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RIGHTS OF HOMOSEXUALS FOR SURROGACY IN INDIA: CRITICAL ANALYSIS OF THE SURROGACY (REGULATION) BILL 2019

ABSTRACT

Surrogacy as a concept has been prevalent in India from immemorial times. Tracing this concept for homosexual couples leads to uncovering of the ancient times wherein many examples can be found of the same. It is a bane for all the couples who are medically incapable to give birth to a baby. But it also has some negative aspects such as forceful surrogacy, which in turn is increasing human trafficking, violations of rights of surrogate mother, allurement to a woman to become a surrogate mother and hence supporting commercial surrogacy. Keeping in mind these issues, The Surrogacy (Regulations) Bill 2019¹ has been passed by Lok Sabha in 2019 banning commercial surrogacy and allowing altruistic surrogacy after putting many restrictions and conditions, but only to heterosexual married couples. Decriminalising section 377 of IPC on one hand, but not allowing homosexuals to have a child is not a balanced equation. Thus, the paper intends to show the lacunas in the current legal regime and the plight of homosexuals. The paper is an effort to balance the rights of homosexuals and focuses on rethinking on the current bill because if the current bill becomes a law then it is certainly a denial to homosexuals for their right to reproduce, create their own family, right to parentage which is violation of Right to Life.

Keywords: Surrogacy, Rights of homosexuals, Right to Reproduce, Right to Parentage.

1. INTRODUCTION

Surrogacy as a concept has been prevalent in India from immemorial times. Tracing this concept for homosexual couples leads to uncovering of the ancient times wherein many examples can be

¹'The Surrogacy 2019 Bill is not treating Homosexuals and other married couples equally under article 14 and also not allowing homosexuals to enjoy Right to life under article 21 to the extent and thus it is injustice to them.' 'The Surrogacy (Regulation) Bill 2019', (PRS Legislative Research) <<http://prsindia.org/billtrack/surrogacy-regulation-bill-2019>> accessed 01 January 2020.

found of the same. But moving towards the modern era leads us to the truth that identity of the homosexuals was lost and was unrecognised in India. It was not inexistent, but not also recognised till the decriminalisation of section 377. After this decriminalisation, the new issue which has arisen is of the right to reproduce, right to extend family, and no discrimination under article 19 and 21 by not having surrogacy rights to homosexual couples.

Though section 377 have been decriminalised in the latest judgement of “Navtej Singh Johar vs. Union of India” but still homosexuals have not been given a place under The Surrogacy (Regulations) Bill 2019 as a category who are being allowed to adopt the procedure of surrogacy for having their own child. This Bill has been passed by Lok Sabha in 2019 banning commercial surrogacy and allowing altruistic surrogacy after putting many restrictions and conditions, but only to heterosexual married couples. Hence, Bill is not treating homosexuals and other married couples equally thereby not providing them Right to life under article 21 to the extent of having a baby by way of surrogacy.

In the 2008 version, ARTs were available to single persons, married couples and unmarried couples. Though the problem for homosexual couples for surrogacy was not raised at that time because section 377 was not decriminalised and also surrogacy was open until Surrogacy Bill 2016 which put the ban on homosexuals to adopt surrogacy. Due to the rise in homosexual relationships and subsequent building and extending their families, this paper is an effort to balance the rights of homosexuals and focuses on rethinking on the current bill because if the current bill becomes a law then it is certainly a denial to homosexuals of their right to reproduce, create their own family, right to parentage which is violation of Right to Life.

2. TO REGULATE SURROGACY IN INDIA: AN ATTEMPT

Surrogacy has been an important procedure for those couples who could not conceive due to some complications and wanted to have a baby of their own. In India it has its own journey from the year 2002. Many attempts have been made by the parliament to fill the vacuum created by the lack of regulation in this area but they have not been successful till today. Therefore, author explains the stand of surrogacy in India with respect to homosexuals.

The first attempt was made when **National Guidelines for Accreditation, Supervision & Regulation of ART Clinics 2005** were laid down by ICMR and NAMS. These guidelines were given in order to regulate and supervise ART (Assisted Reproductive Technology) clinics so that there can be an assurance of safety and also to bring any kind of medical malpractices in front if any. Thus, it was the need of time which was felt by ICMR (Indian Council of Medical Research) and NAMS (National Academy of Medical Sciences). These guidelines did not talk about homosexuals as intended parents by surrogacy process, although there was a scope of a single parent (woman only) to have a baby through surrogacy though that single parent (woman) could have been a homosexual but laws during that time in India were not wide to accept homosexuality as a concept. **Para 3.16.4 of the guidelines** say that – “There is no legal bar on an unmarried woman going for AID. A child born to a single woman through AID would be deemed to be legitimate. However, AID should normally be performed only on a married woman and that, too, with the written consent of her husband, as a two-parent family would be always better for the child than a single parent one, and the child’s interests must outweigh all other interests”.² These guidelines were not statutory in nature but were followed to an extent.

The second attempt was made by way of **Assisted Reproductive Technology (ART) Regulation Bill and Rules 2008**. As there was no legislation to govern the area of surrogacy and the rights of parties involved there in, government came up with the ART Bill 2008, and posted it on the website of Indian Council of Medical Research (ICMR) and the Ministry of Health and Family Welfare for comments from the general public.³ This bill was based mostly on the guidelines which were given in the year 2005. Surrogacy was allowed to unmarried couples and single parent irrespective of any jurisdiction, including India and to homosexual couples (only from outside India). Sec 2(e) of Bill provided for the definition of couple as “*couple*” means the persons living together and having a sexual relationship that is legal in the country / countries of which they are citizens or they are living in⁴. In the year 2008, this definition was wide enough to include homosexuals under its scope. In India, section 377 was criminalised at that time, but this definition clearly provides for the intention of the legislature of not banning the procedure of

² Ministry of Health and Family Welfare, National Guidelines for Accreditation, Supervision & Regulation of ART Clinics in India, 2005 <https://www.icmr.nic.in/sites/default/files/art/ART_Pdf.pdf> accessed 5 October 2019

³ Raywat Deonandan and Andreea Bente, ‘India’s Assisted Reproduction Bill and the Maternal Surrogacy Industry’ (2012) 4 (1) IRSSH <<https://pdfs.semanticscholar.org/096b/0262054971157f86609ae504634a226006c9.pdf>> accessed 5 October 2019

⁴ The Assisted Reproductive Technology (Regulation) Bill, 2008

surrogacy for homosexual couples from jurisdiction other than India wherein homosexuality is legal.

228th Law Commission Report 2009 titled “**NEED FOR LEGISLATION TO REGULATE ASSISTED REPRODUCTIVE TECHNOLOGY CLINICS AS WELL AS RIGHTS AND OBLIGATIONS OF PARTIES TO A SURROGACY**” came up. An issue was raised in the report that “whether a single or a gay parent can be considered to be the custodial parent of a surrogate child?” It was answered in the report affirmatively – “it may be stated that a single or a gay parent can be considered to be the custodial parent by virtue of being the genetic or biological parent of the child born out of a surrogacy arrangement. **Japanese baby Manji Yamada’s case**⁵ and the **Israel gay couple’s case**⁶ who fathered the child in India are clear examples to establish that this is possible.”⁷ Thus going according to the report, it is moral and ethical, and also medically safe for homosexuals to have a child.

The 2008 Bill was never presented in Parliament and thus lapsed, but there was a need to regulate the booming industry of surrogacy in India. Thus, 2008 bill was revised in 2010 and drafted as **The Assisted Reproductive Technologies (Regulation) Bill 2010**⁸. The revised bill proposed few changes in the old bill on many grounds. During all of this status of surrogacy for homosexuals remained unchanged, but certain stringency was introduced due to which **Jan Balaz Case**⁹, **Israeli Gay Couple’s Case** came up in the highlight. There were no regulations or laws to stop homosexual from having a surrogate baby in India because section 377 was not decriminalised in India so there was no recognition and legality of homosexual couples in India. Also on the other hand, there were no restrictions on foreign homosexual couples (except certain strict laws) in India to go through surrogacy procedure for having their own baby.

Further this 2010 bill was again revised in 2013 and laid as **Draft Assisted Reproductive Technology (Regulation) Bill, 2013**. This draft restricted the surrogacy to “Indian married couples only, who are infertile” and no foreigner was allowed for the same until he or she was

⁵ (2008) 13 SCC 518

⁶ 2008 (11) SC 150

⁷ Law Commission of India, Need for Legislation to Regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of Parties to a Surrogacy (Law Com No. 228, 2009)

⁸ Centre for Social Research, Final Report: Surrogate Motherhood- Ethical or Commercial (2013) 101

⁹ AIR 2010 Guj 21

married to an Indian citizen.¹⁰ This proposal did not have effect in India as such because of non-recognition of homosexual relations due to criminalisation of section 377 of IPC. Thus it could not have been raised as an issue in India.

Again in 2014, **The Surrogacy (Regulation) Bill 2014** was brought up by an individual i.e. a Member of Parliament introduced bill in Lok Sabha (not sponsored by the government). The important provision in the bill was section 2(d) which defined 'couple' as "*couple*" means two persons living together and having a sexual relationship that is legal in India.¹¹ First time, the definition provided in 2014 bill was wide enough. The definition had the scope to includesurrogacy for gay couples, after same sex relations are allowed in India. If section 377 would have been decriminalised during that time, then homosexuals from India would have also been blessed with the privilege to have their own child through surrogacy. The intention in the bill was very clear on the same line. In **2015**, a government notification prohibited surrogacy for foreign nationals. Further, **Surrogacy (Regulation) Bill 2016** came up.

3. STATUS AFTER DECRIMINALISATION OF ARTICLE 377

Section 377 of IPC used to ban unnatural sex between two adults and treated it as unconstitutional. It has been a long journey for homosexual couples in India to gain recognition for their existence and identity. In the landmark judgment, of **Naaz Foundation v. Govt. of NCT of Delhi**¹², a Delhi high court bench consisting of Chief Justice Ajit Prakash Shah and Justice S. Muralidhar [decided to strike down section 377](#), saying it violates fundamental right to life, liberty, and equality as enshrined in Indian constitution. This judgement was overruled by the Supreme Court in [Suresh Kumar Koushal vs. Naz Foundation](#)¹³ wherein Court held that amending or repealing section 377 should be a matter left to Parliament, not to judiciary and thus reinstated the constitutionality of section 377 of IPC. In **Navtej Singh Johar v. Union of India**,¹⁴ court finally declared section 377 as unconstitutional saying this section is violative of

¹⁰ Raywat, Supra note 3

¹¹The Assisted Reproductive Technology (Regulation) Bill, 2014

¹²2010 CriLJ 94

¹³(2014) 1 SCC 1

¹⁴[Mirzawardah Beg](#), 'Navtej Singh Johar v. UOI Judgement which decriminalized homosexuality' (iPleaders, 1 July 2019) <<https://blog.ipleaders.in/navtej-singh-johar-v-uo-i-judgment-which-decriminalized-homosexuality/>> accessed 6 October 2019

article 14 and 21. Chief Justice Dipak Misra and Justice AM Khanwalkar has said - “*An examination of Section 377 IPC on the anvil of Article 19(1)(a) reveals that it amounts to an unreasonable restriction, for public decency and morality cannot be amplified beyond a rational or logical limit and cannot be accepted as reasonable grounds for curbing the fundamental rights of freedom of expression and choice of the LGBT community. Consensual carnal intercourse among adults, be it homosexual or heterosexual, in private space, does not in any way harm the public decency or morality.*”¹⁵

The very long journey of the LGBTQ community has been very difficult throughout. It is beyond imagination to understand the fear and pain of this community who lived without any recognition, identity, and existence or lived without any acceptance of its own identity. Decriminalisation of section 377 has given homosexuals a full right to breathe, to accept themselves as they are, openly and has given them right to enjoy all the fundamental rights equally.

➤ **THE SURROGACY (REGULATION) BILL 2019**

After the pronouncement of Navtej Singh Johar judgment, **The Surrogacy (Regulation) Bill 2019** was introduced in Lok Sabha on July 15, 2019 which was passed on August 5, 2019. The said bill was once introduced in the year 2016 but did not pass and thus lapsed in due course of time. The 2016 bill is again introduced in 2019 and thus 2019 bill is on the same line as 2016 bill was. The said bill has not been passed by Rajya Sabha and Rajya Sabha has proposed to send the bill to PARLIAMENTARY STANDING COMMITTEE before taking up for passage for making a report on it. The present pending bill does not include homosexual couple under the definition of intended parents as provided in **sec 2(d) of the said Bill**¹⁶.

In **Surrogacy Regulation Bill 2016**, surrogacy has been discussed as an arrangement whereby an ‘intending couple’ commissions a surrogate mother to carry their child. This Bill permits surrogacy only for couples who cannot conceive a child due to proven infertility. This procedure is not allowed in case of any other medical conditions which could prevent a woman from giving

¹⁵*Id*

¹⁶The Assisted Reproductive Technology (Regulation) Bill, 2019.

birth to a child.¹⁷ The provision of this bill are very narrow, rigid and stringent. In order to reduce the concept of womb renting, malpractices and regulating surrogacy in India, parliament came up with such a narrow bill. Two big problems or loopholes in the bill are: (a) firstly the definition of 'intending parents' which do not include homosexuals anyhow and (b) it allows surrogacy only when the couple cannot conceive a child. By analysing this point we can say that even though if homosexual couples would have been included in the definition of 'intended parents' then also lesbian couples would have fallen outside its scope because in their case they are not infertile, but they cannot become pregnant naturally. Traditional Surrogacy is the only way for them and the same applies for gay couples wherein they are not infertile, but they need a surrogate mother for carrying out pregnancy.

4. DISCRIMINATION UNDER ARTICLE 14 AND 21 FOR HOMOSEXUALS

On one hand, SC has decriminalised section 377 and has talked about treating homosexuals equally under article 14 and providing them 'right to privacy' under article 21 but on other hand government is not doing so. It is said that action speaks louder than words and same has been tried by government by bringing such a one-sided bill which if gets approval from Rajya Sabha will result in hampering the interest of homosexual community and denial of fundamental rights to them. By not including homosexual couples under the definition of 'intended couple' parliament has come up with its intention of treating homosexuals as a different class. It's not a loophole in 'surrogacy bill 2019' but it is an act done intentionally by the pre-occupied status of mind in which parliament is not thinking beyond their lines. Prejudice minds have created a picture and thus are trying to fill colours in it on the grounds of ethics, morality, ethos, culture, effect on parenting of child, etc. It is discrimination to homosexuals that they are not allowed to extend their families by way of surrogacy thereby right to reproduce is being affected which is a violation of article 14 and 21.

➤ RIGHT TO REPRODUCE AND RIGHT TO FAMILY

¹⁷ The Assisted Reproductive Technology (Regulation) Bill 2016.

Surrogacy as a concept can be of two types: traditional surrogacy and gestational surrogacy. In case of homosexual couples, this is not possible by natural way to give birth to a baby when both the parties in a couple is of the same sex. But, they cannot be denied of right to reproduce on the basis of their sexual orientation.

Article 16.1 of the Universal Declaration of Human Rights 1948 provides that “*men and women of full age without any limitation due to race, nationality or religion have the right to marry and found a family*”¹⁸. Judiciary in India too has recognized the reproductive right of humans as a basic right. In the case of **B. K. Parthasarthi v. Government of Andhra Pradesh**¹⁹, Andhra Pradesh High Court upheld “the right of reproductive autonomy” of an individual as a facet of his “right to privacy” and agreed with the decision of the US Supreme Court in **Jack T. Skinner v. State of Oklahoma**²⁰, which characterised the right to reproduce as “one of the basic civil rights of man. Even in **Javed v. State of Haryana**²¹, though SC upheld the two living children norm to debar a person from contesting a Panchayati Raj election it refrained from stating that the right to procreation is not a basic human right.”²²

When right to reproduce and right to family has been recognised as a fundamental right at national and international level still issues arises that why things change for homosexual people or couples because of their sexual orientation, even though it has been proved by the research that it does not affect society at large or to anyone in anyway. Surrogacy is a boon for homosexual couples to complete and extend their family. It is a matter of choice whether to adopt a baby or to have a baby through surrogacy without affecting any other person’s right and freedom. Thus, the laid 2019 surrogacy is full of lacunas.

5. CONCLUSION AND SUGGESTIONS

The following are the observations based on the research and analysis of the present situations.

Thus, the conclusion with suggestions are as follows:

¹⁸ 30 Articles on the 30 Articles of the Universal Declaration of Human Rights’ (ohchr) <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23871&LangID=E>> accessed 6 October 2019

¹⁹ AIR 2000 A. P. 156

²⁰ 316 US 535

²¹ (2003) 8 SCC 360

²² 228th Law Commission, *Supra note 7*

1. The existence of homosexuality was always present in Indian scenario with the absence of its identity or recognition. In modern times, but before the year of 2005, position was very harsh on these people. Such issue of non-allowance of surrogacy to Indian homosexual couples did not ever come up because of non-recognition to their relationship in society. There were no regulations in these areas so absence of laws did not stop the Indian single homosexual people to have their own child through surrogacy.
2. There is no harm in accepting the already prevalent and established concept of surrogacy for homosexual couples and homosexual single parent also. Until and unless any established concept is draconian and against the accepted norms of society, such concept should remain. Homosexuality and existence of surrogacy for them is that concept only. Thus, it should be allowed to them in the 21st century also by lifting the ban from Surrogacy Bill 2019, especially when section 377 has been decriminalised. Homosexuality cannot be judged in isolation, especially when there is a recognised concept of Right to Privacy under Article 21 of the Indian Constitution.
3. The Surrogacy Bill 2019 is regressive as the ambit of the word “couple” is confined to a legally married man and women which as a result deprives people in live-in relationship, single parents and homosexuals of their rights to parenthood. The surrogacy to the same sex couples will help prospective parents to fulfil the lifelong dream of extending their families by maintaining a genetic linkage to their children.
4. If in a heterosexual couple, one partner is infertile then by way of surrogacy they can have a baby but ovum (in case the wife is infertile) or semen (in case the husband is infertile) remains of the donor (may be anonymous) and the legitimacy of the child doesn't get affected and baby remains of the intended heterosexual couple. The same procedure can be applied for homosexual couples. 228th Law Commission report also talked about it.
5. Thinking on the present scenario, if the present bill gets acceptance from Rajya Sabha it would result in discrimination under article 14 and 21 of homosexual couples. Supreme

Court rulings and established international and national principles will be in conflict to the bill. 228th Law Commission Report suggested that prohibition on vague moral grounds without a proper assessment of social ends and purposes which surrogacy can serve would be irrational.²³

6. While looking at the reasons given by legislature for banning surrogacy for homosexuals which is related to concerns on the development of child because of parent's sexual orientation, there is no adverse effect on the mental and emotional quotient of the child raised by homosexual parents. The homosexual parenting might results in open mindedness, tolerance, and can become role models for equitable relationships.

²³ 228th Law Commission, *Supra note 7*