

VOLUME 1 | ISSUE 1**INTERNATIONAL JOURNAL OF ADVANCED LEGAL RESEARCH****SURROGACY (REGULATION) BILL 2019: A LEGISLATION FOR
FREE REPRODUCTORY LABOUR AND VIOLATION OF RIGHTS:**

- Shruti Madhogaria¹

“The barren got the born, and the surrogate mother the means to feed her children.”

This slogan succinctly captures the story of many surrogate mothers for whom surrogacy is a means of subsistence and life. It is an invaluable gift for the childless couple who dream of fulfilling the biological role of parenthood. Infertility is still a social stigma in India and the brunt of it is borne by the couple who struggle to procreate. Surrogacy is the only viable technique that addresses the apprehension of these parents for a biological child. Surrogacy is a form of a contractual agreement where the gestational carrier agrees to nurture the fertilized egg in their womb achieved through assisted reproductive technologies (ART) and deliver the child to their genetic parents upon birth. Section 2(aa) of the Draft Assisted Reproductive Technologies (Regulation) Bill, 2010 (in short ART Bill) also defines Surrogacy (gestational) as an agreement in which a woman agrees to a pregnancy achieved through an assisted reproductive technology in which neither of the gametes belong to her or her husband, intending to carry it till term and hand over the child to the person or persons for whom she is acting as a surrogate.² There is particularly an agreement between the infertile couple and the surrogate mother known as the ‘Surrogate Parenting Agreement’ where the surrogate is required to bear the child in her womb for nine-month and to relinquish her rights on the child upon delivery.

The advent of Surrogacy in India began in the late 1990s which became a thin ray of hope for the intentional parents but gradually its commercialization was legalized in 2002. India became a booming global hub for commercial surrogacy due to the relaxation in legal

¹ Student of Himachal Pradesh National Law University, Shimla

²ART (Regulation) Bill

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restrictions and regulation and also a lucrative foreign exchange rate which became a viable option for foreigners as well. The landscape of surrogacy in India characterized by a lack of stringent laws werebrought into legal radar before the Supreme Court in the case of Baby Manji Yamada v Union of India & Anr.³ This case intensified the debate around the absence of a legal contract between the parties and also exposed its potential for exploitation of the surrogate mother. Owing to the rising concern of unregulated practices due to commercialization of surrogacy the Law Commission submitted its 228th report titled "Need for Legislation to regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of parties to a Surrogacy". The report stressed for a philistine approach to address the knotty issue by legalizing altruistic surrogacy arrangements and prohibiting commercial practices. In a major development, the government introduced The Surrogacy (Regulation) Bill, 2016 (the 2016 Bill) which recommended imposing a ban on commercial surrogacy and allowing altruistic surrogacy only in specific circumstances and certain other changes as well. However, the Bill lapsed due to the dissolution of the Lok Sabha.

The Surrogacy (Regulation) Bill, 2019 (the Bill) was brought in its replacement and was a spitting image of the 2016 Bill. It contained insignificant amendments to the earlier drafts and failed to infuse various annotations which arose between 2016 to 2019. The Bill drew widespread condemnation from lawyers, activists, women's health groups, who accused the bill for reeking of inequality and moral conservatism.

One of the most excruciating aspects of the bill is its incontrovertible ban on commercial surrogacy and its myopic advocacy for altruistic surrogacy. This clause shuts the doors of other legal methods for the aspiring infertile parents to biologically bring a child out of the genetic mother's womb. Altruistic surrogacy is a form of contractual agreement where the surrogate is not entitled to any monetary compensation except certain medical payments. The concept of altruistic surrogacy is certainly not a workable theorem as it would further accelerate the problems of black marketing and surreptitious surrogacy procedures. The Government has exalted the concept of surrogacy to a noble and a pious service of women to bring a new life into the world by undergoing all the physical and mental pain, free of cost and only out of "compassion". This arrangement is exploitative for women who put precious two years of their life on hold and risk their health as well to successfully give birth for

³Baby Mani Yamada v. Union of India, (2008) 13 SCC 518.

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another couple. In a way, this altruistic model bolsters forced labor which is very similar to the sufferings of sex workers. We all are aware that the job of the sex workers gets unethical and shady due to the nature of their work. Therefore the focus of the government should have been to address the exploitation and not the work itself.

For many women, it is a preferable means of sustenance and the focus of the Bill should have been to improve the working conditions. Safe and secured work environment could reinforce the system where a poor woman could earn her daily bread with dignity. Surrogacy should be seen as analogous to other forms of labor as it is a reproductive labor. Commercial Surrogacy is a remunerative job for many underprivileged women struggling to economically uplift their families. The definition of 'willing woman' is a representative of forced and paid labor which is a violation of Article 23 of the Constitution. Similarly, the bill is a picturesque representation of the moralistic assumption of the government which expects the surrogates to be selfless and compassionate role models for the society. The Bill calls for a discriminatory arrangement where the doctors and lawyers involved in the process get paid for their respective roles whereas the surrogates are expected to do labor without a single penny. Similarly prohibiting a woman to receive compensation for the gestation of her fetus is denying her effective possession over her own body by violating one's individual freedom. The consequence of prohibiting pregnancy contracts or banning payment for gestational services is suggested by the question of the surrogate who asked, "Why am I exploited if I am paid, but not if I am not paid?" (Andrews 1989, 259). This Bill has treated surrogacy just like a woman's domestic labor which is non-compensatory and is considered as an act of love and affection for the family rather than a contribution to the real economic activity. Another point of contention in the bill is its provision regarding the quantum of compensation. It is restricted only to the insurance coverage for medical expenses, postpartum complications, and the illness or death of a surrogate mother which is detrimental to her worth. It provides a little scope for other expenses such as the loss of health involved, her devotion towards the pregnancy which restricts her from pursuing alternative career opportunities, child care support for the counseling of surrogate mother's children, maternity wear, and post-delivery healthcare of the surrogate.

Another major loophole in the bill is with regards to the concept of a 'willing woman' who would voluntarily and selflessly devote herself to delivering the divine gift of motherhood for

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some stranger. This concept seems practically impossible and short-sighted on the part of the government. Naturally, the intending parents would have to shift towards the earlier option of a close relative. This clause ignores the implications of social stigma around infertility in the society and also its effect on the family of the intentional parents who consider surrogacy to be a very private affair. The involvement of family members in the process of surrogacy would lead to further conflict and animosity resulting in unfair allegations and character assassinations of both the surrogate mother and the intended parents. It would lead to more exploitation than commercial surrogacy for the younger daughter-in-law in the families who would be coerced into this process, succumbing to the pressure of their family members. It would be shocking to note that almost 50 percent of the court cases relating to surrogacy are fought within families due to various cases of breach of confidentiality and privacy, deregulated money payments, and also due to unwarranted interventions of the family members for the child's future, etc.

The Bill vehemently overlooks the need of including stringent provisions relating to the death of a surrogate in the process of gestation or delivery. Therefore it stands as violative of Article 21 of the Constitution which has enshrined the principles of Right to Life, Personal Liberty, and Right to Livelihood. These principles were recognized by the Court in the case of *Olga Tellis v. Bombay Municipal Corporation*⁴ where the Court openly criticised the ban on commercial surrogacy as it threatened the possibility of a good livelihood for a woman seeking financial independence by the way of surrogacy. Further the Court in the case of *Devika Biswas v. Union of India*⁵ comprehended that the Right to Life also extends to the right of 'reproductive autonomy which includes the rights of parenthood and procreation. The court further held that restricting the ambit of surrogacy only to heterosexual couple's widows and divorcees was discriminatory and violated the right of reproduction of LGBTQ persons, single persons, and older couples.

The Andhra Pradesh High Court in the case of *B.K. Parthasarathi v. Government of Andhra Pradesh*⁶ had strictly remarked that any interference with the process of reproduction or procreation of any intending couple would be conferred as an

⁴*Olga Telis v. Bombay Municipal Corporation*, AIR 1986 SC 180

⁵*Devika Biswas v. Union of India*, (2016) 10 SCC 726.

⁶*B.K. Parthasarathi v. Government of Andhra Pradesh*, (1999) 5 ALT 715.

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encroachment on “Right to privacy” sanctioned as an imperative facet of Right to Life under 21 in the case of *KS Puttaswamy v Union of India*.⁷ The decision of reproducing is a private affair for any couple suffering through the pain of infertility. But this bill intentionally violates the privacy of such couples by making it necessary for them to produce an eligibility certificate or a ‘certificate of infertility’ from the district medical board.

The Bill has proven inadequate on the grounds of violation of Article 14 which provides for “equality before the law and equal protection of laws to all persons.” However, the Article allows for reasonable classification based on intelligible differentia and rational nexus. But the Surrogacy (Regulation) Bill 2020 calls for unreasonable classification by allowing only married couples and divorcees and widows to explore the option of surrogacy ignoring the fact that many non-married individuals, single men might seek to have children as well. The Bill does not address the needs and rights of homosexual couples and transgender for reproduction or procreation even after the decriminalization of Section 377 of the Indian Constitution in the case of *Navtej Johar* and also the recognition of trans genders as a third gender by the Supreme Court in the case of *National Legal Services Authority v. Union of India*.⁸ Therefore the bill has established an irrational nexus by discriminating with the reproductive rights of people on the grounds of their marital status, age, sexual orientation, and nationality.

The proposed law is also held to be unequivocally violating Article 19(1) (g) which guarantees the “freedom of trade and profession.”⁹ By criminalizing commercial surrogacy the court places unfair arbitrary restrictions on the trade practices of surrogates and the surrogacy clinics. The Bills fails to strike the mandatory balance between an individual’s freedom and social control as was held by the Court in the case of *the State of Maharashtra v. Indian Hotel and Restaurant Association*¹⁰, The Supreme Court conferred that a complete ban on bar dancing would be unconstitutional as the ban would drive many women to forced prostitution and

⁷Justice K.S. Puttuswamy & Anr. V. Union of India & Ors., (2017) 10 SCC 1.

⁸National Legal Services Authority v. Union of India, AIR 2014 SC 1863.

⁹Art. 19(1)(g), the Constitution of Indias

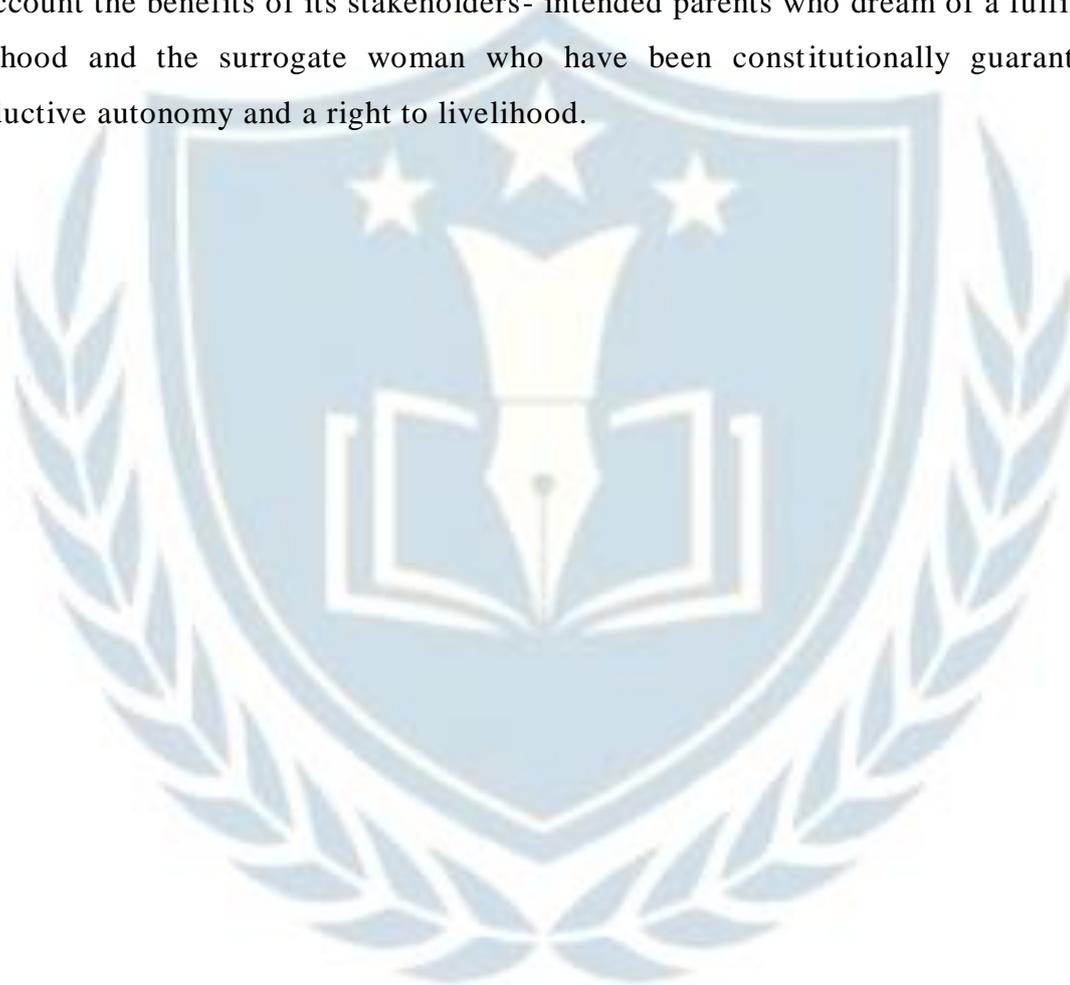
¹⁰State of Maharashtra v. Indian Hotel and Restaurant Association, AIR 2013 SC 2582.

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therefore infringed their right to carry on their profession. Similarly, a blanket ban on commercial surrogacy and legalization of altruistic surrogacy also goes against Article 19(1) (g) of the Constitution.

Taking all the above points in cognizance, it can be unfortunately concluded that the Surrogacy (Regulation) Bill is short-sighted, overtly arbitrary, and conservative that fails to acknowledge the interests of its real stakeholders. It must be re-drafted taking into account the benefits of its stakeholders- intended parents who dream of a fulfilled parenthood and the surrogate woman who have been constitutionally guaranteed reproductive autonomy and a right to livelihood.



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