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The Evolution of Surrogacy and its Shortcomings in India

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ABSTRACT

Surrogacy, often stigmatised, is still one of the ways by which a couple can fulfil their dream of having a child. India, for the longest time has been a surrogate market; attracting a huge number of foreigners to come and find surrogate mothers in the country. The word "surrogacy" is derived from the Latin word "surrogatus," which denotes a replacement or substitute deed. In terms of reproduction, it refers to a deal when a woman agrees to bear another person's kid in exchange for money with the intention of giving it to the intended parents. This practice, however, has always had mix opinions of people. Many considered it a taboo and an 'easy way' out of pregnancy. Eventually people started accepting the norms of surrogacy and of Assisted Reproductive Technologies (ART) and thus made India one of the largest largest market from where people could 'rent a womb.' This is where the need for regulation was realised and thus the parliament made various bills and acts in order to regulate the functions of surrogacy and its relative markets. The paper analyses whether the need and regulations of surrogacy bills have been duly met or if their still remains discrepancies within the acts.

Keywords: *surrogacy, women rights, LGBT, shortcomings.*

I. INTRODUCTION

Surrogacy, often stigmatised, is still one of the ways by which a couple can fulfil their dream of having a child. India, for the longest time has been a surrogate market; attracting a huge number of foreigners to come and find surrogate mothers in the country. The word "surrogacy" is derived from the Latin word "surrogatus," which denotes a replacement or substitute deed. In terms of reproduction, it refers to a deal when a woman agrees to bear another person's kid in exchange for money with the intention of giving it to the intended parents. This practice, however, has always had mix opinions of people. Many considered it a taboo and an 'easy way' out of pregnancy. Eventually people started accepting the norms of surrogacy and of Assisted Reproductive Technologies (ART) and thus made India one of the largest largest market from where people could 'rent a womb.' This is where the need for regulation was realised and thus the parliament made various bills and acts in order to regulate the functions of surrogacy and

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its relative markets. The paper analyses whether the need and regulations of surrogacy bills have been duly met or if their still remains discrepancies within the acts.

(A) What is surrogacy?

Surrogacy is a long-established form of assisted reproduction. Gestational surrogacy is an arrangement in which a female (carrier) is contracted to bear a child for another couple known as the intended parents. The process of in vitro fertilisation is used in surrogacy.

In this procedure, the intended parents' eggs are fertilised in a laboratory and a limited number of the resulting embryo(s) are transferred into the carrier's uterus. The word 'surrogate' is derived from the Latin word 'subrogare' which means "appointed to act in place of". The couple who intends to raise the child after its birth is referred to as the intended parent(s).²

In commercial surrogacy, a gestational carrier is paid to bear the child in her womb in commercial surrogacy, and she is frequently approached by infertile couples who can borrow, save, or afford to cover the costs involved. Commercial surrogacy is commonly referred to in derogatory terms such as 'baby farms' or 'outsourced pregnancies'. Altruistic surrogacy occurs when the surrogate receives no financial reward or remuneration for the services provided by her, despite the fact that all pregnancy related medical expenses, such as check-ups, maternity clothing, or other related expenses, are covered. In most cases, intended parents engage in altruistic surrogacy arrangements with women they already know. Surrogates are typically close relatives of the intended parents.³ There are countries such as Australia, Greece, Canada and even India have adopted the concept of 'Altruistic Surrogacy.' However, countries like Georgia and Ukraine have made commercial available to all, though due the Ukraine and Russia crises, the surrogates were forced, to either remain in the war zone or to flee to countries where surrogacy may not be recognised. There are countries that have banned all forms of surrogacy all together, this includes countries like Spain, Ireland, Italy. The reason behind the ban is to protect the women from exploitation and safeguard women whose wombs are being used as a commodity.

II. SURROGACY IN INDIA

The process of surrogacy had come under the legalisation process in the 1980's, after Harsha Chawla, an IVF baby, was born on August 6, 1986, at Mumbai's King Edward Memorial Hospital. Following this, the Government of India took the initiative to educate the people of

²In-vitro' means outside the living body and in an artificial environment (as opposed to 'in-vovo' which means taking place in a living organism) ²Gestational Carrier (Surrogate)' (Reproductive Facts)

³Urvi Gupta, 'Surrogacy: History and Contemporary laws with focus on Commercial Surrogacy' [2021]

India about assisted reproductive technology. It was later legalised in India in 2002. Commercial surrogacy in India skyrocketed following the legalisation of surrogacy. According to a United Nations study published in July 2012, the surrogacy industry in India is worth \$400 million per year. Prior to 2008, commercial surrogacy was practised in India without any legal guidelines or statutory regulatory mechanism. Because of the cheaper surrogacy rates in India, the country has become a 'baby boom' market for couples from all over the world.⁴ Surrogates were readily available in Indian cities - Madhya Pradesh's Indore, Gujarat's Anand, Thiruvananthapuram, Maharashtra's Pune and Mumbai, Kolkata, and Delhi.

Childless couples from various parts of the world travelled to India in search of a surrogate, because the number of surrogate mothers available in India is greater compared to other countries. Surrogacy arrangements were usually made at random and could have been deceptive, especially since surrogates belonged (mostly) from India's lower socioeconomic strata. Hence, making the country a large supermarket for surrogacy because of the cheaper availability of surrogate mothers, and due to the availability of greater reproductive labourers.⁵

(A) Why is India One of The Largest Surrogacy Market?

Numerous factors might account for India's rise as a global surrogacy leader: the availability of English-speaking people, the lower cost of surrogacy arrangements compared to other locations, such as the United States; a large number of highly qualified doctors who attended the top medical schools in India, the United Kingdom, or the United States; the significant Indian diaspora around the world; and the lower cost of surrogacy arrangements. India has been known as the "mother destination" due to the ease with which working-class Indian women may be found, creating a compliant labour market for surrogate mothers.⁶

But, it is necessity more than choice that pushes women to pursue surrogacy as a career. Women who become surrogates are often impoverished and have no job prospects; they are sometimes illiterate and work on the side; they are occasionally refugees; and they frequently reside in slum neighbourhoods. Surrogate's spouses are either working in informal or contract jobs or are unemployed. As a result, the primary motives for Indian women to become surrogates may be connected to acute necessities, debt repayment, or home ownership. Surrogacy might become a "survival strategy."⁷

⁴P M Arathi, 'Report of a Study to Understand the Legal Rights and Challenges of Surrogates from Mumbai and Delhi' (National Human Rights Commission)

⁵Ibid

⁶Sharmila Ruddrappa, 'Altruistic Agencies and Compassionate Consumers: Moral Framing of Transnational Surrogacy' [2015] published by: Sage

⁷ Amrita Pande, 'Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker' [2010]

Nonetheless, a sample from Amrita Pande's research shows that the majority of the women engaging in surrogacy were not among the poorest women in the region analysed, and that they had work. The "new opportunity" of surrogacy which led to higher income in comparison to their previous job lured them into accepting surrogacy as a mode of employment. With their lower levels of education and lack of economic employment prospects, they could not hope to find a better opportunity, than this, to earn money.⁸

III. WHY THE NEED TO REGULATE THE MARKET

India, with its legalisation of surrogate, markets, saw a huge commercial increase in no time. With no regulation of the market arose the ethical and legal issues. The ethical issue and the main concern were that of women exploitation. Women exploitation took in two ways, one, they were coerced into being surrogate mother. The coercive power here was the 'Money' that they got for the service.⁹ As many of the surrogate mothers were uneducated and came from poor backgrounds, the money they got in this business attracted them. Moreover, various middlemen and agents coerced them into believing that they will earn a fortune by 'Renting out their Womb.' Which instigates the next type of exploitation, that is, not getting paid for the work and poor conditions. Most of the middlemen and agents took a major chunk of money that would be promised to the surrogates, denying them the earning of their labour. Many surrogates were asked to live in the hostels, for the protection of the intended parents and the normal societal stigma. Due to living in the hostels, the surrogate mothers would hardly get to meet their families.

The other issue that arose was the Legal issue: India had no laws or rules regarding surrogacy. The Indian Council of Medical Research (ICMR)¹⁰ created national regulations for fertility treatments in 2005.¹¹ However, those guidelines were not binding on the law. Because of this, foreigners benefitted from the liberal policies of doctors in private Indian hospitals who were willing to use prohibited, strictly controlled, or restricted reproductive methods inaccessible in many nations across the world. However, the need of regulation was seriously recognised in the '*Baby Manji Yamada v. Union of India.*'¹² In 2008, a case came forward

⁸ Ibid

⁹ Alan Wertheimer, 'Philosophy & Public Affairs,' Summer, 1992, Vol. 21, No. 3 (Summer, 1992), pp. 211-239 Published by: Wiley <<https://www.jstor.org/stable/2265356>> accessed on 13 March 2023

¹⁰ Ashish Chug & Satarupa Chakravorty, Surrogacy Arrangements: Comparative Dimensions And Prospective Analysis Of The Law In India (2000), <<http://www.surrogacy.com/legals/article / india.html>> accessed on 15 March 2023

¹¹ The draft National Guidelines were prepared by an expert committee consisting of distinguished professionals, scientists, and educationalists from relevant spheres of study. Id.

¹² *Baby Manji Yamada v. Union of India*, [2008] 13 SCC 518

known as ‘The Baby Manji case,’ in which a baby named Manji was born in Anand (Gujarat), through surrogacy to a Japanese couple. The couple divorced before the birth of the child. The father of the child, was then barred from taking custody of the child as Indian law prohibits unmarried men from taking custody of the child and the Japanese law did not recognise surrogacy. Eventually, a Habeas Corpus Writ Petition was filed before the Rajasthan High Court “challenging the legality of surrogacy and criticising it as feeding an illegal industry in India” and stressed on the need of enactment of a law pertaining to the issue of legality. The baby got a visa but the case underscored the need for a framework to regulate surrogacy in India. Therefore, the above case can be said to be the genesis of the legislations regarding surrogacy in India.¹³

This case found its relevance by not only being the first judgement relating to surrogacy that was made by the Supreme Court of India, but also in highlighting the absence of regulation of the existing surrogacy industry in India. Due to this reason, the need for a regulation was recognized by the legislation and set out to form the bill.

IV. CHRONOLOGY OF THE BILL

Up until 2005, there were no laws or rules in India governing the practise of surrogacy or assisted reproduction, the running of infertility clinics, or the supervision of their operations. The National Guidelines for Accreditation, Supervision, and Regulation of Assisted Reproductive Technology (ART) Clinics in India (ICMR Guidelines) were published in 2005 by the Indian Council of Medical Research (ICMR) and National Academy of Medical Sciences (NAMS) to address this gap and offer a way to maintain a national registry of such clinics in India. The Law Commission of India then addressed the "Need for Legislation to Regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of Parties to a Surrogacy" in its 228th Report, which was presented on August 5th, 2009, recommended that commercial surrogacy be outlawed because it lacked a suitable legal framework. Because of low costs, foreigners mostly exploited surrogacy in India, which led to mistreatment of the mostly illiterate and destitute surrogate moms. The Government of India's Ministry of Home Affairs issued a regulation in 2015 outlawing commercial surrogacy for foreigners in light of the aforementioned.

(A) 2021 Surrogacy (Regulation) Act

The first Surrogacy (Regulation) Bill was presented to Lok Sabha in 2016, but it was abandoned

¹³The current status of commercial Surrogacy in India. <<https://www.indialawoffices.com/legal-articles/current-status-of-commercial-surrogacy-in-india>.> accessed on 23 March 2023

after the dissolution of Parliament. Then, on July 15, 2019, the Surrogacy (Regulation) Bill, 2019 (Surrogacy Bill 2019) was presented in Lok Sabha by the Ministry of Health and Family Welfare. It was authorised on August 5, 2019, by the Lok Sabha. The Surrogacy Law of 2019 aims to regulate the surrogacy process in order to safeguard the rights of children born through surrogacy and stop mothers from being exploited.

The Surrogacy Bill 2019 was referred for review to a Select Committee made up of 23 Rajya Sabha members on November 21, 2019, by the Rajya Sabha. After that, on 5 February 2020, the Select Committee's report was given to the Rajya Sabha, offering revisions to the aforementioned law. After that, on January 25, 2022, the Surrogacy (Regulation) Bill 2021 was introduced and notified as the Surrogacy (Regulation) Act, 2021 (Surrogacy Act). However, there were significant changes that were made from the 2019 act to the 2021 act; one of the major change that made into the bill was regarding the eligibility criteria to be a surrogate. In the 2019 surrogacy bill, the surrogate mother had to be 'a close relative.' This very requirement was removed in the 2021 bill which explicitly stated in the provision that 'any willing woman' can act as a surrogate. Surrogate's rights were also recognised by providing them 36 months of insurance coverage as opposed to 16 months period that was provided in the prior bill (2019 bill).¹⁴ This insurance covers expenses of the complications arising out of the pregnancy and also the postpartum delivery complications.¹⁵

The Surrogacy Act 2021 has several restrictions that made the practise more restrictive, including, but not limited to:

- i. Registration of surrogacy clinics shall be mandatory, (*Section 11*)
- ii. No commercial surrogacy, only altruistic surrogacy (without monetary compensation to the surrogate mother other than the medical expenses and insurance coverage during the pregnancy) would be allowed to be taken up by the surrogacy clinics. (*Section 3*)
- iii. Surrogacy clinics would not be allowed to store/sell/import human embryos or gamete for surrogacy. (*Section 38*)
- iv. All matters related to abortion would be allowed to be performed by surrogacy clinics with due consent only. For instance, abortion would be allowed to be performed with the written consent of the surrogate mother and the appropriate

¹⁴Ministry of Law and Justice, The Surrogacy (Regulation) Act, 2021, pp-6

¹⁵PTI, "Couples Opting for Surrogacy to Buy Three-Year Health Insurance for Surrogate Mothers: Govt" (The Hindu June 23, 2022) <<https://www.thehindu.com/news/national/couples-opting-for-surrogacy-to-buy-three-year-health-insurance-for-surrogate-mothers-govt/article65556439.ece> > accessed April 19, 2023

authority (Section 10), the termination must take place within the compliance of the Medical Termination of Pregnancy Act, 1971.”¹⁶

*The Assisted Reproductive Technology (Regulation) Bill 2020 (ART Bill 2020), which aims to regulate Assisted Reproductive Technology services across the country, was introduced in Lok Sabha on September 14, 2020. The Department-Related Parliamentary Standing Committee on Health and Family Welfare received both the Surrogacy Bill 2020 and the ART Bill 2020 on October 3, 2020 (Standing Committee). The mentioned Standing Committee presented a report on the ART Bill to the Rajya Parliament and Lok Sabha on March 19, 2021, along with recommendations for how to make it more comprehensive. They made provisions where single women can avail the Assisted Reproductive Technology services along with the foreigners who want to avail these services.*¹⁷

V. ARE THE OBJECTIVES OF THE ACT MET?

(A) Prohibition of Commercial Surrogacy

Until it was outlawed in India in December 2018, commercial surrogacy was estimated to be worth between \$500 million and \$2.0 billion¹⁸. It has been derided by many opponents as the "global baby business"¹⁹. The prospects made possible by ARTs like in vitro fertilisation (IVF), as well as the relative accessibility of travel in a globalised environment, can be attributed to the seemingly growing international trend of procreative travel. So, having a family is no longer solely associated with having sex, being intimate, and having a traditional family. In reality, the procreative technologies have separated sexuality from procreation.²⁰

Several bioethicists have criticised commercial surrogacy as a practise with a huge risk of subjecting women to exploitation²¹, highlighting the precarious socioeconomic backgrounds of many women, particularly a scenario visible in the developing countries, who may have chosen to become surrogates solely to escape poverty. It would be incorrect to make generalisations

¹⁶Ajay Bhargava (Senior Partner), Abhisar Bairagi (Partner), Milind Sharma (Senior Associate) and Natasha Syal (Associate) are a part of the Disputes Resolution team at Khaitan & Co, 'The Evolution Of Laws Around The Practice Of Surrogacy And Assisted Reproduct'

¹⁷Report Of The Select Committee On The Surrogacy (Regulation) Bill, 2019

¹⁸Dutta S., Sarkar S. *Towards a Humane Approach to Surrogacy*. Business Standard; Delhi, India: 2016. Last Updated: 17 November 2016

¹⁹nchin A. Reproductive Tourism and the Quest for Global Gender Justice. *Bioethics*. 2010;24:323–332. doi: 10.1111/j.1467-8519.2010.01833.x.

²⁰Montanari Vergallo G. The transforming family: Heterologous fertilization and the new expressions of family relationships in Italian jurisprudence and European Court of Human Rights rulings. *Med. Law Int*. 2020;19:282–297. doi: 10.1177/0968533220909412.

²¹Karandikar S., Gezinski L.B., Carter J.R., Kaloga M. Economic Necessity or Noble Cause? A Qualitative Study Exploring Motivations for Gestational Surrogacy in Gujarat, India. *Affilia*. 2014;29:224–236. doi: 10.1177/0886109913516455.

when dealing with such a complex and multifaceted issue, but there is a chance that at least some of these women may be subjected to exploitation. Several bioethicists and sociologists have noted that because of the financial incentive.

It is important to emphasise that simply outlawing commercial surrogacy won't address the underlying problems because doing so could create an underground market that would likely endanger and violate the rights and interests of vulnerable women who would turn to illegal and covert surrogacy to ease their financial hardships.²² However, as some observers have noted, by promoting altruistic surrogacy as the only option that is legal, the practise may ultimately become completely unregulated, which could result in even worse female exploitation. The Surrogacy Act, which also forbids paying the surrogate any money, outlaws commercial surrogacy in India but enables altruistic surrogacy. This broad restriction goes against the ruling in *Suchita Srivastava v. Chandigarh Government*²³, which stated that Article 21 of the Constitution protects the right to choose one's reproductive options. The prohibition on commercial surrogacy prevents women from using their potential to procreate for financial advantage, notwithstanding the physical, mental, and emotional labour as well as the medical costs they incur before, during, and after the pregnancy.

In 2016, 102nd report by the Parliamentary Standing Committee on Health and Family Welfare advocated for suitable pay for surrogates in place of the repeal of the prohibition on commercial surrogacy. This can also be violative of Article 19(1)(g) of the Indian Constitution, which states 'freedom to trade and profession.' Women are allowed to choose the profession they wish to pursue, they have 'right to bodily autonomy,' thus such restrictions such as absolute ban is not a solution.²⁴ Yet, the Surrogacy Act ignores this defence as well as Articles 23 of the UDHR (The Universal Declaration of Human Rights) and 7 of the ICESCR (International Covenant on Economic, Social and Cultural Rights) which demand a fair wage in exchange for labour performed by humans. However, there are a number of drawbacks to altruistic surrogacy. With altruistic surrogacy, the intending parents tend to choose a friend or a family member to act as a surrogate mother. This might generate emotional difficulties for both the surrogate as well the parents due to a considerable lot of relationship risk during the surrogacy process and even continues after the baby is delivered. Altruistic surrogacy further significantly limits the options

²²Rudrappa S. Reproducing Dystopia: The Politics of Transnational Surrogacy in India, 2002–2015. *Crit. Sociol.* 2018;44:1087–1101. doi: 10.1177/0896920517740616.

²³Suchita Srivastava v. Chandigarh Admn., (2009) 9 SCC 15

²⁴Shefali Kolhe & Anuj Kumar Gupta, 'Commercial Surrogacy: A Cluster Of Issues And Complexities Of Rights Under The Indian Constitution'

available to the intended parents in terms of selecting a surrogate mother because very few family members will be willing to engage in the process.²⁵

Keeping this in mind, there was a change, introduced the 2021 bill, from 'close relative' to 'any women who is willing,' this was done as even parliamentarians recognised the rigidity of the previous bill of having not only a closing relative, but a close relative between the age 25-35, be married and also have a child. However, with a ban in commercial surrogacy, there is loss of wages or the time that is spent during pregnancy. Criminalisation of intermediaries who play the role of matching the intended couples to 'willing women,' de facto biases towards a close relative to be surrogate. Although, the provisions regarding the insurance coverage have also seen a rise from 16 to 36 weeks, it can be argued that it doesn't stop the exploitation, if not endorses it further. The act ignores the fact that the surrogate mother might have commitments towards her own family, may even lose her job or take a hiatus, owing to pregnancy which might lead to loss in income. Insurance for health reasons are covered, but what about the other losses that one might have to face? There seems to be no compensation for that neither any extra beneficial monetary benefit that seems to have been provided.

(B) Exclusion of People Under the Act

The Surrogacy Act's biggest problem is its exclusion of members of the LGBTQIA+ community. The LGBTQIA+ community's right to equality, which is guaranteed by Article 14 of the Constitution, has been gravely violated. This also runs counter to the historic ruling in *Navtej Singh Johar v. Union of India*, which decriminalised section 377 (Indian Penal Code) and safeguarded LGBTQIA+ persons' rights.²⁶ The Surrogacy Act's discrimination also violates a number of international human rights treaties, such as Article 10 of the International Covenant on Economic, Social, and Cultural Rights, Article 16 of the Universal Declaration of Human Rights, which guarantees the freedom to marry and have children, and Article 17 of the International Covenant on Civil and Political Rights.²⁷

The surrogacy (Regulation) Bill, 2016 prohibited surrogacy for single parent in India. Many argued on the basis of *K.S. Puttaswamy v. Union of India*.²⁸ As it is a feature of Article 21 of the Constitution, the right to privacy has been recognised as a legally protected right. The term "the right to reproductive autonomy," which is implied to be a component of the right to privacy

²⁵SURROGACY IN INDIA: THE NEED FOR INCLUSIVE LAWS <[HTTPS://OHRH.LAW.OX.AC.UK/SURROGACY-IN-INDIA-THE-NEED-FOR-INCLUSIVE-LAWS/](https://ohrh.law.ox.ac.uk/surrogacy-in-india-the-need-for-inclusive-laws/)> ACCESSED ON 23 MARCH 2023

²⁶Navtej Singh Johar v. Union of India AIR [2018] SC 4321

²⁷SURROGACY IN INDIA: THE NEED FOR INCLUSIVE LAWS <[HTTPS://OHRH.LAW.OX.AC.UK/SURROGACY-IN-INDIA-THE-NEED-FOR-INCLUSIVE-LAWS/](https://ohrh.law.ox.ac.uk/surrogacy-in-india-the-need-for-inclusive-laws/)> ACCESSED ON 30 MARCH 2023

²⁸K.S. Puttaswamy and Anr. vs. Union of India [2017] 10 SCC 1

protected by Article 21 of the Constitution, refers to an individual's choice to have a child through surrogacy. As a result, no one's right to privacy, including the freedom from unjustified governmental intervention into factors that profoundly influence the decision to carry or procreate a child through surrogacy, can be taken away. Under Article 21, also includes 'Right to Human Dignity,' this includes everything that is required to live an accomplished life. This also includes the aim of having a child. How are the intersex people expected to bear children if not through surrogacy? The Indian Supreme Court had said that, "societal morality cannot trump constitutional morality. Societal morality cannot overturn the fundamental rights of even a single person,"²⁹ if this is true then why are the members of LGBTQ+ and men being discriminated from having a child through surrogacy? The law needs to progress with the progress in the society. This is just the opposite of being progressive.

a. The Concern Regarding Single Parents:

In the case of *Karan Balraj Mehta & anr. v. Union of India*,³⁰ Karan Balraj Mehta and Dr. Pankuri Chandra petitioned the Delhi High Court to decriminalise commercial surrogacy under the Assisted Reproductive Technologies (Regulation) Act, 2021, and to challenge the exclusion of a single unmarried male and a married lady with a child, from surrogacy. The petitioner, Karan Mehta, argued that it is a single, unmarried man's personal decision to have a child through surrogacy, and that they are prohibited from doing so because it is discriminatory and goes against Articles 14 and 21 of the Constitution. Additionally, the Act disqualifies Petitioner No. 2 Dr. Pankuri Chandra because she is devoid of a medical condition that would need surrogacy and is unable to locate and obtain consent from a competent surrogate mother. The petition argues that the right to "reproductive autonomy" is a component of the right to privacy safeguarded by Article 21 of the Indian Constitution. Hence, it is not possible to abolish any resident's or individual's right to protection against unjustified legislative intrusion into matters that often affect a decision to bear or sire a child through surrogacy (There is a scheduled hearing for this petition). The recent developments in the bill, did include the provision of allowing single women, but only widowed and divorced women, to opt surrogacy as an option for bearing a child. This does seem unfair to other women who had not been married before. Many career-oriented women, who are single, might want to hire a surrogate to have a child, yet due to their exclusion from the bill, they wont be able to do so.³¹ Things for men are different, no single men whether widowed or divorced cant opt for surrogacy. This seems to be violative of Article

²⁹Navtej Singh Johar v. Union of India AIR [2018] SC 4321

³⁰KARAN BALRAJ MEHTA AND ANR. VS. UNION OF INDIA, CASE NO. WRIT PETITION (CIVIL) NO. 8448 OF [2022]

³¹Ruby L. Lee, 'New Trends in Global Outsourcing of Commercial Surrogacy: A Call for Regulation' (2009) 20 Hastings Women's LJ 275

14 of the Indian Constitution, as they provide no rational nexus between their reasons of not letting divorced or widowed men from having the child (surrogacy). When people are demanding for equal rights, then men and single women must also be given right to choose and adopt surrogacy as an option.

b. Concerns Apart From Infertility:

As the time progressed, so did health issues amongst men and women. Especially amongst women, who is no stranger to PCOD/ PCOS (Polycystic ovary syndrome). The majority of female endocrine disorders, polycystic ovarian syndrome (PCOS) affects 6–10% of women of reproductive age. Around 20–30% of women have polycystic ovaries (PCO) as detected by ultrasound.³² Infertility is linked to ovulatory dysfunction, which is typically exhibited by oligomenorrhea, which is defined as eight or fewer menstrual cycles per year, or amenorrhea, which is the lack of menstrual flow.³³ Therefore, this may lead to women wanting procreate using ‘surrogacy,’ though it might not necessarily include the possibility of the woman being infertile, it can still cause complication. By not rendering them infertile, the chance of surrogacy gets eliminated for them.

A Select Committee was formed by Rajya Sabha, and they recommended in their report to re-furnish the definition of infertility, that is, reduce the period to one year from the previous suggested five years period. The five-year long period was, undoubtedly, considered a long wait for the couples to have a child and thus the committee found it apt to make this change.³⁴ But, the bill does require the intending couple to be eligible by obtaining the ‘certificate of essentiality’ and ‘certificate of eligibility’ which shall be given by the authority, once infertility is proved. If a couple, though not infertile, has other reasons such as ‘fear of passing a genetic disease’ to their children or just doesn’t want to bear a child, what happens then? What about the rights of such women? A woman should be entitled to decisions upon her right to control the body, fertility and motherhood choices;³⁵ in these provisions not only come out as vague, but also arbitrary by not addressing the issues of ‘choice of a woman.’

³²Maryse Brassard, Youssef AinMelk, Jean-Patrice Baillargeon, Basic Infertility Including Polycystic Ovary Syndrome, *Medical Clinics of North America*, Volume 92, Issue 5, 2008, Pages 1163-1192, ISSN 0025-7125, <https://doi.org/10.1016/j.mcna.2008.04.008>.

³³Alexander Swanton, Lisa Storey, Enda McVeigh, Tim Child, IVF outcome in women with PCOS, PCO and normal ovarian morphology, *European Journal of Obstetrics & Gynecology and Reproductive Biology*, Volume 149, Issue 1, 2010, Pages 68-71, ISSN 0301-2115, <https://doi.org/10.1016/j.ejogrb.2009.11.017>.

³⁴Report Of The Select Committee On The Surrogacy (Regulation) Bill, 2019

³⁵Arijeet Ghosh & Nitika Khaitan, ‘A Womb of One’s Own: Privacy and Reproductive Rights’ (EPW Engage, October 31 2017) <<https://www.epw.in/engage/article/womb-ones-own-privacy-and-reproductive-rights>> accessed 15 April 2023

The country needs to recognise these concerns and check whether what they have decided, fits to the new normal or not.

VI. CONCLUSION

There existed, indeed a bright motive to protect the women and children in the country by bringing in the surrogacy laws. Protection of surrogates from exploitation, protection of children, born out of surrogacy, from the chance of being involved in prostitution, acts of terrorism or from being used for unethical genetic research.³⁶ As well as protecting the intended parents, by drawing out broad boundaries as to what can be done and what cannot. However, it is difficult to ignore the fact that the regulation, is flawed in various senses. The idea of Altruistic surrogacy, might not work for everyone; the exclusion of various sections of the people from the society, has in indeed upset them. The bill also only takes into picture the ‘medical condition’ (infertility or disease), but it leaves out on career-oriented female population, who are keen on being mothers but aren’t in the position of putting their career on hold.³⁷ Surrogacy, is also seen as a more viable option than adoption, because of the obsession with blood and bloodline. With a ban on commercial surrogacy and ultimate promotion of Altruistic surrogacy, things will only get messier in the country. Instead, a regulation on commercial surrogacy with important checks would have saved, not only the now ‘so-called’ (legally) unemployed women, but would have saved the nation from another racket running under their nose and probably would have helped in increasing the economy by maintaining the ‘Hub’ status.

³⁶Mahendra Kumar Singh, New Laws to Rein in "Womb Business," (THE TIMES OF INDIA, Oct. 31, 2007) <<http://timesofindia.indiatimes.com/larticleshow/2503791.cms>>

³⁷ Gagandeep Kaur, Outsourcing a Womb, THE HINDU BUSINESS LINE, Apr. 6, 2007, at Life-4, available at <<http://www.blonnet.com/life/2007/04/O6/stories/2007040600190400.htm>> accessed on 14 April 2023