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The Effect of Globalization on Commercial Surrogacy in India: An Analysis of the Proposed Ban on Commercial Surrogacy

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ABSTRACT

Parenthood forms an important aspect of an individual's life. Surrogacy can provide an option for the couple who are unable to conceive owing to certain physiological defects. The process of globalization has played a vital role in the development of commercial surrogacy, especially in India. Since India provides cheap and illiterate surrogate mother with no or very limited bargaining power, the foreign couples are more than willing to travel to India and involve in the process of commercial surrogacy in India through contractual arrangement. Although commercial surrogacy provides economic benefits to the surrogate mother, it also leads to their exploitation. The latest attempt by the government to address the challenges posed by commercial surrogacy in India is the Draft Surrogacy (Regulation) Bill of 2020. However, the 2020 Bill seeks to prohibit commercial surrogacy of any form and regulate altruistic surrogacy to be great extent. In light of this, the current study aims to analyze to impact of globalization on commercial surrogacy as well as the extent to which the 2020 Bill addresses the primary issues relating to commercial surrogacy in India.

I. GLOBALISATION AND COMMERCIAL SURROGACY IN INDIA- THE RELATIONSHIP, PROCESS AND CHALLENGES

(A) Surrogacy- Meaning and its types

Parenthood forms an important aspect of an individual's life. However, in certain situations, a couple faces issues in conceiving a child owing to certain biological defects in either or both the partners. Surrogacy as well as in-vitro fertilization² (referred to as IVF hereafter), as a medical practice, started with the idea that such couples should also be able to enjoy the delights of parenthood.

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² IVF or in vitro fertilization uses scientific techniques to help sperm fertilize an egg, and help the fertilized egg to be implanted in uterus of the woman.

The dictionary meaning of surrogacy is ‘to substitute’. The Indian Council for Medical Research (ICMR) defined surrogacy as “*an arrangement where a woman agrees to carry a pregnancy that is genetically unrelated to her and her husband, with the intention to carry term and hand over the child to the genetic parents for whom she is acting as a surrogate.*”³

Assisted reproductive technology (referred to as ART hereafter) is the technology used to treat infertility in both men and women. IVF, oocyte and sperm donation, intra-uterine insemination (IUI)⁴, cryopreservation⁵ and surrogacy, all form a part of ART itself.

The advent of IVF and surrogacy has made motherhood possible for women with certain physiological defects like uterine anomalies and women with other complications in conceiving. This process involves the use of embryo created by mixing the oocyte (egg) of such woman or of the donor, with the sperm of such woman’s husband/partner. The embryo created is then transferred to the uterus of the gestational carrier. It has also made parenthood possible for a male whose semen analysis is abnormal, with low sperm count⁶.

Though initially started as a method of providing a possibility of parenthood to the couple where one or both partners were biologically infertile, over a period of time, with the development of society, this technique is now also used by gay couples, single men and single women to achieve parenthood⁷. In case of gay couples and single men⁸, this is done by creating an embryo with their sperm and the oocyte of a donor (who may or may not be the gestational carrier).⁹

The process of surrogacy involves an agreement between the surrogate mother i.e. the woman who carries the fetus in her womb till delivery, and the commissioning parents¹⁰ i.e. the couple who is genetically related to the child to be born out of surrogacy.

Based on the oocyte (egg) used, surrogacy is classified into traditional and gestational. In traditional surrogacy, embryo is created using the egg of the surrogate mother herself, along

³ INDIAN COUNCIL OF MEDICAL RESEARCH, http://icmr.nic.in/art/art_clinics.htm (last visited Jan. 8, 2020).

⁴ The process of placing the sperm directly in the uterus of the woman during her ovulation.

⁵ Process of keeping the live cells, tissues and other biological samples in a deep freeze for the purpose of preservation.

⁶ MID WEST REPRODUCTIVE, <https://www.midwestreproductive.com/male-infertility/ivf-for-male-infertility/> (last visited Jan. 8, 2020).

⁷ Sasha M, *Surrogacy Regulation Bill, 2019: Altruism or state control of bodily autonomy?*, (Oct. 6, 2020), https://i2.wp.com/feminisminindia.com/wp-content/uploads/2020/10/surrogacy_1200.jpg?fit=1200,801&ssl=1.

⁸ *Ideologies and Technologies of Motherhood: Race, Class, Sexuality, Nationalism*, NEW YORK: ROUTLEDGE, (2000).

⁹NCBI,

<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6262674/#:~:text=%5B1%5D%20Surrogacy%20is%20an%20important,motherhood%20through%20the%20use%20of> (last visited Jan. 8, 2020).

¹⁰ LAWINSIDER, <https://www.lawinsider.com/dictionary/commissioning-parent> (last visited Jan. 8, 2020).

with the sperm of the commissioning male partner. On the other hand, in gestational surrogacy, embryo is created by mixing the egg and sperm of the commissioning parents i.e. the child will be genetically related to both the parents. The embryo so created is then implanted into the uterus of the surrogate mother.

Based on the compensation to be paid to the surrogate mother, surrogacy is classified as commercial or altruistic. In altruistic surrogacy, compensation to the surrogate mother is restricted to mere medical costs and other pregnancy-related reasonable expenses. However, in commercial surrogacy, along with the reimbursement for medical costs and other pregnancy-related reasonable expenses, the surrogate mother is also paid an additional sum of money as compensation for carrying the child of the commissioning parents. This additional sum of money is what lures poor women into surrogacy agreements.

(B) Effects of globalization on commercial surrogacy in India

From the international point of view, surrogacy is altogether banned in countries like Australia¹¹, China¹², France, Germany, Italy, Spain,¹³ and some states of the United States of America¹⁴. Countries like Brazil¹⁵, and the United Kingdom¹⁶, on the other hand, have imposed a partial ban on the practice of surrogacy, while countries like India, and Greece¹⁷, have no regulations at all.

It is pertinent to note that surrogacy is not a domestic practice. Transnational commercial surrogacy¹⁸ is very much in practice in the present day. Globalization, technological advancement in the medical industry and increased mobility of people across the globe have expanded and altered the mainstream assumptions and conceptions of family, kinship and parenthood.¹⁹ Transnational commercial surrogacy is carried out where-

- i. There is a complete ban on the practice of commercial surrogacy or surrogacy *per se*;

¹¹ SARAH JEFFORD, <https://sarahjefford.com/surrogacy-laws-in-australia/> (last visited Jan. 8, 2020).

¹² CHINA.ORG, <http://www.china.org.cn/english/2001/Jun/15215.htm> (last visited Jan. 8, 2020).

¹³ EURONEWS, <https://www.euronews.com/2018/09/13/where-in-europe-is-surrogacy-legal> (last visited Jan. 8, 2020).

¹⁴ SURROGATE.COM, <https://surrogate.com/intended-parents/surrogacy-laws-and-legal-information/surrogacy-laws-by-state/> (last visited Jan. 8, 2020).

¹⁵ BABYGEST, <https://babygest.com/en/surrogacy-in-brazil/> (last visited Jan. 8, 2020).

¹⁶ INDEPENDENT, <https://www.independent.co.uk/life-style/surrogacy-uk-cost-it-legal-how-work-baby-kim-kardashian-a8907461.html> (last visited Jan. 8, 2020).

¹⁷ IMTJ, <https://www.imtj.com/news/surrogacy-market-greece-working/> (last visited Jan. 8, 2020).

¹⁸ Transnational commercial surrogacy represents a form of medical tourism undertaken by intended parents who seek to hire women in other countries, increasingly often in the global South, as surrogates.

¹⁹ Prasanna Mohanty, *The Surrogacy (Regulation) Bill 2019: A casual approach to a serious concern*, BUSINESS TODAY (Aug. 15, 2019, 12:27 PM), https://www.businesstoday.in/search.jsp?searchword=Prasanna-Mohanty&searchtype=text&searchphrase=exact&search_type=author.

- ii. Commercial surrogacy is still strictly regulated by the government, even though it is not banned;
- iii. The cost of commercial surrogacy is high in the country where the commissioning parents reside as compared to the place where the prospective surrogate mother resides;

The effects of globalization on commercial surrogacy in India has the following implications-

- i. India becoming a hub of commercial surrogacy;
- ii. The exploitation of woman in India who agree to act as surrogate mothers under the transnational commercial surrogacy setup and
- iii. The subsequent efforts of the government to curb the menaces related to commercial surrogacy.

The reasons which made India a hub of commercial surrogacy are dealt in the below mentioned paragraphs. In the subsequent section of this chapter (Section 1.4), we will focus on how transnational commercial surrogacy led to the exploitation of surrogate mothers in India. Also, in the next chapter (Chapter 2), we will discuss the third aspect of the effects of globalization on commercial surrogacy in India vis-à-vis the attempts of government to curb the perils of commercial surrogacy.

Since the 2000s, India has become a top destination for international commercial surrogacy,²⁰ with the village of Anand in Gujarat being popularly called the 'cradle of the world'. In 2012, more than 25,000 children were estimated to be born by using surrogacy in India, out of which half of the surrogacies were recorded to be carried out for international parents²¹.

There are a number of reasons why India is preferred over other nations for transnational commercial surrogacy. Firstly, till date, there is no particular legal regime governing surrogacy in India²². The surrogacy arrangement is governed by the surrogacy agreement, which the surrogate mother and the commissioning parents are a party to. Secondly, surrogacy procedure is much simpler and cost effective in India than anywhere else in the world. The cost of availing commercial surrogacy in India is almost one third of the cost in United States of America²³. This is further coupled with the fact the women in India who choose to become surrogate

²⁰ Rozée and Unisa, *Surrogacy as a Growing Practice and a Controversial Reality in India: Exploring New Issues for Further Researches*, 4(6) JOURNAL OF WOMENS HEALTH ISSUES AND CARE, 1-7 (2015).

²¹ P Shetty, *India's unregulated surrogacy industry*, LANCET, (2012).

²² There have been a few proposed bills.

²³ S S Das and Priyanka Maut, *Commercialization Of Surrogacy In India: A Critical Analysis*, RESEARCHGATE (2016), [researchgate.net/publication/281710247_Commercialization_of_Surrogacy_in_India_A_Critical_Analysis#read](https://www.researchgate.net/publication/281710247_Commercialization_of_Surrogacy_in_India_A_Critical_Analysis#read).

mothers are mostly poor, illiterate and easily available, and therefore, have no bargaining power. They barely understand the terms of the agreement they enter into and agree to undergo the procedure at whatever price the commissioning parents or their agents quote. India also focusses on private healthcare and medical tourism and provides for lower interest rates on medical loans²⁴. The Indian government, in the year 2015 brought forth a circular stating that the international commissioning couples cannot visit India on tourist visa for the purpose of surrogacy. A new criteria of medical tourist visa²⁵ was formulated to attract international reproductive tourists.²⁶

These reasons make India one of the most sought-after destinations in the world for commercial surrogacy.²⁷

(C) The process of commercial surrogacy in India²⁸

The advent of technology, globalisation, the lack of regulatory framework, and the availability of cheap and illiterate women, coupled with certain other factors have made India a favourite destination for commercial surrogacy. Transnational commercial surrogacy has also helped in defining certain key steps involved in the process.

Surrogacy is often termed as “*a relationship of mutual understanding and generosity between the surrogate and the infertile couple*”²⁹. However, one cannot overlook the fact that commercial surrogacy is primarily a business, and is consumer-driven. In India, surrogacy is mostly governed by the contract entered between the surrogate mother and the commissioning parents. It is important to note that when the surrogate’s identity as a mother is governed by a contract, being a good mother often conflicts with being a good contract worker. The process of achieving a balance between the two involves various steps. The key steps have been mentioned below-

1. Recruiting prospective surrogate mothers

The first step in the process of commercial surrogacy is finding a suitable woman who is ready to become a surrogate for the commissioning parents.

In India, poor, uneducated women who are in desperate need of money are often targeted by

²⁴ IPLEADERS, <https://blog.ipleaders.in/surrogacy-regulation-bill-2020-way-forward/> (last visited Jan. 8, 2020).

²⁵ Circular no. 242 of 2015, by the Ministry of Home Affairs.

²⁶ A Donchin, *Reproductive tourism and the quest for global gender justice*, 24(7) *BIOETHICS*, 323- 332 (2010).

²⁷ Diksha Munjal-Shankar, *Identifying the Real Mother in Commercial Surrogacy in India*, 18 *GENDER, TECHNOLOGY AND DEVELOPMENT* 387, 388 (2014).

²⁸ IPLEADERS, <https://blog.ipleaders.in/critical-analysis-surrogacy-regulation-bill-2019/> (last visited Jan. 8, 2020).

²⁹ Pranav Rao, *Analysis of surrogacy laws in India*, 4 *INTERNATIONAL JOURNAL OF ADVANCE RESEARCH, IDEAS AND INNOVATIONS IN TECHNOLOGY*, (2018).

the clinics. They are systematically recruited by fertility clinics, who then get such women in contact with the clients, both domestic and international.

However, the infertility clinics have to rely on formal and informal surrogacy brokers/agents owing to the stigma and secrecy associated with the practice of surrogacy.

2. Contract formation

Once the prospective woman is recruited by the fertility clinics either by themselves, or with the help of agents, the next step involves the formation of a contract.

On the one hand, the surrogate mother is expected to be a perfect contract worker- someone who will not hesitate to give away the child after delivery and on the other hand, she is expected to be a nurturing mother during gestation and to care for the fetus as if it was her own. This dichotomous expectation is outlined in the surrogacy agreement.

The agreement outlines the rights, duties and obligations of each of the parties. It highlights the amount to be paid as compensation (inclusive of the medical expenses incurred during the gestation), surrogate mother's responsibilities to take care of herself and the fetus, the clauses with respect to termination, and the rights of commissioning parents on the child born out of the agreement, among other things. It reiterates the role of such women, not just as workers bound by a contract, but also as mothers. It is mostly in English, few essential points of the contract, however, are translated for the prospective surrogate mothers.

The agreement is in writing and acts as an expression of proposal and acceptance, the two key ingredients of the contract between the parties. The clause of payment of compensation to the surrogate mother³⁰ meets the requirement of consideration.³¹ Surrogate mother's approval, further, makes the contract binding.

3. Conception of pregnancy and the role of Surrogacy Hostels

After the formation of contract, the medical procedure formally starts. The embryo is created and is inserted in the womb of the surrogate mother. During the period of gestation, the surrogate mother is generally required to stay in surrogacy hostels or dormitories under the supervision of medical staff.

The system of surrogacy hostels was developed keeping in mind the need for discipline and surveillance during gestation. The surrogates are under constant surveillance during their

³⁰ According to the Guidelines of Indian Council of Medical Research.

³¹ Bhumitra Dubey and Yash Tiwari, *Analysis Of The Surrogacy (Regulation) Bill, 2020*, INDIA LAW JOURNAL, (2020), <https://www.indialawjournal.org/analysis-of-the-surrogacy-regulation-bill.php>.

pregnancy wherein nurses and hostel matrons monitor their food, medicines, and daily activities.³²

The surrogate mother delivers the child under proper medical supervision and as soon as the child is born, the obligation on part of the surrogate mother to give away the child to the commissioning parents, comes into picture.

(D) Issues related to commercial surrogacy in India

When any arrangement happens transnationally, having a legal regulatory framework becomes imperative to ensure that the vulnerable party to such arrangement is not exploited by the other party, who is in a better position. In the context of transnational commercial surrogacy, the surrogate mother is the vulnerable party, and the commissioning parents are in a better position, both financially and otherwise (in terms of power, influence, education etc.). In addition to this, when the entire arrangement of commercial surrogacy is governed by a surrogacy agreement where the surrogate mother is unable to understand the terms of agreement and bargain, issues are ought to arise.

The first issue arises with respect to recruiting surrogate mothers. The clinics which enjoy the dominant position add the layer of power dynamics and often use this position to brainwash the poor, uneducated women through what they refer to as "counselling sessions" to carry on with the pregnancies in the nature of a pious deed.³³ They are often not made aware of the implications involved in the process, their rights and remedies available to them. This leads to direct exploitation of such women.

The second issue which arises out of commercial surrogacy is with respect to the surrogacy agreement. The agreement is primarily in English and is drafted by the commissioning parents, who thus have an upper hand in the arrangement. Further, though a few essential points are translated for the surrogate mother, these points generally relate to her obligations towards the commissioning parents. This cripples the position of the surrogate mothers who are only well-versed with their native language and are unable to bargain for themselves.³⁴

The third issue is related to the previous issue. When the surrogate mother is unable to understand each and every aspect of the agreement she is entering into, is it possible to say that

³² *Supra* note 19.

³³ RESEARCHGATE,

https://www.researchgate.net/publication/340443765_SURROGACY_REGULATION_BILL_2019_A_CRITIC_AL_APPRAISAL (last visited Jan. 8, 2020).

³⁴ *Id.*

there is *consensus ad idem*³⁵? If not, then how is the contract even enforceable?

The subsequent issues arise with respect to the child born out of such arrangement, i.e. what would happen if the child is born with some disability, physical or mental³⁶; what would happen if the sex of the child is different from what the commissioning parents so desired; what would happen if the commissioning parents decide not to take the child owing to the foregoing reasons or what if the commissioning parents separate during the gestation period and subsequently, no one is willing to take the custody of the child born out of surrogacy?

The possible solutions to these issues are blurry. Contractual remedies of damages or specific performance are available in the event of a breach of contract by either of the parties. However, these remedies can only act as a recourse in certain specific situations, and hence, do not cover all the circumstances. For example, specific performance of contract is a suitable remedy only in cases where the parents split, and no one takes the custody of the child. Also, the court may grant specific performance on part of the defaulting party, if there has been a default in paying the agreed sum of money as compensation to the surrogate mother by the commissioning couple.³⁷

However, the issue of exploitation of surrogate mothers in the gambit of surrogacy agreement and the entire process of commercial surrogacy is left unaddressed.

It is, therefore, for the government to take necessary steps to ensure that such exploitation does not take place and the entire arrangement of commercial surrogacy is regulated effectively and the surrogate mothers are provided the necessary protection and safeguards.

The next chapter, therefore, addresses the issue of the lack of legal framework regulating commercial surrogacy in India.

II. THE LEGAL FRAMEWORK REGULATING SURROGACY IN INDIA

Commercial surrogacy has raised a number of issues pertaining to the exploitation of the surrogate mothers and the issues arising out of the custody of the child born out of surrogacy, in certain circumstances³⁸. Therefore, the government has made several attempts to address these concerns. The following sub-sections highlight the attempts of government to bring forth a regulatory framework relating to surrogacy in India as well as the stand of the Indian courts

³⁵ Consent for the same thing in the same sense.

³⁶ TIMES OF INDIA, <http://timesofindia.indiatimes.com/india/Aussie-couple-abandoned-surrogate-baby-in-India/articleshow/44766805.cms> (last visited Jan. 8, 2020).

³⁷ *Supra* note 31.

³⁸ When parents separate, when the sex of the child is not the same as the commissioning parents desired, if the child is born with certain physical or mental defects/abnormalities.

regarding the same.

(A) The development of legal framework regulating surrogacy in India

***1. The Indian Council of Medical Research Guidelines, 2002*³⁹**

In India, the practice of commercial surrogacy was informally legalised in the year 2002 when the Indian Council for Medical Research (referred to as ICMR hereafter) laid down certain guidelines for surrogacy. These guidelines played a vital role in bringing India's commercial surrogacy market into the limelight. However, these guidelines were not effective due to the lack of legal backing, as they were mere guidelines without any binding effect. Nevertheless, this can be considered as the very first attempt towards a regulatory framework.

***2. The Indian Council of Medical Research Guidelines, 2005*⁴⁰**

The ICMR, in 2005, again published a set of non-binding “*National Guidelines for Accreditation, Supervision and Regulation of Assisted Reproductive Technology clinics in India*”⁴¹. These Guidelines were another attempt by the authorities to bridge the gap between the surrogacy arrangements and their implementation.

This Guidelines prescribed for the use of assisted reproductive technology procedures by the fertility clinics. It further stated that the surrogate mother should not be considered as the legal mother of the child born out of the surrogacy arrangement; the birth certificate should be made in the name of the commissioning parents (who are also the genetic parents). However, these Guidelines, just like their 2002 predecessor, were mere recommendations and lacked legal enforceability. However, they acted as a blueprint for the drafts of the Assisted Reproductive Technology (Regulation) Bills.

***3. Baby Manji Yamada v. Union of India*⁴²**

The case involved the issue of custody of a child born out of surrogacy in India, whose commission parents were Japanese citizens. The couple separated a month before the birth of the child. The Supreme Court of India finally allowed the grandmother to take the child out of India.

This case is of special significance due to two reasons. Firstly, the case highlighted the issue of custody of the child born out of surrogacy when the commissioning parents get separated. Secondly, it was in this case, that the Supreme Court recognised the practice of surrogacy and

³⁹ Indian Council of Medical Research Guidelines, 2002

⁴⁰ Indian Council of Medical Research Guidelines, 2005

⁴¹ *Id.*

⁴² *Baby Manji Yamada v. Union of India*, (2008) 13 SCC 518.

defined commercial surrogacy as- “a form of surrogacy in which a gestational carrier is paid to carry a child to maturity in her womb”.⁴³ It held that-

“surrogacy is a well-known method of reproduction whereby a woman agrees to become pregnant for the purpose of gestating and giving birth to a child she will not raise but hand over to a contracted party”.⁴⁴

4. The Assisted Reproductive Technology (Regulation) Bills⁴⁵

ICMR, in the backdrop of the guidelines formulated by it in 2005, formulated the Assisted Reproductive Technologies (Regulation), Bill in the year 2008. The Ministry of Law and Justice has revised the Bill a number of times⁴⁶. However, throughout all these years, the legislation never came into existence and till date continue to be a Bill.

The Assisted Reproductive Technology Regulation Bill 2020⁴⁷ have provisions which ensure safe and ethical practice of assisted reproductive technology services in India. Through the Bill, the National Board⁴⁸, the State Boards⁴⁹ and the National Registry⁵⁰ respectively will regulate assisted reproductive technology clinics and banks. The National Board shall “lay down code of conduct to be observed by persons working at clinics, to set the minimum standards of physical infrastructure, laboratory and diagnostic equipment and expert manpower to be employed by clinics and banks”⁵¹.

5. The 228th Law Commission Report on ‘Need for legislation to regulate Assisted Reproductive Technology Clinics as well as rights and obligations of parties to a surrogacy’, 2009⁵²

In 2009, the Law Commission of India, *suo motu*, raised the issue of the lack of a legal framework regulating the practices of Assisted Reproductive Technology clinics as well as the rights and obligations of parties to a surrogacy arrangement. It highlighted that non-intervention of law in the issue of commercial surrogacy will act detrimental to human liberty. Therefore, the Report suggested the adoption of a pragmatic approach by means of legalizing altruistic surrogacy and prohibiting commercial surrogacy.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Assisted Reproductive Technology (Regulation) Bill of 2008, 2010, 2013, 2016 and 2020.

⁴⁶ The A.R.T. Bill has been revised in 2010, 2013, 2016, and latest in 2020.

⁴⁷ Assisted Reproductive Technology (Regulation) Bill, 2020.

⁴⁸ *Id.*, s.3.

⁴⁹ *Supra* note 47, s. 6.

⁵⁰ *Supra* note 47, s. 9.

⁵¹ *Supra* note 47, s. 5(c).

⁵² 228th Law Commission Report on ‘Need for legislation to regulate Assisted Reproductive Technology Clinics as well as rights and obligations of parties to a surrogacy’, 2009.

It also recommended that surrogacy arrangements should be governed by a contract, which should provide for insurance cover for surrogate mother⁵³. Further, it also necessitated that one of the intended parents should be a donor⁵⁴ (of sperm or oocyte). It further highlighted the need for a legislation to recognize surrogate child as legitimate child of commissioning parents⁵⁵, to prohibit sex selective surrogacy⁵⁶ and to mention the name of commissioning parents in the birth certificate of the child born out of surrogacy⁵⁷.

The 228th Law Commission Report is of special significance as the latest Bill regulating surrogacy in India is drafted in lines with the Report.

6. Circular no. 462 by the Ministry of Home Affairs on Foreign nationals [Including Overseas Citizen of India (OCI) cardholders] intending to visit India for commissioning surrogacy, 2015

The Home Ministry of India, in the year 2015, issued Guidelines for foreign nationals intending to visit India for commissioning surrogacy. Previously, the international commissioning parents used to come to India under a tourist visa.

The guidelines included certain specific visa requirements for foreign nationals commissioning surrogacy in India, with such visas being restricted to heterosexual married couple (married for minimum two years) from countries where the practice of surrogacy is legal⁵⁸.

It also stated that as a prerequisite, the commissioning couple should enter into an agreement with the surrogate mother. Such agreement should also be duly authorised by the relevant authorities⁵⁹.

7. The Surrogacy (Regulation) Bill, 2016⁶⁰

In November 2015, a public interest litigation (PIL) was initiated by Mr. Jayshree Wad⁶¹ seeking a ban on commercial surrogacy. This PIL was supported by the Government, and it subsequently submitting an affidavit claiming that ‘altruistic surrogacy to needy, infertile married Indian couples’ will be allowed after thorough checks of the couples⁶².

⁵³ *Id.*, 4.2.(1).

⁵⁴ *Supra* note 52, 4.2. (4).

⁵⁵ *Supra* note 52, 4.2. (5).

⁵⁶ *Supra* note 52, 4.2. (8).

⁵⁷ *Supra* note 52, 4.2. (6).

⁵⁸ *Supra* note 25, 2(i).

⁵⁹ *Supra* note 25, 2(ii).

⁶⁰ Surrogacy (Regulation) Bill, 2016.

⁶¹ ECONOMIC TIMES, <https://economictimes.indiatimes.com/news/politics-and-nation/supreme-court-asks-government-to-explain-stance-on-commercial-surrogacy/articleshow/46378518.cms?from=mdr> (last visited Jan. 8, 2020).

⁶² *Id.*

Consequently, the Surrogacy (Regulation) Bill, 2016 was introduced in the Parliament without any public consultation. It provided a blanket ban on commercial surrogacy and proposed the regulation of altruistic surrogacy.

9. The 102nd Select Committee Report on the Surrogacy (Regulation) Bill of 2016, 2017⁶³

The Surrogacy (Regulation) Bill, 2016 was referred to the Select Committee in the year 2017 for deliberations with respect to certain provisions and clauses. The Committee in its Report provided extensive recommendations. The most intriguing aspect of the Report was the Committee's recommendation to replace 'altruistic surrogacy' in the 2016 Bill with 'compensatory surrogacy'⁶⁴. Further, the report stated that such surrogacy should also be available to PIO, NRI, OCI, live-in couples, divorced women and widows⁶⁵.

The Committee also recommended providing insurance coverage to the surrogate mother for a period of six years⁶⁶ and prohibition of sex selective surrogacy⁶⁷.

10. The Surrogacy (Regulation) Bill, 2019⁶⁸

The recommendations of the 102nd Select Committee were never taken into account as the Surrogacy (Regulation) Bill, 2016 lapsed when the house dissolved for the general elections. It was reintroduced in the Lok Sabha as the Surrogacy (Regulation) Bill, 2019 and was duly approved. The Bill was placed in Rajya Sabha and in November 2019, it was referred to the Select Committee.

The 228th Select Committee Report on Surrogacy (Regulation) Bill, 2019 was published in February 2020 and it provided certain changes to the Bill in the form of a Draft Surrogacy (Regulation) Bill, 2020. This is the latest piece of proposed law to regulate surrogacy in India. The provisions of the Draft Bill, 2020 are analyzed in the coming sub-section.

(B) The Draft Surrogacy (Regulation) Bill, 2020: A critical analysis

1. Key provisions of the Bill

The Surrogacy (Regulation) Bill, 2020 defines certain key terms-

- i. "intending couple means a couple who have a medical indication necessitating gestational surrogacy and who intend to become parents through surrogacy"⁶⁹ (the

⁶³ 102nd Select Committee Report on the Surrogacy (Regulation) Bill of 2016.

⁶⁴ *Id.*, 5.22

⁶⁵ *Supra* note 63, 5.42.

⁶⁶ *Supra* note 63, 5.60.

⁶⁷ *Supra* note 63, 5.149.

⁶⁸ The Surrogacy (Regulation) Bill, 2019.

⁶⁹ *Id.*, s. 2(r).

commissioning parents);

- ii. “couple means the legally married Indian man and woman above the age of 21 years and 18 years respectively”⁷⁰;
- iii. “intending woman means an Indian woman who is a widow or divorcee between the age of 35 to 45 years and who intends to avail the surrogacy”⁷¹ (the commissioning mother);
- iv. “insurance means an arrangement by which a company, individual or intending couple undertake to provide a guarantee of compensation for medical expenses, health issues, specified loss, damage, illness or death of surrogate mother and such other prescribed expenses incurred on such surrogate mother during the process of surrogacy”⁷²;
- v. “surrogate mother means a woman who agrees to bear a child (who is genetically related to the intending couple or intending woman) through surrogacy from the implantation of embryo in her womb and fulfills the conditions as provided in sub-clause (b) of clause (iii) of section 4”⁷³

The Bill talks about both commercial⁷⁴ as well as altruistic surrogacy⁷⁵. It only allows altruistic surrogacy⁷⁶ and prohibits all kinds of surrogacy for any commercial purposes⁷⁷. The Bill also restricts the option of altruistic surrogacy to the intending couple of Indian origin, who has a medical condition necessitating gestational surrogacy⁷⁸, as well as an intending woman of Indian origin who is widow or divorcee, aged between 35-45 years. The Bill further prohibits sex selection procedures⁷⁹ in surrogacy.

The Bill provides certain conditions which are required to be met for becoming a surrogate mother. These include⁸⁰-

- i. She should be married, having a child of her own and aged between 25-35 years;
- ii. She should be a willing woman;

⁷⁰ *Supra* note 68, s. 2(g).

⁷¹ *Supra* note 68, s. 2(s).

⁷² *Supra* note 68, s. 2(q).

⁷³ *Supra* note 68, s. 2(zg).

⁷⁴ *Supra* note 68, s. 3(5)(b).

⁷⁵ *Supra* note 68, s. 2(b).

⁷⁶ *Supra* note 68, s. 4(ii)(b).

⁷⁷ *Supra* note 68, s. 4(ii)(c).

⁷⁸ *Supra* note 68, s. 4(ii)(a).

⁷⁹ *Supra* note 68, s. 3(viii).

⁸⁰ *Supra* note 68, s. 4(b) and s. 5.

- iii. She should not provide her own gametes for the creation of embryo;
- iv. She should only undergo the procedure of surrogacy once in her lifetime;
- v. She should get a document from a registered medical practitioner certifying that she is medically and psychologically fit for surrogacy and
- vi. Lastly, the intending couple or the intending woman should also have a certificate of eligibility

With respect to the intending couple, the following conditions need to be met⁸¹-

- i. Indian origin;
- ii. Married;
- iii. The female partner aged between 23-50 years and the male partner aged between 26-55 years and
- iv. The couple should not have any biological child or child through adoption/surrogacy. This provision is not applicable if the intending couple has a child, but he/she is mentally/physically challenged or suffers from a life threatening disorder or fatal illness, with no permanent cure.

The Bill provides that the child born out of the surrogacy arrangement “*shall be deemed as a biological child of the intending couple or the intending woman*”⁸².

Further, the Bill provides for the requirement of “written informed consent”⁸³ from the surrogate mother after explaining all known side-effects and after effects involved in the surrogacy procedure. Also, all the instructions should be given and the procedure should be carried out in the language which the surrogate mother understands.⁸⁴

The bill prohibits the act of abandoning the child born out of surrogacy by the intending couple or the intending woman owing to the reasons like genetic defect, birth defect, any other medical condition, sex of the child or conception of more than one baby⁸⁵ and also prohibits forced abortion⁸⁶.

The insurance coverage for surrogate mothers has been increased to 36 months⁸⁷. The bill also

⁸¹ *Supra* note 68 s. 4(c).

⁸² *Supra* note 68, s. 8.

⁸³ *Supra* note 68, s. 6.

⁸⁴ *Id.*

⁸⁵ *Supra* note 68, s. 7.

⁸⁶ *Supra* note 68, s. 10.

⁸⁷ *Supra* note 68, s. 4, Explanation III.

contains provisions for establishing National Surrogacy Board⁸⁸ at the national level and, State Surrogacy Board,⁸⁹ at state level.

2. Issues in the Bill

The analysis of the provisions of the Surrogacy (Regulation) Bill, 2020 highlights both positive and negative implications. Though the provisions relating to obtaining informed consent from the surrogate mother in the language she understand, prohibition of sex selection and coerced abortion, prohibition of abandoning the child because of defects or sex, and considering the child born out of the surrogacy arrangement as the biological child of the intending couple/woman, are plausible, however, the restrictions put on commercial surrogacy, and the exclusion of certain classes of individuals from intending couple/woman, highlight the patent issues in the Bill.

- Commercial Surrogacy

Firstly, commercial surrogacy is altogether prohibited under the Act. The Bill provides for an exclusive list of activities which would amount to commercial surrogacy. One of these activities involve commercial surrogacy in the sense of paying reward or compensation to the surrogate mother, in excess of the medical and other related expenses. It is pertinent to note here that this absolute prohibition will have an adverse impact on a large section of women who have been acting as commercial surrogates. It is important to prohibit the sale and trade of human embryo or gametes. However, bringing the traditional surrogacy in the ambit of this new definition of “commercial surrogacy” can be considered as being violative of Article 19(1)(g) of the Constitution. The complete ban acts detrimental to the interests of the poor surrogate mother, whose only means of livelihood is undergoing the surrogacy procedure. The right guaranteed under Article 19(1)(g) can only be restricted by ‘reasonable restrictions’ mentioned under Article 19(2). The restrictions put by the Bill does not seem to be reasonable and hence are violative of Article 19(1)(g) of the Indian Constitution. Putting a complete ban on commercial surrogacy is also violative of Article 21 as it was held in *Consumer Education and Research Center and Ors v. Union of India*,⁹⁰ that “the expression ‘life’ under Article 21 has a wider meaning, including the ‘right to livelihood’⁹¹. The same has also been recognized in *Olga Tellis v. Bombay Municipal Corporation*⁹².

⁸⁸ *Supra* note 68, s. 15.

⁸⁹ *Supra* note 68, s. 24.

⁹⁰ *Consumer Education and Research Center and Ors, v. Union of India*, (1995) 42 SCC 3.

⁹¹ *Id.*

⁹² *Olga Tellis v. Bombay Municipal Corporation*, AIR 1986 SC 180.

- The issue of altruistic surrogacy⁹³

The Bill provides for a complete ban on commercial surrogacy and rather proposes altruistic surrogacy, as a practice. The Bill also mandates that the surrogate mother should be a close relative of the intending couple/woman. However, in the context of such close relative, it is important to ascertain whether she is actually willing⁹⁴ to undergo the procedure or she is coerced by her family. Taking into account the patriarchal structure and the power equations in the Indian households, female members of the family have a very little say.

By limiting the choice of surrogate mother to a close relative of the intending couple/woman, the Bill largely limits the options available to such couple/woman. The entire process of convincing a close relative could be an emotionally tiresome task, which might also lead to breaking family ties.

Furthermore, the entire process of surrogacy and the birth of the child might have severe psychological ramifications on her as she, being close relative of the intending couple/woman, would see the child grow in the same family, over the years.

- Restricted definition of intending couple/woman

With respect to the exclusion of certain categories of individuals from the definition of intending couple/woman, it is important to note that the definition of 'intending couple' is limited to married couple of Indian origin having a medical indication. Further, the definition of 'intending woman' is limited to an Indian woman who is a widow or a divorcee. An analysis of these two definitions highlights that foreigners, homosexual couples, couples in live-in relationship and unmarried couples are excluded from availing surrogacy under the Bill.

These exclusions are unreasonable and violative of Article 14 of the Constitution of India as it does not stand the test of reasonable classification, especially when individuals, irrespective of their marital status, are allowed to adopt children⁹⁵ and the child born out of the live-in relationship of a live-in couple is given the status of a legitimate child of the couple⁹⁶. Further, the Bill has also not considered the rights of third gender as recognized under *National Services Authority v. Union of India*⁹⁷.

⁹³ INDIA CORPORATE LAW, <https://corporate.cyrilamarchandblogs.com/2019/04/surrogacy-bill-and-art-bill-boon-or-bane/> (last visited Jan. 8, 2020).

⁹⁴ *Supra* note 68, s. 4(iii)(b)(II).

⁹⁵ Juvenile Justice (Care and Protection) Act, 2015, s. 57(3) and s. 57(4).

⁹⁶ *Tulsa & Ors v. Durghatiya & Ors*, AIR 2008 SC 1193.

⁹⁷ *National Legal Services Authority v. Union of India*, AIR 2014 SC 1863.

- Violative of Article 21 of the Constitution

With reference to the issue of complete ban on commercial surrogacy in India as well as the exclusion of certain classes of adult men and women from availing the benefits of surrogacy, a plethora of cases have established that the right to reproductive autonomy as a part of right to life and personal liberty under Article 21 of the Constitution of India.

In the case of *Kasturu Lal Lakshmi Reddy v. State of J&K*⁹⁸, the Supreme Court held that-

*“the right to life and personal liberty under Article 21 must be interpreted in a broad manner to include within its ambit all varieties of rights which go to make up the personal liberty of man including the right to enjoy all the materialistic pleasures and to procreate as many children as one pleases.”*⁹⁹

Further, in *R. Rajgopal v. State of Tamil Nadu*¹⁰⁰, it was held that the ‘right to life’ under Article 21 includes ‘right to privacy’. *“An individual has the right to decide over matters such as family, marriage, procreation, motherhood, childbearing among other things.”*¹⁰¹

The Andhra Pradesh High Court in *B K Parasarathi v. State of Andhra Pradesh* held that *“the right to make a decision about reproduction is essentially very personal decision either on the part of the man or woman.”*¹⁰² The court agreed with the decision of the United States Supreme Court in *Jack T. Skinner v. State of Oklahoma*¹⁰³ which characterized the right to reproduce as *“one of the basic civil rights of man”*¹⁰⁴.

Furthermore, the Apex Court in *Suchita Srivastava v. Chandigarh Administration*¹⁰⁵ observed that a woman's right to make reproductive choices has been interpreted as a dimension of ‘personal liberty’ as understood under Article 21.

In *Devika Biswas v Union of India*¹⁰⁶, the Supreme Court held that the right to reproduction is an important component of the ‘right to life’ under Article 21 of the Constitution.

The most recent and the much-celebrated case of *Justice K.S. Puttaswamy v. Union of India* also reiterated that the reproductive choices of the women is an aspect of personal liberty under Article 21 of the Constitution of India.

⁹⁸ *Kasturu Lal Lakshmi Reddy v. State of J&K*, AIR 1980 SC 1992.

⁹⁹ *Id.*

¹⁰⁰ *R. Rajgopal v. State of Tamil Nadu*, 1995 AIR 264.

¹⁰¹ *Id.*

¹⁰² *B. K Parthasarathi v. State of Andhra Pradesh*, AIR 2000 AP 156.

¹⁰³ *Jack T. Skinner v. State of Oklahoma*, 316 US 535.

¹⁰⁴ *Id.*

¹⁰⁵ *Justice K.S. Puttaswamy v. Union of India*, (2009) 9 SCC (1).

¹⁰⁶ *Devika Biswas v. Union of India*, (2016) 10 SCC 726.

III. CONCLUSION AND SUGGESTIONS

Technological advancement in the medical industry, especially IVF and surrogacy, has played a major role in the lives of individuals who could not enjoy the delights of parenthood owing to certain physiological conditions. The difference in the regulatory approaches of different countries with respect to the use of such techniques has paved a way for transnational business in this context. With respect to surrogacy in India *per se*, non-regulation of surrogacy, coupled with the cost of executing the surrogacy procedures, the availability of cheap and uneducated women, and the power dynamics have led to the development of transnational commercial surrogacy to the extent that it is now considered a hub of surrogacy.

Commercial surrogacy is indeed fulfilling the wishes of parenthood of the commissioning couple, however, the impact of such arrangement on the surrogate mother and the child born out of surrogacy cannot be neglected. In the absence of a regulatory framework, the increase in the activities of transnational commercial surrogacy imply that there is a possibility of increase in the level of exploitation of Indian surrogate mothers,¹⁰⁷ with respect to the lack of informed consent, bargaining power, remedies etc. Further, a legal gap also arises with respect to the status of the child born out of surrogacy (what if the child is born with defects or is not of the sex which the commissioning couple desire, or what if the child is abandoned by the commissioning parents owing to their separation). These factors prompted the government to come up with a mechanism to address the legal gaps in the surrogacy sector in India in order to safeguard the rights and interests of the surrogate mother as well as the child born out of surrogacy. However, these attempts have not yet reached the stage of fruition till date.

The latest Bill on Surrogacy was proposed by the Select Committee in the year 2020. After examining the key provisions of the Bill, it is clear that the Bill has made a few plausible efforts in safeguarding the rights and interests of the child born out of surrogacy, by firstly, prohibiting abandoning the child on the grounds of genetic defect, birth defect, any other medical condition, sex of the child or conception of more than one baby, or any other related reasons; secondly, by considering them as the biological child of the intending couple; and finally, by prohibiting sex selection and forced abortion. However, with respect to safeguarding the rights and interests of the surrogate mother, the Bill has not taken into account the ground reality and has created rather unreasonable classification in laying down the conditions for surrogacy.

The Bill intends to prohibit commercial surrogacy; however, the need of the hour is to regulate commercial surrogacy and not prohibit it completely. The same has been mentioned in the

¹⁰⁷ There have been a substantial amount of literature highlighting the condition of surrogate mothers in India.

102nd Select Committee Report of 2017, which, while analysing the provisions of the 2016 Bill, noted that-

*“there is no doubt that as of today there is a potential for exploitation and the surrogacy model that exists today can and does exploit surrogate women. But this potential for exploitation is linked to the lack of regulatory oversight and lack of legal protection to the surrogate and can be minimized through adequate legislative norm-setting and robust regulatory oversight.”*¹⁰⁸

A balance between the rights of intending couple and the rights of a surrogate mother, in the context of transnational commercial surrogacy, can be achieved by laying down express provisions which require taking informed consent and ensuring that both the parties to the surrogacy contract are on the same footing with respect to the enforcement of their rights under the contract. An effective compliance mechanism can be successful in regulating the ‘exploitative’ aspect of transnational commercial surrogacy.

The Bill further takes a step further and violates the rights of the intending couple/individual by limiting the definition of ‘intending couple/woman’ and making it subject to certain unreasonable conditions.

Therefore, although the Bill of 2020 has attempted to safeguard the rights and interests of the child born out of surrogacy, however, the rights and interests of the surrogate mother, as well as the intending couple/individual have patently been compromised with.

In the light of these loopholes in the Surrogacy (Regulation) Bill, 2020, the following recommendations are suggested-

i. Replacing ‘altruistic surrogacy’ with ‘compensated surrogacy’

In the era of globalization, a number of countries follow the model of compensated surrogacy wherein a range of monetary payments are provided to the surrogate mother as reasonable compensation¹⁰⁹. To prevent exploitation and to cope up with the difference in bargaining power, the amount of compensation should be fixed by the relevant authorities. The amount of compensation should be fixed taking into consideration, the surrogacy procedures and the necessary expenses related to it. It should include the *“lost wages for the duration of pregnancy, medical screening and psychological counseling of surrogate; childcare support or psychological counseling for surrogate mother’s own child/ children, dietary supplements and medication, maternity clothing and post-delivery care”*¹¹⁰ as suggested by the 102nd Select

¹⁰⁸ *Supra* note 63.

¹⁰⁹ *Supra* note 63.

¹¹⁰ *Supra* note 63.

Committee Report.

ii. Broaden the purview of ‘surrogate mother’ to include woman from outside the close confines of family

Limiting the practice of surrogacy to close relatives is not practical and has no connection with the objective to stop exploitation of the surrogate mothers. Further, altruistic surrogacy limited only to close female relatives will lead to compulsion and coercion¹¹¹.

iii. Broaden the definition of ‘intending couple/woman’

The definition of the intending couple/woman should be broadened to include unmarried couple, whether heterosexual or homosexual¹¹², and single woman, irrespective of their nationality, marital status and their ability to bear child.

The Ministry of Women and Child Development was of the opinion that- *“foreigners, every lawfully married infertile heterosexual couples, every Indian woman whether married or single (which include not married/ separated /widow etc.), irrespective of their ability to bear child or not, should be given a chance to enjoy the delights of parenthood through surrogacy”*¹¹³. Although, the Ministry also reiterated the exclusion of single men from the purview of ‘intending person’, taking into account the relevant provisions of the Juvenile Justice (Care and Prevention of Children) Act, 2015 which prohibits adoption of girls by single men¹¹⁴.

¹¹¹ *Supra* note 63.

¹¹² Taking into account the decriminalization of homosexual acts under Section 377 of Indian Penal Code, 1860 in *Navtej Singh Johar v. Union of India*, (2016) 7 SCC 485.

¹¹³ *Supra* note 63.

¹¹⁴ Juvenile Justice (Care and Protection) Act, 2015, s. 57(4).