-mentioned criteria need to be fulfilled for being the intending parents and the surrogate. The government stated that the definition of 'close relative' will be mentioned in the rules of the bill. There are also certain offences mentioned in the bill that are punishable with life imprisonment or fine up to ten lakh rupees. These include:

1. Advertising Commercial surrogacy
2. Exploitation or abandonment of the surrogate child
3. The exploitation of surrogate mother
4. Selling or importing of human embryos or gametes for Surrogacy.

Furthermore, the categories under which the surrogacy stands ineligible within the 2019 Bill are live-in relationship couples, foreigners, NRI's and PIO's, homosexual couples, unmarried couples, single parents.

**THE SURROGACY (REGULATION) BILL, 2020**

The 23 member Select Committee of the Rajya Sabha, suggested 15 major changes to be made in the surrogacy law for its better operation.<sup>41</sup> The Bill permits a 'willing' woman to be a surrogate mother, and therefore, would be beneficial to the widows and divorced women along

<sup>40</sup>Lok Sabha passes bill that bans 115 commercial surrogacy, HINDUSTAN TIMES (Aug. 5, 2019, 7:49 PM), <https://www.hindustantimes.com/india-news/lok-sabha-passes-bill-that-bans-commercial-surrogacy/story-xqrMiwWWsUFvGFTAsZr2SN.html>.

<sup>41</sup>Cabinet Approves Surrogacy Bill, supra note 7.

For general queries or to submit your research for publication, kindly email us at [editorial@ijalr.in](mailto:editorial@ijalr.in)

with the infertile couples. The Bill also deleted the definition of ‘infertility’ as given in the Bill. It mainly focused on banning commercial surrogacy and promoted altruistic surrogacy. The Committee suggested certain changes in the eligibility criteria, such as, removing the requirement of being a close relative for a surrogate, reducing the period of non-conception from five years to one year and permitting widows and divorced women to have access to surrogacy services. It aims at establishing various State Boards and National Surrogacy Board for the regulation of surrogacy at the center as well as in the states and union territories. The insurance for the surrogate mother has also been increased from 16 months to 36 months. The Union Cabinet has approved the Surrogacy Bill along with the ART Bill, after the incorporation of the recommendations of the Select Committee.<sup>42</sup>

### IS THE SURROGACY BILL CONSTITUTIONALLY VALID?

Having come this far to ensure the reproductive rights to women, the Central government is all set to enact the newly introduced and extremely desired Surrogacy (Regulation) Bill 2020. The legislation is highly instrumental in the operation of the surrogacy market in India which is also the largest in the world. However, the pertinent issue that arises is that how far it will go unquestionable in the lines of constitutional mandates.

Article 13 of the Constitution<sup>43</sup> specifies a predominant condition which mandates the legislation to be framed in conformity with its Part III. Moreover, the Supreme Court of India put forth the Golden Triangle Test which reads the right to equality<sup>44</sup>, liberty<sup>45</sup> and freedom<sup>46</sup> conjunctively thereby ensure that the fundamental rights guaranteed to the citizens by the constitutional provisions are not to be encroached by the State arbitrarily and unreasonably. Following the principle hereby discussed, even if the Surrogacy (Regulation) Bill 2020 is passed, it will fail to adhere to the constitutional norms and values and will further unfollow the idea behind interpretations of the provisions taken in the varieties of judgments pronounced by the judiciary. The 102<sup>nd</sup> Parliamentary Standing Committee Report on Surrogacy had already questioned the constitutional validity of Surrogacy Bills.<sup>47</sup> Women’s reproductive rights, if negotiated every time, will never fail to constraint their bodily autonomy, had it been related to

---

<sup>42</sup>*id.*

<sup>43</sup>India Const. art. 13.

<sup>44</sup>India Const. art. 14.

<sup>45</sup>India Const. art. 21.

<sup>46</sup>India Const. art. 19.

<sup>47</sup> Alice George & Aviral Chauhan, Surrogacy Bill and ART Bill: Boon or Bane?, A Cyril Amarchand Mangaldas Blog (Apr. 1, 2019), <https://corporate.cyrilamarchandblogs.com/2019/04/surrogacy-bill-and-art-bill-boon-or-bane/>.

For general queries or to submit your research for publication, kindly email us at [editorial@ijalr.in](mailto:editorial@ijalr.in)

<https://www.ijalr.in/>

their right to abortion or right to parenthood. Therefore, it is high time to give recognition to their reproductive rights by negating the unwanted interventions of third parties such as the State. Concurring with the decision of the U.S. Supreme Court in the case of *Skinner v. State of Oklahoma*<sup>48</sup> which classified the right of reproduction as a basic civil right, the High Court of Andhra Pradesh in *B.K. Parthasarthi v. Government of A.P.*<sup>49</sup> upheld the characterization of the right of reproductive autonomy as a constituent of right to privacy. Until now, the right to privacy has become the facet of right to life in consonance with the *Puttaswamy* judgment.<sup>50</sup> Furthermore, in *R. Rajgopal v State of Tamil Nadu*<sup>51</sup>, the Court identified the definition of reproductive autonomy “as the personal decision of an individual about the birth of children.” But the Surrogacy Bill asks the infertile couple to procure the certificate of infertility from the district medical board and is thus, a gross violation of their right to privacy.

Time and again, the Courts have characterized the right of reproductive autonomy as the facet of right to privacy and therefore of right to life<sup>52</sup>, which shall mandatorily be free from the State intrusion in a democratic society. In *SuchitaSrivastava v. Chandigarh Administration*<sup>53</sup>, the widened view had been taken by the Supreme Court by equating the right to make a choice regarding reproduction with the right to life and personal liberty enshrined under Article 21 by stating that the reproductive rights are inclusive of the right of a woman to carry the pregnancy to its full term, to give birth and to subsequently raise the child. Again, in *DevikaBiswas v. Union of India*<sup>54</sup>, the Supreme Court broadened the scope of the right to life guaranteed by Article 21 of the Constitution by characterizing the right to reproduction as an important facet of that right. This right to reproduction and to make reproductive choices is inclusive of the right to procreation and parenthood, therefore, being the component of the right to life restricts state’s intrusion over them. It is the prerogative of an individual to determine the mode of the parenthood, that is, whether to have a child naturally or through surrogacy. However, the Bill raises a serious concern by barring classes individuals to opt surrogacy as a means to have a child. In *MurlidharAggarwal&Anr. v. State of U.P.*<sup>55</sup>, the Apex Court observed that changes are essential in the public policy depending on the needs of the generations. While considering the rights of the surrogate mother or the child born out of the surrogacy, it is significant to examine

---

<sup>48</sup>*Skinner v. State of Oklahoma*, 316 US 535 (1942).

<sup>49</sup>*B.K. Parthasarthi v. Government of A.P.*, AIR 2000 AP 156.

<sup>50</sup>*Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 SCC 1.

<sup>51</sup>*R. Rajgopal v State of Tamil Nadu*, AIR 1995 SC 264.

<sup>52</sup>India Const. art. 21.

<sup>53</sup>*SuchitaSrivastava v. Chandigarh Administration*, (2009) 9 SCC 1.

<sup>54</sup>*DevikaBiswas v. Union of India*, (2016) 10 SCC 726.

<sup>55</sup>*MurlidharAggarwal&Anr. v. State of U.P.*, (1974) 2 SCC 472.

For general queries or to submit your research for publication, kindly email us at [editorial@ijalr.in](mailto:editorial@ijalr.in)

whether the State has any business in regulating the reproductive choices of the society. The Court, furthermore, stated that the State should enact the legislation which complies with the fundamental rights and highlights the societal progress. Furthermore, the Indian Courts, on multiple occasions, have enlisted right to procreation as a fundamental right by widening the scope of Article 21. It forms an essence of reproductive autonomy, bodily integrity, dignity and privacy of every individual, henceforth, considered as a universal, indivisible and undeniable right guaranteed without any sort of discrimination.

The newly introduced Surrogacy (Regulation) Bill 2020 has failed to meet the essentials of Article 14 by limiting itself to married Indian couples and discriminating between the certain class of people based on their marital status, age, sexual orientation and nationality. The central government could not provide the cogent reason for the classification made as there is no direct nexus between restricting these people from exercising their surrogacy rights and the ultimate object of this Bill which is the protection of surrogate woman from exploitation.

Another controversial aspect of the Bill is that it imposes a blanket ban on surrogacy rights of homosexuals despite the decriminalization of homosexuality in India. By doing so, the government has stigmatized homosexuality and promoted its homophobic beliefs by turning the homosexual surrogacy against the societal norms. It has happened for the very first time that the law has mentioned explicitly the term 'homosexuality', and it clearly shows how the government is openly prejudicing the community by calling out the unnatural sexuality undeserving of the basic human rights of parenthood.

Also, the Bill prejudices against the couples residing in a live-in-relationship despite the recent pronouncement of the Apex Court according to which "In the modern times, the live-in relationship has become an acceptable norm. It is not a crime."<sup>56</sup> Even the child born out of such a relationship is legitimate and the partners are entitled to various rights similar to spouses in marriage, then, why the surrogacy rights are denied to them? If proper parenting is the major concern relating to this denial, then it is a misplaced concern. If it is opined that live-in relationships are short-lived, even the marriages have the probability of being short-lived and this is not an acceptable reason to deny them the surrogacy rights. Therefore, for this, a significant change in the law is needed which can deal with the custody of the child born to the unmarried couple in case of a break-up.

---

<sup>56</sup>DevidasRamachandraTuljapurkar v. State Of Maharashtra &Ors, 2015 Indlaw SC 361.

For general queries or to submit your research for publication, kindly email us at [editorial@ijalr.in](mailto:editorial@ijalr.in)

**OTHER PERTINENT CONCERNS THAT RENDERED THE LAW INEFFICACIOUS**

The Surrogacy Bills of 2008 and 2014 were criticized immensely as they provided for unconstrained commercial surrogacy without establishing any mechanism for the authoritative check in its operation. This approach was propounded to be quite detrimental to the interests of the surrogate mothers as it was restricting their rights by subjecting them to exploitation and unfair treatment. Henceforth, the view was overturned by the legislators in the Surrogacy Bill of 2016 which imposed a complete ban on the operation of commercial surrogacy in India and was upheld in the consecutive Bills, thus, to bring India's surrogacy legislation at par with that of UK and Canada. Now, considering the Surrogacy (Regulation) Bill 2020, its Statement of Objects and Reasons distinctly states the abolition of all sort of unethical practices surrounding commercial surrogacy thereby protecting the surrogate mothers from the exploitation. But, in India, it is an established notion that *'everything successful attracts traffic'* thereby leading to another failure to regulate the surrogacy practices in India. It is pertinent to analyze this overzealous approach of the Government which instead of benefitting the surrogate mothers subject them to the greater exploitation and emotional dilemma. The list of injustices continues as the blanket ban imposed on the commercial surrogacy has unanswered the questions that how the non-payment to the surrogate women, even if the surrogacy is allowed through a close relative, will lead to their non-exploitation and how the law is safeguarding the altruistic surrogate mothers from the coercion of infertile couples to bear the child. Furthermore, it is very much evident in the paper that the main purpose of Surrogacy Regulation Bill is to end the practice of commercial surrogacy. The critics argued that the surrogacy was a tool of exploitation but on the other hand according to the international supporters of surrogacy, it is a basic human right. It is a way of earning livelihood for women. It gives them a choice to participate and get financial compensation for their service. Not only the surrogates but it is also very much beneficial for childless couples. But according to the critics, it is also referred to as *'baby outsourcing'* and is the major exploitation of women as they provide their wombs on rent and despite bearing such a risk are still poorly paid for their valued service. And when the sole motive is just to earn money, it could have serious health and social consequences. However, the people have the right to enter into the contractual relations and to trade freely for the services as provided by the surrogate mother. People have the right to choose their profession and it is their choice to be surrogates. For this, there should not be a complete ban on commercial surrogacy as it could lead to the formation of illegal markets which may be harmful to the rights of the surrogate mothers. Altruistic surrogacy must be legalised but at the same

For general queries or to submit your research for publication, kindly email us at [editorial@ijalr.in](mailto:editorial@ijalr.in)

<https://www.ijalr.in/>

time instead of banning commercial surrogacy, it should be made optional, based on certain conditions and guidelines as that may be issued by the concerned authorities. There should be a proper way of providing compensation to the surrogate women, to prevent their exploitation. Moreover, there should also be a proper framework considering the reproductive rights of the people.

The Bill allows only the close relative of the infertile couple to act as a surrogate mother. The major loophole pertaining to this mandate is that the close proximity between the child and the surrogate mother which will eventually lead to the emotional dilemma, therefore, overshadowing the interests of the surrogate mother. But, in cases of commercial surrogacy, the bond between the surrogate mother and the child gets diluted as soon as the stipulated amount is paid and the parents can restrain their bonding by keeping her distanced. Therefore, a procedure to maintain anonymity is required to overcome such high stake situations.

There are various issues raised relating to the cross border surrogacy such as poverty issues, issues of motherhood and how women from different backgrounds interact in the global surrogacy market. A framework for reproductive justice protects the woman's human rights and aims to achieve their physical, political, mental, social and economic wellbeing. This framework also differentiates between the services provided by the women surrogates of developed and developing countries such as India. In developing countries like India surrogacy is not an autonomous choice but more in the form of labour. In order to promote surrogacy properly, the international surrogacy market compensates women so that they may earn more as a surrogate than many other jobs. Now, this puts up a question, whether prohibiting surrogacy at the international level infringes justice. The income of surrogate women is four to five times that of their normal household income. Though this income is less than many other developed countries but is quite useful for the surrogates as it helps them provide education to their children and also earn their livelihood.

Another issue related to surrogacy is concerning the health of the surrogate mother. Surrogacy involves various health risks to the mother and fetus that have been identified. Certain drugs are used to induce ovulation<sup>57</sup>. According to the process, the drug first stimulates the follicles and then releases the mature ova which are the foundation of various types of Assisted Reproductive Technologies. These drugs are not only helpful in artificial insemination but also in In Vitro Fertilization (IVF).<sup>58</sup> In developed countries, surrogates are not implanted with more

---

<sup>57</sup>SalimDaya, Follicle-Stimulating Hormone Versus Human Menopausal Gonadotropin for In-Vitro Fertilisation: Results of a Meta Analysis, Proceedings of the Ares Serono Satellite Symposium (Dec.5, 2008)

<sup>58</sup>*id.*

For general queries or to submit your research for publication, kindly email us at [editorial@ijalr.in](mailto:editorial@ijalr.in)

than two embryos in order to ensure their safety, but in developing countries like India, women are implanted with more than five embryos to ensure pregnancy. Implantation of a large number of embryos may pose health risks and may be fatal for the mother and the baby. They may also suffer from the problem of post-partum depression. There have been cases where surrogates have lost their lives during their gestation period. This occurs due to unawareness, lack of education, poverty, patriarchal structure of our society and the intention of earning more income through surrogacy which are the major problems of a developing country like India.

Some even argue that surrogacy is the exploitation of a woman's reproductive organs. The surrogate woman is also kept away from her family and is allowed to meet them only on the weekends thus depriving her of the rights. In the absence of a proper framework regulating surrogacy, there would be no payment structure for them and also no proper signed contract of surrogacy between the surrogate and the intending couple which could further lead to exploitation. Hence in order to protect the rights of surrogate mothers and to prevent them from being exploited there was a need for regulated ART and cross border commercial surrogacy in India. Previously there was no legal framework in India to regulate surrogacy services<sup>59</sup>. Only certain guidelines and regulations were issued which created more problems rather than providing solutions. Hence there was a need for a genuine structured legal system controlling surrogacy services to ensure protection to the surrogate mother and the child, to protect their rights, to prevent them from being exploited and also to ensure that the health of the surrogate mother is not at peril. As there was no regulated market of surrogacy, there were lots of legal debates regarding commercial surrogacy. Both the surrogate mother and the intending couple faced the fear of entering into the contract as it was not enforceable in the court of law. Considering all these problems the Supreme Court of India asked the government to bring a certain framework regulating surrogacy in India.

## RECOMMENDATIONS AND CONCLUSION

The financial crisis has forced the women to migrate from the rural to the urban areas and undertake such jobs for their survival that are vulnerable to them. The expanding markets open inexperienced fields for the women, for their growth and to earn profits, which often leads to their exploitation. Privatization of the medical sector, mainly the reproductive technologies provided a new livelihood for the women. Surrogacy is one such category. Women mainly from the rural areas aim to make one-time money to meet their financial needs and to support

---

<sup>59</sup>Radhey S. Sharma et al., *supra* note 22.

For general queries or to submit your research for publication, kindly email us at [editorial@ijalr.in](mailto:editorial@ijalr.in)

their family, which would have been difficult through their regular jobs. There is a strong need for the reconsideration of the surrogacy laws by the authorities. A portion of the changes to the these laws that this article recommends are as follows:

1. There must be an international dialogue, where many countries would get together and have discussions regarding the regulation of the surrogacy industry.
2. Use of cross-border surrogacy, though on one hand provides a right to the infertile couples to have a child while on the other hand acts as a medium of exploitation. Hence to protect the basic human rights and to ensure that they are not exploited there is a need for a well-regulated system.
3. As per Article 7 of the Convention on the rights of the child 1990, there should be a legal body providing transparency to the legal contracts being enforced to protect the rights of the child.
4. Further, there should not be a complete ban on commercial surrogacy as it may lead to the formation of illegal markets which may be harmful to the rights of the surrogate mother. Altruistic surrogacy should be legalised but at the same time instead of banning commercial surrogacy, it should be made optional, based on the certain conditions and guidelines as that may be issued by the concerned authorities.
5. There should be a proper way of providing compensation to the surrogates to prevent their exploitation and also there should be a proper framework considering the reproductive rights of the people.
6. The other problem is that the gay couples are not allowed to have a child through surrogacy, which as per the authors is quite unfair because they too are the citizens of India and hence discriminating them on this basis would be the violation of their right to equality.

Before parting, the authors would conclude that if the above-mentioned recommendations are taken into account, it would not only curb the black marketing of the surrogates but also protect the rights of all the parties involved in the process and hence, solve the problems surrounding the practice to a considerable extent.