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DISCREPANCIES IN SURROGACY (REGULATION) BILL, 2020

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ABSTRACT

India is termed as the Surrogacy capital of the world since 2002 where people from different corners of the world reached our country to have a biological child of their own. Despite this flourishing market, India witnessed a number of reported and unreported incidents of exploitation of surrogate mothers, abandonment of children born out of surrogacy and rackets of intermediates. In the light of all these, the Union cabinet of the Government of India passed the “Surrogacy Regulation Bill 2020” by putting a blanket ban on commercial surrogacy with an objective to prevent the exploitation of surrogate mothers as well as the intended parents and to ensure the rights of the child born through surrogacy. The bill has turned a blind eye to the Personal Laws of the Country. The bill has not taken into consideration of the various religions of our country, resulting in the conflict of the personal laws and the bill. This has led to question the rights of the surrogate mother, surrogate child and the intended parents. The paper aims at analyzing the Surrogacy (Regulation) Bill, 2020 as it is highly divorced from the realities of Indian personal laws and traces the evolution of bill along with its constitutional validity and the rights of the child, surrogate mother and intended parents.

Keywords: Surrogacy Regulation Bill, Exploitation, Surrogate Mother, Intended parents, Child, Rights, Personal Law.

INTRODUCTION

When India legalized Commercial Surrogacy in 2002, India became a popular destination for the international intended couples considering the option of surrogacy in another country. Since then India witnessed immense growth in the firm's claiming speciality in commercial surrogacy and providing assistance to the intended couple to have a child of their own through the process of “rent a womb”. India became the “surrogate capital of the world” for commercial surrogacy and the prime reason behind this was poverty, which makes poor Indian women rent their womb for money, meet their basic needs and ends. Surrogacy refers to a contract in which a woman carries a pregnancy “for” another couple¹. The Report of the Committee of Inquiry into Human Fertilization and Embryology or the Warnock Report (1984) defines surrogacy as the practice whereby one woman carries a child for another with the intention that the child should be handed

¹Pikee Saxena, Archana Mishra, and Sonia Malik, Surrogacy: Ethical and Legal Issues, VOLUME NO.4, INDIAN JOURNAL OF COMMUNITY MEDICINE, PAGE NO: (1)(2010)

over after birth². It seems to be an attractive way of earning money but the reality is quite complicated. Most surrogate mothers and intended couples are exploited by the agencies as well as a third person due to lacking proper legislation. Although in 2005, ICMR issued guidelines for accreditation, supervision, and regulation of art clinics in India, these guidelines are repeatedly violated³. In the year 2008, Supreme Court of India, pointed out the lack of proper regulation for surrogacy in India in the case of Baby Manji Yamada vs. Union of India⁴. In the 228th report of Law Commission of India, it suggested the government with certain measures to promote altruistic surrogacy and ban commercial surrogacy in India as it is considered in exploiting in nature not only the women's reproductive dignity but also encouraging baby selling. By the year 2016, the Surrogacy (Regulation) Bill, 2016 was introduced in the Lok Sabha .

The Surrogacy (Regulation) Bill, 2020 permits only altruistic surrogacy for the intending couple those who suffer from proven infertility and they must possess the “certificate for eligibility” approved by the appropriate authority. Moreover, this bill requires the surrogate mother to be a close relative of the intended parents and must be a biological mother of another child. This bill bans single parents, homosexuals and live-in-couples from surrogacy, which is a clear violation of Article 14 of the Indian Constitution. In addition to these, the bill violates the “Right to livelihood” and “Right to Reproductive Autonomy” embedded under Article 21 of the constitution and also Article 19(1) (g) which specifically guarantees the “freedom of trade and Profession ‘in India. The bill is in contradiction with law of adoption in India which eventually leads to the conclusion that the bill fails to keep the balance with other rules and regulations.

Surrogacy has opened a Pandora’s box filled with questions of Personal laws. There has been an expeditious growth in the surrogate mothering technology. This has not only been gaining attention of the medical scientists, psychologists, sociologists but jurists as well. There are many questions to be answered relating to the rights of the surrogate mother, the child and the parents.

This method has given rise to innumerable legal issues especially in the domain of personal laws. Among them ,some of issues in personal law are:

- (1) Is the surrogate child legitimate? If legitimate, of whom?
- (2) Is the custodial rights over the Surrogate child vested with the surrogate mother or intended parents?
- (3) Is the surrogate child entitled to succeed the property of the surrogate mother and her husband or intended parents?

WHAT IS SURROGACY?

The word surrogacy is derived from a Latin word “surrogatus” meaning “to substitute or replacement”. “Surrogacy” means a practice whereby one woman bears and gives birth to a child

²Law Commission of India, 228th Report PAGE NO: (10),PARA NO: (1)

³ National guidelines for the accreditation supervision and regulation of ART clinics in India, (LAST VISITED ON11/09/2020/2:00), http://www.icmr.nic.in/art/art_clinics.html

⁴Baby Manji Yamada vs. Union of India, A.I.R. 2009 S.C. 84 (India).

for an intending couple with the intention of handing over such child to the intending couple after the birth.⁵ Surrogacy is a practice whereby a woman agrees to become pregnant by implanted embryo or medically inseminated sperm and bear a child for another person or persons, to whom she intends to transfer the child's care at, or shortly after birth and in return receives the compensation for carrying and delivering the child.

There are four types of surrogacy.

- a. Traditional Surrogacy: The surrogate mother acts as the biological mother of the baby is quite common in surrogacy-friendly countries even nowadays. Artificial insemination or natural methods of reproduction are the methods used in traditional surrogacy and male's sperm is placed in the female's womb.
- b. Gestational Surrogacy: A process where the biological parent's sperm and ovum are used and processed under IVF[In Vitro Fertilization] and then subsequently implanted into the womb of the surrogate mother's uterus.
- c. Commercial Surrogacy: Commercialization of surrogacy services or procedures or its component services or component procedures including selling or buying of human embryo or trading in the sale or purchase of human embryo or gametes or selling or buying or trading the services of surrogate motherhood by way of giving payment, reward, benefit, fees, remuneration or monetary incentive in cash or kind, to the surrogate mother or her dependents or her representative, except the medical expenses incurred on the surrogate mother and the insurance coverage for the surrogate mother.⁶
- d. Altruistic Surrogacy: Surrogacy in which no charges, expenses, fees, remuneration or monetary incentive of whatever nature, except the medical expenses incurred on surrogate mother and the insurance coverage for the surrogate mother, are given to the surrogate mother or her dependents or her representative.⁷

SURROGACY AND RELIGION

It is roughly estimated that there are around 4200 religions still exist in India and in this paper we are trying to figure out how many of those largest religions exactly boost the concept of surrogacy and have identified that among those largely followed religions.

HINDUISM

Hinduism has been in favor of surrogacy since ancient times. It is considered very important in a Hindu Family to procreate to continue the family lineage. According to some ancient texts it is considered Lord Krishna and his elder brother Balaram were born via surrogacy. The biological parents of Lord Krishna were Devaki and Vasudeva, and the surrogate mother was Yeshodha. It is more favored in Hinduism when the child in the surrogate mother has the embryo of the mother and the sperm of the father i.e. the parents who raise the child.

⁵ The Surrogacy (Regulation) Bill 2019, Section 2(zc), (reported by the selected committee)

⁶ The Surrogacy (Regulation) Bill 2019, Section 2(f), (reported by the selected committee)

⁷ The Surrogacy (Regulation) Bill 2019, Section 2(b),(reported by the selected committee)

A son is considered to be the Vanshaudarak i.e. the one who carries on the family blood line and who will help his parents attain moksha after their death. According to some orthodox theories giving their virgin daughter to the husband's family not only increases the parent's prestige, but also is believed to purify them of sin.

BUDDHISM

Procreation in Buddhism is not considered as a moral obligation. There are not teachings or practices that make it compulsory for couples to marry and have children to continue their lineage. Buddhism accepts the concept of surrogacy and it is not considered immoral.

ISLAM

Islam has a divided view on the concept of surrogacy. Some of the scholars consider surrogacy as adultery, because it involves a woman carrying an egg which is not fertilized by her legal husband. As a result of surrogacy the scholars consider the child to be illegitimate. Whereas, the other Muslim thinkers claim surrogacy is acceptable as humans have a responsibility to preserve the human species and that it is in the public interest to allow surrogacy for infertile couples.

CHRISTIANITY

Similar to Islam, Christianity has a divided opinion on Surrogacy. In Catholic Catechism, children are considered as a "Gift of God" and it would be immoral for a third party to between the "one flesh" principle that unites the husband and wife. The Protestants are more liberal to the concept of surrogacy. The churches falling under this umbrella do not consider surrogacy as immoral. They have also posed a question on the psychological problems that the surrogate and the child will face in the future. They also prefer surrogacy to take place with the married couple's egg and sperm who will take care of the child in future.

ADOPTION VS. SURROGACY

Most of the people intend to choose surrogacy instead of adoption as it helps them to have a child of their own i.e. a child born of their genes. The biggest difference between surrogacy and adoption is genetic linkage. People who are struggling to conceive their own may consider the option of assisted reproductive technologies to have a genetic child. In certain cases, the intended mother may have the knowledge that she is incapable of conceiving but has remaining embryos, so surrogacy is the very next best option for them to have a biological child that they have dreamed about.

The procedures of adoption and surrogacy are different in nature both come with certain complexities. Surrogacy is a new concept in terms of legislation, the legislation has pointed out the effective implementation of the Surrogacy (Regulation) Bill, 2020 with an intention to prevent the exploitation of surrogate mothers. The Bill is highly diverse from the Indian realities as it imposes a ban on commercial surrogacy and denying the right of foreigners, homosexuals, single parents to have a biological child of their own. It's impossible to answer the question about which among, Adoption and Surrogacy is a better option but both of the options have their own pros and cons depending upon the intended couple and their requirement.

EVOLUTION OF THE SURROGACY BILL

Commercial surrogacy or “rent a womb” was legalized in India in 2002 and the main objective of this practice was to expand medical tourism in India to a larger extent. Gradually India was known as ‘the hub of surrogacy’. And the main reason behind it was the low cost in India. One more issue can be pointed out as the reason for this is that in India there weren’t any strict legislature to guide the principles for surrogacy. According to the report published by CII in 2012 the size of Indian surrogacy industry was more than \$2 billion a year. In addition to that, more 3000 fertility clinics were started for promoting commercial surrogacy while majority of the them weren’t government recognized ones. The lenient approach by the government towards commercial surrogacy in India led to many unethical practices in this field.

There weren’t any legal procedures or any ethical procedures because of why surrogacy was unregulated business which has been conducted in unethical ways and the main concern was the middlemen and the commercial agencies their main motive was to make maximum profit out of the business. Many surrogate mothers were exploited, because due to the engagement of the middlemen and agencies the surrogate mothers weren’t getting any money. The children born out of surrogacy were abandoned. Many illegal rackets were also formed like rackets for organ trade, embryo import etc. All these led to the necessity for the proper and legal procedures and guidelines for surrogacy in India.

The Law Commission of India in its 228th report recommended to prohibit commercial surrogacy completely in India and also recommended that only ethical altruistic surrogacy should only be practiced in India by enacting proper and suitable legislation. It can be said that the main reason for the widespread surrogacy in India is its poverty because many women were able to earn lots of money by this practice, for their living poor Indian woman used to rent their womb for their bread and butter.

In 2005, Indian Council of Medical Research (ICMR) issued certain guidelines with respect to surrogacy law in India and the main objective of those guidelines was to necessarily regulate the surrogacy arrangements within India. According to the guidelines put forward it stated that the surrogate mother would be entitled to the monetary compensation which have been decided by the couple and the surrogate mother together. In the guidelines one more thing was also specifically mentioned that the surrogate mother should not donate her own egg for the surrogacy because all the parental rights related to the surrogate child has to be relinquished. In 2008 The Supreme Court held that surrogacy permissible in India which increased the international confidence in going in for surrogacy in India⁸. Once it was held by the Gujarat High Court that the child born out of the surrogacy will have surrogate mother’s name in the birth certificate and also that that child will be provided with the Indian passport which considers him as the Indian citizen and the surrogate mother have to give the child for adoption to the couple⁹.

Many cases have provoked the bill that will ban surrogacy for foreign citizens in India. Where foreign citizens won’t no longer be able to approach the Indian mother for surrogacy. Main reason for the ban was the unethical businesses happening in this field.

⁸Baby Manji Yamada vs. Union of India, A.I.R. 2009 S.C. 84 (India).

⁹ Jan Balaz vs Anand Municipality, A.I.R.2010 GUJ 21(India).

On 21st November, 2016 The Surrogacy (Regulation) Bill was introduced in Lok Sabha. The report on the same was given by the committee on 10th August 2017 and on the basis of that report Lok Sabha passed the bill on 19th December 2018. The Surrogacy Bill, 2016 spotlights on counteraction of business surrogacy and advancement of philanthropic surrogacy. The bill likewise shields the surrogate mother and child from abuse. Surrogacy is a path by which a barren wedded couple who are qualified as per the arrangements of the bill would now be able to shoulder a kid with assistance of a surrogate mother qualified according to arrangements of the bill. In any case, the surrogate mother won't be given any money related advantage or pay for renting her womb to the proposed couple aside from her clinical and protection costs during pregnancy.

The Surrogacy (Regulation) Bill 2019 was presented in Lok Sabha 15 July, 2019 and passed by Lok Sabha on 5 August, 2019. At national level as well as state level there will be a Constitution of surrogacy sheets and it permits just moral selfless surrogacy. Indian wedded couples for at any rate five years. They need to give an authentication of vitality and furthermore an endorsement of qualification. Likewise, they need to embrace that they won't surrender the child resulting from surrogacy. To be eligible for a surrogate mother the one should be nearby relative of the expecting couple, the lady must be hitched having her very own child and she ought to be between the age of 25-35 years. The Bill clearly says that the intended couple should choose a surrogate mother with no past surrogacy experience. The Bill additionally looks to deal with the working of surrogacy centers¹⁰. Further, surrogacy facilities in the nation should be enrolled. Moreover, sex determination of a child in the womb is not allowed as it may lead to the exploitation of the child in future.

PROVISION OF THE SURROGACY (REGULATION) BILL, 2020

CHAPTER I (Section 2): This section deals with the definitions used in the bill such as “Altruistic surrogacy”, “Commercial surrogacy”, and it also defines the “intending woman” as an Indian woman who is a widow or divorcee who is between the age of 35 to 45 years and who intends to avail the surrogacy¹¹.

CHAPTER II (Section 3): This section deals with the “Parentage and abortion of surrogate child” according to this section the child born out of surrogacy will be considered as the child of the intended couple and when it comes to the abortion of the surrogate child the consent from the surrogate and mother and the authority which is concerned is mandatory. The abortion should take place according to the Medical Termination of Pregnancy Act, 1971¹².

CHAPTER III (Section 4-10): This chapter has been divided into four parts where the first part deals with different purposes for which the surrogacy is permitted in our country. The second part deals with the eligibility criteria for the couples who are intending to have a surrogate child. Two certificates are included in this part namely “certificate of essentiality” and a “certificate of eligibility” and these two certificates have to be issued by the appropriate authority. Then finally the fourth part deals with “rights of surrogate child” here it says that the surrogate child will have

¹⁰ Ritu Sharma, Deepali Garg and Huma Khan, Surrogacy in India: Current Scenario and Ethical Perspective, Volume 3, Journal of Clinical Obstetrics, Gynecology & Infertility, PAGE NO(2) (2019)

¹¹ The Surrogacy Bill (Regulation) Bill, 2020 (reported by the selected committee)

¹² Medical Termination of Pregnancy Act, 1971, No. 34, Acts of Parliament, 1971 (India)

all the rights and privileges which are available to a natural born child under any law for time being in force¹³.

CHAPTER IV (Section 11-14): This chapter it mainly deals with the “Registration of surrogacy clinics” by the appropriate authority and the main motive of this is to undertake surrogacy or any other procedure which is related to it within 60 days from the date of appointment of the appropriate authority¹⁴.

CHAPTER V (Section 15-32): This chapter deals with various members of the parliament, State Legislative Assembly, executives who are appointed by the Central and State Government to the National and State Surrogacy boards. The main function of these boards is to guide the Central government in monitoring and help in the regulation of surrogacy law and procedures in India. They also will lay down the rules and a particular code of conduct that has to be followed by the surrogacy clinics.

CHAPTER VI (Section 33-35): This chapter deals with appropriate authority which has a joint secretary and joint director. The main functions of the authority is to issue or cancel the registration for surrogacy, and to provide proper and ethical standard for the functioning of the surrogacy clinics, to undergo necessary investigation if there is a violation of the provisions of the bill occurred, they also have to recommend amendments to the provisions of the bill due to the evolving character of the technology and services, and finally to assist the intendant couple in renewing the their registration if it has been cancelled or expired.

CHAPTER VII (Section 36- 43): This chapter mainly deals with the punishments for any person or an company who are involved in the promotion of commercial surrogacy and degrading the surrogate child and surrogate mother in any manner, he/she will be punished with 10 years of imprisonment and fine up to 10 lakhs.

CHAPTER VIII (Section 45-52): The provisions included in this chapter is considered as the miscellaneous provisions which deals with power to search and seize records, and also make rules and regulations, then also to protect the government from any prosecutions for the actions taken by them in a good faith and finally to remove the difficulties associated with provisions of the bill.

THE CONSTITUTIONAL VALIDITY OF THE SURROGACY (REGULATION) BILL, 2020

According to the report published by CII in 2012 the size of Indian surrogacy industry was more than \$2 billion a year, often been termed as the “Surrogacy capital of the World”, till commercial surrogacy was banned in the year 2012. The main objective of Surrogacy (Regulation) Bill, 2020 is to affirm effective regulation of surrogacy by prohibiting commercial surrogacy and encouraging altruistic surrogacy. Even though the bill was introduced with an intention of preventing exploitation of surrogate mothers, the Bill seems to be in consonance with basic constitutional provisions. Also, the Bill does not check all the boxes of the “Golden Triangle

¹³ The Surrogacy Bill (Regulation) Bill, 2020 (reported by the selected committee)

¹⁴ Ritu Sharma, Deepali Garg and Huma Khan, Surrogacy in India: Current Scenario and Ethical Perspective, Volume 3, Journal of Clinical Obstetrics, Gynecology & Infertility, PAGE NO(2)(2019)

Test”¹⁵ which is laid down by the Supreme Court to evaluate the constitutional validity of any law enacted by the Government. As the bill fails to pass the test, it is clear that the proposed bill is violating the concepts of equality, liberty and freedom of rights, thus the basic fundamental rights of individuals are encroached by the state.

RIGHT TO LIFE UNDER ARTICLE 21

Article 21 of the Constitution of India is a sacred and cherished right to life and personal liberty; it has an important role to play in every person's life¹⁶. It enshrines the principle of Right to Life, Personal liberty, and Right to Livelihood¹⁷. Even though the concept of surrogacy is not directly dealt under the Constitution of India but has included it in wide ambit of Article 21 through various judicial interpretations. Our constitution recognizes Right to life under Article 21 is having a wider meaning and includes Right to livelihood. The same was upheld by the Supreme Court in the Consumer Education and Research Centre and ors. Vs. Union of India¹⁸. Mere blanket ban on commercial surrogacy imposed by the Surrogacy (Regulation) Bill, 2020 doesn't prevent the exploitation of poor women in India; instead, it deprives their right to livelihood which is guaranteed to them under the constitution of India. Thus, Surrogacy (Regulation) Bill, 2020 clearly infringes this "right to livelihood" under Article 21 of Indian constitution by imposing a complete ban on commercial surrogacy which takes away the last possibility for the poor women who are in a desperate need for money to meet their basic necessities.

Further, Article 21 of the Indian constitution includes the right to reproductive autonomy which is also violated by the Surrogacy (Regulation) Bill, 2020. In the case of Rajgopal vs. State of Tamil Nadu¹⁹ The court identified that the “right to life” includes “right to privacy” where an individual has the right to decide over matters such as family, marriage, procreation, motherhood, childbearing among other things. The concept of “right to reproductive autonomy” is interpreted by the Supreme Court in such a way that as it entitled the parents to have the prerogative to choose the mode of parenthood, either naturally or through surrogacy. In Devika Biswas v. Union of India²⁰ The Supreme Court held that right to reproduction as an important component of the “right to life” under Article 21 where women have the absolute right over her privacy, dignity and integrity of the body. In addition to these, our constitution provides that no state can interfere in the prerogative of any person whether the child through natural process or surrogacy. In circumstances where the state is interfering or imposing restrictions to the matters related to procreation shall amount to direct encroachment on one's privacy and the same was pronounced by the Andhra Pradesh High court in the case of B. K Parthasarathi v. Govt. of Andhra Pradesh²¹. In a Suo Motu PIL filed for the deplorable condition of a female prison inmate in which high court stated that a "women alone should have the right to control her body, fertility and motherhood

¹⁵Minerva Mills Ltd. & Ors v. Union of India & Ors., A.I.R. 1980 S.C. 1789 (India).

¹⁶Durga Das Basu, Commentary on The Constitution of India, 350 (8th edition 2010).

¹⁷INDIA CONST. Art. 21

¹⁸Consumer Education and Research center and Ors., v. Union of India, (1995) 42 S.C.C. 3 (India).

¹⁹Rajagopal vs.State of TamilNadu,A.I.R. 1995 S.C. 264 (India).

²⁰ Devika Biswas v. Union of India, (2016) 10 S.C.C. 726 (India).

²¹B.K. Parthasarathi v. Government of Andhra Pradesh, (1999) 5 ALT 715.

choices"²². Right to decide about reproduction is very personal decision making for a woman and this bill is interfering in such a decision making process. Therefore, the Bill is clearly violating the right to livelihood, right to privacy and right to reproductive autonomy under Article 21 of the Indian constitution.

RIGHT TO EQUALITY UNDER ARTICLE 14

Article 14 of the Indian constitution guarantees "equality before the law and equal protection of laws to all people"²³ but permits reasonable classification. To pass the test of reasonable classification, the court has laid down two tests which must be satisfied called intelligible differentia and rational nexus. The classification must be based on an intelligible differentia, which distinguishes persons, or things that are grouped together from others left out of this group.²⁴ The differentia must have a rational relation to the object sought to be achieved by the statutes in question. There must be a nexus between the basis of classification and the object of the Act under consideration.

Since the classification is purely based on marriage by only allowing married couples is arbitrary where our country permits single parents, (non -married individuals or parents) are allowed to adopt children. Even the proposed bill is against the striking down of Section 377 of the Indian constitution by denying the rights of homosexual couples to have a child of their own through surrogacy and refuses to acknowledge these couples as legitimate. In the case of National Legal Services Authority v. Union of India²⁵, Supreme Court has recognized trans-genders as third genders, therefore they are entitled to enjoy equal rights as gender of male and female. But, the Bill doesn't recognise their rights and are exclusive in nature. In addition to these, the bill only allows Indian citizens to be a part of surrogacy and imposes ban on foreigners for commissioning surrogacy which is a clear violation of Article 14 of the Indian Constitution whose benefit is not confined to the citizens but also to any person within the territory of India.

Conclusively, this Bill is a complete violation of Article 14 by allowing surrogacy only to married Indian couples and widows or divorcees and disqualifying others on the grounds of marital status, age, sexual orientation, and nationality impinges upon the right to equality for being an unreasonable classification. "OUR MISSION YOUR SUCCESS"

RIGHT TO TRADE AND PROFESSION UNDER ARTICLE 19(1)(g)

The Surrogacy (Regulation) Bill, 2020 is violating Article 19(1)(g) which guarantees the "freedom of trade and profession"²⁶. Article 19(6)²⁷ provides grounds on which reasonable restrictions can

²²Arijeet Ghosh & Nitika Khaitan, A Womb of One's Own: Privacy and Reproductive Rights, Epw Engage, (LAST SEEN11/12/2020/1:00) <https://www.epw.in/engage/article/womb-ones-own-privacy-and-reproductive-rights>,

²³INDIA CONST. Art 14

²⁴Aparajita Amar & Arjun Aggarwal, The emerging laws relating Surrogacy: A precreational right for Single Parent, Transgenders and Foreigners, The SCC Online Blog (LAST SEEN11/15/2020/3:00) <https://www.sconline.com/blog/post/2018/04/10/the-emerging-laws-relating-surrogacy-a-procreational-right-for-single-parent-transgenders-and-foreigners/>

²⁵National Legal Services Authority v. Union of India, A.I.R. 2014 SC 1863 (India).

²⁶INDIA CONST. art. 19, cl.1(g).

²⁷INDIA CONST. art. 19, cl.6.

be imposed on this right. In the case of the interest of the general public, reasonable restrictions can be imposed on Right to trade and profession under Article 19(1)(g).

In the case of *Chintaman Rao vs. State of MP*²⁸, the court interpreted the word "restriction" of Article 19(1)(g) stating that the reasonable restrictions imposed on a person in the enjoyment of the right should not be arbitrary or of excessive nature beyond what is required in the interest of the public. Imposing a blanket ban on commercial surrogacy and legalizing only altruistic surrogacy goes against the Article 19(1)(g) of the Indian Constitution. The purpose of the bill is to prevent exploitation of surrogate mothers but such blanket ban will drive the industry underground. Moreover, when India became the surrogacy capital of the world, numerous surrogacy clinics were established. This Bill jeopardizes the interest of various stakeholders in this Multi-dollar industry by putting a complete ban on commercial surrogacy. From this view, the Bill is clearly infringing the basic provisions of the constitution as it is unsuccessful in maintaining a balance between regulations and basic rights.

LEGITIMACY OF A SURROGATE CHILD

In Indian Personal Laws the legitimacy of the child is determined as a direct outcome of the concept of marriage. It is a general rule that the children born out of a lawful wedlock of man and woman are legitimate and a child born outside the wedlock is illegitimate. It is a presumption that the legal and natural guardian of the child is the birth mother. The mother-child relationship is solely based on the birth regardless how the child was conceived. The traditional Indian Laws do not presuppose a mother's genetic tie to the child.

In the U.S.A., the development of genetic engineering in reproductive biology has created a radical change in the concept of mother. The intended parents, who provided their genetic imprint are the legal and natural parents of the child in case of a gestational surrogacy and the surrogate mother is considered only as a gestational mother. The above is the case unless and until the intended parents have relinquished their legal status of natural parents of the child. Therefore in the U.S.A., the child is the legitimate child of the intended parents.

In the U.K. mother has a different meaning, the woman who carries the child as a result of natural or artificial pregnancy is considered the mother of the child and no other woman can be considered as the mother. So legally, the surrogate mother is the natural mother of the child and not the woman who has provided her ova, or is genetically related to the child in the surrogate's womb.

Indian courts follow the English Common law in the aspect of the legitimacy or the mother-child relationship in the concept of surrogacy. There are two situations that should be considered

1. **Married Surrogate:** The legitimacy of the child during the force of a valid marriage, under Section 112 of Indian Evidence Act, 1872 the child shall be considered as a legitimate child of the surrogate mother and her husband. Unless the husband proves that he had no access to his wife during the

²⁸*Chintaman Rao vs. State of MP*, A.I.R. 1951 SC 118 (India).

time of her pregnancy or he had not consented to surrogate mothering by his wife. Therefore it is clear that the intended or the commissioning parents are not the legal parents of the surrogate child.

2. Unmarried Surrogate: Unmarried women resorting to either natural or artificial reproduction is not a crime in the eyes of the law. It is a different issue that it is not a socially accepted aspect for an unmarried woman to have a child. As discussed earlier the legitimacy of the child depends on a valid marriage, hence the child of an unmarried woman is considered illegitimate.

In both the above cases, the surrogate child may not become a legal and legitimate child of the intended parents. The only way the surrogate child becomes a legal and legitimate child of the intended parents is via adoption.

Personal laws in India are formed on the basis of various religions of the country. Adoption is only recognized under Hindu law and not Mohammedan law or Parsi Law, the Christian do not have any legal procedures laid down to opt for adoption. The adoption under Hindu Law is only valid when both the adopting parents are Hindu, Buddhist, Jain or Sikh by religion²⁹. When either the surrogate mother or one of the intended parents are non-Hindus, Buddhists, Jains or Sikh the adoption is invalid.

The complexity increases when the surrogate mother and her husband refuse to give the child for adoption to the intended parents who are genetically related to the child. Even though a path is created by the personal laws for adoption, adoption is not possible when the child is not given for adoption by the surrogate mother. This can create a grave injustice for the intended parents who are genetically related to the child. The Family Courts have been vested with a wide array of decisive powers to decide such matters notwithstanding the religion of the parties in the issue,

CUSTODIAL RIGHTS OF THE SURROGATE CHILD

A problem presents itself in a situation when the surrogate mother refuses to hand over the custody of the child to the intended parents, her claim to hand over the baby lays a stronger pavement when she is the genetic mother.

In foreign countries, the judicial approach favors the intended parents only. The Uniform Parentage Act, 1973 in the U.S.A has recognized both genetic testing and the birth test to establish a mother – child relationship. When a child is delivered by gestational surrogacy, the genetic parents are the natural and the legal parents of the child³⁰. There are no known cases of the surrogate mother getting the custody of the child in American Courts.

The Hindu Personal Laws in India, state the child shall stay with the mother till the age of five³¹. The courts in India are influenced by the “Paramount welfare of the child” rather than in deciding the custodial rights of the child. In India, there are currently no laws to ensure the intended parents having legal rights to the child, hence it is well within the rights of the surrogate mother to refuse

²⁹ Hindu Adoptions and Maintenance Act, 1956, Section 2, Acts of Parliament, 1956 (India).

³⁰Belsito v. Clark, 644 N.E.2d 760 Ohio Ct. Com. Pl. (1994)

³¹ Hindu Minority and Guardianship Act 1956, Section 6, Acts of Parliament, 1956 (India).

to hand over the baby to the intended parents. The surrogate mother also has the rights to abort the child and the intended parents have no say in the abortion with the permission from the proper authority under the Medical Termination of Pregnancy Act, 1971.

INHERITANCE RIGHTS OF SURROGATE CHILD

The inheritance rights in the surrogacy arrangement has also left a hole in the wall of the personal rights of the child and the other parties related to it. There are multitudinous questions to be answered in the aspect of inheritance.

1. Is the surrogate child entitled to succeed the property of the surrogate mother dying intestate either at the delivery or thereafter?
2. Can a surrogate mother claim the inheritance of the property of the surrogate child, who dies intestate after some years?
3. Can the surrogate child inherit the property of the surrogate's husband who dies during the surrogate's pregnancy?
4. Is the surrogate child entitled to the property of the both or either of the intended parents died intestate as a child born at the time of their death?
5. Can the surrogate child claim the ancestral property by gaining the coparcenary interest of the intended parents or the surrogate mother's husband or the surrogate mother?

The legitimacy of the child is directly linked to the general principle of inheritance. The legitimacy of the child under all personal laws is directly related to the lawfulness of the marriage of the parents. The surrogate mother and her husband are the natural and legal parents of the surrogate child under the existing Indian Laws, the surrogate child is the legal heir of the surrogate parents, provided the surrogate's husband consented for the surrogate mothering arrangement. According to the above discussion the surrogate child is entitled to the property of the surrogate parents, thereby providing an affirmative to the first three questions. The surrogate therefore has no rights over the inheritance of the intended parents.

An obstacle may also arise when the surrogate mother after the delivery, as the natural guardian claims the property of the property of the intended father or mother during intestate during her pregnancy, due to which the child cannot be given up for adoption to the commissioning parents. Her claim may even fail as the genetic parents had not yet adopted the surrogate child. The surrogate mother should not only protect the rights of the intended parents but also the rights of the surrogate child. It is important to decide who would get custody of the child from the very beginning of the agreement. The child is deemed to be the child of the intended parents from the moment the child is born for the purpose of intestate and testamentary succession.

LOOPHOLES AND SUGGESTIONS

The Bill permits only altruistic surrogacy by putting a blanket ban on commercial surrogacy will offer an opportunity for corruption, black marketing and ignoring the fact that unpaid surrogacy may also lead to exploitation. The Bill is excluding foreigners, NRIs and homosexuals from commissioning surrogacy in our country. By imposing a ban on commercial surrogacy, this so-

called Bill is highly divorced from the realities of Indian society where thousands of women are willing to rent their womb to make their family ends meet. India was considered as the World Capital of Commercial Surrogacy as it was considered to be a beneficial alternative for surrogate mothers as well as the intended parents. And apart from these drawbacks, this ban is directly affecting the foreign investment. There is an immediate need to amend the Surrogacy(Regulation) Bill, 2020 with an intention to facilitate commercial surrogacy in a regulatory manner. This can be achieved with the help of the government by fixing a uniform monetary value per surrogacy in order to avoid bargaining among the parties. Thus, it may prevent exploitation of surrogate mothers by agency or third parties and can solve some of their immediate financial problems through this income.

The Bill is only suggesting that the intended couple and surrogate mother need a certificate of eligibility but it remains silent about the time limit for the certificates being issued. Moreover, the Bill evidently states that the approval of the competent authority and the consent of the surrogate mother are required for the procedure of abortion. While, it does not acknowledge the decision of the intending couples. Surrogacy is a part of Artificial Reproductive Technology(hereinafter referred as ART) and most of the countries have enacted separate Acts to regulate surrogacy and ART. Implementing this Surrogacy Bill will be irrelevant if there is no proper regulation of ART. Therefore, there is an immediate need to deal with rules and regulations regarding ART as it addresses technical and medical aspects, and it is considered as a necessity for effective implementation of this Surrogacy Bill. The Bill assumes that allowing altruistic surrogacy will never lead to the exploitation of women, but in reality the bill takes away her last opportunity to earn something independently. It is assumed that a woman is expected to carry someone's baby without being paid for it and must go through all physical and emotional waves without being supported by anyone. As far as this method is followed, it amounts to forced labour. Thus, the Bill must replace "Altruistic Surrogacy" with "Compensatory Surrogacy" in this present scenario where poor Indian women are trying to earn money and meet the basic needs of them as well as their families.

Furthermore, the Bill should have been amended in such a way that by inserting a provision stating that all the Reproductive clinics must have a counselling department as an effective method to check the mental condition of the surrogate mother. Also, the counselling department must explain the process of surrogacy and risk involved before going through the process. Moreover, this may help us to check whether the surrogate mother was coming willingly or by forcefully. Ultimately this can reduce the exploitation of surrogate mothers.

Another important factor that needs to be considered is the possibility of any unforeseen situation, for instance, the divorce of the intended couple which may leave the child abandoned. Therefore, there is an immediate need for rules and regulations when a situation like abandonment of the child arises. The bill must specify the roles and duties of the intended couple and surrogate mother which such situations come into reality.

There are numerous lacunae in the Surrogacy bill in the aspect of the Personal laws of the India, which can be gravely misused by the surrogate mother gain the property of the intended parents,

or refuse to give the child for adoption after the birth of the child. The legitimacy of the child is also a question this bill has left unanswered. The legitimacy is an important factor for the child to gain inheritance from the intended parents, the question also remains if the property of the married surrogate mother's husbands property will be inherited by the surrogate child. The question of who are the natural and legal parents of the child remains blank. The bill prepared did not foresee the legal problems to which it has paved a path. The government has to formulate laws in accordance with the religious practices of the country and make sure the rights of the intended parents, surrogate mother and child are not violated.

CONCLUSION

The Surrogacy (Regulation) Bill, 2020 has been a matter of controversy because of the retrieve nature of its provisions and it's inconsistency with the fundamental rights of our Constitution. Even though the proponents of the bill made it with an intention to safeguard the surrogate mothers as well as the intended couple by imposing certain restrictive limitations which are highly divorced from the Indian realities. In the case of *Murlidhar Aggarwal and Anr. Vs. State of U.P*³², the SC remarked that public policy does not remain static in any given community and change from generation to generation and even in the same generation. Conclusively, we can say that the Bill is unsuccessful in maintaining a balance between regulations and rights and it is inconsistent with the Fundamental right of an individual guaranteed by the constitution such as Article 14, 21 and 19(1)(g).

It is given that there is a legal vacuum created with the advancements in the artificial reproduction. The government has to formulate the laws to make sure the legal issues do not deprive the citizens of the country their rights. The rights of the surrogate mother, child and the intended parents have to check and balance each other, thereby not letting one of them have an upper hand over the other.

Thus, it is a necessary precondition to amend the Bill to the extent of its inconsistency with the Fundamental rights, Personal Laws and reflect the changing social needs and must take every step which may prevent the exploitation of surrogate mothers and must be encouraged to respect their dignity.

³² *Murlidhar Aggarwal and Anr. Vs. State of U.P*, A.I.R. 1974 SC 1924 (India).