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FROM WOMEN RIGHTS PERSPECTIVE

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## INSIGHT INTO THE SURROGACY (REGULATION) BILL, 2020: AN ANALYSIS FROM WOMEN RIGHTS PERSPECTIVE

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### Abstract

The Surrogacy (Regulation) Bill 2019 was introduced in the Lok Sabha to regulate commercial surrogacy in the country. The bill does allow altruistic surrogacy but does not involve monetary compensation to the surrogate mother. The paper explores how legislatures have ignored the reproductive rights of women and refused to recognize the bodily autonomy of women. The Bill also fails to take into consideration the social patterns in India, where the woman is often solely made responsible for not being able to bear a child. The recent surrogacy bill not just prohibits same-sex couples from becoming parents, but it is also discriminatory for couples who would fail to access a 'close relative.' It is also a form of denial of employment of women in the surrogacy business, which puts them at an economic disadvantage. A legal framework is indeed necessary to protect the rights of women contemplating surrogacy, as completely banning commercial surrogacy will not protect women against exploitation. The remedy to uplift the status of women is not by restricting her reproductive rights, but by enabling them to make informed decisions. Blanket acts only promote corrupt and unethical practices.

### I. Introduction

“Reproductive technologies are not much regulated by those who seek them. One of the crucial challenges of women’s civil liberties is to strike the optimum balance between her liberty and the equally legitimate, but often conflicting, interests of the community”<sup>2</sup>. The conflict between these two theories gives rise to demand for reproductive liberty of women. The Apex Court in 2012, recognized right to make reproductive choices, under the wide interpretations of Article 21<sup>3</sup> of the

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<sup>2</sup> Simi Rose George, *Reproductive Rights: A Comparative Study of Constitutional Jurisprudence, Judicial Attitudes and State Policies in India*, 18 STUDENT BAR REVIEW 1, 70 (2006).

<sup>3</sup> In *Suchita Srivastava and Ors. vs. Chandigarh Administration* (28.08.2009 – SC: MANU/SC/1580/2009), Court recognised that women’s rights to make reproductive choice is also an aspect of Article 21 and includes right



Constitution. On the contrary, while hampering the economic rights as well as the right to bodily autonomy, the surrogacy bill, 2020, will ban commercial surrogacy in India.

Social security of health and wealth creates a psychological urge to have a child in couples. Persons who have infertility as a medical condition have to rely on either adoption or biological repair methods to have a child. The biological repair method falls under Artificial Reproduction Technology, while the legal method falls in the category of adoption. In all recognized societies, adoption is one of the practiced cultures. A Childless couple may become father and mother through the process of adoption.

As per Ernst and Young study<sup>4</sup>, Approximately 27.5 million Indian couples suffers infertility. Out of which about 270,000 infertile couples come to evaluate infertility, and 20-25% of these couples undergo IVF treatment after registering at an infertility center (that is only 10% of the total infertile couple opt for fertility treatment). So, if the infertile couples choose for adoption- The adoption system in our country is not sufficient to fulfill the needs of as many as 27.4 million remaining infertile couples. As number of abandoned children in India is less to meet this demand. Also, the waiting time in India for adoption varies from 1-3 years. Adoption cannot alone cover the enormous demand, can be estimated.

The desire to have the child of their own genes, having complementing reproductive technology has driven parents' attention to the surrogacy market<sup>5</sup>. Today, we see a significant advancement in the area of reproductive technologies. It has invented technology like Artificial insemination, IVF, and like techniques, which has transformed the environment of procreation. Such methods act as a ray of hope for many couples suffering from infertility conditions. Even after such popular demand, the existing law in India failed to fill the void. The phrase 'surrogate' is derived from the Latin word "surrogates," which implicates "a substitute".<sup>6</sup> Moreover, Black's Law Dictionary defines "surrogacy" as the process of carrying and delivering a child for another person<sup>7</sup>.

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exercised in favour of procreation or to abstain from procreating. The important consideration is woman's right to privacy, dignity and bodily integrity should be respected.

<sup>4</sup> A report 'Call for Action: Expanding IVF treatment in India' published by Ernst and Young (EY) in 2015 says that IVF is beyond access for as many as 80 per cent of the infertile population as they need multiple cycles.

<sup>5</sup> ANIL MALHOTRA & RANJIT MALHOTRA, SURROGACY IN INDIA- A LAW IN THE MAKING 13 (2013)

<sup>6</sup> Malini Karkal, *Surrogacy from a feminist perspective*, INDIAN JOURNAL OF MEDICAL SCIENCE (1997).

<sup>7</sup> OLIPHANT RE, SURROGACY IN BLACK LAW DICTIONARY, FAMILY LAW 349 (2007).



The growth in the Assisted Reproduction Technology shows that infertility is a significant disability in the life of a couple, mainly in societies like India & USA, where patriarchy flows in the blood. “A woman is respected as a wife if she is a mother of a male child so that the family lineage continues,”<sup>8</sup> Infertility is a significant issue in women’s life, primarily as families are depended on the child for progeny. In such cases, gestational surrogacy acts as a savior<sup>9</sup>. There has been a boost in the development of reproductive technology, accelerating the probability of inception and carrying a pregnancy for nine months<sup>10</sup>. Since the end of the 20th century, these technologies have developed at a pace. They have also influenced how society thinks of fertility, reproduction, and motherhood<sup>11</sup>.

Today, surrogacy is seen as an alternative to adoption, although adoption, for the reason that adoption may not provide for a genetic child, as in gestational surrogacy,<sup>12</sup> a child is born of their genes. From 1978 several Assisted Reproductive Techniques have been developed by scientists<sup>13</sup>. Assisted Reproductive Techniques has increased the probability of pregnancy as well as have helped surrogates to utilize it as a source of income to rent a womb.

Conventional techniques have undergone revolutionary changes, consequent to biomedical advancement. Like in many fields of science, reproductive technology, and surrogate motherhood have brought forth several socio-ethical-legal issues such as commercialization, violation of bodily autonomy of woman that needs attention. To make it a useful tool for realizing the dreams of motherhood for many couples who could not otherwise enjoy parenthood and for women to ensure her fundamental rights.

## II. Timeline of surrogacy rule in India

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<sup>8</sup> M. Srinivas *Assisted Reproductive Technology: Legal issues*, ANDHRA LAW TIMES 28 (2010)

<sup>9</sup> Justice Lakshmanan, *Surrogacy Bane or Boon*, MADRAS LAW JOURNAL 41 (2009)

<sup>10</sup> Sama, *Assisted Repro. In India: Implication for women*, 9 ECONOMIC & POLITICAL WEEKLY 9 (2007),

<sup>11</sup> *Ibid*

<sup>12</sup> ANDREW GRUBB, JUDITH LAING AND JEAN MCHALE, *PRINCIPLES OF MEDICAL LAW* 832-833 (2010)

<sup>13</sup> MATHIHARAN. K AND PROF. PATNAIK AMRIT K, *MEDICAL JURISPRUDENCE AND TOXICOLOGY* 867 (2006)



India, being the center of rented wombs, generates approximately two billion dollars yearly<sup>14</sup>. Despite being a center for surrogacy, the statutory regulations to regulate it are yet not passed by parliament. However, In India, surrogacy has become a significant concern due to its commercialization. The wheels of marketing, on one hand, have given a boom to the industry but, on the other hand, have obfuscated its progressive potentials.<sup>15</sup> Despite disadvantages, the legality of commercial surrogacy was upheld in India in many decisions, as in the ‘Baby Manaji case’.<sup>16</sup> Similarly, the Gujarat High Court upheld the validity of commercial surrogacy in *Jan Balaz vs. Anand Municipality and Others*<sup>17</sup>.

The subject matter of both cases had obvious relevance that, for the first time, issue about arbitrariness prevailing in the surrogacy market was raised. During *Baby Manaji case*<sup>18</sup>, the Indian Council of Bio-medical Research guidelines, 2006 inspected surrogacy contracts and regulated infertility clinics. However, couples having a subsisting marriage with one of the partner infertile eligible for surrogacy, and the regulations promoted gestational surrogacy, making it obligatory to adopt the baby born out of surrogacy within 42 days of his birth.<sup>19</sup> Both the judgments pronounced the need for legislation to regulate surrogacy in India. Consequently, In 2005 the ICMR drafted the Guideline<sup>20</sup>, i.e., “*first-ever national guidelines*”, laying down rules for regulation surrogacy business in India. Later, the Assisted Reproductive Technology (regulation) Bill was drafted and partially passed in 2008, 2010, 2015, and 2020 but never got enacted.<sup>21</sup>

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<sup>14</sup> LAW COMMISSION OF INIDA, INDIA – A REPRODUCTIVE TOURISM DESTINATION: 228<sup>TH</sup> LAW COMMISSION OF INDIA REPORT at p. 1.

<sup>15</sup> P M ARATHI, A STUDY TO UNDERSTAND THE LEGAL RIGHTS AND CHALLENGES OF SURROGATES FROM MUMBAI AND DELHI, FINAL REPORT SUBMITTED TO NATIONAL HUMAN RIGHTS COMMISSION.

<sup>16</sup> *Baby Manaji vs. Union of India*: (2008)13SCC518

<sup>17</sup> *Jan Balaz vs. Anand Municipality And Others*: AIR 2010 GUJ 21

<sup>18</sup> *Supra* note 11

<sup>19</sup> *Ibid*

<sup>20</sup> The National guidelines for accreditation, supervision, and regulation of ART Clinics in India, 2005 (Nov 11, 2020, 3:31 PM),[https://www.icmr.nic.in/sites/default/files/art/ART\\_Pdf.pdf](https://www.icmr.nic.in/sites/default/files/art/ART_Pdf.pdf).

<sup>21</sup> THE COMMITTEE ON THE SURROGACY (REGULATION) BILL, 2016: 102<sup>ND</sup> REPORT: RAJYA SABHA



Looking into the urgency, in 2009, the Law Commission formed a report<sup>22</sup> on the need for legislation to regulate infertility Clinics, i.e., and defining the terms of the surrogacy-agreement covering rights and obligations of the parties to agreement & making its execution binding by law. The Commission in its 228<sup>th</sup> report<sup>23</sup> stated about the boom in the Assisted Reproductive Technique was because of the underlying truth that “infertility as a medical condition is a considerable hindrance in the overall life cycle of a couple as a couple”. Further, the Commission highlighted that India’s surrogacy market had become a destiny for infertility- treatment for foreigners, thereby leading to prosperous medical tourism because of inexpensive surrogacy services in India. The Commission, however, advised for only allowing altruistic surrogacy<sup>24</sup> and banning commercial surrogacy in India.<sup>25</sup> The Law Commission report on several points missed discussing the right of women to possess' bodily autonomy and her Fundamental Right to carry any occupation, trade, business.

The Ministry of Home Affairs issued guidelines in mid-2012 & tried to regulate the exploitation by foreigners in the surrogacy business. It prohibited foreign couples, along with homosexuals and single persons. It only allowed heterosexual couples married for more than 2 years. A notification, which restricted foreigners/OCI couples and their medical visa for surrogacy services was terminated<sup>26</sup>, which was later upheld by the Punjab High Court. The Ministry of Commerce via Notification restricted surrogacy<sup>27</sup> by forbidding the export-import of human-embryo, except for research. Another Notification<sup>28</sup> in 2015 by the MHA barred OCI cardholders, foreign nationals & PIO to have recourse of surrogacy services in India. The Department of Health Research reported that Thousands of clinics are registered with the Indian Council for Medical Research. However, in reality, the actual number of such clinics cannot be verified, as hundreds of IVF/ART Clinics

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<sup>22</sup> *Supra* note 14

<sup>23</sup> *Ibid*

<sup>24</sup> “The surrogacy in which no charges of whatever nature, except the medical expenses incurred on surrogate mother and the insurance coverage for the surrogate mother, are given to the surrogate mother or her dependents or her representative.” (As per surrogacy (regulation) bill, 2020 )

<sup>25</sup> *Ibid*

<sup>26</sup> Notification No. 2502/74/2011-F-1 dated 9th July 2012

<sup>27</sup> Notification No. 25/ 2015-2020 dated 26th October 2015

<sup>28</sup> Notification (No. 25022/74/2011-F-1) dated 3rd November 2015



were not registered with Indian Council for Medical Research and yet we're working<sup>29</sup> as middlemen surrogate harassing surrogate mother and couples and thereby earning marginal profit.

For a decade, the growing misuse of unregulated surrogacy services has been felt. After a long wait, the Council of Ministers approved the Surrogacy (Regulation) Bill in August 2016. However, it lapsed, and in 2019 the lower house passed the bill Surrogacy (Regulation) Bill and is now pending in the upper house. In contrast, the provisions of recent Bill are conservative in a way and violate the Reproductive and Fundamental Rights of women in the surrogacy business.

The Bill proposing a ban on all forms of surrogacy except altruistic surrogacy violates the fundamental right to carry profession, business, and occupation and putting her true bodily autonomy on stake and advocates solely its altruistic form. According to the Bill, the surrogate should be genetically related to intending parents, of age group 25-35, and allowing her to be surrogate for once in her entire life.<sup>30</sup> As per the Bill, the eligibility of intending parents is they have to be Indian, heterosexual couples having no biological child and having at least five years of persisting marriage, where a wife of age 23-50 and the husband between 26-55 age brackets & any or both of the partners have fertility issues than only eligible.<sup>31</sup> Instead of regulating the surrogacy industry, this Bill having these many filters makes surrogacy as unpopular as adoption. Further, the Bill, by default, denies access to a large ratio of the population from the option of surrogacy as a measure to cover the biological disability, such as overseas Indians, live-in relationship couples, lesbian, gay, bisexual, and transgender couples, foreigners, and single persons. The development timeline in the above paragraphs defines the legitimate grounds for enacting Surrogacy-legislation in India to regulate the rights and obligations of the parties

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<sup>29</sup> See One Hundred Second Report of the Committee on the Surrogacy (Regulation) Bill, 2016.

<sup>30</sup> In 2016, a Surrogacy (Regulation) Bill was introduced and passed by Lok Sabha, the lower house of the Indian parliament, proposing to permit only Indian heterosexual couples married for at least five years with infertility problems to access altruistic or unpaid surrogacy and thereby banning commercial surrogacy. The 2016 bill lapsed owing to the adjournment sine die of the parliament session. The bill was reintroduced and passed by the Lok Sabha in 2019. The bill would require to be passed by the Rajya Sabha, upper house of the Indian parliament and presidential assent before it becomes an act and thereby a law.

<sup>31</sup> *Ibid*



(including a child) to the surrogacy-agreement and to put an eye on the surrogacy clinics across India.

### III. Rights of a Surrogate Mother

The surrogate mother has the most delicate and vulnerable status in the whole process of surrogacy, as she can be easily exploited and coerced. Hence it is important to protect their rights through statute. Here some rights are explained concerning the Constitution, international conventions, and prevailing circumstances:

**Right to get compensated:** A woman gives consent to surrogacy agreement either out of affection or in need of monetary reward. Whereas, in both cases, surrogate won't intend to invest her own money. So she has the right to get reimbursement in the first case as well as the right to get compensated in the second case. However, it is proposed as per Surrogacy (regulation) Bill, 2020, that such amount of compensation will be illegal due to a ban on commercial surrogacy. Also, in several countries where Commercial Surrogacy is banned, such amount is treated illegal<sup>32</sup>. But it is Right of Surrogate Mother to get compensated except insurance and medical claims as without such amount it could be treated as forced labor. And insurance and the medical claim cannot compensate the amount of mental harassment is suffered by her.

**Right to give informed consent:** When it comes to the right to give informed consent of surrogate mother, it is often observed that it is difficult to give pre-consent for surrogate mother as it relinquishes all her rights over a child<sup>33</sup>. However, this right is considered as the most basic right with the surrogate mother though on consent would not complete the purpose as these women are poor & illiterate and therefore not in a position to understand the impact of the procedure on their own. Now, as per Surrogacy (Regulation) Bill, 2020 informed-written consent is made binding with such be written in language understand-able by surrogate mother, to form a valid contract. In case it is not followed by medical professional them shall be charged with committing criminal offenses under the Indian Penal Code, 1860.<sup>34</sup>

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<sup>32</sup> See Embryo Protection Act, 1990.

<sup>33</sup> Oakley J., *Altruistic surrogacy and informed consent*, NCBI, (Nov 11, 2020, 3:31 PM), <https://www.ncbi.nlm.nih.gov/pubmed/11652090>

<sup>34</sup> Section 304 A, 318



**Right to get counseling:** Counseling is a crucial matter in surrogacy process, surrogacy mothers being illiterate; poor require counseling to understand the entire process, as pregnancy involves mental stress as well. At the time of handing over baby, she tends to have an emotional breakdown. In many cases, mothers deny handing over the baby to the parents, and in extreme cases, they run away with the child<sup>35</sup>, and therefore, pre & post counseling becomes important. Post counseling helps mothers to overcome the emotional attachment with the child.

**Right to Privacy:** Under the stigma attached to surrogacy it becomes necessary that the surrogate mother's identity is not disclosed unless such situation prevails (hurt child, breach contract, etc.) It is right of surrogate mother to save disclosure of the identity. Surrogacy (Regulation) Bill, 2020, recognizes this right of surrogate mother with the exception that it shall be disclosed to the National & State Surrogacy Board made under the Bill.<sup>36</sup>

**Right to Maternity Benefit:** Be it normal pregnancy or pregnancy through surrogacy, maternity benefit must be given to all pregnant women. In both, the case of altruistic or commercial surrogacy, women who carry a child for nine months might be a working woman. Therefore she should be allowed to avail maternity benefits under the Maternity benefits Act, 1961. However, in the recent amendment has not included surrogate mother, whereas it has accepted commissioning mothers<sup>37</sup> and therefore violates the right to equality enshrined under Article 14 of the Indian Constitution.

#### IV. Reproductive Rights vis-s-vis the Surrogacy (Regulation) Bill, 2020

The object of the Surrogacy bill instead of being "A bill to constitute National Surrogacy Board, State Surrogacy Boards and appointment of appropriate authorities for regulation of the practice and process of surrogacy and matters connected therewith or incidental to it" should have been – *"A Bill to protect the rights of the surrogate mother and child born out of surrogacy-agreement and honoring the execution of the contract between the surrogate mother and commissioning parents and for matters connected therewith or incidental thereto."* However, by restricting

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<sup>35</sup> Re Baby M, 109 N.J. 396, 537 A 2d 1227, 1988 N.J. LEXIS 1, 77 A.L.R. 4<sup>th</sup> 1 (N.J. Feb.3, 1988).

<sup>36</sup> See Surrogacy (regulation) Bill, 2020

<sup>37</sup> Maternity Benefit (Amendment) Act, 2017, Section 5 (3)(B)(4).



commercial surrogacy, the Bill has given unwanted protection to the surrogate mother. But as Surrogacy industry in India is fully grown today. Banning it may create implementation challenges, extortion by authorities, and also has violated the fundamental right of women to carry any trade, business, and profession, and this will finally push the business underground, transforming it into the illegal market. A proper law with strict provisions and enforcement, which would address the concerns of all stakeholders in the industry, is required at this stage.

It is a need of an hour to amend and make a simple adoption procedure. Moreover, it will curb the boost in surrogacy business. Compensated surrogacy should be permitted through stringent provisions. Laws since inception should be keenly drafted and executed to shield women and children, associated with surrogacy, leaving no grey areas.

The stigma attached to surrogacy in the absence of monetary reward would prevent anyone among the women (in this case, relatives) to come forward to be commissioned as surrogate mothers. This would make it impossible for a couple to find mothers ready to rent their wombs in charity. The “adoption” could not be the remedy as the process is long and tedious. Also, the wish to have the child of their blood would discourage people from moving from surrogacy to adoption. It puts unreasonable and arbitrary restrictions on commissioning parents and women by controlling their autonomy.

The Bill proposes a complete ban on all types of commercial surrogacy, which signifies a paternalistic attitude under which the government decides for the women by depriving their freedom. Despite not being a moral and ethical issue, it makes surrogacy fall under its prey.

The Bill also falls short on recognition of the basic women's right to give birth to a child and is discriminatory as it denies the constitutional right to work and earn wages. It ignores the changing realities of the existence of single parents in modern society. It also lacks vision and supports gender discrimination by taking away this right from unmarried women, same-sex couples. By narrowing down the eligibility criteria to only heterosexual couples, the government has violated the right to equality of single parents and homosexuals.

The provisions of the Bill again fall short against the decision of the Supreme Court, which legalized live-in relationships as equal to marriage and birth of a child out of live-in relationships, are held as legitimate as born out of marriage. By restricting surrogacy to legally married



heterosexual couples, the government is not loyal towards the acceptance of live-in relationships and hence, setting an immoral precedent.

Nuclear families are today's reality and by narrowing down eligibility criteria of women to be surrogate, such as she should have blood relations with infertile couple intending surrogacy, having at least one children, married or widow, becomes problematic, and Secondly, denies of Fundamental Right to choice of women, as well as intending couples. Another restriction that is a commissioning woman should be a married woman having her own child<sup>38</sup> also creates an arbitrary classification as it denies the right to choice of other women.

In India, there is no hard data on the prevalence of infertility (as a result of oocyte deficiency) to label it as a significant public health problem to justify the need for oocyte donation. Politicians and bureaucrats have repeatedly failed to look into the intricacies involved in oocyte donation (as is quite understandable from the nomenclature of the Surrogacy (Regulation) Bill, 2020 and understanding its true exploitative potential. The stakeholders have been very successful in keeping it out of the public eye. The list of complications arising out of oocyte donation is endless. Ovarian hyper-stimulation syndrome is a life-threatening complication of the oocyte harvesting process. Altruistic motivations for oocyte donation and informed consent by women following full disclosure of such complications are confusing and hard to understand.

Oocyte donation is a complicated and harmful process, as it causes the ovarian hyper-stimulation syndrome, which is a life-threatening disease of the oocyte harvesting process. Altruistic motivations for oocyte donation and informed consent by women following full disclosure of such complications are confusing and hard to understand. The surrogacy (regulation) bill, 2019, remains silent on this point, and the surrogacy debate has completely overshadowed the dangerous component of egg donation. As it remains unregulated except the age bar under the Bill, uneducated and poor women are every day exposed to this life-threatening process.

Under the realm of Right to privacy<sup>39 40</sup> the Apex Court had recognized the right to make reproductive choices as inalienable part of part III of the Constitution<sup>41</sup>. As it's about the right to

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<sup>38</sup> *Ibid*

<sup>39</sup> Nitika Khaitan & Arijeet Ghosh, *A Womb of One's Own: Privacy and Reproductive Right*, 52 ECONOMIC AND POLITICAL WEEKLY 42 (2017).

<sup>40</sup> Justice K.S Puttaswamy v. Union of India, AIR2017SC4161.

<sup>41</sup> INDIA CONST. art. 21.



bodily autonomy of women and law must not encroach it violating the fundamental principles of the Constitution.

## V. Proposed Suggestions

Surrogacy is an option that should be made accessible to every infertile person and also to every woman regardless of their marital status. Some provisions of the Bill on eligibility of women willing to be surrogate to be a genetically related person of the intending couple are arbitrary and creates an unreasonable restriction on the bodily autonomy of women to rent their wombs. Rather a national registry of the surrogate mother should be made under a statutory authority to curb their exploitation by keeping a close eye on each surrogacy agreement.

With respect to the ban on foreign couples, it can be limited to the countries which do not provide citizenship rights to baby born out of bi-lateral surrogacy-agreement should be denied the advantage under the upcoming legislation.<sup>42</sup> Surrogacy-agreement should be signed only after the rigorous screening of such couples as an eligibility process as done in case of adoption and, mandatory counseling of such couples should be added and pro's and con's of both adoption and surrogacy should be discussed giving an edge to adoption.

The eligibility criteria for the surrogates, instead of close relatives only eligible for commissioning surrogacy, a system should be promoted so that surrogate mothers are impaneled by the States and should be given a choice to withdraw themselves at any time after registration, before the beginning of the surrogacy-procedure. Surrogate mother must not be exploited and her willingness should be taken only after her psychological counseling. "A surrogate mother, if declared medically sound, should be provided the option of being surrogate twice in her life with three years of interval period between two pregnancies".<sup>43</sup>

Right of surrogate mother is not covered under maternity benefit Act, however irony is commissioning mother who do not even went through pregnancy is given a place.<sup>44</sup> It is recommended that surrogate mothers should be given recognition for maternity benefits such as paid-leave etc, as done by govt. of Haryana in May, 2019. Another issues arises with regard to

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<sup>42</sup> One Hundred Second Report of the Committee on the Surrogacy (Regulation) Bill, 2016.

<sup>43</sup> *Ibid*, (paragraph 5.12, page 23).

<sup>44</sup> Nitika Khaitan & Arijeet Ghosh, *A Womb of One's Own: Privacy and Reproductive Right*, 52 ECONOMIC AND POLITICAL WEEKLY 42 (2017).



eligibility of surrogate mother being married for five years & having child. As process of surrogacy involves risk, there are chances of surrogate mother might die, and in such situations insurance & family is of utmost importance but mostly surrogacy is opted by either divorced or widow women, which creates a barren life for her child. Indian legislation must take into account every possible situation while drafting Bill, which has already meet so much of delay.

It can be deduced that completely banning commercial surrogacy may result in opening of an underground market as happened in case of prostitution in India, which will adversely affect the status of women offering surrogacy services. It will also affect the right to livelihood of women who wish (Right to choice) to become surrogates and instead surrogates women are expected to perform reproductive labour without any monetary compensation. That such ban tends to be a harsh step when it comes to right to livelihood of surrogates even though when it is done to reduce exploitation of surrogate mothers, such harsh step is unjust. In the present scenario government does not even tried to regulate commercial surrogacy and on advice of law commission blindly moved towards banning commercial surrogacy in India.

A contract should be entered between the intending parent & surrogate-women specifying the terms of monetary consideration, including its pre & post-delivery reimbursement for the surrogate-women, calling such surrogacy as compensated surrogacy. Considering the risk of health, a provision on health care should be included in the contract. Surrogacy-agreement should be treated as a legally binding contract, and Surrogate mothers should be treated as a skilled employee as a party to the contract and, a fair compensation should be paid in the form consideration including a full insurance coverage.

And therefore, The Parliament should utilize this opportunity to amend the pending surrogacy (regulation) Bill in accordance with the reproductive rights of women and privacy judgment and fulfill its social obligations to protect the rights of the parties.

## **VI. Conclusion**

Eighteen states in the U.S, pan India, as well as at least forty other countries, have no legislation regulating surrogacy thoroughly. Because of the failure of parliamentarians to reach at a consensus



coupled with their neglect for a long time, as in India twice, the Bill has been passed, but over time, it got lapsed. In states where there is no statutory regulation, a promisor - promisee model of surrogacy contract protects the rights of parties. Intended person and commissioning mothers discuss the terms of the surrogacy-agreement through ART clinics acting as a middlemen.<sup>45</sup>

In those states in the U.S, where there is no statutory protection for surrogate-mothers, the surrogacy industry has channelized stringent process for the protection of women in surrogacy business. For example, according to the industry requirement the intended person pays for legal representation & for her life & health insurance. However, in India, the surrogacy industry has exploited poor surrogate mothers and not even provided them basic health protections, as the Union of India does not have statute addressing surrogacy matter.<sup>46</sup>

The Bill must not put unreasonable restrictions on the bodily autonomy of women by restricting unmarried, childless women from being surrogates. It should not hamper the fundamental right of women under Article 19(1) (g) by imposing a total ban on commercial surrogacy rather provisions should be drafted in such a manner that surrogacy agreements are strictly executed, promoting compensated surrogacy and cover all provisions of health care on surrogate mother as well as that of child and other essential factors incidental to it. There is a need of right-based legislation protecting surrogate mothers, as there are not enough ICMR guidelines.<sup>47</sup> And ART Bill, 2020, should be passed by the parliament before passing the Surrogacy Bill, 2020.

So the main issue that revolves around is the lack of stringent regulation. Instead of passing balanced legislation, parliament is busy in passing so-called legislations of greater importance. And that is the only reason for such a large scale of human right violation of women. Analyzing the timeline and in light of an approximate decade delay in the passing statute, they are being treated as second citizens. Provisions such as the banning of commercial surrogacy are not required if the entire procedure is regulated properly, and it might result in economic benefits to the country as well as a poor surrogate mother.

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<sup>45</sup> Sital Kalantry, *Regulating Markets for Gestational Care: Comparative Perspectives on Surrogacy in the United States and India*, 27 Cornell Journal of Law and Public Policy 3, 8 (2018).

<sup>46</sup> *Ibid*

<sup>47</sup> Dr. Ranjana Kumari, *Final Report on Surrogate Motherhood Ethical or Commercial*, CENTRE FOR SOCIAL RESEARCH, (Nov 11, 2020, 3:31 PM), <https://wcd.nic.in/sites/default/files/final%20report.pdf>.



With the increase in fertility rate all over the world, more and more people will be benefitted from this process, and therefore, an immediate call for stringent regulation both at domestic and international levels is required.

Lastly, it can be said that the importance be given to altruistic surrogacy in the Law commission report as well as Surrogacy Bill, 2020 is overrated. As under altruistic surrogacy the surrogate mother undergoes several problems (side effects of medicines, mental stress, social stigma, etc.) without any monetary benefit i.e., forced labor. This violates Reproductive rights as well as the Fundamental Right of women as she is forced or manipulated, without any benefits, to compromise her rights. The remedy to uplift the status of women is by educating them about their reproductive rights, thereby enabling them to make informed decisions. The blanket ban shall only promote corrupt and unethical practices.

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