

INTROSPECTING THE SURROGACY (REGULATION) BILL, 2019

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Abstract: The primary focus of the paper is to study the latest Surrogacy (Regulation) Bill 2019, which is yet to be passed by the Rajya Sabha. The paper begins with the introduction of the concept of surrogacy and the recent trend. Thereafter it discusses as to how the judicial system has interpreted the various issues that came before it. The paper also provides for the background of various Assisted Reproductive Technology Bills and Surrogacy Bills that were previously drafted by Indian Council of Medical Research and were placed before the standing committee. The paper then goes on to analyze various provisions of the 2019 Bill. It points out the lacunas and issues that may possibly arise if the bill gets passed in its present form without making any changes. The paper ends with a concluding observations and suggestions on the Bill.

Index Terms: Surrogacy, Surrogate mother, Commercialization.

I. INTRODUCTION

In ancient Indian history we have often heard the story about hundred *Kauravas* in the *Mahabharata*. It is truly unbelievable as to how, at that time *Gandhari*'s³ pregnancy continued for two years and she delivered a piece of solid mass. The same mass was then cut into hundred pieces and kept in different nutrient medium containers, out of which hundred children were born.⁴ Therefore the technique of 'in vitro fertilization' (IVF) used in gestational surrogacy is not a modern concept; it existed even five thousand years ago.

The recent trend shows that surrogacy has emerged as an alternative means of reproduction through artificial techniques. Earlier, if any of the partners were infertile the only option left with them was to adopt a child. But now they consider child through surrogacy as the best option because they wish to have a child that is biologically and genetically related to them. In gestational surrogacy the semen and egg are obtained from the intending couple and once an embryo is formed, it is implanted into the womb of the surrogate mother. The Surrogacy (Regulation) Bill, 2019 defines 'Surrogacy' as "a practice whereby one woman bears and gives birth to a child for an intending couple with the intention of handing over such child to the intending couple after the birth"⁵ Hence, this whole process gives rise to various complex issues. The key reason behind the problem is insufficiency of proper surrogacy laws in India.

II. JUDICIAL INTERPRETATION

India's first test tube baby⁶ was born on 3rd October 1978, through the efforts of Kolkata's Dr. Subhash Mukherjee. She was also the world's second IVF baby after Marie Lousie Brown⁷. Hence from 1980s onwards there was boom in the sector of medical tourism, as surrogacy was neither banned nor regulated in India. Absence of any law, impliedly gave recognition to surrogacy. And as a result of cheap reproductive labor, India became a hub for surrogacy super markets. At this point, Judiciary became the key role player solving surrogacy disputes in the absence of any legislation in India.

In 2008 Baby Manji Yamada⁸ was born out of an Indian surrogate mother and Japanese commissioning parents. The Japanese couple got divorced a month before baby was born. Only Mr. Yamada was ready to raise the child. But the Japanese Embassy in India denied granting a Japanese passport and visa to Baby Manji. Reason behind refusal was that laws of Japan do not recognize children born out of surrogacy. Then he applied for the Indian passport and even that was refused on the pretext that it was unclear as to who was the legal mother of the child. Indian passport requires the name of both mother and father. Here even though Mr. Yamada was the genetic father of the child, but there was ambiguity in regard to the mother's name. The authorities were confused whether to consider the surrogate mother, the commissioning mother or the anonymous egg donor as a legal mother. As a result of which even determining baby's nationality became difficult. At the end, the Supreme Court intervened and directed the Regional Passport Office (Jaipur) to issue an identity certificate for the baby allowing it to travel to Japan. The Municipal Corporation of Jaipur also issued a birth certificate to the baby with the name of only its biological father. This case was a landmark example on the diplomacy and legal crisis.

In another case of an Israeli gay couple, twin baby boys were born out of Indian surrogate mother. Surrogacy took place with the sperm of one partner and an anonymous egg donor. They were stranded in India because they were denied Israeli citizenship on the grounds of public policy as Israeli law bars gay couples from entering into any surrogacy agreements. This case

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⁴ NARAYAN SATHYA, "KAURAVAS BIRTH-ARTIFICIAL FERTILIZATION?" SPEAKING TREE.IN, 13TH NOVEMBER, 2015, ACCESSED ON 10TH SEPTEMBER, 2019, AVAILABLE ON: [HTTPS://WWW.SPEAKINGTREE.IN/ALLSLIDES/KAURAVAS-BIRTHARTIFICIAL-FERTILIZATION](https://www.speakingtree.in/allslides/KAURAVAS-BIRTHARTIFICIAL-FERTILIZATION)

⁵ Section 2(zc) of The Surrogacy (Regulation) Bill, 2019

⁶ Named as *Kanupriya* (also known as *Durga*)

⁷ World's first test tube baby created by British scientists Robert G Edwards and Patrick Steptoe

⁸ *Baby Manji Yamada vs. Union of India and Another* AIR 2009 SC 84 (2008) 13 SC 518

made the highlight and the matter was debated in the Parliament of Israel. Ultimately, Jerusalem District Court had to allow for the DNA paternity test to grant passports for the best interest of the two children.⁹

In the case of *Jan Balaz vs. Anand Municipality*¹⁰, a German couple entered into a contract with an Indian surrogate mother. Out of whom twin boys were born. In Germany surrogacy is not recognized as a means of parenthood, therefore it was implied that the children will not be given German Citizenship. Hence they decided to apply for Indian Passport to avoid legal hurdles. Anand Municipality (Gujarat) issued the birth certificate which had the name of surrogate mother as the mother of the twin babies. Regarding this the High Court of Gujarat held that both the babies are Indian national by birth under section 3 of Indian Citizenship Act 1955 and the gestational surrogate is the natural mother as she has given birth to the twins. The intended mother is just the wife of the biological father. She cannot be the natural mother because she has neither donated the egg nor conceived or delivered the babies.

It's not just about the cross border surrogacy that is creating the problem. There are several other issues that persist within India. Various celebrities such as Karan Johar, Shahrukh Khan, Ekta Kapoor, Tusshar Kapoor etc have opted for child through surrogacy. Some have also opted for being a single parent to the child. After Section 377 Judgment¹¹ many same sex couples also aspire to be the parents through surrogacy. This implies that there would be increase in the number of cases to address these complex issues arising thereof. Despite all the above landmark judgments, India is yet to address and pass a comprehensive law regulating surrogacy in India.

III. LEGAL BACKDROP

The Laws relating to surrogacy varies from one nation to another. Some nations consider commercial surrogacy as a criminal offence and provides for complete prohibition of such activity. However in other countries it is regulated and their laws permit only altruistic surrogacy. In the third category we have country like India where even though we haven't declared it as unenforceable, but the absence of any law has created an implication of free commercial market.

After years of deliberations and debates among the National Academy of Medical Sciences, Indian Council of Medical Research (ICMR), and Assisted Reproduction Technology (ART) Practitioners; the Ministry of Health and Family Welfare finally came up guidelines for regulation, accreditation and supervision of ART clinics in the year 2005.¹² Till date even though these guidelines are active, but it does not have any legal enforceability.

In 2008 ICMR came up with the draft Assisted Reproductive Technology Bill to regulate surrogacy in India. In 2009 the Law Commission of India also submitted its 228th report stating the need for legislation for the regulation of ART and rights and obligations of the parties involved in surrogacy.¹³ The 2008 bill was modified and the gaps were filled by passing the Draft Assisted Reproductive Technology Bill and Rules 2010. But due to its limitations it couldn't be passed and therefore the Assisted Reproductive Technology Bill was reviewed and proposed again in 2014 and 2017, which were subsequently lapsed. It is still unclear as to why ART Bill kept languishing since its inception.

The Indian Council of Medical Research also laid few guidelines allowing commercial surrogacy in 2002. But these guidelines had no legal backing, as a result of which India became a surrogacy hub over a short period of time. In 2016 a bill¹⁴ solely regulating surrogacy in India was introduced in Lok Sabha. It was referred to the standing committee in 2017 and was finally passed by the Lower House on 19th December 2018.¹⁵ It imposed a complete ban on commercial surrogacy and allowed only altruistic surrogacy for infertile couple without any monetary benefits to the surrogate mother apart from the medical expenses. The revamped version of this bill was introduced again in the monsoon session of 17th Lok Sabha and it was again passed by majority on 5th August 2019. Currently, Rajya Sabha is yet to pass the bill.

IV. THE SURROGACY (REGULATION) BILL, 2019

The latest Surrogacy (Regulation) Bill, 2019 has eight chapters and fifty one clauses. The Bill provides for complete ban on commercial surrogacy. It permits only altruistic surrogacy without any benefits or monetary compensation apart from insurance cover and medical expense of the surrogate mother. It allows surrogacy only for intending couple who suffer from infertility and prohibits when surrogacy is misused or exploited for prostitution or sale. The Bill talks about two kinds of certificate- 'Certificate of Essentiality' and 'Certificate of Eligibility' that an intending couple must possess in order to obtain child through surrogacy. The commissioning parents can go for surrogacy only after five years of marriage. In order to be a surrogate mother, she must be a 'close relative' of the intending couple and must be a married lady with a child of her own. She can become a surrogate mother only once in her lifetime between 25-35 years of age. The Bill also deals with registration of surrogacy clinics and constitution of national and state surrogacy boards. The surrogate mother is not allowed to provide her gametes for surrogacy; hence the child born out the surrogate mother will deemed to be the biological child of the intending or commissioning parents. The surrogate mother can only withdraw from surrogacy before the implantation of embryo. In case of abortion or discontinuation of pregnancy the surrogate mother has to give a written consent and an approval from the authorization authority is required. The Bill imposes a penalty of rupees ten lakh and imprisonment up to ten years for various

⁹ Jolly Stellina, "Surrogacy and Family Ties: A Comparative Analysis of Indian and Japanese Legal Framework". (2010) 2 University of Legal Studies Journal, 299, accessed on: 15th September, 2019

¹⁰ (2010) AIR Guj. 21

¹¹ *Navtej Singh Johar and Ors. v. Union of India* [W. P. \(Crl.\) No. 76 of 2016](#)

¹² "National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India" Indian Council of Medical Research, 2005, accessed on 10th September 2019, available on : https://www.icmr.nic.in/sites/default/files/art/ART_Pdf.pdf

¹³ "Need for Legislation to Regulate Assisted Reproductive Technology Clinics as Well as Rights and Obligations of Parties to a Surrogacy", 228th Law Commission Report, August 2009, accessed on 9th September, 2019, available on : <http://lawcommissionofindia.nic.in/reports/report228.pdf>

¹⁴ The Surrogacy (Regulation) Bill, 2016

¹⁵ Available on : <http://www.prsindia.org/billtrack/surrogacy-regulation-bill-2016>

offences such as “(i) undertaking or advertising commercial surrogacy; (ii) exploiting the surrogate mother; (iii) abandoning, exploiting or disowning a surrogate child; and (iv) selling or importing human embryo or gametes for surrogacy.”¹⁶

It is important to note that no bill is perfect in its complete sense. Even though the Lok Sabha has passed the Surrogacy (Regulation) Bill, 2019, but it is full of discrepancies. There are various issues yet to be addressed before being passed by Rajya Sabha. Some of the lacunas are as follows-

Definition of ‘infertility’: Under clause 2(p), infertility is defined as “the inability to conceive after five years of unprotected coitus or other proven medical condition preventing a couple from conception.” This definition of infertility becomes absurd in the cases where the female partner has already got her uterus removed, which biologically establishes the fact that she cannot conceive a baby. In such cases it becomes pointless for the intending couples to wait for a period of five years to prove that infertility exists. There are other medical conditions such as diabetes, multiple fibroids in uterus, hypertension, HIV, Polycystic Ovary Syndrome etc that sometimes make the pregnancy unsuccessful.¹⁷ Hence the definition fails to address these cases in which a person is not able to bear a child.

Definition of ‘close relative’: Clause 4(iii)(b)(II) imposes a pre condition that only a close relative can be surrogate mother. But the Bill does not specify as to who can be the ‘close relative’; thereby leaving the definition open to wider interpretations. Some other laws such as the Transplantation of the Human Organ and Tissues Act, 1994 defines the term ‘near relative’ as mother, father, brother, sister, son, daughter or spouse, who can be the living donor of organ. Similarly, there is need to clearly specify the definition of ‘close relative’ to remove the ambiguity in the present bill.

Surrogate only once in her lifetime: Under Clause 4(iii)(b)(III), the Bill states that a woman can be a surrogate only once in her lifetime. Here the major problem is about monitoring or keeping a check whether a mother has been a surrogate before or not. Another issue is regarding how to determine whether the baby that a mother is bearing is her own baby or a surrogate baby. Therefore figuring out the difference between a surrogate women and a pregnant woman to keep a track throughout her life seems difficult.

Delegation of power: The Bill states that the ‘additional eligibility criteria’ of the intending couples under clause 4(iii)(c) and ‘any other conditions or disease’ under clause 4 (ii)(e) for allowing surrogacy can be specified through regulations. It is important to note that these two provisions are the essential or core clauses of the parent bill. Hence, delegating these powers might lead to excessive delegation thereby causing misuse of power by administrative authorities.

Review or appeal: The intending couple and the surrogate mother need to obtain the ‘certificate of essentiality’ and ‘certificate of eligibility’ from the authorities as mentioned under clause 4(iii). The Bill does not provide for any appeal or review in case the authorities reject the application for surrogacy. In Juvenile Justice (Care and Protection) Act 2015, if an application for adoption is rejected, the Act provides for the review and appeal procedure. Similar procedures are also given under the Human Organ and Tissues Act, 1994.

Termination of pregnancy: In order to abort the child a written consent from the surrogate mother and an authorization from the authority is required as per clause 3(vi). But the bill does not specify any time period for giving the authorization for abortion. Secondly, after closely analyzing the clause it can be deduced that the commissioning partners have no say when it comes to giving consent for the abortion of the surrogate child. Situation might become go against the intending parents in the cases when the surrogate mother is not ready to abort the child with physical deformities. It must be kept in mind that intending parents are the ones who have to bring up the child.

Women from under privileged background: The bill speaks only about altruistic surrogacy and bans commercial surrogacy completely. But if we observe the surrogacy pattern in India, we see that it’s majorly the underprivileged women who opt for being a surrogate mother. This clearly indicates that surrogacy is a source of earning for them. They earn more through surrogacy than just being a domestic worker in the Indian households. If they are able to feed their family, provide education to their children and are able to live a better standard of life through the money received by renting their wombs; then it’s very obvious that completely banning commercial surrogacy curbs their source of income and hence violates their Fundamental Right.

Assisted Reproduction Technology (Regulation) Bill: We have already seen as to how despite several efforts, ART Bill has not yet been passed. ART bill already had provisions regarding regulations of surrogacy. It is very important to understand that surrogacy is the last (or one of the options) under Assisted Reproduction, or in other words the process of surrogacy is based upon ART when embryos are cultured in IVF (in-vitro fertilization) labs. Therefore it seems quite illogical to have a surrogacy law without regulating Assisted Reproduction. The primary focus of the government should be on ART bill and then consequently surrogacy bill can be brought in force.

Surrogacy for Non Resident Indians (NRI): According to the Bill¹⁸ only Indian parents can opt for surrogacy, hence imposing a ban on cross border surrogacy completely. The bill fails to address the NRI community if they decide to come back to India to have a baby through surrogacy.

¹⁶ Available on: <https://www.prsindia.org/billtrack/surrogacy-regulation-bill-2019>; accessed on: 13th September, 2019

¹⁷ “Health problems in pregnancy, U.S. National Library of Medicine” available at: <https://medlineplus.gov/healthproblemsinpregnancy.html>., accessed on: 12th September, 2019

¹⁸ Clause 2(g) and clause 4(iii)(c)(II)

Fundamental Right to Equality¹⁹ : The Bill appears to be biased as it does not allow unmarried couples, live-in partners, single parents, same sex partners or a transgender to obtain a baby through surrogacy. This bill contradicts section 377 judgment²⁰ passed by the highest court of law in India. On one hand we see that the judiciary is legalizing same sex marriages and on the other had we see that the legislative wing is passing surrogacy bill prohibiting the same sex partners to opt for a child through surrogacy. Even in several cases the court had recognized the live-in partners or the domestic relationships of the unmarried couples. Setting up a bar that only married couples can opt for surrogacy stands opposed to the decision of the court as well. Also, barring single parents and transgender will result in violation of their fundamental right because they also have the equal right to have a child just like married couples.

Fundamental Right to Privacy²¹: The Surrogacy (Regulation) Bill, 2019 is medical in nature. It should have more medical consultants debating rather than the political members. Reproduction is a personal right of a women and state regressively regulating the same would mean intruding into the right to privacy of a human being. And we cannot overlook the fact that in 2017 Judiciary has recognized Right to Privacy as a Fundamental Right under Article 21.²² Hence, the bill not only violates the right to choice of the surrogate mother but also the rights of the intending couple, as their opinion or consultation was not taken into consideration while drafting the bill.

V. RECOMMENDATIONS AND CONCLUSION

The Surrogacy (Regulation) Bill, 2019 is not perfect in its complete sense. There are various issues that need to be addressed before it gets passed by the Upper House of the Parliament. In order to make the bill more authentic, opinions from single parents, widows, divorced women, gay, lesbians, and people with infertility problems should also be taken into consideration by giving them a participatory role.

In order to prevent the misuse through commercial surrogacy, there has to be a legal backing regulating the surrogacy contracts. The terms of the contract should be such so as to protect the exploitation of surrogate mother by agents and middlemen. It must contain detail payment clause, in addition to the insurance coverage of the mother and the baby. Also, there has to be an assurance clause that both the mother and the baby will be treated well.

The Bill must try to include a clause relating to those foreign citizens who have already got the embryo implanted in the womb of surrogate mother in India. They should be given consideration by allowing them to complete the surrogacy procedure and legally take the surrogate baby from India. This is to protect the stake of surrogate mothers and for the best interest of the baby to be born out of the surrogate mothers.

In a nut shell, completely banning commercial surrogacy is a very regressive step. Bill has to be brought only after considering physical as well as emotional factor of the surrogate mother and opinion of the other stakeholders. Even if the bill bans surrogacy with monetary compensation, there would still be violations taking place somewhere in the corner of India. Hence, there has to be 'regulation' rather than imposing a strict ban on commercial surrogacy, so that even the underprivileged class of surrogate women is not much affected.

¹⁹ Article 14 of the Constitution of India, 1950

²⁰ *Navtej Singh Johar and Ors. v. Union of India* [W. P. \(Cr.\) No. 76 of 2016](#)

²¹ Article 21 of the Constitution of India, 1950

²² *Justice K. S. Puttaswamy (Retd.) and Anr. vs Union Of India And Ors.* [W. P. (Civil) No. 494 of 2012]