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POTENTIAL TRANSFORMATION TARGETED THROUGH THE SURROGACY (REGULATION) BILL, 2019: *AN OVERVIEW*

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The right to reproduction is an innate right of an individual and the desire for children among couples is a universal phenomenon, unmatched and unparalleled to any other constructive and materialistic happiness. Parenthood is considered to be a life-changing experience in the concept of carrying forward the legacy of the family. The emerging prevalence of infertility in the couples over the world has lead to advancement in the science of infertility treatment and has moved forward by leaps and bounds by providing *Assisted Reproductive Techniques (ART)*. Because of this, the surrogacy comes as an alternative when an infertile woman or couple is not able to reproduce or conceive a child, naturally.

Predominantly, surrogacy is an arrangement where a surrogate mother bears and delivers a child for another couple or person who as unfortunately marred with infertility. Surrogacy may be commercial or altruistic, depending upon the nature of surrogate a couple chooses. The *laissez-faire* approach to surrogacy in India, the low cost for surrogacy services compared to other countries, the shorter waiting time to be matched with a surrogate, the availability of women willing to be surrogates, and the possibility of close monitoring of these surrogates, as well as the modern medical infrastructure in India, are all important factors which contribute to India's desirability as a surrogacy destination.[3]

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[3] *Birthing a market: A study on commercial surrogacy.* SAMA-Resource Group for Women and Health. (2012)

I. THE SURROGACY REGIME IN INDIA AND A NEED FOR REGULATION

Section 2 (zc) of The Surrogacy (Regulation) Bill, 2019,[4] (*hereinafter referred to as the* 'Bill') defines surrogacy as *"a practice where a woman gives birth to a child for an intending couple to hand over the child after birth to the intending couple".* The Black's Law Dictionary,[5] defines it as 'an agreement wherein a woman agrees to be artificially inseminated with the semen of another woman's husband." The Bill majorly specifies two modes of surrogacy which are altruistic and commercial surrogacy. The basic legislative intent which is germane to such philosophy is to eradicate the commercial angle which has rose in the last decade or so and also to propagate and encourage the concept of altruistic surrogacy which also entails the surrogate being a close relation to the intended parents. It goes undisputed that the child born out of surrogacy is stated to be deemed the biological child of the intending couple and be entitled to all the rights and privileges available to a natural child. The altruism comes from the surrogate not receiving any monetary compensation which becomes the operational difference between the two modes of surrogacy. Many contend that altruistic surrogacy is the only ethical option because it does not put a price on human body parts and life which avoids exposure of the body to sale in the market. In contrast, commercial surrogacy includes predetermined monetary compensation, in addition to the coverage of ensuing medical and care costs which, given the lawmakers, is bereft of the settled human rights across the globe.

The intellect of the legislature behind the prologue of the Bill comes out to facilitate altruistic surrogacy in the country and as such has allowed ethical altruistic surrogacy only to the intending infertile Indian married couple. Not only this, but it also mandates the couple to obtain a certificate of essentiality and a certificate of eligibility as a condition precedent before going ahead with the process of surrogacy along with the provisions that intending couples should not abandon the child born out of surrogacy under any condition making it incumbent that the paramount importance is of the child and nothing else. The most imperative stipulation is to set a criterion for the surrogate mother, that being a close relative and married and should be between the age of 25-35 years of age. The aforesaid fulfillment of the three conditions for a mother to be called as a 'surrogate mother' should be enough to put an effective end to the

[4] Introduced by the Minister of Health and Family Welfare, Dr. Harsh Vardhan in Lok Sabha on July 15, 2019

[5] Garner, B. A., & Black, H. C. (2009) *Black's law dictionary*, 9th ed. St. Paul, MN: West.

commodification of the womb and is also a step to overcome the law laid down in *Baby Manaji Yamanda vs. Union of India*[6] by the Hon'ble Supreme Court of India.

As contended by the Ministry of Women & Child, the commercialization of surrogacy has left a lot of women from underprivileged backgrounds, who lend their wombs, in a vulnerable condition and immediate action has become the need of the hour to eliminate the unbridled and rampant commercialization of wombs across the country. Apart from the above, the Bill specifically aims to introduce a new framework to the surrogacy regime in India with the constitution of Surrogacy Boards at the national as well as state levels to ensure effective regulation of the process. Also, the child born out of such a surrogacy process shall be entitled to all rights and privileges that are available to a natural child.

II. ANALYZING THE BILL OF 2019

The intention with which the Surrogacy (Regulation) Bill, 2019 was passed was to curb exploitation, it left leeway for both medical as well as the general public in some of the clauses for enough criticism. Beginning with, only a close relative can be a surrogate mother limits the possibility of surrogacy for the couple as this becomes the very last option a couple chooses. Given the fact that adoption is always an option available to the couple but the ever-lasting stigma attached to adoption and the desire of own blood and true heir also follows. The concept of "*altruistic surrogacy"* discussed in the Bill, greatly limits both potential surrogate mothers as well as couples wanting children as women can become surrogates only once, and since couples who cannot find willing relatives have no way out.

Section 3 (2) of the Bill puts a complete ban on Commercial Surrogacy while promoting only Altruistic Surrogacy comes down heavily on a wide stretch of couple opting for surrogacy and appears to be an outright restriction on the choice of the couple to choose a surrogate mother even in the presence of her consent. In many of the international surrogacy cases namely in *Re The Matter Of TT (A Minor)*[7], *Re P (Surrogacy: Residence)*[8] the utmost significance of the case is summed up by stating that "*the surrogate child is born as a result of the surrogacy agreement*" thus implying the fulfillment of all the conditions, situations and stipulations

[6] (2008) 13 SCC 518

[7] [2011] EWHC 33 (Fam)

[8] [2008] 1 FLR 177

leading to the birth of surrogate child thereby implying all-round protection for the surrogate mother.

Furthermore, the bill restricts and limits the woman's surrogacy choice only once, thus limiting the ideology of a few who have considered this process as a source of their income who survive on the business of surrogacy which ultimately comes down to the point of consent.[9] Given a situation when a woman is willing to be a surrogate mother and is assured of the safe birth of the child, then why to restrict her to only one child is a question which the Bill fails to answer. In the humble opinion of the author, the intent can be to stop considering the women as a '*child producing machine*' and that the facility is being used only by those for whom this is not just a nine-month process rather it be an event of giving birth to new hope, vision, and belief that being of an unfortunate infertile couple. The bloom in the surrogacy industry of India made a lot of women from various regions of the country mainly Anand town in Gujarat State, Indore city in Madhya Pradesh, Pune, and Mumbai in Maharashtra, Delhi, Kolkata, and Thiruvananthapuram dependent on this.[10]

The idea is to set out surrogacy laws in India in such a way that there is full consent of the woman in question whereas the Bill of 2019 instead of regulating the ways and policies in which a woman's exploitation is prevented, eliminates the very idea of surrogacy for business. That the intention of the Legislation for some falls under the grey clouds by putting a complete ban on Commercial Surrogacy while keeping the issues like regulating the framework, putting the change in the modalities, and strengthening the institution of surrogacy while restricting exploitation of the surrogate mother, remains untouched.

Additionally, the bill also seeks to ban egg donations, so that it could curb child trafficking and illegal surrogacy being carried on the basic parameter being the only a blanket ban will help in this situation and as such only policies and laws need to be structured and implemented in such a way that it does censure the whole industry from curbing the menace. In the humble opinion of the author, yet another aspect left to be highly ignored by the Legislature in the Bill is pursuant to the decriminalization of section 377 of the Indian Penal Code by the Honourable Supreme Court of India[11], the pernicious nature of the bill is evident by its prohibition of same-

[9] Pyali, C. (2015). Role of Law Relating to Commercial Surrogacy in India and Protection of the Surrogate Mother. *International Journal of Recent Scientific Research*, *6*(9), 6187-6192 p.

[10] Das, S.S & Maut, P. (2014). Commercialization of Surrogacy in India: A Critical Analysis. JCC Law Review ISSN – 2231 296X. V. 14 – 29.

[11] Navtej Singh Johar vs. Union of India

sex couples from using surrogacy services which is one of the most contentious points as it is a blatant ban on surrogacy rights of homosexual couples. This is sheer and evident discrimination violating Article 14 of the Constitution of India,[12] and goes on to violating Article 21 of the Constitution,[13] as laid down by the Hon'ble Supreme Court in Justice K.S. Puttaswamy case.[14]

However, some elements of the Surrogacy (Regulation) Bill may be considered positive and protective. For example, it emphasizes that the intending couple must respect, love and not "abandon the child, born out of a surrogacy procedure, whether within the territorial boundaries of India or not without any restrict on condition or any genetic defect which the child might have by birth or any other medical condition, the defects developing subsequently, sex of the child or conception of more than one baby and the like."

Yet the bill does seem to do more harm than good. Although it was formulated to curtail the abuse of women and trafficking of children; again, it goes on to the general policy of a state banning or censoring an activity almost completely, instead of aiming at ways to utilize and enact laws to standardize and progress the state of affairs. One of the desirable qualities of law is its dynamism coupled with stability, continuity, and the fact that, *law is never static*.[15] The Bill even in a state of advancement in terms of human life and technology demonstrate a deficiency of understanding the respect and freedom which ought to be given to a woman to enable to her make decisions when the question is about her body but Bills like these are just another nail in the coffin proving that the actions of the state are still based upon the old school thoughts, orthodox and outdated approach of homophobic, paternal society which is *mutatis mutandis* to that of anarchic philosophy unbecoming of a welfare state. The provisions in the surrogacy agreement take away from the surrogate mother the guaranteed legal rights namely the reproductive right to seek termination of medical pregnancy subject to the mandatory form of the terms and conditions stipulated in the Medical Termination of Pregnancy Act 1971.[16]

The approach of the legislature banning commercial surrogacy goes in line with the provisions of the Transplantation of Human Organs Act, 1994 which *per se* bans the sale of human organs, loaning of organs and commercialization of trade of human organs. Moreover, as a situation

[12] Article 14, Constitution of India, 1950

[13] Article 21, Constitution of India, 1950

[14] Justice K.S. Puttaswamy v. Union of India [Writ Petition (Civil) no 494 OF 2012].

[15] Cardozo, B. N. (1963). *The growth of the law* (Vol. 88). Yale University Press.

[16] Act No. 34 of 1971, came into force on 10th August 1971.

since surrogates were nowhere available as in India to single parents, gay and unmarried partners, also raised a question mark on the approach of the government and the judiciary, both. The inclination, desire, and aspiration to have a genetic child of one's flesh, blood and DNA, supported by technology and purchasing power of money coupled with the Indian entrepreneurial spirit has generated this flourishing Indian reproductive tourism industry to which this bill intends to regulate rather to put an end, *ex-facie*.

III. CONCLUDING OBSERVATIONS

Now is the time for India to take stock, evaluate, access, and decide the future course of surrogacy. A clear cut law on surrogacy must be enacted by the Parliament without investing any more time in amending and debating. The medical professionals need to aid and assist the Government in preparing a new draft law on surrogacy or to subsume changes in the existing after drawing an analogy with proper checks, safeguards and adequate precautions to ward off the ills of the commercial overtones of surrogacy. The foreign citizens must not be misguided anymore and must be informed about the new law which shall come into force and as such a proper law must rein in all concerned to effectively regulate the surrogacy practices. There is a need to prepare legislation to regulate not only the ART clinics but also the rights and obligations of all parties to a surrogacy including rights of the surrogate child and intended parents. Surrogacy has both positive and negative effects. If it is used wisely, it would bring happiness to millions of couples. But if it is used in a careless way and as a means of commerce, it would harm the society which is precisely the imperative reason as to why the government has been forced to introduce a law relating to control and regulate surrogacy in India.