



# The Surrogacy (Regulation) Bill, 2020: A Critical Analysis Of The Provisions In The Light Of Procreative Choice Of Surrogate Mother To Use Her Agency

Dr. Dipankar Debnath\*

\*Assistant Professor-in-Law, Department of Law, University of North

*“The greatest good is what we do for one another.” — Mother Teresa*

## I.INTRODUCTION

The much awaited surrogacy Bill<sup>1</sup> which was introduced on February, 26, 2020 in the Lok Sabha by the Ministry of Health and Family Welfare in the name of The Surrogacy (Regulation) Bill, 2020 was with a view to set at rest all the controversies that was surrounded on different aspects of surrogacy (and the Bills). Indian women who are unable to exercise their respective reproductive rights due to inability to conceive could make an approach to another woman (obviously close relative) to conceive and give birth to a baby with a view to handover the baby to the former. Now under the new Bill, a willing woman would be eligible to become a surrogate mother excluding the woman from close relative. The Bill also proposed to include widows and divorced within the domain of prospective mother besides infertile Indian couples. This Bill has been introduced with a view to regulate the practice of surrogacy for the benefit of the surrogate mothers who are subject to exploitation involving in this ‘rent a womb’ business. This paper makes an attempt to analyse critically on the various provisions of the Bill to find out the answer of the following questions:

- Whether the proposed Bill has opened an avenue of exploitation to exercise the reproductive choice of surrogate mother by using her agency against her will?
- Whether a surrogate mother should ethically involved in surrogacy?
- Is there any scope available to her under the Bill, if she wanted to use her agency to gain monetary benefit?

<sup>1</sup> The Surrogacy (Regulation) Bill, 2020.

Mother Nature has awarded the mankind with unexpected incredible gifts. One of such gift is the introduction of eve with the ability to procreate life within by providing them to experience the feeling of motherhood. Unfortunately, there are a few amongst them who due to some physiological conditions are unable to procreate which in turn put such women into such miserable and tyrannical situation where, at one point of time they decides to put an end of their lives by committing suicide in order to get rid from such unbearable family and social pressure. Fortunately, scientific and technological development has been considered as a boon to such unfortunate women who, although unable to exercise their reproductive rights, finds many alternatives to become a happy mother. Moreover, due to the involvement in different activities, many women, specially, some sections of working women are not mentally (or physically?) prepare to experience the taste of becoming genetic mother. Amongst many methods<sup>2</sup>, the concept of surrogate mother has found a momentum during the recent past with increasing cases of infertility world has been facing nowadays.

## II. SURROGACY IN INDIA

### II.I A Booming Industry

The surrogacy industry in India has burgeoned since 2002 and at its zenith in 2014 was said to be worth over INR 2000 crores<sup>3</sup> or USD 500 million. In 2005-2006, the Indian Council for Medical Research (ICMR) anticipated that profits from the surrogacy industry would reach USD 6 billion in the coming years<sup>4</sup> from about 7,000-8,000 surrogacy clinics in India. The parliamentary standing committee for the department of health and family welfare, which submitted its report on the bill to the Rajya Sabha in August 2017, had estimated 2,000 surrogacy births in India—i.e., in a population of 1.3 billion—over the preceding three years<sup>5</sup>.

However, according to the National ART Registry of India (NARI) which is maintained by the Indian Society for Assisted Reproduction (ISAR) being the nodal agency for recording surrogacy cases during the period of 2015-2017 there has been a shocking decline of surrogacy cases in India. As per the report published in the Economic Times<sup>6</sup>, in 2015 where the number of embryo transfers<sup>7</sup> were 714, and during 2016 it was 728, unfortunately, during 2017 it reduced to 489 out of which pregnancy ratio during those years were 302, 391 and 311 respectively. Doctors say that

<sup>2</sup> Test tube baby, Artificial Reproductive Technology (ART), In-Vitro Fertilisation, Intra-Uterine Injection (IUI), etc. are few of such examples to become a mother in an artificial ways.

<sup>3</sup> Namita Kohli, 'Commercial Surrogacy: The Half Mothers of Anand', Hindustan Times, Aug. 20, 2018 Available at: <https://www.hindustantimes.com/india/commercial-surrogacy-the-half-mothers-of-anand/story-sYIUel9CGC5FoilmshKE4O.html> (Last visited on April, 22, 2020).

<sup>4</sup> Aditya Ghosh, 'Cradle of the World', Hindustan Times (23 December 2006) 18

<sup>5</sup> Puneet Nicholas Yadav, Rent-A-Womb? Wait, The Government Is Planning to Ban It; 'Absurd', Say Experts, The Outlook, Aug. 5, 2019, available at: <https://www.outlookindia.com/magazine/story/india-news-rent-a-womb-wait-the-government-is-planning-to-ban-it-absurd-say-experts/301961> (Last visited on April, 23, 2020).

<sup>6</sup> Sudipta Sengupta, New strict Surrogacy Bill on the anvil, clinics shut shop, The Economic Times, Nov. 16, 2019, available at: [https://economictimes.indiatimes.com/news/politics-and-nation/new-strict-surrogacy-bill-on-the-anvil-clinics-shut-shop/articleshow/72081780.cms?utm\\_source=contentofinterest&utm\\_medium=text&utm\\_campaign=cppst](https://economictimes.indiatimes.com/news/politics-and-nation/new-strict-surrogacy-bill-on-the-anvil-clinics-shut-shop/articleshow/72081780.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst) (Last visited on April 23, 2020).

<sup>7</sup> It is a method under which the embryo created from the egg and sperm is transferred into the carrier's womb.

these are the recorded data and are partially accurate as it only reflects information voluntarily uploaded by clinics. The main reason behind such declination is that commercial surrogacy has been banned in India.

### III. PROCREATIVE RIGHTS OF SURROGATE WOMAN UNDER THE CONSTITUTION OF INDIA

*Black's Law Dictionary* defines procreation as the generation of children. These rights are human rights because it is essential to a contemporary concept of the free individual, and if a right is arguably necessary to the freedom of an individual, i.e. to have the power to direct his own life, it is to be considered fundamental<sup>8</sup>. Therefore, to carry a child on behalf of another by the surrogate woman is her choice of right which she considered as fundamental to direct his own way of life when it is related to extending (or renting) her womb to procreate a child for other. Surrogacy is a reproductive alternative, which aims at overcoming involuntary fertility<sup>9</sup>. The area of procreative rights in itself is in need of greater conceptual clarity, as it has been asserted to include a right to make procreative decisions without governmental restriction including a right to procreate without discrimination by doctors, an equal right of infertile people to procreate with a right to be assisted in procreating; a right to engage in reproductive contracts or multiple-party interventions; and a right to have procreative assistance funded<sup>10</sup>.

The right to procreate and to found a family is a fundamental right. It is a part of the reproductive autonomy guaranteed to every individual. The procreative right can be looked at from two perspectives one containing the positive and the negative right to procreate and the other being the narrow and the broader right to procreate. The narrow procreative right, which is a negative or first generation right, is linked to a bundle of fundamental negative rights regarding bodily integrity. The broader procreative right which is positive or second generation right, is linked to economic and social rights (or entitlements) like rights to reproductive education and actual means to choose family size<sup>11</sup>.

There have been debate among various stakeholders in and outside the Parliament including social workers, social right activists etc. on the question whether surrogacy is immoral, exploitative and commodifying? Unfortunately, in none of such discussions or debates the surrogate women had given an opportunity to raise their respective voices. It appears that draft after draft of any proposed regulation on surrogacy has failed to involve them in the law-making process or making them central to it.

In the light of the above analysis the question therefore, remains whether procreative and other rights of the surrogate mothers have been adequately protected under the Constitution of India? Whether the voices of the surrogate women are adequately heard? Are they voluntarily coming forward to share their feeling of motherhood providing the facility to use their agency for those unfortunate, infertile sections of women who are subject to mental and physical abuse

<sup>8</sup> T.H. Lackland, "Towards Creating a Philosophy of Fundamental Human Rights" Vol. 6 Columbia Human Rights Law Review, at p. 489 (1975).

<sup>9</sup> R. Lee & D. Morgan (eds.), *Surrogacy: An Introductory Essay in Birth Rights: Law and Ethics at the Beginning of Life* 78 (Routledge Press, London, 1989).

<sup>10</sup> Laura Shauver, "The Right to Procreate: When Rights Claims Have Gone Wrong" 40 McGill L.J. 826 (1995).

<sup>11</sup> Aparajita Amar and Arjun Aggarwal, "The emerging laws relating Surrogacy: A Procreational Right for Single Parent, Transgenders and Foreigners", SCC Online Blog, April 10, 2018, available at: <https://www.scconline.com/blog/post/2018/04/10/the-emerging-laws-relating-surrogacy-a-procreational-right-for-single-parent-transgenders-and-foreigners/>

for not being capable of giving birth of a child? The answer of all the above questions could be possible to understand if we analyse such right in the light of the Constitutional provisions and also on the basis of the observations made by the Apex Court of the country and the various High Courts of the country.

The opportunity to be heard is an unwritten tenet of Article 21 of the Constitution.<sup>12</sup> In *Olga Tellis* case also the Hon'ble Supreme Court reiterated that "The ordinary rule which regulates all procedure is that persons who are likely to be affected by the proposed action must be afforded an opportunity of being heard as to why that action should not be taken. The hearing may be given individually or collectively, depending upon the facts of each situation."<sup>13</sup>

in the case of *Baby Manji Yamada v Union of India & Anr.*<sup>14</sup>, a historical deed on the cases of surrogacy, the Hon'ble Supreme Court recognises the practice of surrogacy to be legal and described it as "a well-known method of reproduction whereby a woman agrees to become pregnant for the purpose of gestating and giving birth to a child she will not raise but hand over to a contracted party" obviously without any personal gain or benefit. It is a matter of debate whether under the veil of moral duty; a woman uses her agency for economic benefit which is her right to livelihood as guaranteed under Article 21 of the Constitution of India.

In November 2015, a public interest litigation was filed by Advocate Jayshree Wad seeking a ban on commercial surrogacy which was supported by the Government and by submitting an affidavit it claimed that 'altruistic surrogacy to needy, infertile married Indian couples' will be allowed after thorough checks of the couples. Interestingly, in the same month, a group of surrogate mothers through a petition approached to the Hon'ble Supreme Court<sup>15</sup> with a claim that the changes made by the Government of India with regard to the surrogacy matters were discriminatory and projected surrogacy in a very negative light<sup>16</sup> unfortunately, with the consequence of rejection of the petition and the matter has been kept in abeyance.

Consequently, the Surrogacy (Regulation) Bill, 2016 was introduced in the Parliament without any public consultation. As it lapsed when the house dissolved for national elections, it was reintroduced in the Lok Sabha as the Surrogacy (Regulation) Bill 2019 and was duly approved. The law claims that it stops the exploitation of surrogate without providing the opportunity to the surrogates to place their opinion as to who they are and what they have to say instead their voices have been condemned violating the principles of natural justice.<sup>17</sup>

<sup>12</sup> A.K Gopalan v. The State of Madras AIR 1950 SC 27

<sup>13</sup> *Olga Tellis & Ors. v. Bombay Municipal Corporation & Ors.*, 1985 SCC (3) 545.

<sup>14</sup> AIR 2009 SC 84.

<sup>15</sup> Bindu Shajan Perappadan "A setback for surrogacy in India", The Hindu, November 29, 2015 available at: <http://www.thehindu.com/opinion/op-ed/a-setback-for-surrogacy-in-india/article7927730.ece> (Last visited on April, 24, 2020).

<sup>16</sup> Aradhna Wal, "Surrogate Mothers say regulate practice, don't ban it; moves SC opposing restriction" DNA, November 30, 2015, available at: <http://www.dnaindia.com/india/report-four-women-vocally-oppose-the-new-restrictivebanning-foreigners-from-availing-surrogacy-in-india-2150202> (Last visited on April, 24, 2020).

<sup>17</sup> Devika Singh, "Visibilising Vulnerability through a Constitutional Lens: Revisiting Policy Making for Surrogacy in India," Kaushal Graphic Art, New Delhi, 2019 at p. 285 available at: <https://research.vu.nl/ws/portalfiles/portal/88639526/complete+dissertation.pdf> (Last visited on April, 24, 2020).



Right to procreate is an imperative right. Article 21 is possibly one of the shortest clauses of the Constitution which has received the widest possible interpretation. When the surrogates approached the Supreme Court, they argued that by banning surrogacy, their reproductive freedoms guaranteed by the Constitution of India have been violated<sup>18</sup>. In addition to the above rights, the right to choose the method of reproduction can also be read as part of liberties guaranteed under Article 21. The judiciary in India too has recognized the reproductive rights of humans as a basic right. In *B.K. Parthasarathi v. Government of Andhra Pradesh*<sup>19</sup>, the A.P. High Court held that, “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*<sup>20</sup> which characterized the right to reproduce as “one of the basic civil rights of man”.

The Hon’ble Supreme Court also in *Suchita Srivastava v. Chandigarh Administration*<sup>21</sup> observed that a woman's right to make reproductive choices has been interpreted as a dimension of ‘personal liberty’ as understood under Article 21 of the Constitution of India. In this connection it is pertinent to refer *Govind v. State of Madhya Pradesh & Anr.*<sup>22</sup> where the Courts stated that “nothing would advance women's welfare more than respecting their reproductive autonomy. Such autonomy must encompass and protect the personal intimacies of marriage, motherhood, procreation, and child rearing”. In the light of above observation by the Hon’ble Court it may be concluded that since women may decide on whether to have an abortion or not, they should also be allowed to offer their body for surrogacy not only for her subsistence but also for the benefit of intended parents in order to remove the social stigma of infertile i.e. “baanz.”

#### **IV. THE SURROGACY (REGULATION) BILL, 2020: THE SCOPE OF PROCREATIVE RIGHT OF SURROGATE MOTHER**

In the backdrop of tremendous growth of surrogacy clinics across the country, the Government has formulated various draft Bills to regulate surrogacy over the years in 2008, 2010, 2014, 2016, 2019 and latest draft Bill being the Surrogacy (Regulation) Bill, 2020. The new Bill provides certain rules and restrictions on who can avail and who cannot avail surrogacy. The Bill proposes a complete ban on commercial surrogacy, restricting ethical and altruistic surrogacy to legally wed infertile Indian couples only. It also creates a ban on the overseas Indians, foreigners, unmarried couples, live-in partners and gay couples to be a part of surrogacy. The following are some of the important features of the Bill:

- a. It allows any “willing” woman to be surrogate mother.
- b. It included live-in couple, divorced women, widows, non-resident Indians (NRIs), persons of Indian origin (PIO), overseas citizenship of India (OCI) etc.

<sup>18</sup> *Ibid.*

<sup>19</sup> AIR 2000 A.P. at p. 156

<sup>20</sup> 316 US 535.

<sup>21</sup> (2009) 9 SCC (1).

<sup>22</sup> AIR 1975 SC 1378.

- c. The period of proven infertility has been reduced to one year instead of five year.
- d. It seeks to allow ethical altruistic surrogacy to the prospective infertile Indian married couple between the age of 23-50 years for females and 26-55 years for males.
- e. It proposes to regulate surrogacy by establishing a National Surrogacy Board at the central level and State Surrogacy Board and appropriate authorities in states and Union Territories respectively.
- f. The insurance coverage for surrogate mothers has been increased to 36 months from 16 months provided in the earlier version.
- g. The Bill makes it mandatory for the couple to obtain a certificate of essentiality and also a certificate of eligibility for surrogacy.
- h. It proposed for the prohibition of the commercial surrogacy including sale and purchase of human embryo and gametes.

“The Bill is aimed at banning commercial surrogacy and allowing altruistic surrogacy” said Mr. Prakash Javadekar, Minister of Information and Broadcasting. It is to be submitted that banning commercial surrogacy will take away the livelihoods of women who intended to rent out their wombs and would deny women rights over their own bodies. Both commercial or ‘compensated surrogacy’ (named by Dr. Nayana Patel, known for handling Asia’s first surrogacy case in 2003) and altruistic surrogacy be legalised and there must be proper regulatory check to protect the rights and interests of all parties or else there should be a total ban on surrogacy in all forms for the sake of human dignity keeping in view that surrogacy is inherently exploitative. The researcher also bear the same view that a blanket ban on commercial surrogacy has also evoked criticism for the reason that such a ban would deprive women from poor socio-economic backgrounds from earning some money. It can of course be argued that surrogacy need not be a medium for financial empowerment. However, financial empowerment is incidental and nothing more than a compensation for the services rendered as a surrogate<sup>23</sup>. Further, although commercial surrogacy has been kept out of the purview, the Bill incorporated certain monetary aspects in the name of insurance coverage, medical expenses and prescribed expenses (such as cost of food, maternity wear etc.) etc., an interesting paradox lies in the fact that the inclusion of the term “prescribed expenses” leaves the door half open for some form of compensation, especially since the arrangement is not restricted to “close relatives”.

Furthermore, by the inclusions of different categories of women (mentioned above in the features part) who could pursue surrogacy, it paved the way of commercial surrogacy indirectly where the PIOs and OCIs who are reach enough and who would be happy enough to compensate the willing women in the name of different cost of expenses. This in turn will make some (un)willing women subject to exploitation who are not mentally and physically capable to procreate or who would conceive against her choice using her agency. Experts have rightly criticised the absence of monetary compensation for surrogate mothers. Not many women are likely to be interested in carrying someone

<sup>23</sup> The Need for Responsible Surrogacy, The New Indian Express, February 20, 2020, available at: <https://www.newindianexpress.com/opinions/2020/feb/20/the-need-for-responsible-surrogacy-2105917.html> (Last visited on April 29, 2020).

else's child without being paid for it. On the other hand, the inclusions of widows and divorced women triggered a possibility that they might also be subject to exploitation at the hand of surrogate mother as she might refuse to hand over the baby or demand for higher money despite the existence of the regulatory Boards in this connection.

The bill proposes to regulate surrogacy by establishing National Surrogacy Board at the central level and, State Surrogacy Board and appropriate authorities in states and the Union Territories respectively. The new Bill also provides for a new layer of government certification such as certificate of essentiality and certificate of eligibility. The interference by the government will affect the personal liberty of the surrogate mother and is unconstitutional. If the Bill sees the day light, it is submitted that the surrogacy industry was not illegal but un-regulated. But it will, in effect, be obsolete if the new bill becomes law because only ethical altruistic surrogacy will be allowed which is unrealistic concept and does not tenable at all.

## V. CONCLUSION

Surrogacy is an area that revolved round with ethical, moral and legal issues. In the whole aspects of surrogacy, it is the surrogate mother who is subject to physical, mental and economical exploitations because the pain and agony they undergone with cannot be possible to realise by the prospective mother and that is why it is important that her interests must be safeguarded under the contract in such a way that a proper balance could be possible to maintain between both the mothers (prospective and surrogate). Rather than treating the contract a commercial one for which provision of punishment has been prescribed under the Bill, the interest of the person providing a womb for surrogacy must be monetarily secured under it including the provision of proper insurance and medical expenses that is bore by the surrogate mother along with physical and mental sufferings. Proper counselling must be made before entering into the agreement between the parties which would facilitate in protecting the various rights including the procreating right of the surrogate mother. There is no denying the fact that rather than emotional and other factors, it is the economic factor on which focus is made in general because it is considered as the primary and most important factor that has connection with the right to livelihood. Other factors which are similarly important from the human rights point of view involving right to individual autonomy, right to health including procreative liberty, right to dignity, right to privacy are some of such rights and are matter of concern to be taken care of while drafting the contract and the same should be made understood to the surrogate mother who is poor, illiterate having no idea regarding legal complications that might arise at any point of time during the subsistence of the contract of surrogacy. Apart from the economic factor, the procreative right of the surrogate mother should be properly safeguarded and during pregnancy special care should be on her health (mental as well as physical) because at such vulnerable stage of pregnancy and also after the delivery of the baby she should not be left with vulnerability putting her health in danger.

