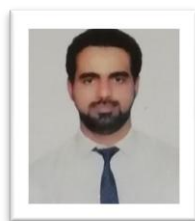


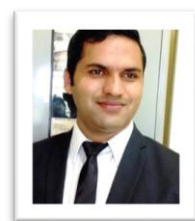
Reproductive Rights and Technology: A Critical Appraisal of Surrogacy (Regulation) Bill, 2016

Paper Submission: 16/05/2020, Date of Acceptance: 28/05/2020, Date of Publication: 29/05/2020



Shaharyar Asaf Khan

Assistant Professor,
Amity Law School,
Delhi, India



Shahnawaz Ahmed Malik

Assistant Professor,
Dept. of Law,
Aligarh Muslim University,
Malappuram Centre,
Kerala, India

Abstract

The innate desire to have a child is one of the most important constituent of a family. Inability to have so, often leads to frustration of marriage and sometime divorce too. With the development of technology, there are various ways to have a child of one's own genetic code. This Assisted Reproductive Technology has its inherent cons too besides the obvious pros. In cases of surrogacy arrangements which requires a surrogate mother, the issues of commodification of motherhood and child comes up into picture. And unregulated commercial surrogacy arrangements result in exploitation of the parties. The role of State, to protect the interests of the parties is undeniable. However, the reluctance of the State in taking form steps to regulate such arrangements or the loopholes in the existing guidelines and proposed legislations need an immediate attention so as to bring a family into existence which does not owes its existence to process of exploitation.

Keywords: Surrogacy, Family, Surrogacy Bill 2016, Assisted Reproductive Technology.

Introduction

The cohesiveness and stability of the society depends heavily on the unity and strength of its most basic unit, its cornerstone, the FAMILY. The right to family life has been recognized by various instruments of International Law. International Covenant on Civil and Political Rights which was adopted by United Nations General Assembly on 16 December 1966 and enforced on 23rd March 1976, recognizes Civil and political rights of the people including right to family. Family is recognized as the fundamental unit of a society¹ and is protected from any type of unlawful and arbitrary interference with privacy, family or home.² International Covenant on Economic Social and Cultural Rights provides for the widest possible protection to give it to be given to the family as a fundamental unit of society.³ European Convention of Human Rights treats right of privacy and family life as an indispensable right of the people and should be protected from any unreasonable interference from the State.⁴ European Court of Human Rights has stated:

"when considering what constitutes family relationship the court must necessarily take into account development in society and changes in perception social civil status and relational issues including the fact that there is not just one way or one choice inner sphere of leading and living one family or private life."⁵

Parenthood is the sole phase of life which binds a family. Experience is the sublime Joy of yielding ones want and decide for the happiness of the child. More so, having a child has been configured to be a social mandate for a family to subsist and have a social identity. Inability to procreate either due to medical or social grounds can be a distressing experience causing enormous amount of emotional trauma. It can at large, impact every part of an individual's life affecting his/her self-esteem or the relationship with others. This fact is not hidden that in number of couples, childlessness due to infertility leads to serious damage in their interpersonal relationships which often results into personal distress. One of the imperative challenges faced by such couples is to learn how to manage the unproductiveness with oneself, with the spouse as well as with the society. Such couples often end up feeling frustrated, annoyed or guilty after being diagnosed as such. Women hold the feeling of being

unfeminine and men feel powerless or un-masculine. In few cases, the inability to have children also becomes one of the major causes for divorce.⁶

The emotions of expectant parents of bringing their child to life are exhilarating and incomparable to anything in this world. In fact, every human being, married couples or single individuals desire to experience the unique sentiment of parenthood. As mentioned by S. Saghir Ahmad, J⁶ "To become a mother is the most natural phenomenon in the life of a woman."⁷ Conversely, number of couples and individuals face disappointment in fulfilling their desire to procreate on various medical or social grounds. Their inability to give birth to the child results in devastating effect on their lives. Thus, they look into various alternatives to have their own children either through the method of adoption or surrogacy. In the past few decades, using surrogacy as an alternative to giving birth to a child has progressively been adopted by infertile heterosexual couples, single women, lesbian and gay couples. Thus, the complete process of surrogacy is taken up by commissioning parents in order to fulfill their dream of having their own child who is genetically and biologically their own. The inability of not being able to procreate is indeed fatal for the survival of marriage and many a times become one of the major causes of divorce. This inability to procreate can be due to biological reasons or due to social reasons. Biological infertility comes into existence where couples or individuals are not able to reproduce due to physiological or physical reasons. The social infertility comes into existence due to social inability of a person to become parents because of the stress of the day to day life. It cannot be denied that birth of a child is indispensable in creating a family, which is elementary to the society. But in contemporary times, inability to reproduce is no more a bar to have a child, both for the couples as well as for individuals.

The desire to have their own family, coupled with few other relevant reasons like attitude towards the significance of biological kinship connecting parent and child, plays a vital role in influencing the longing for medical assistance in respect of curing infertility. In 1950s, Robert Edwards, who was working with the National Institute for Medical Research in London concentrated on framing fundamental discoveries on the subject that how human eggs mature, how diverse hormones contributed in their maturation and at what particular stage of time, the eggs are susceptible to fertilization.⁸

'Kanupriya alias Durga', is the first Indian and world's second IVF baby, who was born on October 03, 1978 in Kolkata, just after three months when the world's first IVF child was born in Great Britain on June 25, 1978.⁹

Nowadays, there is extensive range of assistance available for conception. In fact, today we have a large and very advanced fertility industry which essentially provides all probable measures to evade infertility and makes conception probable mostly in all conditions. On one hand, few measures enlarge the chance of conception through sexual intercourse like ovulation predictor kits, fertility-enhancing hormone

treatments or the surgical interventions. Also, few methods have been invented as alternate for sexual intercourse. Such methods are Artificial Insemination (hereinafter referred to as AI) or In-Vitro Fertilization (hereinafter referred to as IVF) which altered the method of conception and its probability of success. Since AI and IVF assist in conception without intercourse, they utilize sperm, ova or gestation services which is donated or sold to the individuals or couples who desire a child. Out of such methods, surrogacy is the most resourceful method to surmount both biological as well as social infertility. Globally, such concept has become famous specifically since the practice has been adopted to have a child by famous celebrities like Nicole Kidman, Elton John, Sarah Jessica Parker and Japanese actress Aki Mukai. In India also, since past few years this practice has been noticed to be happily adopted by many Indian actors like Amir Khan, Shahrukh Khan, Tushar Kapoor, Karan Johar, Ekta Kapoor, Sunny Leone etc.

The concept of surrogacy can be taken as an 'arrangement' wherein a woman gives her consent to bring into life a child with the assistance of assisted reproductive technology. In such terms of pregnancy neither of the gametes belongs either to her or to her husband. She carries the child to full term pregnancy with the intention to handover the child to the intended couple, on whose behalf she carries the baby. The surrogate refers to the woman who consents to have an embryo to be generated through merging the sperm of a man not being her husband, and the oocyte of another woman, further to be implanted in her womb. She carries the pregnancy to full term and finally on delivery of the child hands over the same to its biological parents.

In medical phraseology, the word 'surrogacy' refers to a substitute mother replacing the natural mother. The surrogate mother agrees to bear a child for another woman, who is generated either from her own egg, or from the implantation of a fertilized embryo in her womb from another woman. As per Black's Law Dictionary, the term 'surrogate' owes its origin to a Latin word '*surrogatus*', which means 'a substitution' or 'replacement', in more specific terms it means a person who is appointed to act on the place of another.¹⁰ The word 'surrogate mother' or 'surrogate' is frequently applied to those women who agree to carry and deliver a child to another couple. A 'surrogate arrangement' is a process by which a woman gives her consent to be artificially inseminated and thereupon carry the child up-to his/her birth, for the intended couple or individual who is unable to procreate.

Supreme Court has discussed the types of surrogacy in the case of *Baby Manji Yamada v. Union of India*¹¹. As already was prevalent, Supreme Court mentioned two types of surrogacy. In the procedure of natural or partial surrogacy which is also termed as traditional surrogacy¹², the commissioning mother does not play any role. The woman who agrees to be a surrogate provides her own egg to be fertilized by artificial insemination. She further carries the foetus and finally gives birth, to a child for another couple. It is the surrogate mother who gestates the child which

finally makes her the biological or genetic mother of the said child. Such child is either conceived through artificial insemination i.e. the method of using fresh or frozen sperm, or is impregnated with the help of IUI (intra-uterine insemination), or ICI (intra-cervical insemination) which is professionally performed at a health clinic. The resultant child is genetically related to the woman who serves as surrogate together with the male partner and not to the commissioning female partner. Thus, such child is bestowed with the genetic make-up of the surrogate and the intended father. Those women who face the dysfunctional or non-functional ovaries problems on the ground of premature menopause can seek the option of receiving the egg through donation. However, a woman, who faces the risk of passing any genetic disease to her offspring, can resort to traditional surrogacy. Traditional surrogacy is also a good resort to the woman suffering from chronic or life-threatening diseases, if their long-term prospects in respect of health are otherwise good. The concept of traditional surrogacy comes within the ambit of commercial angle when the surrogate is implanted with a fertilized egg, either fully genetically related to the commissioning parents or only to any one of them in return for monetary consideration. Another form is gestational surrogacy¹³ or total surrogacy is concerned, the child owes the genetic combination of the commissioning parents. The eggs of 'genetic mother' is fertilized with the help of *in-vitro* fertilization which is further implanted in another woman, called surrogate mother, who finally carries the foetus in her womb till the time the child is born. Consequently, under this process, an embryo is created through the method of IVF/test tube in a laboratory, by combining the genes of both the intended parents, which is at last implanted into the surrogate's womb. Hence, under this process a woman, i.e., the surrogate mother is required to carry a pregnancy created by the egg and sperm of the intended couple. Once the child is born, the gestational mother i.e. surrogate mother gives back the child to the biological parents to be raised by them and on this, she assigns her parental rights to them. Here, the surrogate is not genetically related to the child who is born. Through gestational surrogate motherhood, the intended couple becomes the genetic parents of the child. Gestational surrogacy thus gives rise to a different situation where a child has not one, but two biological mothers i.e. a genetic and the gestational mother.

On the basis of monetary consideration, surrogacy arrangements can also be classified into 'Commercial' and 'Altruistic' surrogacy. In 'Commercial Surrogacy', the woman who serves as surrogate mother is paid additional monetary consideration apart from medical or other reasonable expenses, for carrying a child in her womb to full term.

'Altruistic Surrogacy' arrangement, the surrogate has a generous concern for the welfare of others and she does not render her services for any financial reward in respect of her pregnancy. There is no hesitation in giving away the child to the intended couple, although generally the expenses of pregnancy

and birth are paid by the intended couple. The surrogate mother receives no monetary compensation except for medical and other reasonable expenses in return for carrying and delivering the child. Such kind of benevolent act is done by a friend or a close relative¹⁴ who receives only the necessary expenses and no other reward for giving birth to the child. It's a kind of help to the childless couple.

It cannot be denied that the notion of surrogate motherhood is bliss for childless-couples and no one can deny that it is a revolutionary foundation of hope for couples who are infertile. In fact, in recent phenomenon it seems to present a new powerful alternative which can replace adoption for those intended couples who desire to have their own genetic child.

However, this arrangement has become a new battleground for the frequent conflicts between two school of thoughts i.e. liberal and communitarian philosophies. The supporters of surrogacy arrangements put forward the argument that a right of a married couple to "procreative autonomy" does include the right to enter into any kind of agreement with consenting collaborators to bear a child for them. The right in respect of 'genetic continuity' as well as to rear offspring is included in the right of reproductive choice. Nevertheless, on the same hand the opponents of surrogacy hold the opinion that 'reproductive autonomy' does not mean to legalize the selling of the body by a woman or to commercialize the concept of reproduction wherein one baby has been subjected to become the commodity, where one party sells it and the other buys it in terms of monetary consideration.

Surrogacy has its own set of advantages because of which this practice has become so common in the countries where either the rules and laws are absent or are supportive of this arrangement. The major advantage of surrogacy is the opportunity of parenthood. Every childless couple want to have a child so that they feel their family to be complete and if the child can have the same or similar genetic code then it attracts a lot of "customers". Surrogacy also helps the other side of the arrangement also i.e. the surrogates. The surrogate mothers are primarily from the lower section of the society and in need of some economic advantage and surrogacy comes as a resource to such females where they can a good amount of money. Surrogacy has its medical and emotional complication but most of the times poverty and economic advantages trump over. Besides the surrogates, surrogacy also comes up as a boon to doctors, agents and donors too as they are the part and parcel of the arrangement and they also derive economic advantages out of such arrangement. Taking into account the detailed study of foreign legal systems together with the Indian domestic law, it is observed that the human right to privacy is a closely knitted fabric and in fact a very pertinent component of family life which also includes the right to make reproductive choices. As observed by Justice Brennan in the landmark case of *Eisenstadt v. Baird*,¹⁵

"...the right of privacy includes the right to be free from unwarranted

governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child. Thus decisions made by individuals about their own body particularly those that affect reproductive capacity come within the domain of private decision-making and are therefore protected from interference by the right to privacy."

Similarly, in *Doe v. Kelley*,¹⁶ the Michigan Court of Appeals held that a father holds a fundamental privacy right to bear or beget a child with the help of surrogacy.

In India too, the right of family and right of procreation has been affirmed as a fundamental right under Article 21.

*"The right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by Article 21 and it is a **right to be left alone**, for a citizen has a right to safeguard the privacy of his/her own, his/her family, marriage, procreation, motherhood, child-bearing and education, among other matters."*¹⁷

With a new dimension given to Article 21 of the Constitution by our Supreme Court, the ambit of marriage, procreation, contraception, family relationship and child bearing has immensely emerged in a new dimension. By allowing the writ petition in *Navtej Singh Johar's* case,¹⁸ which was filed for declaring right to sexuality, right to sexual autonomy and right to choice of a sexual partner, to be part of the right to life guaranteed under Article 21 of the Constitution, the Court has opened a new question in respect of right to procreate and to have children of one's own, in reference to such same sex couples. Though the Court has shown its clear vision that the right to procreate and childrearing is very much a part of one's Right to life and personal liberty; being part of reproductive autonomy.

Despite all the advantages, the practice of surrogacy has attracted various criticisms from religious, ethical, social etc. angles. The most important being the commodification of the child. Persons are not customized objects which can be subjected to selling and purchasing for some monetary consideration. As held by New Jersey Supreme Court in the *Baby M* case;

*"There are, in a civilized society, some things that money cannot buy....there are values that society deems more important than wealth whatever it can buy, be it labour, love or life"*¹⁹

Another major area of on the similar lines is that surrogacy somehow leads to the concept of commodification of motherhood.²⁰ The said drawback is justified on the ground that when resources are permissible to be exchanged in the course of contract, it necessitates that the resources should be commodified.²¹ Since surrogacy arrangement is like a contract and just lie any other contract there is no deniability that there can be a breach of contract.

However, the difference between the breach of ordinary contract and surrogacy arrangement is the welfare of all three parties i.e. the surrogate mother, intending parents and above all the child. The worst affected are the surrogate mothers as they are most vulnerable in case they are denied what had been agreed as they don't have resources to meet their needs through legal corridors. The best and the only possible way they have is to not give up on the custody of the child which adds to the misery of the child. Another controversial issue which affects the surrogate child is in respect of the question whether the child is to be treated as legitimate or illegitimate.²¹ The status of a child is very significant because it is the foundation of many rights of the child, like custody, maintenance, inheritance, etc.²² Childless couples or the individuals who resort to the surrogacy arrangement are satisfied to have the child. But if such child who is born through the surrogacy contracts is considered to be illegitimate, it would result in injustice to the intended parents and most significantly to the surrogate child.²³ There is lack of much accessibility of literature on the risk upon health resulting from ARTs. Also, the short term as well as long-term undesirable effects of the drugs used in such process and the complications involved in the procedures have also not been researched in detail. The same has been appraised by WHO, as is reflected in a WHO Summary Report 1990²⁴;

"...that no new technology should become an accepted medical practice until it has undergone a thorough and scientific evaluation which has not been the case with ARTs."

At present, there are a variety of approaches to Surrogacy all around the world. However, response to Surrogacy is, to some extent in a state of flux. Many countries have already legislated upon this issue whereas many are still in the stage of introducing the bills or such bills are under consideration. Nevertheless, the call for a comprehensive legislative framework is what is required as the need of hour. The reason behind it is the cases encircled with the legal tussles about the citizenship status of children witnessing the first dawn of this world through Transnational Surrogacy Arrangements. Few of the international initiatives that took into consideration the aspect of the surrogacy either directly or indirectly are The Hague Convention on Protection of Children and Cooperation in respect of Inter-Country Adoption, 1993, The Convention on Jurisdiction, Applicable Law, Recognition, Enforcement And Cooperation in respect of Parental Responsibility and Measures for the Protection of Children, 1996, Hague Convention on Contract Pregnancy/Surrogacy, World Health Organisation in 2001, World Medical Association, Feminist International Network For Resistance To Reproductive And Genetic Engineering (FINRRAGE) etc.

There have been differences in the laws of various countries also as far as surrogacy is concerned. In Australia, only altruistic surrogacy is allowed and no advertisements can be done for the

same²⁵. Foreigners are not allowed to go ahead with surrogacy. Surrogacy contracts are unenforceable in United Kingdom even if someone has entered into a contract with the surrogate and have paid for her expenses (except for their reasonable expenses).²⁶ The woman who gives birth is always treated as the mother as per UK law and she is bestowed with the right to keep the child even if they're not genetically related. However, through parental orders or adoption, a person can attain the parenthood of such child. In U.S. around half of the states have legislated on surrogacy, while some states only refer to the case law governing surrogacy contracts, and some have no regulation at all on the said subject. At present, there are four states which have explicitly banned surrogacy i.e. New York, New Jersey, Indiana, and Michigan and the contract of surrogacy are completely void and unenforceable. However, with the recently proposed Child-Parent Security Act, the New York's surrogacy ban is expected to be repealed and the practice shall be regulated.²⁷ On the other hand, there are fourteen states regulating and permitting some form of surrogacy through legislations. Somehow, it is seen that among these states, different approach on surrogacy is adopted and they are not uniform. Few states allow compensation for surrogacy whereas others completely prohibit such concept of compensation for surrogacy. Again, there are few states which follow no restrictions on who can be an intended parent, whereas some of the states allow only married couples with a medical need, who are residents in that state, to have access to surrogacy. In Israel, the legislation on surrogacy was passed in 1996 authorizing surrogacy in Israel. The said law, 'The Surrogacy Agreements (Approval of the Agreement and the Newborn's Status) Law, 1996, allows a man and a woman who are in a partnership, to find a surrogate mother either independently or through the services of brokerage and to enter a surrogacy agreement with her. The Japanese laws also prohibit the gestational surrogacy in Japan. However, the couples who are unable to procreate can seek the recourse of cross-border surrogacy. Though, there is no specific law declaring the Gestational surrogacy either legal or illegal in Japan but the guidelines and legal opinions extended by professional associations and government throws light upon the fact that the practice of this specific ART is forbidden.²⁸ Thailand has now a specific law, for the woman who can become a surrogate mother for the intended parents. The said Act was enacted in 2015 which provides for the 'Protection for Children Born through Assisted Reproductive Technologies. In Thailand, the main problem confronted was that this practice was connected to human trafficking. However, the new Thai surrogacy law has brought the country into the group of those nations where surrogacy is allowed, but only for altruistic purposes.

Till 2016, India was one of the most chosen destinations for commercial surrogacy. The intended parents were attracted toward India due to many favourable causes like well-maintained health care, skilled doctors and reasonable medical expenses. The lower cost of services coupled with the relatively

lack of laws regulating use of reproductive technology created a booming baby market in India. Thus, it was easy for India to become the hub for international commercial surrogacy arrangements.

The pecuniary benefit for an intending foreign couple opting for India is also quite impressive. In India, such arrangements generally cost around US\$10,000-15,000 whereas it is quite whopping in the western countries when compared (US\$50,000- 70,000). In addition to it, many western nations have declared commercial surrogacy to be illegal, which is not so in India till date and is practiced successfully since 2002.²⁹ In India it has been estimated that foreigners accounted for 80% of surrogacy births.

"India's \$2.3 billion reproductive tourism industry is thriving, with 500 legal fertility clinics; of which 350 offer surrogacy services. 70% of surrogacy cases are for foreign clients and the 25% for non-resident Indians and persons of Indian origin. Local Indian couples form only 5% of the clientele. Many customers come from the UK, USA and Canada".³⁰

Disconcerted by this situation of serving as a baby market as well as due to huge criticism, the Indian Council of Medical Research (hereinafter referred as ICMR) forwarded some guidelines for regulating and supervising the fertility arrangements in 2005. Though these guidelines were to regulate the same, they were not legally binding. Thereafter, the Law Commission of India in year 2009 published its 228th report in respect of 'Need for Legislation to Regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of Parties to Surrogacy'. This report was published with the objective to reflect the necessity for regulating the ART services along with taking necessary measures to restrain the booming baby market growing exponentially in the country. The report further brought into light that how India is becoming the hub of a "reproductive tourism destination". It explains that India is now an ART industry with an estimated worth of Rs. 25,000 crore pot of gold. The Indian judiciary faces vast difficulty while dealing with the cases relating to surrogacy arrangements is because we lack a proper set of legislation in this respect³¹. However, in the year 2008, the ICMR, on the request of the Union Ministry of Health and Family Welfare, presented a draft of 'The Assisted Reproductive Technology Regulation Bill, 2008'. The said Bill was not presented in the Parliament on the ground of many ambiguities pointed out by women's rights organizations, queer rights, human rights and legal rights organizations all over the country. It was insisted that before the said draft is laid in the Parliament, necessary rectifications and alterations should be carried out. This led to introducing various amendments in the year 2010, in the said Bill. Subsequently, the Ministry of Home Affairs, in year 2011, issued a notification in respect of restricting the use of such arrangements only by heterosexual married couples coming to India on the basis Medical

visa. This somehow created another set of controversy in respect of reproductive equality.

Finally, in the year 2016, The Surrogacy Regulation Bill, 2016 was introduced by Minister of Health and Family Welfare Mr. J.P. Nadda in Lok Sabha on 21st November 2016 as an effort to regulate and reorganize the surrogacy tourism as well as the functions of various infertility clinics all through India. However, the matter is still under consideration by our legislative body till date. The Bill completely bans the commercialization of surrogacy. The Bill makes it clear that no surrogacy clinic shall be permitted to conduct or associate with, or help related to surrogacy unless registered under this Act. No surrogacy clinic, paediatrician, gynaecologist, human embryologist, or registered medical practitioner is allowed to conduct, offer, undertake or promote the commercial surrogacy in India. Any kind of storage of a human embryo or gamete for surrogacy purpose is also completely prohibited.³²

In the Bill of 2016 it was provided that for obtaining a certificate from appropriate authority in respect of eligibility, the surrogate mother requires to be³³:

- (i) be a close relative of the commissioning parents;
- (ii) be a married woman (including divorced and widow) and having a child of her own;
- (iii) be between the age group of 25 to 35 years;
- (iv) should not have been a surrogate mother prior; and
- (v) must possess a certificate of medical and psychological fitness.

The Bill of 2016 provided that surrogacy procedures cannot be conducted by any person, unless:

- (i) explained all side effects have been explained to the surrogate mother by him, and
- (ii) has obtained the consent in written form from the surrogate mother in respect of undergoing surrogacy procedures.³⁴

The Bill of 2016 prohibits various activities to regulate the functioning of surrogacy clinics and medical practitioners, which includes:

- (i) undertaking any kind of commercial surrogacy,
- (ii) employing persons in the clinics without necessary qualifications, and
- (iii) storing a human embryo etc.³⁵

The Bill of 2016 makes it mandatory for the intending couple to possess a 'certificate of essentiality' along with the 'certificate of eligibility' which is to be issued by the appropriate authority for undertaking surrogacy. It further states that in respect to receive a certificate of essentiality it is essential to provide insurance coverage for the surrogate mother.³⁶ In addition to it, the Bill states that for aborting the surrogate child during the period of surrogacy, authorization has to be granted by the appropriate authority for the same after obtaining the written consent of the surrogate mother.³⁷ The 2016 Bill states that any registered medical practitioner, gynaecologists, paediatrician, human embryologists or any person who owns a surrogacy clinic or employed with such a clinic or centre or laboratory and renders his professional or technical services to or at such clinic or centre or laboratory, whether on an

honorary basis or otherwise, who contravenes any of the provisions of the Bill shall be punishable with imprisonment for a minimum term of five years, along with a fine of up to 10 lakh rupees.³⁸ If any commercial surrogacy is initiated by the intending couple or any other person, they shall be punishable with imprisonment for a minimum term of five years and fine which may extend to 5 lakh rupees and in case of repeat offence, the imprisonment may extend up to 10 years together with a fine of up to 10 lakh rupees.³⁹

The Bill, though encompasses many good provisions, yet needs a critical assessment. One of the most important aspect of the Bill is that contrary to earlier Bills and in consonance with the Bill of 2014, Commercial surrogacy in every form has been banned. The thing which requires an appraisal here is that Altruistic Surrogacy has been allowed. This fact coupled with the fact that the intending couple are very much interested in having a child, might lead to unnecessary exploitation done by the doctors and the payment can be asked by the doctors however the same shall not be put on record. If this shall happen then the exploitation of the surrogates is always a sure possibility. The most important change that is needed is the serious consequences in case of breach of the law by the medical practitioners. In order to achieve the aim of banning commercial surrogacy with no unreported monetary transactions, the medical practitioners should be met with heavy hand and once proved to have violated the law, the medical practice license should be cancelled to start with.

Another important aspect is that foreigners are not allowed surrogacy in India as per Section 4(iii)(c)(II). However, the legislation can be little relaxed for NRIs or for those people who owes their origin in India. However, in such cases, the family of either party must be permanently residing in India and should agree to such arrangement. They should also agree to be the guardian of the child and take custody of the child in case of either breach of arrangement or any mishap to the parties of the surrogacy arrangement.

The State should fix up with the minimum amount of monetary consideration to be paid in the surrogacy arrangements which confers most of the benefits to the surrogate mother as compared to the middlemen and the commercial institution.

A general surrogacy contract should be framed by the governments which should act as a model for contracts to be entered into in respect of surrogacy. The said contract should clearly specify the rights and obligations of all the stake holders.

The requirement of five years of marriage before opting for surrogacy arrangement should be abolished or reduced to one year as given under Section 4(iii)(c)(II) because of the requirement of certificate of proven infertility of both or either party to the marriage under Section 4(iii)(a)(I).

The essential requirement of surrogate mother being the close relative of the intended parents as per Section 4(iii)(b)(II) should be abolished as the fact that necessitates such a requirement negates the possibility of even going ahead with

surrogacy as in Indian societal setup giving birth for someone else within family is not appreciated.

The provision of the surrogate mother to be compulsorily married as mentioned under Section 4(iii)(b)(I) should be abolished and the marital status of the surrogate mother should not be taken into consideration. However, the consent of guardian, in case of her being unmarried and the consent of husband, in case of her being married should be strictly followed.

Aim of the Study

Family is the basic unit of any society and parenthood is taken as an essential attribute of fulfilling both societal as well as emotional needs. Not having a child because of any reason, is taken in a society like India as a bane which has often extreme results extending to mental cruelty as well as divorce. Surrogacy is taken as an answer to the same where a person can fulfill his/her desire of parenthood with the aid of technology. India, due to lack of laws, poverty, and availability of technology and doctors, has become the centre of attraction of childless couples. There have been attempts to make laws on the same, however, none of the step led to formation of an Act. The latest being the Surrogacy Regulation Bill which was introduced in 2016. The paper aims at mentioning the aspects of surrogacy and critically analyse the Bill keeping in mind the social setup of India.

Conclusion

The aim of the surrogacy regulation laws should be to regulate surrogacy arrangements. To regulate the same, there should be a possibility of the happening of such arrangements too. With certificate of proven infertility, wait of five years after marriage, no option to arrange a surrogate from outside family who can be possibly more in need of money to give consent to be a surrogate mother, arranging for a surrogate mother within family, possibly of the same generation that too married with children, with an attached taboo, will in all possibility result in giving up the idea of surrogacy in itself gradually.

References

1. Article 23 ,ICCPR
2. Article 17, ICCPR
3. Article 10(1), ICESCR
4. Article 8, ECHR
5. *Villianatos and Others v. Greece* (29381/09 & 32684/09) [2013] ECHR (7 November, 2013), at [84]
6. K.Svitnev, *Legal Control of Surrogacy International Perspectives in Joseph G.Schenker* (ed.), *Ethical Dilemmas in Assisted Reproductive Technologies*, Walter de Gruyter GmbH & Co., Germany, 2011, p.149
7. *Municipal Corporation of Delhi v. Female Workers*, (2000) 3 SCC 224.
8. Sir Robert Geoffrey Edwards, was an English physiologist who is also called as pioneer in reproductive medicine, and in-vitro fertilisation (IVF) in particular. Along with the surgeon Patrick Steptoe, hesuccessfully pioneered conception through IVF, which led to the birth of Louise Brown on 25 July 1978.

<http://www.britannica.com/EBchecked/topic/179875/Robert-Edwards>

9. http://surrogacylawsindia.com/index_inner.php
10. Garner, Bryan A., *Black's Law Dictionary*, 9th ed. 2009.
11. (2008) 13 SCC 518.
12. *In traditional surrogacy, women use their own eggs which are artificially inseminated by the intended fathers or donor sperm. The surrogate mother carries the baby, delivers that baby and then gives that baby to the parents to raise. The traditional surrogate mother is the baby's biological mother because it's her egg that was fertilized by the intended father's sperm.*
13. *It is a process in which a woman carries a baby that has been conceived using the egg of the intended mother, or an egg donor, and sperm from the intended father or a sperm donor. A gestational surrogate mother has no genetic connection to the baby because it wasn't the gestational surrogate's egg that was used during the IVF cycle.* Available at; <https://www.fertilitysourcecompanies.com/what-is-a-surrogate-mother-or-a-gestational-carrier/>
14. *In September 2012, Casey assisted her daughter to give birth to her grandson since she struggled with infertility. Her son-in-law's sperm and daughter's egg her were used in-vitro fertilization procedure, making the couple biological parents of the child born through his grandmother; available at <http://abcnews.go.com/blogs/health/2012/09/04/surrogate-mother-61-gives-birth-to-her-grandson/>*
15. 405 U.S. 438 (1972).
16. 106 Mich. App. 169, 307 N.W.2d 438 (1981).
17. *R. Rajagopal v. State of TN*, (1994) 6 SCC 632.
18. *Writ Petition (Crl.) No. 76 of 2016 D. No. 14961/2016*
19. 537 A.2d 1227, 109 N.J. 396 (N.J. 1988)
20. Pamela Laufer-Ukeles, "Approaching Surrogate Motherhood: Reconsidering Difference", 26 *Vt. L.Rev.* 407 (2001-2002), p.417.
21. William Joesph Wagner, "The Contractual Re-allocation of Procreative Resources and Parental Rights: The Natural Endowment Critique", 41 *Case W. Res. L. Rev.* 1 (1990), p.7.
22. Theresa M. Mady, "Surrogate Mothers: The Legal Issues", 7 *Am. J.L. & Med.* 323 (1981-1982), p.345.
23. Indu S. Nair, "Rights of the Child: Challenges for Law in the New Era of Technology", (2003) [C.U.L.R.] 101, p.115.
24. *Ibid.*
25. WHO Summary Report, "Consultation on the Place of In Vitro Fertilization in Infertility Care, WHO Regional Office for Europe, Copenhagen, June 18-22, 1990.
26. Parentage Act, 2004
27. The Human Fertilization and Embryology Act, 2008
28. *Surrogacy Law and Policy in the U.S.*, Columbia Law School Sexuality & Gender Law Clinic (2016), Report of the Columbia Law School Sexuality & Gender Law Clinic; Alex Finkelstein

- (J.D. '17), Sarah Mac Dougall (J.D. '16), Angela Kintominas (LL.M. '16), Anya Olsen (J.D. '17), https://web.law.columbia.edu/sites/default/files/microsites/gender-sexuality/files/columbia_sexuality_and_gender_law_clinic_-_surrogacy_law_and_policy_report_-_june_2016.pdf
29. Beginning in 2003, the Japan Society of Obstetrics and Gynecology (JSOG) issued guidelines advising its members not to perform gestational surrogacy at risk of losing their membership and their license to practice medicine. Later that year, the Ministry of Health, Labor and Welfare and the Ministry of Justice issued reports calling for the prohibition of surrogacy, with this opinion further supported in 2007 by the Science Council of Japan and the Japan Federation of Bar Associations. In 2008, Japan's ART Review Committee repeated the call to prohibit the practice of gestational surrogacy, and in 2014 the Liberal Democratic Party put forth a proposal calling for the prohibition of surrogacy except for in exceptional circumstances. Source: Patrick Balazo ' Cross-border Gestational Surrogacy in Japan and the Spectre of Statelessness'; Available at: http://www.institutesi.org/WP2017_05.pdf
 30. Available at: <https://www.asiasentinel.com/econ-business/india-reproductive-tourism/>
 31. ShereneAzli, 'Developing markets in Asia', IMTJ, 2015, Source, <https://www.imtj.com/medical-tourism-topics/statistics-and-data/>
 32. Baby Manji Yamada v. Union of India, (2008) 13 SCC 518, Jan Balaz v. Union of India AIR 2010 Guj. 21
 33. Section 3, Surrogacy Regulation Bill, 2016
 34. Ibid, Section 4(iii)(c),
 35. Ibid, Section 6
 36. Ibid, Section 35 and Section 36
 37. Ibid, Section 4(iii)
 38. Ibid, Section 9 read with Section 47(2)(g)
 39. Ibid, Section 36
 40. Ibid, Section 37