

INTERNATIONAL JOURNAL OF LEGAL SCIENCE AND INNOVATION

[ISSN 2581-9453]

Volume 4 | Issue 4

2022

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Surrogacy: Is India having a Regressive Approach towards it?

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ABSTRACT

Surrogacy is a practice which enables a couple or an individual, unable to bear a child to experience parenthood. India is referred to as the hub of surrogacy. It is the most desired destination for those who want to undergo the procedure. There are two primary reasons for it. Each year numerous couples from abroad are attracted to India, firstly because the surro-gacy procedure here is cost effective. Secondly, the surrogates are easily available. The pre-vailing poverty and desire to earn money has made the business of surrogacy run well in the country. The so-called surrogacy agencies too, play an important role in this. They are the prime liaisons between the commissioning parents and the surrogates, throughout the surro-gacy procedure.

However, with the recent developments in the Indian legislative front, there appears to be an attempt by the government to make commercial surrogacy illegal in India. A bill was passed in 2019 in Lok Sabha and is, at present, pending in Rajya Sabha, which aims at banning commercial surrogacy.

This Paper mainly focuses on whether this legislative step of banning commercial surrogacy would be right for India. With briefly introducing what is surrogacy, the paper moves on to clarifying the meaning and concept of surrogacy. The paper also touches upon the aspect of surrogacy as seen in the ancient times. Thereafter, it discusses how the law relating to surro-gacy emerged in India with various bills being proposed and judicial interpretations being done. The paper is concluded by putting forth the various points for criticism of The Surrog cy bill 2019 and some suggestions and recommendations for making the bill more inclusive.

Keywords: *surrogacy, Bill, surrogate.*

I. INTRODUCTION

Scientific advancements have reached a new high over the ages. Developments are visible in every field whether it be as complex as data science or something as simple as a glue gun which goes unnoticed by most of us. Similarly, advancements have been made by the science fraternity in the biological and reproductive field as well.

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Childbirth is a beautiful process. It is a privilege that nature has particularly bestowed upon females, the capacity to procreate and expand their clan. However, there are many couples in the world who are deprived of this joy. One in every four couples in developing countries is found to be affected by infertility.² All over the globe, about 15% of the couples, of reproductive age, are affected by infertility. In India, primary infertility is estimated to range between 3.9 to 16.8%, because of which couples face extreme emotional and psychological trauma.³ Thus, the urge for parenthood leads couples to take up alternate methods of having an offspring. Research in the medical field has led to the development of artificial techniques of childbirth, assisting those who are unable to get pregnant. Artificial Reproductive Techniques (ART), In-Vitro Fertilisation (IVF), Intra-Uterine Injections (IUI), etc are all the other alternate techniques that have gained popularity in the lieu of this urge to have a child. The World saw its first IVF baby in the 1978 in London and the second was born in our own country, India, on 3rd October 1978, just two months after the first IVF birth.

Robert Edwards, a scientist in National Institute for Medical Research in London, was the first scientist to make fundamental discoveries on human egg maturation, working of hormones over their maturation, and at which point in time the eggs fertilize. It was in 1965 that, after several years of hard work, he succeeded. He found the right conditions to activate dormant and immature egg cells in vitro and promoted their maturation.⁴

With such advancements, research and scientific growth, the concept of surrogacy has gained popularity and has become the next best alternative along with adoption to aid the childless couples. India is a billion-dollar industry for surrogacy. Couples from various parts of the world, flock to India, to make surrogacy arrangements. Surrogacy in India, with respect to costs involved, is cheap and surrogates are easily available.

II. MYTHOLOGY AND SURROGACY

- **Hindu Mythology**

The *Anushasana Pava*, section 49 of the Mahabharat states the six type of sons that can be classified as kins and kinsmen-

“one’s own son; son born to one’s wife by an accomplished person; son born to one’s wife through another by payment; son of a remarried woman by her second husband

² Demographic and Health Surveys, in collaboration with WHO,2004.

³ <https://www.nhp.gov.in/disease/reproductive-system/infertility>.

⁴ Neha Bahl, *Law and Policy on Surrogacy: A Socio-Legal Study in India*, SHODHGANGA (Mar. 28, 2020, 10:30 AM), <https://shodhganga.inflibnet.ac.in/bitstream/10603/93605/2/research%20papers.doc>.

or to a woman through niyoga (levirate) son born to the wife before her marriage; and son of an adulterous wife.”

Surrogacy as a practice can be traced back to the ancient times. The instances of the same can be seen in the epic of Mahabharat. Dhritarashtra’s wife Gandhari, was pregnant for more than a year, after which she gave birth to a mass of cells. Bhagwan Vyas found that there were 101 cells that were normal in the mass. These cells were then grown to full term, in vitro, out of which children were born (Kauravs). Not only do ancient Indian texts talk about birth through IVF but there are also examples of birth without a female.⁵

Sage Gautam, from his own semen, produced two children- a son Krip and a daughter Kripi, who were both test-tube babies and Sage Bharadwaj gave birth to Drona (Dronacharya). The story of birth of Drishtadyumn and Draupadi is even more interesting and reflects the supernatural powers of the great rishis. King Draupad’s enmity with Dronacharya resulted in a desired to have a son, strong enough to kill Drona. It is believed, Drupad was suggested Artificial Insemination Homologous (AIH) by a rishi, who even collected his semen for the same, however his wife refused to undergo the procedure. The rishi then put the semen in a Yajna-Kunda from which Dhrishtadyumn and Draupadi were born.⁶

- **Christian Mythology**

There were traces of surrogacy in Biblical times too. The Old Testament contains example of surrogacy. Abraham’s wife, Sarah, was infertile and so she commissioned her maid Hagar to bear her child with Abraham. Another example is that of Rachel. She was the wife of Jacob, who had no child for reasons of infertility. She commissioned her maid Bilhah to bear her a child with Jacob.⁷

- **Islamic Mythology**

In Islamic culture the concept of surrogacy is completely rejected. According to Islam and various Muslim Scholars, “*Maqasid al- Sharī‘ah*” or purposes of the Law lie with Protection of Religion, Life, Progeny, Mind and Wealth. The paramount necessities of human beings of protection, preservation and promotion are clearly being defined in this classification.

Since, *Maqasid al- Sharī‘ah* includes protection of progeny, treatment of infertility is preferred over surrogacy. Protection of progeny entails care for pregnant women and the

⁵ Dr. Ralla Guha Niyogi, *May You Be the Mother of a Hundred Sons: Social and Ethical Impact of Surrogacy in Ancient Indian Myth*, 1 BHARATIYA PRAGNA: AN INTERDISCIPLINARY JOURNAL OF INDIAN STUDIES, 20, 24 (2016).

⁶ Surrogate Motherhood: History and Concept.

⁷ The Holy Bible, Genesis 30:1-8.

health of the children and also preserves lineage. It is always preferred that a newborn be related to both his/her mother and father.

The concept of womb renting has gained popularity in the world; however, the Islamic culture and bioethics have not yet welcomed this practice. Surrogacy procedures require a donor sperm. This sperm, which is a foreign element, is then put in the uterus of a woman, resulting in the mixing of lineage. This procedure is considered as equivalent to disregarding Allah.⁸

III. SURROGACY: EXPLAINED

The word 'surrogate' was derived from the Latin word 'Surrogatus' which means substitute, a person who acts on behalf on another. It is regarded as one of the best methods to overcome both biological and social infertility. It helps in providing an opportunity to the intending couple to have genetically related child through artificial reproduction and in vitro fertilization. The concept of surrogacy is widely recognized throughout the world. It is considered as a boon for infertile couples as it gives them the hope of having a child.

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."⁹

Blacks' Law Dictionary defines Surrogacy as 'an agreement wherein a woman agrees to be artificially inseminated with the semen of another woman's husband.'¹⁰

There are basically two types of surrogacy which are practiced in India:

i. Traditional/Natural/Partial surrogacy:

In this the surrogate mother donates her egg well as acts as the carrier for the embryo. Commissioning father donates his sperm to become the genetic father of the child. Generally, the surrogate is impregnated using a process known as Intra-Uterine Insemination (IUI) or In Vitro Fertilization (IVF).

ii. Gestational surrogacy:

In this the surrogate is not related to the child biologically at all. Her eggs are not used, and the embryo is actually created through a process called In-Vitro Fertilization (IVF). In this process, the biological father's sperm and the biological mother's egg is used to create an

⁸ Sharmin Islam et al. *Ethics of Surrogacy: A Comparative Study of Western Secular and Islamic Bioethics* 44 JOURNAL OF ISLAMIC MEDICAL ASSOCIATION OF NORTH AMERICA (2013).

⁹ The Surrogacy (Regulation) Bill, 2019.

¹⁰ Oliphant RE. New York: Aspen Publishers; 2007. Surrogacy in Black law dictionary, family law; p. 349.

embryo. The surrogate only acts as a carrier of this embryo.

Like in other countries, in India also, the following two types of surrogacy arrangements are being practiced:

- i. **Altruistic surrogacy:** In this form of surrogacy, apart from necessary medical expenses, no financial rewards are given to the surrogate mother for her pregnancy or for relinquishment of the child to the genetic parents.
- ii. **Commercial surrogacy:** In this form of surrogacy the surrogate mother does get financial rewards for carrying the child along with the necessary medical expenses she incurs.

IV. SURROGACY REGULATIONS IN INDIA

India is a surrogacy heaven. Couples from across the globe flock the country to arrange for a surrogate and fulfil their desire of a child. The primary reason for people coming is the easy availability of surrogates and cheap facilities. Anand, Surat, Bhopal and Indore are bustling centers for surrogacy where several American, Russian and British women come to fulfil their desire for a child.

The reasons for this this booming medical tourism are varied. Some couples come here as the treatment is extremely expensive in their own country or for some, it's the laws of their country that do not allow for surrogacy. A report stated that an account of a 37year old Russian who came to Bhopal for surrogacy arrangement as the expense for surrogacy is prohibitive in her country, ranging between Rs. 15,00,000 to Rs. 20,00,000, as compared to Rs. 2,00,000 cost in Bhopal. Also, the lack of easy availability of surrogates provokes couples to come to India.

Currently, India is the only country where surrogacy is neither banned nor regulated. There exists no strict law that can effectively control the use and misuse of this practice of surrogacy in India. There is no check over any kind of exploitation of surrogates. Even the courts have not comprehensively addressed the subject.

Judicial Pronouncements :

- **Baby Manji v. Union of India**¹¹

It was in 2009 that the first case of surrogacy surfaced on the floor of the Supreme Court. It is considered as a landmark case on surrogacy where the custody and motherhood of the baby

¹¹ Divyansh Sisodia, "surrogacy under the framework of Indian constitution" available at <https://blog.iplayers.in/surrogacy-under-framework-of-the-indian-constitution/>

was a question before the court.

A Japanese couple came to India and entered into a contract of surrogacy pursuant to which Baby Manji was born. Mr. Yamada was the commissioning father. The Japanese Civil Code does not recognize surrogate children and so Mr. Yamada was refused by the Embassy, a passport or visa in the name of baby Manji. He then filed for an Indian passport for the baby, but the baby could not be issued one as the Indian passport requires a birth certificate for its issuance. The birth certificate issuance procedure in India requires the name of both the parents in it. The baby was born via surrogate and practically had three mothers—commissioning mother, anonymous egg donor and the surrogate.¹² The authorities hence declined a birth certificate and consequently an Indian passport to Baby Manji. The baby's grandmother fought the case for baby Manji. The court however, in this case, did not give any judgement but looped in the National Commission for Child Rights for further directions.

- **Jan Balaz v. Anand Municipality**¹³

Famously known as the German Couple case, a childless German couple had come to India and commissioned a surrogacy contract through which twins were born to them with the help of a surrogate mother and the Anand Infertility Clinic, Gujarat.

Surrogacy as a means of parenthood is not recognized in Germany, following which surrogate born children are not recognized as German citizens. This law posed a significant barrier to the parents and to avoid any legal battle for immigration, the couple requested the Gujarat High Court to permit the surrogate children to carry Indian Passport.

Yet again the question of natural mother came up. Since there were no laws regulating the practice of surrogacy, the courts were inclined to believe that the gestational surrogate was the natural mother who has even donated the egg. The court with respect to the intending mother, held that the intending mother has neither donated the ova nor conceived or delivered the babies and is just the wife of the biological father. The court further held that, in the absence of any legislation, she can never be treated as a natural or legal mother.¹⁴

Apart from these cases, two more cases came up in Mumbai, one in 2008 and the other in 2010, where two gay couples from Israel commissioned for surrogacy and after much legal struggle were able to take their surrogate children home, to Israel.

¹² Ibid.

¹³ Available at <https://www.thehindu.com/news/national/expained-surrogacy-assisted-reproduction-in-india-laws-offence-problems/article65443258.ece>

¹⁴ Ibid.

The Indian courts, time and again, have been faced with this challenge of dealing with questions of citizenship, motherhood and immigration of the surrogate children. No concrete decisive steps have ever been taken by the judiciary in this regard. The Indian judiciary has not yet comprehensively addressed surrogacy, leaving the task to the legislature.¹⁵

b) Legislative Perspective

India is the only country where surrogacy is neither banned nor regulated. No steps have ever been taken by the legislature to regulate the practice or direct the procedure. The result of the same is the creation of an open market for surrogacy where couples both, domestic and foreign, come frequently for commissioning surrogacy. This has led to increased medical tourism and a fair chance of surrogate exploitation.¹⁶

Keeping in view the recent emerging problems with regard to surrogacy the Indian Council for Medical Research (ICMR) along with the Ministry of Health and Family Welfare, after many years of deliberations, formulated the National Guidelines for Accreditation and Supervision and Regulation of ART Clinics in India in 2005.

These regulations provide an easy guide to regulation of IVF and related technologies and also highlight the guidelines to regulate the practice of surrogacy. The major points that deal with surrogacy include¹⁷

- A single contract will deal with the surrogacy arrangement between the parties.
- A proper financial support should be provided, to the surrogate child, in situations of death of either one or both of the commissioning parents, divorce before taking the delivery or failure to take the child after birth.
- No surrogate should be allowed to undergo more than five pregnancies including her own children. A maximum of 3 embryos are allowed to be implanted.
- A life insurance cover must necessarily be provided in the contract, for the surrogate mother.
- The surrogate child should be treated as a natural born of the commissioning parents without any requirement for adoption or declaration of guardianship.
- Only the names of the commissioning parents should be there on the birth certificate of the surrogate child.

¹⁶ Divyansh sisodia."Surrogacy under framework of Indian constitution" available at <https://blog.ipleaders.in/surrogacy-under-framework-of-the-indian-constitution/>

¹⁷ *ibid*.

- Right to privacy of the donor as well as the surrogate mother should be protected.
- Sex-selective surrogacy should be prohibited.

In the year 2008, the ICMR drafted the **Assisted Reproductive Technologies Bill, 2008** to regularize and legitimize different forms of reproductive technologies which included commercial surrogacy as well. The reasons and need for bringing up laws relating to surrogacy had been elaborated in detail in the 228th Law Commission report as well.

A number of provisions were incorporated in the ART Bill, 2008 that attempted as regularizing the practice of surrogacy however, the same was criticized by a large number of scholars on the ground that it promotes the interest of medico-business lobby and does not provide adequate protection to the rights of the surrogate mother and children.

The draft bill of 2008 was modified by introducing The Draft Assisted Reproductive Technology Bill and Rules, 2010. This new bill aimed at bridging the gaps in the 2008 bill. Later another bill, Assisted Reproductive Technology (Regulation) Bill, 2013 was drafted as well that dealt with surrogacy and surrogates in a little more detail, however all these bills never saw the light of the day and were not even tabled on the floor of the parliament bringing us back to square one with no actual regulations in place to regulate surrogacy.

- **The Surrogacy (Regulation) Bill, 2016**¹⁸

It was only in 2016 that the government realized the need for making a specific legislation for surrogacy. The legislation aimed at banning commercial surrogacy. There was an evident increase in the reported cases of unethical practices, ill-treatment of surrogate mothers, desertion of children born out of surrogacy and import of human embryos and gametes. The Law Commission too in its 228th Report, suggested banning the practice of commercial surrogacy by passing a suitable legislation.

The statement of objects and reasons, of the bill, stated that it was

*“Due to lack of legislation to regulate surrogacy, the practice of surrogacy has been misused by the surrogacy clinics, which leads to rampant commercial surrogacy and unethical practices in the said area of surrogacy. In the light of above, it had become necessary to enact a legislation to regulate surrogacy services in the country, to prohibit the potential exploitation of surrogate mothers and to protect the rights of children born through surrogacy.”*¹⁹

¹⁸ Available at <https://indianexpress.com/article/what-is/what-is-surrogacy-regulation-bill-2016-5500725/> on Dec 19,2018

¹⁹ Ibid.

An in-depth analysis of the bill shows that the bill proposes to allow altruistic ethical surrogacy. Any infertile Indian married couple between the age of 23-50 years and 26-55 years for female and male are eligible to get into the process of surrogacy. However, the bill requires any such intending couple to be married for 5 years before getting into any such contract and there should not be any surviving biological, adopted or surrogate child. The only exception is when the child they have is mentally or physically challenged or suffers from a threatening or permanent disorder with no permanent cure.²⁰

Any such child born through surrogacy will have the same rights as that of any biological child and the couple is not allowed to abandon the child born through surrogacy under any circumstances.

The bill favors and promotes ethical altruistic surrogacy and so requires the surrogate mother to be a close relative of the intending couple between the ages of 25-35. The clinics acting as intermediaries for such surrogacy contracts are supposed to maintain a record for about 25 years of every surrogate mother and child so born. The termination of such a pregnancy can only be commissioned by prior permission of the surrogate mother and on authorization of the appropriate authority.

The bill talks about setting up of a National Surrogacy Board and State Surrogacy Boards. These boards are supposed to be the policy making bodies for the practice of surrogacy and there should be Appropriate Authority for the implementation body for the Act. The total number of members in these boards should be 24. The bill clearly specifies the members and process of creation of these boards.

The bill specifically requires the Magistrate of Class I, to pass an order concerning the parentage and custody of the child to be born through surrogacy and violation of any such provision as mentioned in the bill, practice of commercial surrogacy, exploiting the surrogate mother, abandonment of the surrogate child, sale of human embryo or import of embryo for the purpose of surrogacy shall be an offence punishable with imprisonment for a term of 10 years or more and fine which may extend up to 10 lakh rupees.²¹

- **The Surrogacy (Regulation) Bill, 2019²²**

²⁰ The surrogacy bill, 2016 available at <https://www.legalservicesindia.com/law/article/1128/4/The-Surrogacy-Bill-2016>

²¹ Ibid.

²² Khushboo, The surrogacy (regulation) Bill, 2019 available at <https://www.legalserviceindia.com/legal/article-4512-the-surrogacy-regulation-bill-2019.html>

The 2016 Surrogacy bill lapsed as the session of Parliament adjourned for the term. The same bill again, with no changes at all was tabled in 2019 on the floor of the Parliament. This reintroduced bill was promptly passed by the Lok Sabha and so was sent to the Rajya Sabha. The Rajya Sabha now plans to send the bill again to a Parliamentary Committee Panel for detailed analysis and so clear the passage to make it into a legislation.

V. CRITICAL APPROACH

Surrogacy should not only be looked at as a means to ensure the survival of the family name or legacy in India. It must be understood as a need or practice to resolve the complex psycho-social emotions of the intending parents and the socioeconomic needs of the surrogate mother. It must be noted that a ban at the present stage may create many challenges, extortion by state authorities and push the business underground.

However, the Lok Sabha in the month of July passed the Surrogacy (Regulation) Bill, 2019. It is a piece of legislation aiming at a complete ban on commercial surrogacy, allowing only altruistic surrogacy in India.²³ The bill is on its way to become the law of the land and it is presently pending in the upper house of the Indian Parliament, Rajya Sabha. The bill is considered as a progressive measure to curtail the exploitative practice of “womb renting” or baby outsourcing by the Indian government. Following are some points in the bill which require some serious reconsiderations:

1. Violation of article 21

We currently live in a world where medicine and healthcare practices are making strides through advanced technology. Hence for someone to be a child bearer, must undoubtedly be his/her personal choice. The sweeping ban on commercial surrogacy can be considered as much more regressive. It essentially denies women autonomy, control and privacy over their own bodies and in the process, violates their fundamental rights.

The right to make reproductive choices has been recognized by the Indian courts to fall under “personal liberty” that is guaranteed by Article 21 of the Indian Constitution. These reproductive rights of women include the right to carry a baby to term, give birth, and raise children. Similarly, the Supreme Court in the **Puttaswamy judgement**²⁴ also recognized the very fact that every person has a right to autonomy in taking decisions that pertain to their body. Therefore we can say that the Bill in the present form is creating unrealistic and

²³ Mridul Tripathi, “Surrogacy Regulation Bill 2019 and its constitutional validity” available at <https://blog.ipleaders.in/surrogacy-regulation-bill-2019-constitutional-validity/>

²⁴ Ibid.

violative approach because Surrogacy laws should eventually help the already traumatized intended couples and surrogate mothers, instead it is violating their rights and is also creating an impediment in the procedure.

The Supreme Court of India in the case of **Suchita Srivastava v. Chandigarh Administration**²⁵ also recognized the right of every woman to bodily integrity especially with respect to decisions pertaining to pregnancy and abortion.

2. Inconsistent definition of infertility

The word 'infertility' defined in the Surrogacy (Regulation) Bill, 2019 is inconsistent with the definition given by WHO and also as in the ART (Regulation) Bill, 2014. According to the definition of 'infertility' given by the World Health Organization infertility means "a disease of the reproductive system defined by the failure to achieve a clinical pregnancy after 12 months or more of regular unprotected sexual intercourse".²⁶

In India, infertility is considered a taboo. Due to infertility, a lot of agony and trauma is undergone by couples. Therefore, it is necessary to note that this five-year time bar as notified by the government would only add to the adversity of the already distressed couple. The five-year waiting period is therefore vague, erratic and without any definable logic.

The Surrogacy (Regulation) Bill, 2019 disregards any other medical condition to be a reason to opt for surrogacy. According to the bill, infertility that is defined as failure to conceive, can be the only cause for entering into surrogate agreements. For example, there can be a situation where a girl is born without a uterus or has an underdeveloped uterus or have been suffering from repeated miscarriages, but these conditions do not fall within the ambit of the bill. Majority of the experts/stakeholders in the 102nd report on The Surrogacy regulation bill 2016 understood the aforesaid problem thereby asserted that the extended time period of five years before commissioning surrogacy in the proposed bill seems to be irrational and arbitrary in many aspects.²⁷ Hence recommended that the word "five years" shall be replaced with "one year" and consequential changes shall be made in other relevant clauses of the Bill

3. Close relative not defined in the bill

The bill proposes an altruistic surrogacy model which has moral assumptions as its basis along with all kinds of value judgments. As per the bill the altruistic model can only be

²⁵ Available at <https://blog.ipleaders.in/surrogacy-regulation-bill-2019-constitutional-validity/>

²⁶ Ibid.

²⁷ Ibid.

availed through “close relatives”. The major problem in this regard is that the term ‘close relative’ is not defined in the Bill.

Ours is a very conservative society. considering the society, we live in, it is very difficult to find someone who is actually a close relative in-order to act as a surrogate mother. Even if we find someone it cannot be guaranteed that the surrogate who is a ‘close relative’ is willing to do it without any coercion. The committee on Surrogacy regulation bill 2016 also affirmed that coercion and compulsion will always be at the root of altruistic surrogacy involving close relatives. Hence, the word ‘close relative’ should be replaced.²⁸

Furthermore Having a close relative as surrogate also has a major problem that biological mother may be always or at some point of time be around the child which is a serious issue and will have an impact on the child's bonding with the intending parents, which will also at some stage surely impact the rights and relationship of the concerned parties .

4. Marital status or sexual preferences

The Surrogacy Bill 2019 also disqualifies homosexual couples and couples in live-in-relationships from having children through surrogacy in India. The Indian Constitution according to Article 14 provides that all citizens are equal in the eyes of law. Therefore, by placing such restrictions on the right to have a surrogate child the bill has only allowed the heterosexual couples to have a child through surrogacy. This entirely negates the concept of equality that the Constitution of India guarantees to single parents and homosexuals alike.

The Supreme Court rulings on live-in relationships have clearly established that live-in relationships are at par with marriage and children born out of long-standing live-in relationships are legitimate. Even clearly, after the Supreme Court judgement in the case of **Navtej Singh Johar**²⁹ , homosexuals should also be given the right to have child through surrogacy. The bill would be setting a wrong precedent, by restricting the option of surrogacy to married couples, even after the Indian courts have given acceptance to live-in relationships and LGBTQ community.

It must be made clear that surrogacy is a practice which gives the hope to the couples who are gay, lesbian or a single man or a woman that, they can have a child of their own by this method and can complete their family. Hence, they should be allowed to have a child through surrogacy.

²⁸ Mridul Tripathi, “Surrogacy Regulation Bill 2019 and its constitutional validity” available at <https://blog.ipleaders.in/surrogacy-regulation-bill-2019-constitutional-validity/>

²⁹ Ibid.

VI. MAKING THE BILL INCLUSIVE: SUGGESTIONS

Surrogacy is a method that provides an opportunity to couples who are unable to conceive, to have a child genetically related to them. Usually, surrogacy is considered to be the last option available to a married couple to procure a child, however, technology has played a very important role for people to bear a child. This in turn had a great impact on the social structure, meaning of family and the institution of marriage. In order to make the bill beneficial to all classes and categories of people it must include the suggestions as given below-

1) By Imposing a ban on widows, divorced women, live-in partners homosexuals and keeping them out of the purview of the Bill, it is clearly indicated that the Bill is not in consonance with the present day modern social milieu. It indicates that the government's understanding is "too narrow" to include all the mentioned categories as fit for surrogacy. Hence, various stakeholders like unmarried females, separated, widows, transgenders, single parents and people having live in relationships should be allowed to bear a child through surrogacy. To bear or not to bear a child is an individual choice and the government cannot prohibit certain categories of people from obtaining a child through any means.³⁰ Prohibiting people to commission surrogacy on the basis of their marital status, sexual preferences and various other factors would be violative of their basic human rights.

2) In India, the economic circumstances along with an unregulated surrogacy model provides for ample scope for exploitation of surrogate women adding to their inability to effectively negotiate favorable terms for themselves. However, we are of the opinion that it is the duty of the government to provide adequate protection to the surrogates by adopting a proper regulatory. Very often, it can be seen that the agreement is signed and negotiated by the intended parents and clinic, while the surrogate mother has no say in the matter.

3) The fundamental right to reproduce a child is a part of a person's personal autonomy and privacy, fixing a period of five years after which a person can opt for surrogacy will only cause breach of his or her reproductive rights and will only delay or defer parenthood. The five-year waiting period is therefore arbitrary, discriminatory and without any logic. It is recommended that the definition of infertility should be made synonymous to the definition given by WHO.³¹ The word "five years" in the definition of infertility shall be replaced with "one year" and consequential changes be made in other relevant clauses of the bill.

³⁰ Available at <https://www.drishtiiias.com/daily-updates/daily-news-editorials/surrogacy-regulation-bill-2019>

³¹ Available at <https://www.drishtiiias.com/daily-updates/daily-news-editorials/surrogacy-regulation-bill-2019>

4) In Indian society, generally believes that, a woman's role in the family sphere is based on notions of love and duty, and she should not be compensated for her work. Based upon this notion, commercial surrogacy is banned, and only altruistic surrogacy is allowed in India. Furthermore, altruistic surrogacy can only be performed by close relatives. The term 'close relative' is nowhere defined in the bill. Looking onto the other side of the story, a family has the ability to demand or force a woman in the family to be a surrogate for another family member. Such surrogacy contracts where a member from within the family is asked to act as a surrogate for another is bound to become more exploitative than compensated form of surrogacy. Another major problem with altruistic form of surrogacy is that the child remains close to the surrogate with no mother-child relationship established. This creates a heavy psychological impact on the surrogate. Hence, it is recommended that compensated surrogacy should not be banned instead should be regulated. Even if its banned, the word close relative should be properly defined in the bill.

5) One of the major issues that needs attention is that of creation of an unwanted black market for surrogacy which could come up by completely banning compensated surrogacy. As the demand for surrogacy is so high, banning compensated surrogacy would ultimately cause abuse to surrogates. The government instead of banning commercial surrogacy should adequately and reasonably compensate the surrogates. Keeping in view the elaborate procedure as involved in surrogacy, it is suggested that certain amount or quantum for compensation should be pre-decided.³² Furthermore, the amount of compensation shall be fixed by relevant authorities such as the National and State Surrogacy Boards, the formation of which is already mentioned in the bill, and the compensation so fixed should not be bargained between the relevant parties.

VII. CONCLUSION

Surrogacy, a million-dollar industry, is booming in India. It is giving hopes to a lot of parents who because of some inability or other are not able to conceive. Parenthood is a joy that every couple seeks after some time. It completes the family and brings joy. Surrogacy is now coming up as an easy alternative to all those parents who want their child to be related to them by genes and blood. It is upcoming and is gaining popularity among the newer generations as the infertility rates too are going up with years.

Many countries across the globe do not recognize or accept surrogacy. It is necessary in such countries that the child must be related to either one of the parents or they simply do not

³² Ibid.

allow any such child in the country. India is a safe haven for all such couples. The lack of regulations and no law with respect to surrogacy makes India a market for surrogacy- too open and unregulated. It opens various holes and empty spaces for people to manipulate. In such unregulated scenario, the most affected is the surrogate mother. The surrogate mother is always on the losing end as she does not even get to keep the child and has to undergo the long toll taking process of pregnancy as well.

Looking at the current scenario in India it is very much the need of the hour to regulate this market of surrogacy and to fill in the lacunae so that no scope for exploitation is there of the surrogate mother and to provide with utmost security to the so born surrogate child.

Banning commercial surrogacy is no solution to the problem this industry faces. Banning commercial surrogacy will lead to many more problems such as black market, greater exploitation and sociological and psychological impacts on the surrogates considering only altruistic surrogacy is being done. The government must alter the bill to make it more inclusive and comprehensive. Proper guidelines must be laid out so that surrogacy becomes an easy recourse to all those who are unable to fulfil their desire of a child. Creation and implementation of stricter regulations is necessary and a dire need of the hour.
