

necessary on the assailant meaning thereby that the defender cannot assume the role of the assailant by exceeding his right of private defence. Also under Section 99 there is no right of private defence if there is time to have recourse to public authorities.

Section 100 of the IPC, provides that subject to restriction under Section 99, the right of private defence extends even to the causing of death or any harm to the assailant if; there is reasonable apprehension of death, grievous hurt, rape, unnatural intercourse, kidnapping/abduction, wrongful confinement or acid attack.

According to Section 101, if the act of the assailant does not fall under various description of offences under Section 100 then the defender can in no case while exercising the right of private defence cause the death of the assailant.

According to Section 102, the right of private defence commences on reasonable apprehension of danger, or arises from attempt or threat even if the act be not yet committed, and it continues till the apprehension or threat of danger is there.

### *Conclusion*

This article brings out the basic understanding of general exceptions of the offence committed in Indian Penal Code. Since IPC is a substantive law which determines the criminal liability of a person committing the Act in good faith or for self-defense cannot be punished, and lastly the Criminal Law also defined in Sections 97 and 99 that acts which there is no right of private defence to balance the justice between intentional and self-defense activities.

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## **A COMPREHENSIVE ANALYSIS ON REPRODUCTIVE HEALTH AND SURROGACY IN INDIA – A STUDY ON THE LAW, POLICY AND PRACTICE**

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### **ABSTRACT :**

Over the past decade, legal, ethical and moral issues surrounding surrogacy are hotly debated. The new draft Surrogacy Bill, 2020 was finally approved by the Cabinet after it was referred to the 23-membered select

committee. At this juncture, it is pertinent to extensively study various aspects of Surrogacy. The basic subject-matter of this research is divided into five parts as follows:

The Part-A of this article covers concepts of Surrogacy and its earliest

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evidence to latest developments. Further, it sheds light on India's emergence as a reproductive tourist destination. Part-B of this article deals with Ethical and moral issues surrounding surrogacy and discusses the two-decade-long legal journey which includes various policies, Landmark Judgments, Parliamentary debates, and Committee reports.

Part-C of this article comprehensively deals with the new draft bill. Finally, The Constitutional aspects of the New Draft Bill and Blanket ban on Commercial Surrogacy are analysed through various viewpoints, and a way forward is suggested.

## PART-A

### Introduction

*"For Robert Brown, all love begins and ends with motherhood, by which a woman plays the God. Glorious it is like the gift of nature, being both sacrosanct and sacrificial, though; now again, science has forced us to alter our perspective of motherhood. It is no longer one indivisible instinct of a mother to bear and bring up a child. With the advancement of reproductive science, now, on occasions, the bearer of the seed is a mere vessel, a nursery to sprout, and the sapling is soon transported to some other soil to grow on. Now, it is Law's turn to appreciate the dichotomy of divine duty, the split motherhood."*<sup>[3]</sup>

The word 'surrogate' has its origin in the Latin term '*surrogates*' meaning a substitute, a person appointed to act in place of another. "It is the practice by which a woman (called a surrogate mother) becomes pregnant and gives birth to a baby to give it to someone who cannot have children."<sup>[4]</sup> Nature has bestowed the capacity to procreate a life within women and every woman cherishes

the experience of motherhood. But, growing cases of infertility and technological advances have led the world to turn its eyes on surrogacy. The conventional is to go for adoption and the unconventional is Assisted Reproductive Technology (ART) in which pregnancy is caused by artificial or partially artificial means.

### Earliest Evidence of Surrogacy

In 1976 the first legal surrogacy agreement in the history of surrogacy was brokered by Lawyer *Noel Keané*<sup>[5]</sup>. From then, there were a lot of historical snapshots of the rise in the practice of surrogacy. Surrogacy is not a new wonder it has existed for many years. It took momentum once artificial insemination and assisted reproductive technology were developed.

In 1986, the famous case of *Baby M* was the first evidence of the Surrogacy case. The woman who was the surrogate and also the biological mother of the child decided she wanted to keep the child, despite prior discussions and contracts. The case is illuminating even today because it explains the nature and contractual arrangement between the intended parents and a surrogate. It also discusses certain risks that can arise in the wake of such relations. However, the Court declared such contracts are against public policy and hence are void and unenforceable. The Court in the end has given the custody of the child to the intended parents in the best interests of the child.

In recent times, Technology has radical advances to enable women to carry a child not biologically related to them. The most commonly used ART procedures

[3] *P. Geetha v. The Kerala Livestock Development*, 2015 SCC OnLine Ker. 71.

[4] Merriam-Webster Dictionary.

[5] Information on Surrogacy, 2008 History of Surrogacy, <http://www.information-on-surrogacy.com/history-of-surrogacy.html>, (Last accessed : April 24th, 2021).

are Intrauterine Insemination (IUI), Tubal Embryo Transfer (TET), In Vitro Fertilization (IVF), Zygote Intrafallopian Transfer (ZIFT), Zygote Intrafallopian Transfer (GIFT) and Gestational Surrogacy<sup>6</sup>.

Surrogacy in India has its origin in history and evidence of being a century-old method. In 1978, surrogacy in India became successful with the birth of the world's second and India's first in vitro fertilization (IVF) baby *Kanupriya alias Durga* in Kolkata. Commercial surrogacy was then legalized in India in 2002. This decision was taken to encourage medical tourism in India.

At Last, one can say surrogacy is the union of science, society, services, and person that make it a reality<sup>7</sup>. While some Advocates, surrogacy leads to a win-win situation for both the infertile couple and the surrogate mother and says "The barren gets a baby, the broken gets a bonus". Others debate on various moral, ethical aspects.

However, within that broad definition, there are many different ways to define surrogacy, but considering the prevailing practices in India there are two types of surrogacy medically practiced<sup>8</sup> :

- (i) Traditional/Natural/Partial surrogacy : The first type of surrogacy arrangement is "traditional surrogacy" or "complete surrogacy" in which the eggs of the surrogate mother are

used in the conception of the child. In this process, the child is genetically related to the surrogate and hence the surrogate is practically considered as the biological mother. The process through which the baby is conceived is called "artificial insemination"<sup>9</sup>

- (ii) Gestational surrogacy : In this, the wife is fertile but incapable of carrying a growing foetus; the child is conceived by "in-vitro fertilization" (IVF)<sup>10</sup> using the wife's eggs and her husband's sperm, the obtained embryo is embedded in the surrogate mother's uterus.

Apart from this, there are different arrangements through which surrogacy is being practiced<sup>11</sup> :

- (i) *Altruistic surrogacy* : Where the surrogate mother receives no financial rewards for her pregnancy or the relinquishment of the child to the genetic parents except necessary medical expenses<sup>12</sup>. Altruistic surrogacy can be titled as "women helping women", where the surrogate agrees to help the couple by giving birth to the child without any consideration<sup>13</sup>.
- (ii) *Commercial surrogacy* : Where the surrogate mother is paid over and above the necessary medical expenses or when Surrogate mother receives a financial reward for her pregnancy or the relinquishment of the child

[6] Victoria Clay Wright, "Assisted Reproductive Technology Surveillance-United States, 2004", Vol.56, 3-6 (June 8, 2007).

[7] R.S. Sharma, Social, ethical, medical & legal aspects of surrogacy : an Indian scenario, IJMR, 2014 Nov; 140 (Suppl. 1) : S13-S16.

[8] Saxena P., Mishra A, Malik S. Surrogacy : ethical and legal issues. Indian J Community Med. (2012).

[9] Babu Sarkar, Commercial Surrogacy : Is it Morally and Ethically Acceptable in India?, (2011) PL December S-11.

[10] Ibid.

[11] Steven J. Mt. Royal, New Jersey : International Federation of Fertility Societies, IFFS surveillance report, (2013).

[12] Babu Sarkar, Supra 6.

[13] Reetu and Basabdutta, "Surrogate Birth", AIR 2009 Jour 108.

(besides medical and other reasonable expenses), usually according to a pre-decided liquidated agreement, it is termed as 'commercial surrogacy'.<sup>14</sup>

### Reproductive Tourism

Reproductive tourism describes any travel to seek commercially provided assisted reproductive technologies (ARTs), which can include in vitro fertilization, pre-implantation genetic diagnosis, gamete procurement, or a host of other services<sup>15</sup>. Over the last two decades, India has become a major global destination for "reproductive tourism". According to a study backed by the United Nations in July, 2012, it is estimated that surrogacy may be worth approximately \$400 million annually, generated from the country's approximately 3,000 speciality clinics in India.<sup>16</sup>

India was known as the capital of "commercial surrogacy" and fertility tourism in the world. Once upon a time, India was considered the most preferred "surrogacy destination" in the world. Commercial surrogacy was permitted in India from 2002 to 2016. Since commercial surrogacy banned in most nations, many are flocking to India.<sup>17</sup>

The main customers of surrogacy tourism were infertile couples, heterosexual couples, homosexuals, incapacitated and

handicapped people, and even elderly couples. Surrogacy tourism was a very lucrative business for Indian medical tourism with a huge potential to generate foreign exchange earnings for the country.<sup>18</sup>

### PART-B

#### Ethical and Moral Issues around Surrogacy

Although Surrogacy seems to be helpful for all parties involved, certain delicate issues need to be addressed through rigorously framed laws to protect the rights of the intended parents and the surrogate. Some argue that in commercial surrogacy buying and selling of the womb of the women's body is an immoral act. Poor, indigent Indian women would become the source for bearing the baby, get and exploited by the rich and powerful infertile couple.

The emotional bond between the biological mother and the child is extremely strong and that surrogate motherhood is unnatural and immoral because it violently "breaks" that bond<sup>19</sup>. The biological child is often being neglected and that we do not focus on the possible trauma of the mother giving her child away to the adopters<sup>20</sup>. Ethical consideration regarding the rights of the child to know the mother (surrogate); emotional aspects of the surrogate mother influence the surrogate child's behaviour; Social isolation; social out-casting and many

[14] Casey Humbyrd, Fair Trade International Surrogacy, Developing world bio-ethics 112 (2009).

[15] Rawat Deonandan, Recent trends in reproductive tourism and international surrogacy : ethical considerations and challenges for policy, NCBI, (2015), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4544809/> (Last accessed : 1st May, 2021).

[16] Bhalla N., Thapliyal M. Foreigners are flocking to India to rent wombs and grow surrogate babies. 2013. <http://www.businessinsider.com/india-surrogate-mother-industry-2013-9?IR=T>. (Last accessed : 1st May, 2021).

[17] Dr. Binoy, T.A., An evaluation of surrogacy tourism in India, International Journal of Current Research, (2008), Vol.10, Issue, 02, 65160-65163.

[18] Ibid.

[19] Ragini Kulkarni, Ethical dilemmas in surrogacy, Hektoen International, (2015). <https://hekint.org/2017/01/30/ethical-dilemmas-in-surrogacy/> (last accessed : May 7, 2021).

[20] Bhimji, S., Womb for rent : ethical aspects of surrogate motherhood, CMAI, Vol.137/1987.

other societal and religious-oriented strings are attached to this.

“If we look into the difficulties faced by a surrogate, the conditions are worse and unethical. The illiterate poor women of rural background are often induced in such deals by their partner or middlemen for earning easy money. These women have no right or to decide on their own body and life.”<sup>21</sup>

It is sardonic that people are taking part in the practice of surrogacy when nearly 12 million Indian children are orphans. Adoption of a child in India is a complicated and lengthy procedure for those childless couples who want to give a home to these children<sup>22</sup>.

#### **A Conspectus on various Indian Legislations on Surrogacy**

Commercial surrogacy has been made legal in India since 2002. The Indian Council of Medical Research expected the growth of the surrogacy industry upto 6 billion dollars by 2018<sup>23</sup>. In the Indian Medical industry, surrogacy has been a thriving part, many couples from other countries visit for this purpose as laws are not restrictive, relatively lower costs, and availability of surrogate mothers. But, the Ministry of Health and Family Welfare introduced the Surrogacy Regulation Bill,

2020 seeking to prohibit commercial surrogacy from allowing altruistic surrogacy in India.

In 2005, The Indian Council of Medical Research Guidelines regulates the practice of surrogacy in the absence of any codified law<sup>24</sup>. The financially weaker and cheap reproductive labour made low-income Indian women are the ultimate sellers of their reproductive potentialities. To curb exploitation against ‘mother-workers’<sup>25</sup>, the Indian Council for Medical Research laid down ethical guidelines in 2005 which emphasized contractual agreements between commissioning parents, fertility clinics, and the surrogate mother, as well as the notions of privacy, consent, and support.<sup>26</sup>

The Supreme Court in 2008, in *Baby Manji Yamada v. Union of India*, (2008) 13 SCC 518, formally recognized commercial surrogacy and pointed out the need for the law governing surrogacy in India, as the money-making racket is being perpetuated in various parts of India. This task was given to the National Commission for the protection of child rights.

In 2009, the 228th Report of the Law Commission of India declared it to have become an Rs.25,000/- crore industry<sup>27</sup> has recommended prohibiting commercial surrogacy and allowing altruistic surrogacy citing concerns over the prevalent use of

[21] *Pikee Saxena, Archana Mishra & Sonia Malik*, Surrogacy : Ethical and Legal Issues, Indian Journal of Community Medicine, (2012), Issue 37(4), Pp.211-213.

[22] Ibid.

[23] *Bhumitra Dubey and Yash Tiwari*, Analysis of the Surrogacy (Regulation) Bill, 2020, ILJ, <https://www.indialawjournal.org/analysis-of-the-surrogacy-regulation-bill.php>, (Last Accessed : 20th April, 2021).

[24] Indian Council of Medical Research, Accreditation, Supervision and Regulation of Assisted Reproductive Technology, 2005.

[25] *Amrita Pande*, Commercial Surrogacy in India : Manufacturing a Perfect Mother-Worker, 35 The University of Chicago Press Journal 969 (2010).

[26] *Shubhangi Priya*, Evaluating Surrogacy Legislation in India, Social & Political Research Foundation, <https://www.sprf.in/post/2019/08/02/evaluating-surrogacy-legislation-in-india>, (Last assessed : 6th May, 2021).

[27] 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).



surrogacy by foreigners and lack of proper legal framework resulting in the ill-treatment of the surrogate mother who mostly is compelled to become a surrogate due to poverty and lack of education.

Later in 2012, another incident triggered this issue, an Australian couple abandoning one of their twins born to a surrogate because one of them is born with Down syndrome.<sup>28</sup> In 2014, this issue again came into the limelight as a 23 years old died after an egg donation procedure at an IVF clinic. Looking at these horrifying incidents, in 2015, Advocate *Jayashree Wad* filed a Public Interest Litigation (PIL) in the Supreme Court seeking prohibition of commercial surrogacy. Her PIL shaped public opinion and created pressure on the Government to pass legislation.

In 2016, the Surrogacy (Regulation) Bill, 2016 proposed in the Parliament. The Bill provided the establishment of national and State-level surrogacy boards. Further, only heterosexual Indian couples, legally married for five years, could be benefited from surrogacy, with the precondition of proven fertility certified by a recognized medical doctor. It also creates a ban on foreigners, live-in partners, unmarried couples, overseas Indians, single parents, live-in partners, and gay couples from commissioning surrogacy<sup>29</sup>. The Surrogacy (Regulation) Bill, 2016 was introduced but lapsed in the Rajya Sabha and was sent to the Parliamentary Standing Committee to examine. In 2017, the committee in its 102nd Report opined prohibiting commercial

surrogacy is unacceptable and is based more on moralistic assumptions than on any scientific criteria.

In 2019, the Government has called the bill “need of the hour,” citing an estimate of 2,000 to 3,000 unregulated clinics operating in the country<sup>30</sup>. During the winter session 2019, the Rajya Sabha referred the Surrogacy Regulation Bill, 2019 to a selected committee headed by *Bhupendra Yadav*.

### Draft Surrogacy Bill, 2019

After a two-decade-long legal journey, this Bill is finally passed in the Lok Sabha to regulate altruistic surrogacy and prohibited commercial surrogacy. Altruistic surrogacy is allowed in the Bill which involves no monetary compensation to the surrogate mothers other than the insurance coverage and medical expenses during the pregnancy. Surrogacy is permitted when intending couples suffer from proven infertility and not possessing any condition or disease specified through regulations. Hence, a ‘certificate of essentiality’ and a ‘certificate of eligibility’ is required by the appropriate authority.

Undertaking or advertising commercial surrogacy; abandoning, exploiting, or disowning a surrogate child; exploiting the surrogate mother, and selling or importing human embryos or gametes for surrogacy are penal offenses with imprisonment upto 10 years and a fine of upto 10 lakh rupees. Further, the written consent of the surrogate mother and the authorization of

[28] Aussie couple abandoned surrogate baby in India, Times of India, (2014), [http://timesofindia.indiatimes.com/articleshow/44766805.cms?utm\\_source=contentofinterest&utm\\_medium=text&utm\\_campaign=cppst](http://timesofindia.indiatimes.com/articleshow/44766805.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst), (Last accessed on 6th May, 2021).

[29] *Aparajita Amar* and *Arjun Aggarwal*, The emerging laws relating Surrogacy : A procreational right for Single Parent, Transgenders and Foreigners, SCC, April 10, 2018, [https://www.scconline.com/blog/post/2018/04/10/the-emerging-laws-relating-surrogacy-a-procreational-right-for-single-parent-transgenders-and-foreigners/#\\_ftn6](https://www.scconline.com/blog/post/2018/04/10/the-emerging-laws-relating-surrogacy-a-procreational-right-for-single-parent-transgenders-and-foreigners/#_ftn6) (Last accessed on 6th May, 2021).

[30] *Shonotra Kumar*, India’s proposed Commercial Surrogacy Ban is an Assault on Women’s Rights, the wire, November 9, 2019, <https://thewire.in/law/surrogacy-ban-assault>, (Last accessed on 6th May, 2021).

the appropriate authority is required for the abortion of the surrogate child. An option to withdraw from surrogacy is given to the surrogate mother before the embryo is implanted in her womb and she can be a surrogate once in her lifetime.

### PART-C

#### The Surrogacy (Regulation) Bill, 2020

The latest Bill is incorporated with all the recommendations of the Selection Committee with the Union Cabinet has approval with 15 major changes suggested by the 23-member committee and was introduced on February 26, 2020, in the Lok Sabha by the Ministry of Health and Family Welfare.

Speaking on the Bill, Dr. Harsh Vardhan said<sup>31</sup> : “The Bill is aimed at ending the exploitation of women who are lending their womb for surrogacy and protecting the rights of children born through this. The Bill will also look after the interests of the couple that opts for surrogacy, ensuring that laws are protecting them against exploitation by clinics that are carrying this out as a business.”

#### PROVISIONS OF THE BILL<sup>32</sup> :

*[Note : Words and Figures italics indicate the Amendments suggested by Select Committee]*

The (CHAPTER-1) Section 2 of the Bill is the definition clause, Terms such as :

‘Altruistic surrogacy’ [In Section 2(b)] :

The surrogacy in which no charges, expenses, fees, remuneration or monetary incentive of whatever nature, except the

medical expenses *and such other prescribed expenses incurred* on surrogate mother and the insurance coverage of the surrogate mother, is given to her dependents or the surrogate or her representative;

‘Commercial surrogacy’ [Section 2(f)] :

Commercialisation of surrogacy services or procedures or its component services or component procedures including selling or buying of a human embryo or trading in the sale or purchase of human embryo or gametes or selling or buying or trading the services of surrogate motherhood by giving the payment, benefit, reward, fees, remuneration or any kind of monetary incentive to the surrogate mother or her representative or her dependents, except the medical expenses *and such other prescribed expenses incurred* on the surrogate mother and the insurance coverage for the surrogate mother;

‘Intending woman’ [Section 2(s)] :

*An Indian woman who is a widow or divorcee between the age of 35 to 45 years and who intends to avail the surrogacy;*

CHAPTER-II (Section 3) deals with “Parentage and abortion of surrogate child” in which a child born by surrogacy procedure will be considered to be the biological child of the intending couple or intending woman. It requires the written consent of the surrogate mother and the authorization of the appropriate authority for the abortion of the surrogate child. This authorization must be according to the Medical Termination of Pregnancy Act, 1971.<sup>33</sup> Further, before the embryo is implanted in her womb, the surrogate

[31] Lok Sabha passes surrogacy bill, The Hindu, 5th August, 2020, <https://www.thehindu.com/news/national/loksabha-passes-surrogacy-bill/article28824277.ece> (Last accessed : 7th May, 2021).

[32] The Surrogacy (Regulation) Bill, 2020 (Reported by the Select Committee).

[33] Medical Termination of Pregnancy Act, 1971, No.34, Acts of Parliament, 1971 (India).

mother will have an option to withdraw from the surrogacy<sup>34</sup>.

### CHAPTER-III (SECTIONS 4-10)

First part deals (Section 4) with the five purposes for which surrogacy is permitted :

- (i) *when an intending couple or intending women of India has a medical indication for gestational surrogacy*;
- (ii) when it is only for altruistic surrogacy purposes;
- (iii) when it is not for commercial purposes or commercialization of surrogacy or surrogacy procedures;
- (iv) when it is not for producing children for sale, prostitution, or any other form of exploitation; and
- (v) any other condition or disease as may be specified by regulations made by the Board.

The Second Part deals with Eligibility criteria for intending couples who need to obtain two certificates issued by the appropriate authority which are

A. Certificate of essentiality. [Sec.4(iii)(a)]

B. Certificate of eligibility. [Sec.4(iii)(b)]

An eligibility certificate for intending couple is given separately by the concerned authority on fulfilling the following conditions, [Section 4(iii)(c)]

A certificate of essentiality shall be issued when the following conditions are fulfilled<sup>35</sup> :

- (i) A certificate of a medical indication in favour of either or both members of the intending couple or intending

woman for gestational surrogacy from a District Medical Board.

- (ii) An order of parentage and custody of the surrogate child passed by a Magistrate's Court.
- (iii) Insurance coverage for 36 months from 16 months provided in the earlier version which covers postpartum delivery complications for the surrogate.

To acquire a certificate of eligibility from the concerned authority, the surrogate mother should be :

- (i) no woman, other than an ever-married woman having a child of her own and between the age of 25 to 35 years on the day of implantation, shall be a help in surrogacy by donating her egg or oocyte or otherwise or a surrogate mother;
- (ii) *A willing woman* shall act as a surrogate mother and be permitted to undergo surrogacy procedures as per the provisions of this Act : *the intending woman shall approach the appropriate authority with a willing woman who agrees to act as a surrogate mother*; No woman shall act as a surrogate mother by providing her gametes;
- (iii) No woman shall act as a surrogate mother more than once in her lifetime;
- (iv) The surrogate mother cannot provide her gametes for surrogacy.
- (v) A certificate of medical and psychological fitness for surrogacy and surrogacy procedures from a registered medical practitioner;

[34] *Bhumitra Dubey and Yash Timari*, Analysis of the Surrogacy (Regulation) Bill, 2020, ILJ, (2020), <https://www.indialawjournal.org/analysis-of-the-surrogacy-regulation-bill.php>, (Last accessed : May 9, 2021).

[35] *Bhumitra*, Supra 32.



Section 8 deals with the rights of the surrogate child : *A child born out of surrogacy procedure, shall be deemed to be a biological child of the intending couple or intending woman and the said child shall be entitled to all the rights and privileges available to a natural child under any law for time being in force.*

#### CHAPTER-IV (SECTIONS 11-14)

“Registration of surrogacy clinics” by the concerned authority to undertake surrogacy or the procedure-related within 60 days from the date of appointment of the concerned authority.

“Registration of certificates” the validity of which is three years and can be renewed. “Cancellation or suspension of registration” by the concerned authority if any infringement of the provisions of the Act. And

“Appeals” can be made by surrogacy clinics or *intending women or intending couple* against orders such as rejection or *cancellation of certificates*, registrations, and applications passed by the appropriate authority to the State and Central Government.

#### CHAPTER-V (SECTIONS 15-32)

National and State Surrogacy Board consisting of various members from Parliament, State Legislative Assemblies, Executives, and ten eminent members appointed by State and the Central Government. Boards must guide the Central Government on policy formulation relating to surrogacy, monitoring and reviewing the implementations of the Act or rules and regulations, laying down the code of conduct of the surrogacy clinics, supervise

the operation of the State Surrogacy Board, and the working of various bodies initiated under the Act.<sup>36</sup>

#### CHAPTER-VI (SECTIONS 33-35)

This Chapter deals with the functioning of ‘appropriate authority’. To put a firm regulatory structure in place, the Bill authorizes the significant authority to issue, suspend, or terminate the registration of surrogacy clinics; Advocate the explicit standards; examine and take actions in case of any deflections from the Bill, and finally to take into consideration the change in technological and social conditions.<sup>37</sup>

#### CHAPTER-VII (SECTIONS 36-43)

Penalizes any person upto 10 years imprisonment and fine upto 10 lakhs rupees for offenses like advertising or undertaking commercial surrogacy in any manner, disowning or exploiting the surrogate child or surrogate mother, selling or importing human embryo or gametes for surrogacy purpose, and conducting sex selection in any form for surrogacy.

Punishment for not following altruistic surrogacy shall be punishable with imprisonment for a term which may extend to five years and with fine which may extend to five lakhs rupees for the first offense and for any subsequent offense with imprisonment which may extend to 10 years and with fine which may extend to 10 lakhs rupees.

#### Commercial Surrogacy and Way Forward

The advancement and growth of IVF clinics across India has made it a spot for reproductive tourism<sup>38</sup>. Advocates of

[36] Siddhart Behera, A Critical Analysis of the Surrogacy (Regulation) Bill, 2020, Lexforti, (December 4, 2020), <https://lexforti.com/legal-news/surrogacy-regulation-bill-2020/>, (Last accessed : May 9, 2021).

[37] Ibid.

[38] Anil Malhotra and Ranjit Malhotra, Surrogacy in India : A Law in the Making : Revisited, Universal Law Publishing 2016, P2.

Modern Commercial Surrogacy may consider this business that can be professionally marketed in the capitalistic economy. But the reality is somewhat different. Over the past half-century, the world has witnessed huge controversy on legal, moral, and ethical issues surrounding commercial surrogacy.

Nevertheless, the much-debated topic in India should be about the laissez-faire approach to the surrogacy industry alongwith the legal vacuum, which paves the way for human rights abuse, citizenship issues, health policy, and many more.

The need of the hour is to analyse commercialization given the draft Surrogacy Bill at a time when surrogacy as a multi-crore industry is in making. Further, women's needs and safeguarding their interests is also a bedrock in this transformative constitutional era, (as most of the debate is centred on the morality of the process.) Hence, the question of allowing commercial surrogacy should be ventilated at lengths.

Some advocate that women are finally recognizing their capabilities which can be economically tapped. What was considered as a societal duty, *i.e.*, bearing a child, can now be used as a tool to economically empower women. When sperm donors get paid, why shouldn't women have the same liberty to cash this is another question?<sup>39</sup>

On the other side, many researchers had found that commercial surrogacy is financially, emotionally, ethically, and also morally exploitative. Some even compared it to prostitution as surrogates are used for reproductive labour by taking advantage of their sexuality.

In case of recurrent failure, the women have to put up with clinical processes

relating to the transfer of embryos, miscarriages, and other health conditions involved in the process. High dosage of medication, multiple embryo transfers, hormone treatment, and a high risk of sexually transmitted disease. Other aspects of surrogacy, like insufficient compensation, risk of trafficking, not well informed about the contract, choice restrictions, post-pregnancy issues, mental health, and many more. However, because most of these shortcomings can be regulated, to justify a ban, the harms to surrogates must be considered concerning their living conditions previously.

### Constitutionality

In *Govind v. State of Madhya Pradesh and another*, AIR 1975 SC 1378, the Court stated that "nothing would advance women's welfare more than respecting their reproductive autonomy. Such autonomy must encompass and protect the personal intimacies of marriage, motherhood, procreation, and child-rearing". The Supreme Court in *Suchita Srivastava v. Chandigarh Administration*, (2009) 9 SCC 1, observed that a woman's right to make reproductive choices has been interpreted as a dimension of 'personal liberty' as understood under Article 21 of the Constitution of India.

In *Devika Biswas v. Union of India*, (2016) 10 SCC 726, the Hon'ble Supreme Court held that the right to reproduction is an important component of the right to life under Article 21. Reproductive rights of a woman include the right to carry a baby, give birth, and raise children. Rights to privacy, dignity, and integrity are also included.

Hence, the above judgments indicate that a women's right to make a reproductive choice is a part of her liberty under

[39] C. Srinidhi, Surrogacy : Exploitation v. Empowerment, A Feminist Perspective, Asian Law House, (2020).

Article 21. A blanket ban if applied to commercial surrogacy can deprive the right to parenthood as not all close relatives can help a couple with surrogacy.

In the *Consumer Education and Research Centre and others v. Union of India*, (1995) 3 SCC 42, the Supreme Court stated that the expression 'life' under Article 21 of the Constitution has a much wider meaning and includes the right to livelihood. This was also reiterated in *Olga Tellis v. Bombay Municipal Corporation*, AIR 1986 SC 180. Hence, violation of the Right to livelihood is another ground under Article 21. Violation of Article 19(6) can also be ground, as it gives freedom to practice or carries on any occupation, trade, or business. In *Saghir Ahmed v. The State of U.P.*, 1955 SCR 707, the expression 'freedom' was interpreted as "every citizen has a right to choose his own or take up any trade or calling".

In *B.K. Parthasarathi v. Government of Andhra Pradesh*, 1999 (5) ALT 715, wherein the Andhra Pradesh High Court held that State's interference on procreation amounts to a direct encroachment on one's "right to privacy". The stance of privacy was fortified in the Aadhar Judgment<sup>40</sup>. Hence, "woman alone should have the right to control her body, fertility and motherhood choices"<sup>41</sup>. As Act mandates Certificate of essentiality and eligibility to be taken from appropriate authorities which violates the right to privacy.

Furthermore, the Supreme Court recognized transgenders as third genders in the leading case of *National Legal Services Authority v. Union of India*, AIR 2014 SC 1863. But the Bill is silent on providing

equal rights to the third genders. The grounds mentioned in the Bill are very narrow and it disentitles same-sex couples and transgenders from commissioning surrogacy. Hence, in this transformative constitutional era that is marching toward the ideals of liberty and equality, these loopholes would be constitutional hurdles.

### Way Forward

The fertility of Indian women who are inclined towards surrogacy has become a global commodity and to stand the global economic meltdown, reproductive tourism which generates foreign exchange is the reason for delaying in enacting legislation to govern surrogacy. But this profit motive to save the industry has failed to address an issue that requires a deeper concern. Rather than banning it, placing effective regulations can prevent further exploitation and the emergence of illegal markets. It is high time to wake up from this slumber and place an alternative route consisting of stringent regulation and enforcement policies.

Government should enact laws that are incoherent with fundamental rights and policies which cater to the feministic ethos. To justify a blanket ban, the living conditions of surrogates must be considered concerning the problems they might face. In the "altruistic model", a surrogate mother has to put up with the physical and emotional tolls only out of "compassion" which is not practical. Thus, the 'compensatory surrogacy model' where losses are taken care of by the intending parents in terms of health, wages, sufferings, and death, *etc.*, shall be explored.

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[40] *Justice K.S. Puttuswamy and another v. Union of India and others*, (2017) 10 SCC 1.

[41] *Arijeet Ghosh & Nitika Khaitan*, A Womb of One's Own : Privacy and Reproductive Rights, Epw Engage, <https://www.epw.in/engage/article/womb-ones-own-privacy-and-reproductive-rights>, (Last accessed : May 8, 2021)

### Conclusion

Surrogacy is a complicated tangle of social, ethical, legal, and technological issues. The matter of Surrogacy is not just having legal implication to be pondered into, but the society at large needs to look into it as a social issue and deal with it in such a way that our ethical values are not lost and at the same time, we also take the advantage of the growing technology<sup>42</sup>. Governments must take respective stake holder's consideration, which is essential in making such laws. It must account personal experiences of surrogates to develop best practices in surrogacy contracts with the least ethical violations.

States must understand that being a surrogate mother is an actual legitimate profession for some women and they indulge in it willingly<sup>43</sup>. Surrogacy agents and surrogacy clinics should be regulated closely to prevent any exploitation of Surrogate mothers and intended parents<sup>44</sup>. However, the hopes remain open as it hasn't still enacted and thus there's still is a chance open for it to become more conducive to the needs of the society and of the individuals consisting of it<sup>45</sup>. Hence, Parliament should utilize this opportunity in fulfilling its obligations and fill the legal lacuna and shortcomings and make a comprehensive law devoid of loopholes and illegalities which can pass the test of judicial scrutiny.

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[42] *Vijayalakshmi*, Supra 35.

[43] *Surekha Nelavala*, Surrogate Mothers in India-Are they empowered or exploited? A discussion from a feminist perspective, Journal of Lutheran Ethics, [https://www.elca.org/JLE//Articles/1097?\\_ga=2.203985433.827067841.1576305165-952038808.1576305165#\\_edn2](https://www.elca.org/JLE//Articles/1097?_ga=2.203985433.827067841.1576305165-952038808.1576305165#_edn2), (Last accessed: 5<sup>th</sup> May, 2021).

[44] *Sreenidhi*, Supra 58.

[45] *Omkar Upadhyay and Sukriti Nigam*, Contradictions of Reproductive Rights and Human Rights : Critical Analysis of Surrogacy in Light of Surrogacy (Regulation) Bill, 2019, Asian Law House, (2020).