

COMMERCIAL SURROGACY IN INDIA: AN ANALYSIS OF THE SURROGACY (REGULATION) BILL, 2020

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ABSTRACT

At present, India is one of the few states where the practice of commercial surrogacy is unregulated. Other than the ICMR 2005 Guidelines, there is no regulatory framework to govern this practice. Due to the relatively lower medical cost and scarcity of legal regulations, India has become an attractive destination for 'fertility tourism'. However, this lack of a regulatory mechanism has also made surrogates and children born through surrogacy vulnerable to exploitation. The Surrogacy (Regulation) Bill, 2020 is the most recent attempt by the State to Ban Commercial Surrogacy and protect the interest of the parties involved in the process. This Paper, thus, attempts to analyse 2020 Bill. The question of banning commercial surrogacy gives rise to a number of ethical issues as well. A complete Ban on commercial surrogacy has also been a subject of considerable debate. This Paper, by discussing the exploitation of the surrogates and the children they give birth to, tries to settle the debate and emphasise the need to ban commercial surrogacy.

OVERVIEW

Back in 2018, there had been reports of a 64-year-old man, being arrested for harassing a woman he had hired to be a surrogate. The man reportedly wished to have a son, after having three daughters, and had paid Rs. 5 lakh to the woman. The woman, who was married, had agreed due to her financial difficulties. However, later the man started pushing her to live with him, and when she refused he became abusive.¹ In 2012, an Australian couple had come to India, to take the twins they had commissioned via surrogacy. However, they only took one of the children back with them. According to them, the other child was given up in adoption, however, despite thorough investigations, the child in question has not been traced even today.² In another

¹ Hyderabad: Man harasses woman he hired for surrogacy; arrested, The Indian Express, *available at*: <https://indianexpress.com/article/cities/hyderabad/hyderabad-man-harasses-woman-he-hired-for-surrogacy-arrested-6279245/> (last visited on June 1, 2021).

² Where is Dev, the child born through surrogacy but left behind by his parents?, Scroll, *available at*: <https://scroll.in/pulse/817116/where-is-dev-the-child-born-through-surrogacy-but-left-behind-by-his-parents> (last visited on June 1, 2021)

case, a surrogate mother complained, that despite big promises, she was left with only Rs 1300 after the procedure.³

Incidents of this nature, are the reason behind State's attempts to regulate the practice of Commercial surrogacy in India. The most recent draft of the Surrogacy Regulation Bill, has been approved by the cabinet and has been introduced in Parliament.⁴ Until the Bill is passed, commercial surrogacy remains very much legal in India. Other than India, commercial surrogacy is legal in Ukraine, Russia and some parts of US. Due to the relatively lower medical cost and scarcity of legal regulations, India has become an attractive destination for 'fertility tourism'. For this reason, the 102nd Parliamentary Select Committee called India the 'World Capital of Surrogacy'.⁵ At present the only regulation is the ICMR Guidelines of 2005 ('guidelines'), which lack statutory force.

This lack of a legal framework leaves the surrogate mothers as well as the children borne out of surrogacy vulnerable to exploitation. Keeping this exploitation in mind the Government had introduced the Surrogacy Regulation Bill 2016, and its revised drafts in 2018, 2019 and 2020. The purpose of this paper is to examine the problems relating to commercial surrogacy by reviewing the condition of women involved and whether the Surrogacy Regulation Bill 2020 ('the 2020 Bill') addresses these problems effectively. Thus, this paper has been divided in 3 parts. Part I discusses the problems associated with commercial surrogacy. Part II discusses the evolution of the legal framework concerning surrogacy to understand where the need for regulation comes from. In this context, Part III analyses the provisions of the 2020 Bill.

PART I: THE PROBLEMS WITH COMMERCIAL SURROGACY

This section analyses the condition of the surrogates and the children borne out of surrogacy arrangements within the present framework. The objective is to better understand the treatment that surrogates receive and how the lack of any regulation leaves them and the children they give birth to, vulnerable.

³ Prem Choudhary, Surrogates victims of abuse, exploitation, The Tribune, *available at*: <https://www.tribuneindia.com/news/archive/comment/surrogates-victims-of-abuse-exploitation-712289> (last visited on June 1, 2021)

⁴ Path breaking measures taken to protect women's reproductive rights, Press Information Bureau, *available at*: <https://pib.gov.in/PressReleaseDetail.aspx?PRID=1603649> (last visited on June 2, 2021).

⁵ PSC, "One Hundred and Second Report: The Surrogacy (Regulation) Bill, 2016" para 1.1 (GOI, 2016).

According to Black's Law Dictionary 'Surrogacy' is the act of "*carrying and delivering a child for another person.*"⁶ Accordingly, when this act is performed for monetary gains it is referred to as commercial surrogacy. The commercialisation of any commodity changes the significance and understanding of that commercialised object.⁷ According to Michael J. Sandel, Giving birth in order to sell the child for monetary gains is a corruption of parenthood, since it treats children as objects to be used rather than human beings to be loved.⁸ Further it is also questionable whether any price can be put on the noble act of Motherhood. The practice of commercial surrogacy, thus, gives rise to a number of ethical considerations. These in turn have raised numerous concerns regarding the rights of the surrogate mother and the child.

The Radical Cultural Feminists are against commercial surrogacy, as it perpetuates the division between the economically privileged and the disadvantaged women by providing that the privileged women can hire the underprivileged to meet their reproductive needs. Acceptance of this practice, thus, gives rise to the notion that the wombs of disadvantaged women can be used as a service.⁹

The Marxist group is opposed to the idea of surrogacy as they believe that in a capitalist society the market forces women to undertake surrogacy. The willingness to act as a surrogate mother, thus, is a result of the social, economic and political situation constructed by the state which pushes the poor women to to sell their reproductive capacity for survival.¹⁰ This assertion is supported by the fact that most women who become surrogates do so because of their financial adversities, and not out of choice.¹¹ The lack of alternative opportunities remain at the core of this question of choice.

⁶ Black's Law Dictionary, 1582 (Thomson Reuters, 9th ed., 2009). Surrogacy has further been classified into "Gestational" and "Traditional" surrogacy.

⁷ Thomas Ploug, Jacob Birkler, et al. "International trade in human eggs, surrogacy and organs" 18 (Danish Council of Ethics, 2013).

⁸ Michael J Sandels, "*What Money Can't Buy: The Moral Limits of Markets*" 46 (Penguin Books, 2012)

⁹ Julia Bindel, "Commercial surrogacy is a rigged market in wombs for rent", *The Guardian*, Feb. 20, 2015.

¹⁰ Dr. P M Arathi, "A Study to Understand the Legal Rights and Challenges of Surrogates from Mumbai and Delhi" 33 (NHRC, 2014).

¹¹ Dalia Bhattacharya, "Commercial Surrogacy in India: Bans, 'Altruism' and the Women Involved" 41 *The Economic and Political Weekly* 28 (2016)

Proponents of commercial surrogacy argue that it is a means of livelihood for poor women to improve their economic condition. However, the question that needs to be addressed why these poor women have been pushed into making such a choice? Why they are forced to engage in such exploitative work?

The Indian society which is predominantly patriarchal, is defined by social and gender hierarchies. With a female literacy rate of 70%, the Indian women who become surrogates, often have no awareness of their rights and have no say in the process. Once the surrogacy arrangement is made they usually have no way out. The following section is thus aimed at discussing the profile and condition of surrogate mothers:

I. THE CONDITION OF SURROGATE MOTHERS

A 2014 study by Centre for Social Research has found that usually women from educationally and economically weaker backgrounds are engaged in surrogacy. They were found to have a monthly income of Rs 1000-2000 and were mostly illiterate. Thus, the need for money is often the driving force behind the choice to become a surrogate. In the present state of things, it is the agents and clinics who reap the most benefit from surrogacy arrangements. The terms of the engagement are usually decided without the involvement of the surrogates. Infact it was found that most surrogates do not possess a copy of the surrogacy agreement (only 2% of the participants in the study reported that they possessed a copy of the agreement). The contracts that signed between the surrogate and the commissioning parents always in english, a language that the surrogates as well as their husbands are often not familiar with. Thus, they are often not aware of their rights under these agreements. For instance, most surrogates were found to unaware of their right to abort the child. Thus, they have no say in the entire process. Where the commissioning couple wishes to discontinue the pregnancy due to some deformity or sex preferences, they are free to abort the child without the surrogate having any say.¹²

The entire procedure involved in gestational surrogacy requires heavy medical intervention, which includes daily injectibles. The surrogates own ovulatory cycle needs to be suppressed for which she required to take birth control pills and hormone shots. Following this she is given oestrogen shots to build her uterine lining. And once she is impregnated, she is given progesterone until her body realizes it is pregnant, and is able to sustain the pregnancy on its own.¹³ All of these medications are known to have major side effects.

¹² Centre for Social Research, "Surrogate Motherhood- Ethical or Commercial" 77-81 (CSR, 2014).

¹³ Shohre Beski, "Gestational surrogacy: a feasible option for patients with Rokitansky syndrome" 15 *Human Reproduction* 2326 (2000).

Furthermore, In most cases multiple embryos are transferred during the implantation of foetus in the surrogates, in order to increase the success rates. This later leads to the requirement for foetal reduction. Given the complex procedure that the surrogates the already going through, this extra surgical intervention for foetal reduction, just adds to the complications.¹⁴ Most commissioning parents in the CSR (2014) study admitted to having adopted sex selection through Selective Foetal Reduction technique.¹⁵

Throughout the pregnancy, the surrogates are housed in surrogate hostels. They are not allowed to go out even for a stroll. Usually 5-6 women occupy one room, which usually has no place no place to store their belongings. They are frequently visited by their children and husbands, but for women from villages that are far from the clinics, it is not possible to see their families very often. The internal struggle that the surrogates go through because of their poverty, physical and emotional struggles of pregnancy, lack of awareness, and their subordinate position in relation to the clinical staff and the commissioning parents, when coupled with the external hardships they face throughout the process, can make the experience extremely challenging.¹⁶

Surrogacy in India is accompanied by a lot of stigma. Most women engaged in surrogacy, keep it a secret from the communities and extended families.¹⁷

After the child is born the woman is not accepted by her own family members in some cases. In the CSR study, a significant proportion of the respondents (40% in Anand, 82.9% in Surat) felt isolated by their family members and friends.¹⁸ The Clinics and Hostels only accommodate the surrogates until the child is delivered. In cases where following the deliver, the surrogates are abandoned by their families, they are left with nowhere to go.

Along with the surrogates, the children they bear are just as vulnerable. Thus the next section is focussed on discussing the insecurities of the children.

¹⁴ *Supra* note 10 at 114.

¹⁵ *Supra* note 12 at 69.

¹⁶ Diksha Munjal Shankar, "Commercial Surrogacy in India: Vulnerability Contextualised" 58 *Journal of Indian law Institute* 359 (2016).

¹⁷ Amrita Pande, "'At Least I Am Not Sleeping with Anyone': Resisting the Stigma of Commercial Surrogacy in India" 36 *Reinventing Mothers* 299 (2010).

¹⁸ *Supra* note 12 at 78.

II. THE CONDITION OF CHILDREN

In a rather shocking incident, a foreigner couple had come to India to opt for surrogacy, for the purpose of getting an organ transplant for their sick child back home. In the absence of any regulatory framework, the children born out of surrogacy are just as vulnerable as the surrogate mother. The desire and ability to spend a significant amount of money does not guarantee good parenting. There are also cases where the commissioning parents have rejected a child after its birth. All of these possibilities exist even in cases of adoption and ordinary reproduction, however, concerns are more severe in cases of surrogacy as it involves engaging a third party to give birth.

The kind of complications that can arise in the absence of law in this area, were best demonstrated by the case of Baby Manji Yamada. In the case, the commissioning mother refused to take custody of the child after it was born, following her divorce with her husband. As a result, the child was left virtually orphaned and stateless. Because the commissioning parents were Japanese, but the baby had been born in India, issues concerning its identity were raised. The Japanese embassy at Delhi had refused to issue a passport saying that because baby Manji was born in India, she needed an Indian passport and a no-objection certificate to leave the country. Under Indian Laws, the passport of an Infant has to be linked to the mother's passport and because both the biological and the surrogate mother refused custody, it became impossible. Finally, the child was given a certificate of identity which is usually issued to stateless people, with the column for mother's name and nationality left blank.¹⁹ Had there been any medical emergencies post the birth of the child, which required the parent's consent, it would have been very disorganised.²⁰

In response, the Ministry of Home Affairs introduced a new set of visa rules making it mandatory for commissioning couples to get a medical visa, instead of a tourist visa, if they intended to visit India for opting commercial surrogacy. Further, only those couples could commission surrogacy in India, whose countries allowed for commercial surrogacy. This provision was meant to ensure that the child would receive a definite citizenship.²¹

¹⁹ Special Correspondent, Japan gate-pass for baby Manji, The Telegraph, *available at*: <https://www.telegraphindia.com/india/japan-gate-pass-for-baby-manji/cid/534514> (last visited June 10, 2021).

²⁰ *Supra* note 16.

²¹ Instructions Relating to Foreign Nationals Intending to Visit India for Commissioning Surrogacy, MHA, *available at*: https://www.mha.gov.in/PDF_Other/surrogacy03112015.pdf (last visited on June 10, 2021)

Thus, it is important that a proper legal framework is introduced to ensure that children borne out of surrogacy are not ill treated, abused or abandoned by their biological parents.

PART II: LEGAL DEVELOPMENTS IN SURROGACY REGULATION: TOWARDS ALTRUISM

The Practice of Surrogacy in India began to gained pace in the 2000s. Up until 2002, there were no guidelines governing the practice of surrogacy. However, as the practice grew, a call for regulation was made. As a result, in 2002 ICMR proposed its draft national guidelines for the accreditation, supervision, and regulation of ART clinics, which were approved in 2005.²² The guidelines however were not binding and anyway they were only applicable to the medical fraternity.

The lack of a legal framework governing surrogacy was felt in *Baby Manji Yamada v. Union of India*²³ (facts discussed in the previous section). Though the SC in this case recognised commercial surrogacy, it did not make any attempt to review the 2005 ICMR Guidelines or the ART Bill 2008 which had already been introduced by then. In 2010, the Gujarat High Court, in *Jan Balaz v. Anand Municipality*²⁴ highlighted the legislative gap by observing India does not have a “law prohibiting artificial insemination, egg donation, lending a womb or surrogacy agreements” and that the “legislature will have to address a lot of emotional, legal and ethical concerns”.²⁵ In Response to a PIL filed in *Jayashree Wad v Union of India*,²⁶ the SC urged the government to intervene by bringing forth a legislation to address the issue of commercial surrogacy.

When it come to surrogacy, there are essentially three types of arrangements: Commercial, Compensatory and Altruistic. While commercial surrogacy involves the act being undertaken for monetary gains, altruistic surrogacy involves an act undertaken selflessly for the benefit of others. The median path is often believed to be compensatory surrogacy, which does not per se involves any monetary benefit, however, it involves making good the loss suffered by the surrogate in terms of health, wages, and so on. However, the lines

²² National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India, MHA, available at: https://main.icmr.nic.in/sites/default/files/art/ART_Pdf.pdf (last visited on June 11, 2021)

²³ (2008)13 SCC 518.

²⁴ L.P.A. No. 2151 of 2009.

²⁵ Id. at para 14.

²⁶ WP [C] No 95/2015.

between commercial and compensatory surrogacy often get blurred. In the past few years, the discussion around regulation has discussed all three types of arrangements.

The need for surrogacy regulation was emphasised in the 228th Law Commission Report. The report stated that while prohibition based on moral grounds without a proper assessment would be unjustified, "*Active legislative intervention is required to facilitate correct uses of the new technology*"²⁷ It was the first time that a ban on Commercial Surrogacy was called for. The Roots of the Surrogacy Bill 2016 can be traced to this report. This Bill was referred to a Parliamentary Standing Committee which submitted its report in 2017. The Report noted a number of shortcomings within the draft legislation, and demonstrated an inclination towards compensatory surrogacy over altruistic surrogacy.²⁸ However, the arguments in support of compensatory surrogacy have been addressed in the Select committee report on the 2019 surrogacy bill. First and foremost the committee noted that all the expenses of the surrogate are covered under the provisions of the Bill. Further, to cover the loss work days, benefits under the Maternity Benefits Act 2017 may be extended to the surrogate mother. Finally in order to preserve the divine nature of motherhood, and prevent commoditisation of the children, altruistic surrogacy was considered the only way forward.²⁹

Based on the Recommendation of the select committee, the Surrogacy Regulation Bill, 2020 has been introduced in the Parliament. This is the most recent draft and thus, will be the subject of discussion in the next section.

PART III: THE SURROGACY REGULATION BILL, 2020: AN ANALYSIS

The UN Special Rapporteur in 2018, noted that unregulated practice of surrogacy constitutes sale of children and has urged states to adopt clear legislation either prohibiting or regulating the practice of surrogacy.³⁰ The discussion in the previous section has clarified how lack of legislative framework has allowed for the exploitation surrogates and children in surrogacy. Thus, the need for a regulatory framework cannot be denied. The Surrogacy Bill 2020 is aimed at provided such a framework.

²⁷ Law commission, "Report No. 228: Need For legislation to regulate assisted reproductive technology clinics as well as Rights and Obligations of the Parties to a Surrogacy" para 4.1 (GOI, 2009).

²⁸ Parliamentary Standing Committee, "102nd Report: The Surrogacy Bill 2016" para 5.108 (GOI, 2017).

²⁹ Select Committee, "Report of the Select Committee on The Surrogacy Regulation Bill 2019" Para 4.3-4.11 (GOI, 2019).

³⁰ HRC, "Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material" (2018).

The section will be divided into parts: (1) first part lays down the important features of the bill, and how far they have been successful in recognising the rights of the surrogates, the intending parents and the children; (2) second part evaluates the bill in terms of its shortcomings.

I. SALIENT FEATURES OF THE BILL

The Bill received the cabinet's approval on 26th February, 2020, incorporating all the major recommendations of the Select Committee. The most important aspects of the 2020 Bill are discussed below:

- **Regulation of surrogacy:** The Bill imposes a complete prohibition on commercial surrogacy and only allows for altruistic surrogacy. The Bill also prohibits sex selective surrogacy.³¹ Given the patriarchal set up of our society where people prefer having a son over a daughter, this restriction on sex selection will prevent female foeticides.

- **Essential Requirements to be Surrogate:** Under this Bill, any woman who meets the criterion prescribed under Sec 4(iii)(b), and not just a close relative of the couple, can become a surrogate.³² The 'close relative' requirement has been removed keeping in mind that it has the potential to reduce the number of surrogates available. Research has revealed that very few Indian women are comfortable undertaking surrogacy for a relative. Further, this requirement could have resulted in women being forced to take up surrogacy by their family, thus, its removal is a welcome step.³³

Now, A woman to be a surrogate mother must be between the age of 25-35 years and must have been married and must have a child of her own.³⁴ Any woman can be a surrogate only once in her lifetime.

- **Essential Requirements to Commission Surrogacy:** In order to opt for surrogacy the intending couple must be married and childless and must have a "medical indication necessitating gestational surrogacy". The wife must be between the age of 23 and 50 years and the husband must be between the age of 26 and 55

³¹ The Surrogacy (Regulation) Bill, 2020, s. 3(ii)&(viii).

³² *Id.* at s. 2(zg).

³³ Brownwyn Perry & Rakhi Ghoshal, "Regulation of surrogacy in India: whenceforth now?" *BMJ Global Health* 2 (2018).

³⁴ *Supra* note 31 at s. 4(iii)(b)(I).

years.³⁵ In addition to this any ‘intending woman’ who is a widow or divorcee between the age of 35 to 45 years, is also eligible to opt for surrogacy.³⁶

Further, the requirement of a 5 year waiting period has been removed for intending couples, to save them the unnecessary emotional struggle over such a long period of time.³⁷ Also, they are no longer required to obtain an infertility certificate, as this was demeaning and in violation their right to privacy. The Bill has also extended the facility of surrogacy to Persons of Indian Origin as these people have ancestral roots in India. However couples of Indian origin or intending women are required to obtain a certificate of recommendation from the Board.³⁸

- **Rights of Surrogate Mother:** The surrogate mother is entitled to the following rights and protection under this bill:
 - She is entitled to have all her medical as well as other prescribed expenses reimbursed.³⁹ The insertion of the phrase “other prescribed expenses” has significantly broadened the scope of the reimbursable expenses, to now include all reasonable expenses which are essential for the well-being of the mother. This implies that even in a altruistic arrangement the surrogate will be duly compensated.
 - She is entitled to an insurance coverage for 36 months.⁴⁰ The duration has been raised from 16 months in the 2019 Bill, considering the fact that surrogacy involves the risks of various medical complications and health hazards, postpartum. This insurance covers all health risks, post delivery complications and even death.
 - Her written consent has been made mandatory prior to abortion.⁴¹ Further all abortions are to be carried out in accordance with the Medical Termination of Pregnancy Act, 1971.
 - She is entitled to know about all the side effects and after effects of such procedures. Her written consent to the surrogacy procedure has also been made mandatory. She also has the option of withdrawing her consent anytime before the implantation of embryo.⁴²

³⁵ *Supra* note 31 at s. 2(r) r/w s. 4(c)

³⁶ *Supra* note 31 at s. 2(s)

³⁷ Sec 2(p) of the Surrogacy Regulation Bill, 2019 has been deleted.

³⁸ *Supra* note 31 at s. 4(ii)(a), proviso.

³⁹ *Supra* note 31 at s. 2(b)

⁴⁰ *Supra* note 31 at s. 4(iii)(a)(III)

⁴¹ *Supra* note 31 at s. 3(iv)

- There is rebuttable presumption where an offence under Sec 38 of the Bill is alleged, that the surrogate mother was compelled by her husband, the intending couple or any other relative, to render surrogacy services, procedures or to donate gametes.⁴³ This ensures greater protection to women against pressure and exploitation.

- **Rights of the Child:** Sec 8 clarifies that a child born out of surrogacy is deemed to be a biological child of the intending couple, and has all the rights and privileges that a natural born child would have.⁴⁴ The clarification regarding the parentage will remove a lot of ambiguities. Further such recognition of the child's rights will prevent its commodification and ensure that he/she has all the necessary avenues to avail her rights as a child.

- **Offences and Penalties:** Chapter VII of the Bill lists out the various offences and the accompanying penalties prescribed. The offences and the stringent penalties are meant to ensure protection of surrogates and children against exploitation. The following table enumerates the offences and penalties at glance

Table 1: List of Prescribed offences and penalties

Section	Offence	Penalty
36	Person, organisation or clinic: <ul style="list-style-type: none"> • undertaking commercial surrogacy • Advertising commercial surrogacy • Abandoning, exploiting or disowning a child born from surrogacy • Selling or importing human embryo • Sex selection 	Imprisonment upto 10 years and fine upto 10 lakh.
38	intending couple or intending woman not following altruistic surrogacy.	Imprisonment upto 5 years and fine upto 5 lakh.

⁴² *Supra* note 31 at s. 6.

⁴³ *Supra* note 31 at s. 40.

⁴⁴ *Supra* note 31 at s. 8.

Table 1: List of Prescribed offences and penalties

Section	Offence	Penalty
39	Contravention of provision for which no specific penalty is prescribed in the Bill	Imprisonment upto 3 years and fine upto 5 lakh.

Source: Chapter VII, Surrogacy Regulation Bill, 2020.

- **Constitution of National and State Surrogacy Boards:** Chapter V of the Bill provides for the constitution,⁴⁵ composition⁴⁶ and function of the National and State Surrogacy Boards. These Boards are to comprise of members who are experts in the field of embryology, gynaecology, obstetrics, and civil society workers associated with women’s rights and health.⁴⁷ The Boards have been assigned wide ranging functions. The functions of the National Board include advising the Central Government on policy matters relating to surrogacy, reviewing and monitoring the implementation of the Act, and setting the minimum standards of physical infrastructure, laboratory, diagnostic equipment and expert manpower to be hired by surrogacy clinics.⁴⁸ Thus, the bill gives adequate thought towards providing a mechanism to ensure effective implementation. The State Boards which work under the supervision of the National Boards are required to submit consolidated reports of their activities to the national board.⁴⁹
- **Mandatory Registration of Clinics:** Chapter IV provides for mandatory registration of the clinics undertaking surrogacy.⁵⁰ The Appropriate authorities prior to granting the certificate of registration, must

⁴⁵ *Supra* note 31 at s. 15 & 24.

⁴⁶ *Supra* note 31 at s. 15 & 25.

⁴⁷ *Supra* note 31 at s. 15(2)(f).

⁴⁸ *Supra* note 31 at s. 23.

⁴⁹ *Supra* note 31 at s. 24.

⁵⁰ *Supra* note 31 at s. 11

ensure compliance with the requirements under the act.⁵¹ The registration may be revoked or suspended in case of breach of provisions of this Bill.⁵²

The Bill has made some significant progress, and has, infact, incorporated many of the recommendations of the 102nd Parliamentary Standing Committee Report. For instance, extension of surrogacy to PIOs, removal of the 5 year waiting period, removal of the ‘close relative’ requirement, extending the period of insurance coverage (the PSC had recommended the period be extended to 6 years, however, it has only been extended to 36 months), prohibition on sex selection, and giving the surrogate an option to withdraw from the arrangement.

The Bill in these respects provides a noble framework to protect the interests of all parties involved. However, there are still certain shortcomings within the Bill which need to be addressed. The next section will discuss these shortcomings.

II. SHORTCOMINGS

Despite the remarkable progress that has been brought about by the Bill, there still remain certain shortcomings. Firstly, even though the 2020 Bill has broadened the scope of intending parents by allowing widow and divorced women to access surrogacy. However, it still leaves out homosexual couples, or single men and women. The requirement of the parents beings within a set age group coupled with the requirement of “medical indication necessitating gestational surrogacy”, make surrogacy a difficult choice. As times are progressing, we as a society have become more open to homosexuality, transgenderism, late marriages, and women remaining unmarried by choice. However, by restricting the option of availing surrogacy to only married couples and widows and divorcees in a certain age group, the legislation fails to recognise the rights of the homosexuals and the unmarried. While restriction and regulation are valid, they should be just, fair and reasonable.⁵³

Secondly, though the requirement of “medical indication necessitating gestational surrogacy” is broader than the previous “infertility” requirement provided in the 2019 Bill, it is still restrictive in the sense that it includes

⁵¹ *Supra* note 31 at s. 12

⁵² *Supra* note 31 at s. 13.

⁵³ Astha Srivastava, “The Surrogacy Regulation Bill of India: A Critique” 22 *Journal of International Women's Studies* 146 (2021)

conditions other than just infertility, however, it still does not incorporate situations where the couple may be able to conceive naturally but do not wish to because of the possibility of a hereditary/genetic illness passing down to the child. Many serious diseases such as Multiple Sclerosis, Huntington's Disease, Muscular Dystrophy, etc. have the likelihood of being passed down from parent to child. In such a situation, the biological mother may not wish to conceive naturally, for risk of passing down her illness.

Thirdly, though the duration of insurance coverage has been increased, and the Select Committee has clarified that it will cover instances of death of the surrogate, however, mere insurance may not be sufficient. Surrogate pregnancies cover a very real risk of mortality. Where it mandatory for the surrogate has children of her, particularly in cases where she is a single parent, additional compensation, in case of death is a necessity, for her own children may be rendered orphaned. Additionally social security measures for her orphaned children should also be made in such cases.⁵⁴ Because the Bill makes it mandatory for a woman to have children of her own in order to be a surrogate, such provisions become all the more necessary to protect her children.

Fourthly, the Bill presumes that adopting an altruistic surrogacy model will somehow by itself prevent exploitation. In reality however altruism does not guarantee, that a woman's wishes will be respected. The patriarchal family set up may cause women to be forced to be surrogates. Though the Bill provides for written consent of the surrogate to be taken, it is not sufficient to ensure genuine and free consent. Additional supervision mechanisms must be introduced to ensure that the surrogate mother is a consenting party.

Finally, even though under the 2020 Bill commercial surrogacy arrangements have been made punishable, no provision has been made to clarify what happens to the child that is born out of such illegal arrangement.⁵⁵

While the Bill in its current form is not perfect and may even be a little conservative, however, once enacted, the errors and shortcomings can be dealt with overtime. Most laws in India have, following their enactment, been amended multiple times based on experience and have as a result improved in terms of structure and implementation. Similarly, this law can also be built upon based on experience.

CONCLUSION

⁵⁴ Sonali Kusum, "What If the Surrogate Mother Dies ?", *ET Healthworld*, Apr. 24, 2018.

⁵⁵ *Supra* note 42 at 147.

The practice of surrogacy in India, in the absence of any regulatory framework, has led to surrogates being exploited and children being abandoned and abused. The practice of commercial surrogacy in its current state only benefits the clinics and the agents engaged. For the intending parents, surrogates as well as the children, the process remains arduous and uncertain. While the Surrogacy Regulation Bill 2020 provides a noble framework to regulate surrogacy in India, it is true that it may not be sufficient to effectively prohibit commercial surrogacy, and that some of it will continue albeit illegally. However, these cases are likely to be limited. It is important that India clarifies its stance on surrogacy. Because at present, the uncertainty and the availability of a grey area is enabling the practice to flourish.

Further, The ground realities that are the underlying causes of exploitation of women in India, remain unaddressed. In reality it is the paternalistic society, female illiteracy, employment and subordination that are at the root of women being exploited. These root causes need to be addressed at the earliest for any substantial change to occur.

