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SURROGACY (REGULATION BILL, 2020): AN OVERVIEW

Introduction

It's always a special moment when Partners get a chance to become parents, it's even more special when a woman becomes a mother. Not all women have textbook pregnancies it's sad that not everyone gets the golden opportunity to bear a child in them, but why should they suffer? Shouldn't partners by choice get a chance to experience the wonders of parenthood?

At this point somewhere in the world, partners are being introduced to the concept of Infertility and they have jumped to a conclusion that they will never be responsible for the creation of another human being, but there is always a solution. Besides other medical reproductive options there another that is *Surrogacy*.

What is Surrogacy?

Surrogacy is a technique of assisted reproduction where parents deliberately assign a surrogate who will bear and care for their baby until birth. It is for partners who are unable to have a child or simply do not want to get pregnant but want to start a family. Surrogacy is defined and explained in the case of **K. Kaliselvi v/s Chennai Port Trust** as "*Surrogacy is 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. She may be the child's genetic mother or maybe as a gestational carrier, carry the pregnancy to deliver after having been implanted with an embryo*"

Surrogacy is a complex process that requires medical and legal expertise as well as a strong support system during the journey. Usually, partners go for Gestational Surrogacy where there is almost no genetic relation of the surrogate and the child but in other situations, the method of traditional Surrogacy is done where the child is genetically related to the surrogate. In India Surrogacy as a practice has been carried out for a few decades, where this practice has been helping the unfortunate it also needs some protection for who is involved. The government realised the same and introduced The Surrogacy (Regulation) Bill, 2019¹ for regulation purposes by the Ministry of Health and Family Welfare.

Surrogacy (Regulation) Bill, 2020.

It all started in 2002² when Surrogacy was legalised in India, where India became the hub of surrogacy due to the low cost, and the technique of surrogacy and surrogate became extremely popular. Any legalised act needs to be backed up with some strict legislation and this bill is no different, certain proposed regulation was passed like the Assisted Reproductive Technology Bill³, Surrogacy regulation bill 2016 and 2019 and 2020.

Certain Facts about the bill./Provisions under the Surrogacy (Regulation) Bill 2020.

- The Surrogacy (Regulation) Bill, 2020 was a reformed version of the 2019 and 2016 draft legislation after certain changes incorporated and approved by the Union Cabinet and the Rajya Sabha Select Committee, introduced by the Ministry of Health and Family Welfare, Dr. Harsh Vardhan in Lok Sabha on July 15, 2019.
- The Bill Defines Surrogacy "*a practice where a woman gives birth to a child for an intending couple with the intension to hand over the child after the birth to the intending couple*" It also defines terms like 'altruistic surrogacy', 'commercial surrogacy', 'intending women'. The term 'compensatory surrogacy' has been omitted as it promotes commercial surrogacy. **(Section 2)**

¹ Parliament of India – Rajya Sabha: report of the Select Committee on The Surrogacy (Regulation) Bill, 2019 dated 5th February, 2020 (recently introduced with changes for a well rounded legislation) ; The bill of 2016 was reintroduced in the Lok Sabha as The Surrogacy (Regulation) Bill, 2019 and passed on 05/08/2019

² In 2002, commercial surrogacy or informally 'Rent a Womb' practice was legalised in India. It was done to promote medical tourism in India and after this decision India became "the hub of surrogacy".

³ Introduced in Lok Sabha on September 14, 2020. The Bill defines ART to include all techniques that seek to obtain a pregnancy by handling the sperm or the oocyte (immature egg cell) outside the human body and transferring the gamete or the embryo into the reproductive system of a woman

- The Bill **prohibits** commercial surrogacy but **allows** altruistic surrogacy. Altruistic surrogacy⁴ involves no monetary compensation to the surrogate mother other than the medical expenses and insurance coverage during the pregnancy. Commercial surrogacy includes surrogacy or its related procedures undertaken for a monetary benefit or reward exceeding the basic medical expenses and insurance coverage.
- Surrogacy is **permitted** when (a) for intending couples who suffer from proven Infertility, (b) altruistic, (c) not for commercial purpose, (d) not for producing children for sale, prostitution, or any other forms of exploitation, (e) for any condition or disease specified through regulations.
- A child born out of a surrogacy procedure will be deemed to be the **biological child** of the intending couple. **(section 3)**
- The Intending couple should have fulfilled certain conditions⁵ and should have a **certificate of essentiality and eligibility** issued by appropriate authority and the same applies to the surrogate. **(Section 4-10)**
- Registration of surrogacy clinics is **compulsory** and the clinics must apply for registration within **60 days** of the appointment of the appropriate authority. **(Section 11-14)**
- The central and state government shall constitute **National Surrogacy Board (NSB) and the State Surrogacy Boards (SSB)**, respectively. Advising the central government on surrogacy relating policies, also it helps in laying down the code of conduct for clinics. **(Section 15-32)**
- The requirements of certification have been put to smooth the contractual relation and also it has extended the insurance coverage from **16 to 36 months**.
- The bill allows any **married or willing women** from the age of **25 to 35 years** having a child of their own can act as a surrogate mother.
- The Central and state government are in charge of appointing appropriate authorities for granting, suspending, cancelling the registration of surrogacy clinics, enforcing certain standards, taking action against any breach, recommending a modification to the rules and regulations. **(Section 33-35)**

⁴ Altruistic Surrogacy under the Bill includes contracting a 'close relative' as a surrogate by a heterosexual married couple who have been childless for five years of their marriage. This line, in gist, separates altruism from the commercial tinge that surrogacy carries with it.

⁵ Conditions mentioned under the Surrogacy (Regulation) Bill, 2019.

- The penalty for such offences is imprisonment up to 10 years and a fine up to 10 lakh rupees. (**Section 36-43**)
- An abortion of the surrogate child requires the written consent of the surrogate mother and the authorisation of the appropriate authority and this authorisation must be compliant with the Medical Termination of Pregnancy Act, 1971 ⁶.
- The surrogate mother will have an option to withdraw from surrogacy before the embryo is implanted in her womb.
- There are certain **offences and penalties** under this bill that include - (a) advertising of commercial surrogacy. (b) Abandoning, exploiting, or disowning the surrogate child. (c) Exploitation the surrogate. (c) Selling or importing human embryo for surrogacy.

Critiquing the Surrogacy (Regulation) Bill, 2020.

With every bill that gets passed in the legislature, there is a wave of critics that come with it and this bill was no exception. The law governing surrogacy has great importance and in a period of time India has flourished into a reproductive tourism industry and the surrogacy capital of the world. Though it might be a milestone in the history of surrogacy it did not see the light of the day. They say, as women one must be able to own their bodies and the law should not encroach on them, this Bill does not counter the statement but it somehow restricts.

It restricts in a way by not qualifying the test of classification by disallowing certain class of people on basis of the duration and status of their marriage, sexuality and nationality. The clause that specifies restriction of surrogacy intrudes on the rights of single persons, homosexuals, couples in a live-in relationship or who are divorced or widowed. However, there is no such clause restricting this class of people on adopting a child under the adoption laws ⁷. Such restriction violates the Rights of equality and personal liberty **under Article 14⁸ and 21⁹** i.e. right of reproduction, procreation, childbearing, motherhood, etc., are infringed

⁶ This act allows for aborting the pregnancy by medical doctors (with specified specialisation) on certain grounds. A pregnancy maybe be terminated up to 12 weeks based on the opinion of one doctor, and up to 20 weeks based on the opinion of two doctors.

⁷ See The Hindu Adoption and Maintenance Act, 1956 and The Juvenile Justice (Care and Protection of Children) Act, 2000

⁸ Article 14 of the Constitution of India reads as under: "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

by the interference of the state violates the reproductive autonomy of the intending couples. Although **article 14** is not absolute i.e., not all laws apply to everyone but the whole process of surrogacy comes under the test of reasonable classification where one put the law for legal validity and this bill does not necessary qualifies the test only for the sole reason that it paces restriction on people who opt for surrogacy. It somehow also infringes the Right of privacy as the bill or the government acts as an agency over the woman's body by dictating terms that does not allow her to act independently It also denies justice to the LGBTQ+ community who are trying to be parents through surrogacy even though after a historic judgement of *Navtej Singh Johar vs Union of India* was passed legalising same sex marriage and couples. An idea have been put forth by Several judgements that a couple in a live-in relation hold the status of a married couple as someone living together for many years are presumed to be married¹⁰. However under Surrogacy, Talking about the rule barring couples in a live-in relationship is just "absurd". As by law couples in a Live-in relation¹¹ are justified but those couples opting for surrogacy is not unjustified? Isn't this a clear case of discrimination on the part of the law?

Moreover, the term "close relative" mentioned in the 2019 bill, in which the surrogate can be has not been defined under the bill and that's what makes it ambiguous. It does not mention which exact relations are included and to what extent is considered "close". However, on 5th February 2020, this clause was amended by the Rajya Sabha when the report on the Surrogacy (Regulation) bill 2019 was presented by the Select Committee. Now with the new legislation any 'willing woman' can act as a surrogate mother.

This bill mentioned about the Ban of commercial surrogacy which was a blooming industry before this bill, this industry was ranked in \$400 million every year. Since the ban, it has led to a conflict between the economic interest of these women and the state protecting them. The bill however allows altruistic surrogacy but it does not suffice the needs of the economically poor. There is sufficient literature on how commercial surrogacies infringes on the reproductive right of a woman, but let's look at it from the point of privacy and practice

⁹ Article 21 in The Constitution Of India 1949 Protection of life and personal liberty No person shall be deprived of his life or personal liberty except according to procedure established by law.

¹⁰ Madan Mohan Singh v. Rajni Kant 9 SCC 209 : (2010) 3 SCC (Civ) 655, 13-08-2010

¹¹ A landmark judgment on 8-4-2015 by the seat comprising of Justice M.Y. Eqbal and Justice Amitava Roy, the Supreme Court decided out that couples living in live-in relationship will be presumed legally married.

as a profession. There are two points to point out besides the obvious, firstly commercial surrogacy is an occupation and is protected under **Article 19(1) (g)** and does not come within the scope of restriction under this right. Secondly, it argues that this bill infringes on the right of privacy of individuals undergoing surrogacy under Article 21.

Commercial surrogacy is perceived as the root cause of all the evil that afflicts surrogacy in India. The highlight of the bill aims to curbs the unethical practices that go on in the name of commercial surrogacy. The law commission sees it as additional layers of safety mechanisms towards these practices. The approach of banning commercial surrogacy goes in line with provisions of the Transplantation of Human Organs Act, 1994, which bans the commercialization of trade of Human organs. Moreover as a situation since surrogates were nowhere available in India to single parents, gay and unmarried partners also raised a question on the approach of the government. There is always a flip side to a coin, it is argued that very less intrusive measures are taken by the Government for whose rights are infringed under Article 19(1) (g)¹² and Article 21. The main issue here is a problem-solution mismatch; if the government is looking out for the exploitation of surrogate mothers then the bill should have included some less intrusive options that would legislate the happenings under commercial surrogacy. This does not mean that the state would take away the powers of the contracting party but would rather form a certain legislative framework that could be entered in the contract in a language the surrogate understands for example **Section 4(iii) (a) (III)** of this bill has made a mandatory provision of insurance for a surrogate mother, along with screening and counselling centres which can help them understand their health implications. Additionally, the government should also make a base amount for the surrogate mother mandatory and if the amount is not paid it should amount to an offence and not just a breach of contract. By doing this the government would benefit the trust of those who feel betrayed. The said legislation takes away a women's right to earn by losing the right exercise bodily autonomy. A blanket ban on commercial surrogacy will not give woman the compensation that they received by going through risky procedures. The only compensation they will be getting is in the form of insurance coverage, medical expenses etc which is not enough for them. Even many women entrepreneurs, stakeholder, gynaecologists are of the opinion that women give in all and go through so much trouble in giving birth to whole living being, this strenuous process should be awarded with some monetary benefit.

¹² Commercial surrogacy is protected under Article 19(1)(g) of the constitution of India

On the other hand, there was a landmark of **Justice K.S. Puttaswamy v/s Union of India**¹³ back in 2012, where Justice K.S. Puttaswamy had recognized infringement of the constitutional rights of surrogate couples and women in general to make reproductive choices. These were their personal choices that they had all the right of under Article 21 (13) of The Constitution of India. The case stated that the government had imposed certain restrictions on certain categories of people from undergoing surrogacy. Like Section 4(iii)(c)(III), The Surrogacy (Regulation) Bill, 2020 included that a couple undergoing surrogacy cannot have living, biological or adopted child except a child suffering from a mental disability or life threatening diseases and the same has to be confirmed with a certificate from the medical department by the state medical board. Further it also mentions about including infertility certificates of both or one partner opting surrogacy. Surrogacy is an individual and personal choice and the bill should not be the one to decide on behalf of someone else. When the concept of privacy is extended to matters of procreation and reproduction than any interference by either law or the state is a matter of encroachment to one's privacy.

There is all this talk about how Constitutional Rights are being affected but somewhere even Human Rights are being affected, though there is a very thin line that is so blur that is not identified. There is a difference of opinion on the categorisation of Human Rights in the context of surrogacy. While some treat it as a progressive practice, some feel that it is a method used to exploit women hence a violation of basic Human rights. This gets interesting because our constitution does not specifically talk about anything related to the 'Reproductive rights of women'. Hence the thin line between the two most important rights gets even thinner and non-distinguishable.

The Brighter side to the Bill.

It's a paradox, but to count the positives the Primary objective of this bill was to prevent the exploitation of women both physically and emotionally. Being a surrogate or lending a womb can help you make more money than prostitution without any repercussions therefore women go through emotional trauma by their family only with the thought of getting some monetary

¹³ SC 2017 Writ Petition (Civil) No. 494 of 2012, (2017) 10 SCC 1

benefits. Besides that many foreign nationals benefited by starting surrogacy services that did not go in the right direction and resulted in unjust behaviour towards women, targeting economically poor women to be surrogate over and over again not keeping the dire health conditions in mind, selling of the human embryos. By prohibiting commercial surrogacy you are putting an end to an unethical vicious cycle and beating the drum for this exploitation to stop. The bill also makes sure that the practice of surrogacy has an improved condition with structured rules and regulation that need to be followed at both state and national level. The bill also mentions who can explore surrogacy, with stringent laws in place certificate eligibility is also in place so reduce the scope of illegalities. Additionally the bill does not only look after the surrogates but also the child born out of surrogacy in order to protect their rights also most importantly making sure that surrogacy as a practice is not sex selective.

A lot of questions have been raised regarding surrogacy contracts without which surrogacy cannot happen but this bill puts an end to all the speculations by putting a ban on commercial surrogacy. This bill makes sure that the child born out of surrogacy will be biological child of the intended couple. Also a lot of questions were being raised regarding the privacy of the surrogacy contracts, which the court upheld that any reproductive right of a women including surrogacy will be right to privacy. Even though there are regulations that are required to protect the rights of surrogate mother, guardianship, responsibilities of fertility clinics etc., the law regarding public welfare and policy remains the same and does not enforce on surrogacy contracts and it's this bill that fills the gap by proving the provisions governing surrogacy. Further the validity of surrogacy contracts remain intact since Section 35 prohibits and penalises commercial surrogacy, exploitation of surrogates and children born out of it making surrogacy contracts lawful in light of Section 24 of the Indian Contracts Act.

The Bill in today's Day

This bill has followed a certain timeline starting from 2002 when commercial surrogacy was legalised, Central Government introducing the Surrogacy (Regulation) Bill in 2016 and 2019. Another addition to this timeline was in 2020 with certain changes to the bill proposed in 2019 which had some prominent issues that need to be thrown some light on. On 5th February 2020 the select committee amended the clause that the surrogate needs to be a "close-relative" of the intending couple as this would difficult in convincing someone close to you to lend their womb. Another clause amended was the five year time limit for couples

before opting for surrogacy and also the removal of the term "*infertility*"¹⁴ as it made the couple wait too long to have a child. The Committee took up all these changes from the previous bill and making amendments into a new bill i.e. the Surrogacy (Regulation) Bill, 2020¹⁵ and the Cabinet minister approving the Bill, these amendments made the bill more acceptable to the society without any potential infringement of human rights. Surrogacy Laws have accommodated for the vested interest of millions of women. The question to exploitation and abandonment is a government regulation and not an absolute restriction. In today's age a lot of efforts are being put to make the two decade old surrogacy sector effective, regulative and ethical. The 2020 bill was not like any other bill that's gets introduced in the parliament this bill had a lot to prove and even satisfy the good old Golden Triangle Test¹⁶.

Surrogacy is an integral part of Assisted Reproductive Technology (ART), both the Surrogacy bill and the ART bill¹⁷ are intertwined as the ART bill sets a base, procedures and technology related to reproduction which in turn sets a mode for the surrogacy bill which sets the implication and ethical arrangements. Even though these two bills are intertwined the ART bill does not have an effect on the surrogacy Bill but yet it is important to have a continuous sync between both the bill and that's the duty of the government. Hence the Surrogacy bill, ART bill, Medical Termination of Pregnancy Act and the Pre-conception and Pre-natal Diagnostic Act (old) together work for the regulatory safeguarding for the protection of reproductive rights on women and that's something society needed.

In conclusion, Surrogacy or the Surrogacy (Regulation) Bill doesn't have to be a test of constitutionality it's rather the beauty of humanity. It's a journey from being able to help partners from becoming "intended parents" to "parents", this bill has also changed the concept of motherhood and has broadened it to include genetic mothers, biological mothers, social mother and surrogate mothers. Let's look at the Bill as a clear advocate for those struggling with infertility. Surrogacy has become the need of the society, it is the last hope for infertile couples, how much ever one will try to curb surrogacy it will come back, as it's the last ray of hope to the problem of childlessness. Its time there needs to be an open

¹⁴ Clause 2(p) read with Clauses 2(r), 4(ii)(a) & 4(iii)(a)(I) of the report of *K S Puttaswamy v Union of India* (2017) 10 SCC 1

¹⁵ the compilation of the 2020 Surrogacy Bill, central government has shifted the spotlight onto the regulation of other forms of assisted reproductive technologies with the Union Cabinet approving related legislation. The Draft Assisted Reproductive Technology Bill, 2020, seeks to establish a National Advisory Board, State Advisory Boards and a national registry for accreditations, regulation and supervision of all assisted reproductive technology clinics and assisted reproductive technology banks.

¹⁶ *Minerva Mills Ltd. & Ors. v Union of India & Ors.* AIR 1980 SC 1789.

¹⁷ <https://prsindia.org/billtrack/the-assisted-reproductive-technology-regulation-bill-2020>

dialogue on how the bill should uplift the society rather than down siding a category of people which has certainly not helped. It's time we start working towards viewing surrogacy as a fundamental right, even though the bill as certain flaws its yet a blend of social, moral, ethical and scientific issues. Besides the bill can play an important role by ensuring a proper process in place instead of seeking to impose a total ban. Commercial surrogacy will become an underground business if the ban is imposed, further risking the lives of surrogate and the babies they carry therefore it's important to first secure the interest of the person providing the womb for surrogacy. Surrogacy should not compromise the worth of the child by making it a contract and it should neither compromise the Surrogates dignity by exploiting them. Even though this bill might have failed to explain some aspects and despite such enormous efforts and deliberations there are still many suggestions to be advanced and incorporated to produce meaningful beneficial legislation lacking practical shortcomings. There is always scope of improvement and hopefully there is more from the side of the Indian Government and the Indian Judiciary. Lastly, it is important to understand that an improved Legislation is necessary so that this wonderful procedure can be supervised and it is being done by the right people for the right people.

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