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## Legislative Efforts for Surrogacy in India- A Journey from Liberal Practices to Robust law

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### Abstract

This article briefs the journey of law for Surrogacy in India. How Surrogacy was practiced when there was no codified law particular for medically assisted reproductive technologies in India? 'Assisted reproductive technologies (ART)' were invented to help issueless couple people to beget their own child. In Surrogacy arrangement a women carries and delivers a child for another couple or person. A number of issues were raised against the Surrogacy especially commercial surrogacy but Surrogacy gained popularity worldwide and India became 'Surrogacy Capital' 'Surrogacy Hub' in the world. In 2014 ART industry was about 25000 crore rupees industry<sup>1</sup>. In the absence of guidelines and legislation, malpractices by the ART clinics were prevailing in India. In 2005 ICMR issued the guidelines for the first time in India to regulate and control practice of Surrogacy. In Jan Balaz case Supreme Court asked Government to enact proper codified law in order to stop the malpractices and negative implication of Surrogacy in India. Government of India drafted a bill viz. The Assisted Reproductive Technologies Bill 2008 to regulate all kinds of Assisted Reproductive Technologies (IVF, Sperm Donation, Embryo Transfer, Surrogacy etc.) in India. Law Commission of India presented its 228<sup>th</sup> Report on contemporary situations and condition of Surrogacy arrangement and suggested some amendments. This paper also briefly highlights The Assisted Reproductive Technologies Bill 2008, The Assisted Reproductive Technologies Bill 2010, The Assisted Reproductive Technologies Bill 2012, The Assisted Reproductive Technologies Bill 2014, The Surrogacy (Regulation) Bill 2016, The Surrogacy (Regulation) Bill 2018, The Surrogacy (Regulation) Bill 2020 and the Bill which finally turned into Act carrying the name 'The Surrogacy (Regulation) Bill 2021'.

### INTRODUCTION

Mother Nature enabled the human beings to beget their own child through the conventional biological means. The state of not being fertile is called infertility, which is seen as major problem of kinship and family ties are dependent on progeny<sup>2</sup>. 228<sup>th</sup> report of law commission of India quoted the importance of child in following words "the parents construct the child biologically, while the child constructs the parents socially"<sup>3</sup>. Infertility can cause trauma and intense agony to the infertile couple. Medically Assisted Reproductive Technologies are the options for the infertile couple to beget their own child/children.

The term 'Surrogacy' has derived from a Latin word 'Surrogatus' which means a that is a person appointed to act in the place of another. Popularly the term 'Surrogacy' used for a medical arrangement where a woman agreement to become pregnant and bear a child for another couple/individual. It helps childless infertile couple to beget their own genetic child. A number of issues were raised against the Surrogacy especially commercial surrogacy.

<sup>1</sup> Kusum Sonali, Indian Bar Review Journal, Bar Council of India, March issue 1, 2014, p.1

<sup>2</sup> 228<sup>th</sup> report of Law commission of India, government of India , August 2009, p.9

<sup>3</sup> 228<sup>th</sup> report of Law commission of India, government of India , August 2009, p.9

Surrogacy gained the popularity worldwide by achieving parenthood not only for infertile heterosexual couples but also person who are disabled to reproduce their babies in natural way for e.g. Gay Couple, Lesbian couple, single unmarried male, people with genetic disorder etc. Surrogacy is also an option for those women who are suffering from secondary infertility.

India's Surrogacy industry boom began in 2004 with a grandmother delivering her daughter's twins. Surrogacy as a medical arrangement has matured over the years, later it became a booming centre of fertility market and around 7000-80000 clinics running in India and most of them were illegal.

In Surrogacy mostly IVF-ET technique is used but in the womb of other woman i.e. surrogate mother. ICMR Guidelines Surrogacy is defined as "Surrogacy is an arrangement in which a woman agrees to carry a pregnancy that is genetically unrelated to her and her husband, with the intention to carry it to term and hand over the child to the genetic parents for whom she is acting as a surrogate".<sup>4</sup>.

Surrogacy had gained the popularity in all over world by achieving parenthood for infertile couples and facilitating family formation. Surrogacy in commercial form was legal and practiced in India though there was no proper legislation to deal with Surrogacy.<sup>5</sup> The usual cost was around \$25,000 to \$30,000 which was around 1/3<sup>rd</sup> of that in developed countries like the USA. Till 2008 ART services rapidly became an Industry about 25000 crore rupees.<sup>6</sup> India emerged as biggest hub of Surrogacy and Anand, a small district of Gujarat, earned the epitaph of the 'cradle of the world. The increasing demand of ART resulted in mushrooming of ART clinics in India. By 2011 about 1000 clinics were functioning in India and produced 25000 babies a year.<sup>7</sup> Commercial Surrogacy remains controversial and was banned in many countries. But in India, a socially conservative society, surrogacy has thrived since the supreme court of India legalised the practice in 2002. It is mentioned that report of the CII estimated the practice will generate US\$2.3 billion.<sup>8</sup>

Surrogacy has been a contentious topic since its inception. The advocates of Surrogacy believed that Surrogacy is boon for intending couple or person and it is a gratuitous act of Surrogate Mother to help intending couple/person. On the other hand Surrogacy condemned by many authors, scholars and researchers on the ground of physical exploitation, mental exploitation of surrogate mother, commodification of women's body, commodification of the child born out of surrogacy, sex selection of the child, chances for misuse of technology, fashion for celebrities etc. IVF has become a billion dollar industry, but ethical control is needed to stop unethical practices. In India, moral dilemmas and legal problems began in the late 90s, leading to the need for legislation in 2002. The Law of Surrogacy was created to resolve these issues. The Chronology of the legislative efforts are as follows:

- I. National Guidelines for Accreditation, Supervision & Regulation of ART clinics in India 2005 drafted by ICMR and NAMS, popularly known as ICMR Guidelines
- II. The Assisted Reproductive Technology (Regulation) Bill 2008
- III. 228<sup>th</sup> Report of Law Commission of India titled " NEED FOR LEGISLATION TO REGULATE ASSISTED REPRODUCTIVE TECHNOLOGY CLINICS AS WELL AS RIGHTS AND OBLIGATIONS OF PARTIES TO A SURROGACY" August 2009
- IV. The Assisted Reproductive Technology (Regulation) Bill 2010
- V. Home Ministry Regulation on Surrogacy to FRRO – VISA, January 2013
- VI. The Assisted Reproductive Technology (Regulation) Bill 2013
- VII. The Assisted Reproductive Technology (Regulation) Bill 2014

<sup>4</sup> Clause 1.2.33 ICMR Guidelines 2005 p.10

<sup>5</sup> Sonali Kusum, Overview of Surrogacy laws in India, Indian Bar Review, Journal Bar Council of India, March Issue 1, 2014, p.1 available on <https://writingsurrogacy.wordpress.com/tag/icmr-guidelines-on-surrogacy/> accessed on 22/01/2019

<sup>6</sup> 228<sup>th</sup> report

<sup>7</sup> Sonali Kusum, Overview of Surrogacy laws in India, Indian Bar Review, Journal Bar Council of India, March Issue 1, 2014, p.1 available on <https://writingsurrogacy.wordpress.com/tag/icmr-guidelines-on-surrogacy/> accessed on 22/01/2019

<sup>8</sup> Divya Gupta, Inside India's Surrogacy industry, Guardian weekly, Tuesday 6 December 2011 <https://www.guardian.co.uk/world/2011/dec/06/surrogate-mothers-in-india> accessed on 15 December 2020

- VIII. The Surrogacy (Regulation) Bill 2016
- IX. The Surrogacy (Regulation) Bill 2018
- X. The Surrogacy (Regulation) Act 2021

### **ICMR Guidelines 2005**

The Ministry of Health and Family Welfare released the first draft of guidelines for the accreditation, regulation and supervision of ART clinics in India in 2002, which were debated in different regions of India in 2005. The Guidelines of the ICMR steer the following issues relating to ART procedures and Surrogacy viz. Accredite and license ART clinics, maintain a national registry, supervise practices, take punitive action, make IVF available to economically weak people, and draw up rules for spare embryos, support training to the workers and promote research in the field ART. These Guidelines established the procedure that should be followed by ART clinics, outlawed undesirable practices like gender selection, established the role of a mediator in surrogacy agreements, and addressed other issues associated with surrogacy. One of the provisions was that the surrogate mother should be aware that she will give up her rights to the child after it is born and hand the child over to the parents who commissioned the pregnancy. A further provision stipulates that the child's birth certificate must include the name of the child's genetic parents. The guidelines say that gametes donors should be between the ages of 21 and 45 for sperm donors, and that ovum donors should be between the ages of 18 and 35. Not more than three eggs or embryos should be placed in a surrogate mother during any treatment cycle, regardless of the procedure used.<sup>9</sup> A relative or friend of either spouse should not donate sperm. The commissioned couple is entitled to the donor's most up-to-date and relevant information. The rule that Semen Bank is responsible for ensuring that the couple is aware of the donor's identity also protects the donor's identity.<sup>10</sup> Trans-species fertilization is prohibited.<sup>11</sup> Mixing of semen of two individual not allowed under any circumstances.<sup>12</sup> However, it did not prohibit foreign nations to avail surrogacy service in India.

Clause 3.10 of the Guidelines stipulates that a child born through surrogacy must be adopted if it is not genetically related to its parents. Payment to the surrogate must include all expenses related to pregnancy, and ART clinics must not be involved in the monetary aspect. With Clause 3.12 ICMR tried to safeguard the freedoms conceived out of Surrogacy. It was established that an ART-born child will be presumed to be the couple's legitimate child if it was born out of wedlock and with both spouses' consent. It stipulates that, in the event of a divorce occurring during pregnancy, the law of the land applicable to a normal conception would apply to protect the child's best interests. Sub clause 4 is a significant arrangement which laid no bars on single unmarried lady to become a mother.

ICMR Guidelines were a precursor to the ART Bills. The drawback of these guidelines was that they are only recommendatory in nature and not legally binding to the parties of Surrogacy and ART clinics. The ART clinics were actively participated in Surrogacy arrangement. They used to arrange the Surrogate mothers for their foreign clients.

### **The Assisted Reproductive Technology (Regulation) Bill 2008**

It was the first Bill proposed to give a public system to the guideline and oversight of assisted reproductive technology innovation and matters associated therewith. The ICMR authored this bill. There were nine chapters and fifty clauses in the draft bill. The definitions of important terms are provided in Chapter I. The constitution and establishment of a "National Advisory Board for ART," "State Boards for ART," and "Registration Authorities" for registering ART clinics are outlined in Chapter II. The registration procedure for ART clinics was established in Chapter III. The ART clinics are required to perform various tasks under Chapter IV. Making commissioning couples or individuals, as the case may be, is one of the primary responsibilities; be aware of the rights of a child born through ART or surrogacy. Patients who would normally be able to carry a baby to term are also required to consider surrogacy as a possible method of conception. Section 20(14) says that no assisted reproductive technology procedure can be done on a woman under the age of 21 to stop the practice of making young women surrogate mothers. Breaking this rule

<sup>9</sup> clause 3.5.12 of ICMR Guidelines 2005

<sup>10</sup> clause 3.5.13 of ICMR Guidelines 2005

<sup>11</sup> clause 3.5.16 of ICMR Guidelines 2005

<sup>12</sup> clause 3.5.18 of ICMR Guidelines 2005

would be a violation of the law. It prohibited ART clinics from providing commissioning parents or individuals with predetermined sex selections; any violation of this provision constitutes a criminal offense. A seminar on the topic “Surrogacy – Bane or Boon” was held at the India International Centre on 3<sup>rd</sup> February 2009 to fill the ‘paucity of lex’ in India. The discussion was focused on The ART (Regulation) Bill 2008.

### **228<sup>th</sup> Report of Law Commission of India**

On the basis of above findings of seminar ‘Law Commission of India’ prepared its 228<sup>th</sup> report on surrogacy titled ‘Need for legislation to regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of the Parties to a Surrogacy’. Law Commission found that The Bill 2008 was incomplete. The report recommends that surrogacy arrangements should be governed by the contract act 1872, provide for surrogate children in the event of death or divorce, require life insurance cover for the surrogate mother, recognise the child as a legitimate child of the commission parents, contain the name(s) of intending parents only, protect information about the surrogate mother and gametes donor, prohibit sex-selective surrogacy, and deal with abortions under the Medical termination of Pregnancy Act 1971.

### **The Assisted Reproductive technology Bill 2010**

India had seen an exponential growth of infertility clinics in nearly 20 years prior to bill 2010. At that time, anyone could open the infertility or ART clinics; no permission required to do so. Infertility clinics were not limited to Anand, New Delhi- NCR, Mumbai and Kolkata; it was spreading all over country even in small cities like Allahabad, Meerut, Bhopal, Gwalior, Patna and Banaras etc. for the interest of public, it had become important to regulate the functions of ART clinics and to ensure ethical practices and all concerned rights whether medical, social and legal rights are well protected. The ART (Regulation) bill 2010 was made to address the gaps of ART Bill 2008.

This Bill condemned by the human rights activists and other learned persons for two grounds, first it allowed commercial surrogacy and it did not deny foreigners to avail commercial surrogacy in India. By permitting the cross border surrogacy, India had become top choice for NRI’s, POIs, OCIs and foreigners to avail ‘cheap and best’ Surrogacy service in the world. The commercial surrogacy had tarnished the image of the India by labelling it as ‘Baby factory’, ‘rent a womb’, ‘baby farming’, ‘cradle of the world’ etc. and earned the epitaph of the world capital of surrogacy.<sup>13</sup>This Bill prescribed lower age of intending couple, surrogates and gametes donor is twenty one years in ART procedure and surrogacy and no upper age fixed for the intending couple. This Bill ignored the health of Surrogate mothers by stating that a woman shall act as a surrogate only upto five successful live births in her life, including her own children. This statement is full of ambiguities because number of ART cycles were not described and given the low success rates of ART procedure, it often implies multiple cycles for successful outcomes, thus posing serious risks to the surrogate’s health.<sup>14</sup>

### **Home Ministry Guidelines 2012**

The Home Ministry issued a letter to Shri Amrendra Khatua on 9 July 2012 to restrict the option of availing surrogacy to foreign married heterosexual couples with a marriage lasting at least two years. Foreign couples must enter into a notarised contract with a surrogate mother to make the surrogacy agreement enforceable, and exit permission from FRRO/FRO is required before leaving the country.<sup>15</sup>

<sup>13</sup> Sonali Kusum, Overview of surrogacy of laws in India, Indian Bar Review, Journal Bar Council of India, March 2014, vol. 1, p.1 Available on <https://writingsurrogacy.wordpress.com/tag/icmr-guidelines-on-surrogacy/> accessed on 22/01/2019

<sup>14</sup> Aarti Dhar, Gaps in surrogacy bill, Fix ambiguities in the draft bill dealing with surrogacy before rushing to finalise it, health activist urge the government, The Hindu, 27 October 2013, p.3

<https://www.thehindu.com/features/metroplus/society/gaps-in-surrogacy-bill/article5276062.ece> accessed on 22/01/2019

<sup>15</sup> F.No.25022/74/2011-F.I, Ministry of Home Affairs, Government of India, letter to Additional Secretary, ministry of External Affairs, dated 9 July 2012

The Home Ministry of India issued a letter to the FRROs and Principal Secretary (Home) of all state governments/UT administrators regarding Medical visa issue for persons with OCI/PIO card holders.<sup>16</sup>

Home Ministry then restricted foreign nationals, PIOs, OCI from commissioning surrogacy in India, visiting India for surrogacy, and granting exit permission.<sup>17</sup> It was an action of the Indian government to stop the practices of commercial surrogacy in India with the immediate effect.

### **The Assisted Reproductive Technology 2013**

The Indian Council for Medical Research and Ministry of Health and Family Welfare constituted a committee to draft the Assisted Reproductive Technology Bill 2013.<sup>18</sup> The ART Bill 2013 seeks to revise the earlier ART Bill 2010 with new provisions and monitoring mechanisms. It provides for a national legal framework for the establishment of authorities to administer and regulate ART. The draft Bill 2013 is not available in public domain and Malhotra conferred it as 'deemed top secret as part of Cabinet notes'.<sup>19</sup>

Highlights of the Bill 2013 were Egg donation reduced to three attempts from six attempts, Woman may serve as a surrogate Mother only upto three times with a minimum of two year gap, permit not only heterosexual couples and all individuals including single persons to avail the surrogacy services in India, It proposed to impose prohibition on ART clinics on offer intending couples/individuals pre-selection of gender of the child and conducting gender determinative test, and violation of such provision would amount to be punishment upto five years imprisonment and fine upto ten lakh rupees. It imposes various liabilities on ART clinics, Sperm Banks and agents, which were not existed in the earlier Bills. To keep the record of the surrogacy and other ART services this Bill introduced a new and distinct body 'National Registry'. Import and export of frozen gametes and embryos made permissible for subject to compulsory permission of National Registry. Further The Bill 2013 required obtaining 'written consent' from the parties of a surrogacy agreement whereas the earlier Bill 2010 emphasised on obtaining 'informed consent'<sup>20</sup>.

### **Criticism**

The Bill 2013 was not able to satisfy was able to satisfy the expectations of women rights organisations, LGBT rights, human rights and legal right organisations. Sam Resource group for women and health' considered that the Bill is not strong enough to protect the rights of vulnerable parties i.e. Surrogate mother and the Child. They urged the Government to fix ambiguities before finalising it.<sup>21</sup> The Bill 2013 ignored important considerations in a surrogacy agreement, such as the number of cycles a surrogate mother can undergo, and the regulation of third parties such as surrogacy agents, home operators, law firms, private agencies and travel/tourism firms.

### **The Assisted Reproductive Bill 2014**

Bill no.61 was introduced to protect surrogate women and resolve legal and ethical issues. It also contained some provisions to regulate the functioning of ART clinics to ensure that the services are ethical, and the medical, social and legal rights of all concerned parties in surrogacy agreement.<sup>22</sup> Shri Bhartruhari Mahtab presented Bill 117 to address sex selection and excessive use

<sup>16</sup> No.25022/74/2011-F.I(Vol.III), Ministry of Home Affairs , Government of India, letter dated 19 February 2014

<sup>17</sup> Circular no. 462, Ministry of Home Affairs, Government of India, dated 3 November 2015.

<sup>18</sup> <http://ncw.nic.in/ncw-cells/legal-cell/new-bills-law-prosed/new-bills-law-proposed>

<sup>19</sup> Anil Malhotra , Ending discrimination in Surrogacy laws, The Hindu, 3 May 2014, in The law Commission & Surrogacy: A Critical look at the 228<sup>th</sup> Report, Banerjee Sneha, Journal of India Law and Society, Vol.6: Monsoon, p.45

<sup>20</sup> A brief overview of Indian surrogacy law (ART) Regulations Bill 2013, Legislative Comment, NLSIU LLM Journal of Law, NIJL, July 2014  
<https://writingonsurrogacy.wordpress.com/2016/10/18/a-brief-overview-of-indian-surrogacy-law-ART-regulations-bill-2013/>

<sup>21</sup> Dhar Arti, Gaps in surrogacy Bill, The Hindu, 27 October 2013

<https://thehindu.com/features/metroplus/society/gaps-in-surrogacy-bill/articles5276062>

<sup>22</sup> The Assisted Reproductive Technology Bill 2014, Bill no. 61 of 2014, as introduced in Lok Sabha by Dr. Kirit Premjibhai Solanki, M.P

<http://164.100.47.4.isbilltexts>

of surrogacy, and proposed making sex selection an offence. The Government of India opened an invitation for suggestions/comments on the Assisted Reproductive Technology Bill 2014.<sup>23</sup>

On 15 October 2015, a national consultation was organized by the National Commission for Women with the technical support of UN Women, ICMR, Ministry of Women and Child Development, Ministry of Health and Family welfare, Civil society Experts, State Women Commission and UNFPA. The objective of the consultation was to examine the provisions of the Bill 2014 and ensure the welfare of the surrogate women and of children born through Surrogacy. Another objective of the consultation was to build opinion amongst diverse constituents on the issue and challenges related India's emergence as the global hub for surrogacy.<sup>24</sup>

Highlights of the draft of The Assisted Reproductive Technology Bill 2014: Insurance made integral part of the surrogacy agreement. Here insurance included Medical insurance as well as life insurance for surrogate and oocyte donor. It proposed to establish 'National Board for Assisted Reproductive Technology'. It provides that a 'Selection Committee' to be established by Central Government to make recommendation for appointment against each vacancies in National Board. Board shall meet at least three in a year and shall observe such of procedure in regard. It had proposal to establish a National Registry' for Assisted Reproductive Technology Clinics and Banks in India. Establishment of State boards to monitor the ART clinics and Surrogacy services within their jurisdiction. The power and functions and state Boards are similar to 'National Board' subject to their jurisdiction and limitations. It assigned various duties on ART clinics and Banks like ART shall have to examine the health of intending couple and surrogate and that ensure that they are fulfilling all criteria as prescribed in the Bill. This Bill was not a perfect one to protect the rights of all parties and stakeholders. It had legal inconsistency issues in vesting legal parentage of the child.<sup>25</sup> Later the same Bill became 'Bill 2015'.

### **The Surrogacy (Regulation) Bill 2016**

The Assisted Reproductive Bill 2016 bifurcated in 2016 into distinct bills, first one, The Surrogacy Regulation Bill 2016 and the second one titled The Assisted Reproductive Technology Bill 2015. The Surrogacy Guideline Bill 2016 was planned to explicitly determine the issues and issues engaged with Surrogacy rehearses in India. The purpose of this bill was to regulate and completely outlaw commercial surrogacy in India. To safeguard the privileges of children brought into the world through Surrogacy and forestall the double-dealing of unfortunate women. Only altruistic surrogacy was permitted. The proposition of 'The Surrogacy Guideline Bill 2016' was presented in Lok Sabha on 21 November 2016 by the then Ministry of Health and Family welfare, Mr. J.P Nadda. Nonetheless, this Bill also couldn't take form of proper Act in light of the fact that the Bill lapsed owing to the adjournment sine die of the Parliament session.<sup>26</sup>

### ***Salient features of the draft The Surrogacy (Regulation) Bill 2016<sup>27</sup>***

1. The Indian Government introduced a new objective to regulate surrogacy. It aimed 'to constitute National Surrogacy Board, State Surrogacy Board and appointment of appropriate authorities for Surrogacy regulation of the practice of surrogacy and for matters connected therewith or incidental thereto'.
2. Surrogacy clinics must be registered, commercial surrogacy prohibited, unqualified persons cannot be employed, promotion, canvassing, publishing, propagation and advertisement prohibited abortion during the period of surrogacy barred, and storage of embryos or gametes prohibited. Surrogacy can be conducted when either or both members of the couple suffer from infertility, and only altruistic surrogacy is allowed. Purpose for producing must not be selling the child, prostitution or exploitation, and commissioning must seek an order concerning the parentage and custody of the child. Insurance coverage made mandatory. A surrogate mother must be an ever married woman having a child of her own and between the ages of 25-35, only close relative of the intending, and have a certificate of medical and psychological fitness

<sup>23</sup> No. V.25011/444/2011-HR (Vol. II) (Part), Ministry of Health and Family Welfare, Government of India dated 30/09/2015 available on <http://feministlawarchives.pldindia.org/wp-content/uploads/drafts-Assisted-Reproductive-Technology-Regulation-Bill-2014.pdf>

<sup>24</sup> <http://ncw.nic.in/basic-page/assisted-reproductive-technology-bill-2014>

<sup>25</sup> Kusum Sonali, Review of Art Bill- Contested issues and cases, IJI Law Review, Summer issue 2016

<sup>26</sup> Sonica Sharma, Nakul Singh and Payala Vijaylakshmi, Surrogacy: Risks to health of surrogate and Laws regulating surrogacy, Asia Life Sciences, vol.10,issue 03, July 2020, p.572

<sup>27</sup> Bill no.257 of 2016, Draft of The Surrogacy (Regulation) Bill 2016

for surrogacy. The Bill 2016 requires the age of the female member to be between 23-50 years and the male member to be between 26-55 years. Foreigners, Homosexuals and Single persons are excluded. The surrogate mother must have written and informed consent in the prescribed form and language. This is a solution to the problem of international commercial surrogacy where agreements were made in English. This provision prohibits foreign couples from abandoning children due to genetic or birth defects, and declares the child born out of surrogacy to be a biological child of the commissioning couple, with all the rights and privileges of a natural child.

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This Bill seeks to discriminate the eligibility of commissioning couples on the basis of marital status, age, sexual orientation and nationality. It also contradicts the Juvenile Justice (Care and Protection) Act 2015, which allows foreign people to adopt a child irrespective of their marriage status.<sup>28</sup>

By allowing only close relatives of the intended couple who have given birth to a child to be surrogates, it had ignored the possibility of exploitation in altruistic surrogacy. The close relative's genuine altruistic assistance to the couple is not guaranteed. Additionally, there is no assurance that an altruistic surrogate will not be coerced into giving birth. The Bill's claim that any woman found performing a non-altruistic surrogacy will be presumed to have been forced to do so "by her husband, the intending couple or any other relative" ignores the woman's own agency.<sup>29</sup>

### ***102<sup>nd</sup> Report of Parliament Standing Committee***

The Surrogacy (Guideline) Bill 2016 was presented in the Parliament on 21st of November 2016. On January 12, 2017, the Bill was referred to the Parliamentary Standing Committee on Health and Family Welfare. This report was introduced in the Rajya Sabha and simultaneously laid on the Lok Sabha on tenth of August 2017. The Parliamentary Standing Committee recommended that altruistic surrogacy should be replaced with compensated surrogacy, the definition of infertility should be made commensurate with WHO, the insurance period should be longer, sex selective surrogacy should be banned, and the time limit for issuing an essentiality certificate should be prescribed. At the same time, the Department of Health and Family Welfare submitted a total of 42 recommendations from the DRSC on Health and Family Welfare's report. Of those 42 recommendations, 13 were accepted by the Department, and 13 were agreed to be included in the rules and regulations. The Department rejected eleven recommendations. The Surrogacy Bill already included four suggestions. On March 21, 2018, cabinet approved the Surrogacy (Regulation) Bill 2016 to move the official announcements recommended by the Parliamentary Standing Committee. Subsequent to consolidating the reasonable ideas the Surrogacy (Guideline) Bill 2016 passed in the Lok Sabha on nineteenth December 2018 with the title The Surrogacy (Guideline) Bill 2018 containing the Bill no.257-C of 2016. Despite protests by Congress and AIDMK MPs over a variety of issues, the Lok Sabha debated the bill for an hour before passing it. During the debates, members of various political parties spoke in support of the surrogacy (Regulation) Bill 2016, but some, such as TMC's Kakoli Ghosh Dastidar and NCP's Supriya Sule, urged the government to broaden the scope of a bill.

### **The Surrogacy (Regulation) Bill 2018**

This bill presented to regulate surrogacy services in India consisted of 51 sections divided into eight chapters. The bill's maximum provisions were unchanged from the previous Bill. Highlights of the Bill are as follows:

- Surrogacy can only be performed by a close relative of the couple; however, the term "close relative" was not defined. She ought to be married and has her own child. She needs to be between 25 and 35 years old, and she also needs to be mentally and physically ready for the surrogacy process.

<sup>28</sup> Anil Malhotra, Draft Surrogacy Bill violates fundamental right of people to choose modes of parenthood' The Indian Express August 27, 2016 cited in Prabhanjan Kumar Singh, Critical evaluation of Draft Surrogacy Regulation Bill 2016, Jamia Law Journal, Vol.2, 2017, p.161

<sup>29</sup> Bronwyn Parry, Rakhi Ghosal, Regulation of surrogacy in India: whenceforth now?, BMJ Global Health, 8 October 2018, p.1

- It only permitted a couple from India to be the commissioning couple. Female accomplice ought to be between 23-50 years and male 26-55. At the very least, they should have been married for five years.
- Single people and homosexual couples were not allowed to use surrogacy services.
- Engaging in commercial surrogacy carries a severe penalty of up to five years in prison and a fine of up to five lakh dollars.
- In order to eradicate malpractices in surrogacy and safeguard the interests of the surrogate mother and the child or children born through surrogacy, certain acts were made illegal. Infractions like (a) practicing or promoting commercial surrogacy; b) exploiting the surrogate mother or child or abandoning them; (c) selling or importing human embryos or gametes for the purpose of surrogacy carries a maximum penalty of ten years in prison and a fine of ten lakh rupees.

This Bill was not succeeded to take form proper Act. Soon this Bill with some new amendments as The Surrogacy (Regulation) Bill 2019 was introduced in the Lok Sabha as Bill no. 156-C of 2019 on 15<sup>th</sup> July 2019 and also passed by the Lok Sabha on 5<sup>th</sup> August 2019. This Bill further referred to on 6<sup>th</sup> November 2019 for consideration and on 21<sup>st</sup> November 2019 referred to the Select Committee. The aim of this bill was to make altruistic surrogacy available to needy Indian couples, including NRIs. However, PIO and OCI cardholders will still be unable to use surrogacy services in India. The Surrogate Mother was offered a sixteen-month insurance policy to cover all of her postpartum issues. Registration of the surrogacy facilities made compulsory. The surrogate mother's written informed consent and the authorization of the appropriate authority are required for an abortion of the child in her womb. This approval should be agreeable with the Clinical End of Pregnancy Act 1971. Additionally, the surrogate mother will be able to opt out of the procedure. This Bill proposed to establish National Surrogacy Board, State Surrogacy and Proper expert similarly depicted in before bills. These authorities shared the same authority and function.

### ***Report of the Select Committee of Rajya Sabha on 'The Surrogacy (Regulation) Bill 2019'***

On December 3, 2019, the Select Committee began discussing the aforementioned Bill. Nine more meetings were held on December 9, December 12, December 20, December 30, January 1, and February 3, 2020. In the subsequent gathering dated 09.12.2019, the Secretary of Department of Health Research presented that the Department had been chipping away at the Bill throughout the previous decade and had presented that the very best practices from various nations and the changing examples in various nations. Additionally, they had considered the plight of surrogate mothers and the culture and tradition of surrogacy. The committee was briefed on the global surrogacy situation by the department's Joint Secretary. It had separated the nations into three groups: (A) Nations in which both commercial and altruistic forms of surrogacy are outright prohibited. Finland, France, Hong Kong, Hungary, Iceland, Ireland, Italy, Japan, Nepal, Pakistan, Saudi Arabia, Serbia, Spain, Sweden, and Switzerland were the countries at the time that outright prohibited the practice of surrogacy. B) Australia, Canada, Georgia, Greece, Israel, the Netherlands, Belgium, New Zealand, Portugal, South Africa, Thailand, the United Kingdom, and Vietnam are the only nations that permit only altruistic surrogacy. C) The Russian Federation, Colombia, Ukraine, and a few states in the United States—California, Illinois, Arkansas, Maryland, and New Hampshire—allow both forms. The Committee discovered that each nation provided a unique justification.

The Committee examined the arguments in favour of altruistic and compensated surrogacy, as well as the arguments against commercial surrogacy. The government proposed compensation to the surrogate mother through insurance coverage for expenses incurred by the surrogate mother.

### **The Surrogacy Regulation Bill 2020**

The Surrogacy Regulation Bill 2020 was approved by the Union Cabinet on February 19, 2020, incorporating the Rajya Sabha Select Committee's suggestions and recommendations. Then, in a press conference, Cabinet Minister Prakash Javadekar and Women and Child Development (WCD) Minister Smriti Irani stated that the bill aims to regulate surrogacy by allowing altruistic and commercial surrogacy. Smriti Irani additionally said that State leader Narendra Modi has driven from the front of with the



liberal view on the issues of regenerative privileges of women, be it clinical end of pregnancy, The Assisted Reproductive Technologies Bill and the Surrogacy Bill.

The Surrogacy (Regulation) Bill 2020 includes the following key provisions:

- It made it possible for a "willing woman" to become a surrogate mother, eliminating the requirement that a "close relative" be a surrogate mother.
- Altruistic surrogacy is also available to infertile couples, widows, and divorced women between the ages of 35 and 45. The Select Committee of the Rajya Sabha made the following statement in support of the need to allow single women to have children: "There are certain conditions under which a single person genuinely needs to avail surrogacy as an option to have a child." One such circumstance is a young widow, who is generally capable but cannot carry a child due to dread of social disgrace attached to pregnancy of widows in our society."
- The Bill proposed to lay out a National Surrogacy Board, State Surrogacy Board in each state and appropriate authorities like the previous Bills.
- The prescribed insurance cover for a surrogate mother had expanded to 3 years from 18 months.

The Bill 2020 was criticised for enforcing gender norms and by excluding homosexual couples and LGBTQ community as it reinstates the gender binary ingrained in patriarchal hegemony.<sup>30</sup>

### **The Surrogacy (Regulation) Act 2021**

On December 25, 2021, with the approval of the President, a robust law to regulate surrogacy practices in India was finally enacted this bill. It was approved without a debate in the Lok Sabha on December 1, 2021, and the Rajya Sabha approved it on December 7, 2021, along with the Assisted Reproductive Technology Act of 2021. The Minister of Health and Family Welfare, Dr. Mansukh Mandaviya moved for contemplations of Bills in Lok Sabha and Rajya. Shri Karti P. Chidambaram, an MP, asked two important questions about surrogacy during the debate. He stated that the two laws conflict frequently. After the age of 18, a child born to a donor may be curious about the father's identity. That right isn't given here. Although he acknowledged the donor's right to privacy, he requested some sensitivity in this regard and inquired about the available recourse in the event of a data leak.<sup>31</sup>

In Rajya Sabha Shrimati Mamata Mohanta invited the Bill and expressed that "The ART technique has given new hope in the minds of many women but many lawful, moral and social issues connected with it had likewise become exposed. In India, these services are not normalised. Individuals from everywhere world come to our country for surrogacy. A global racket is thriving under guise of Surrogacy, which should have been halted. With the assistance of this Bill this can be checked".<sup>32</sup> Both Acts 'The Assisted Reproductive Technology Act 2021' and 'The Surrogacy (Regulation) Act 2021' had commenced on 25 January 2022 via a government notification.

#### *Salient Features of 'The Surrogacy (Regulation) Act 2021'*

- This law only permitted altruistic surrogacy in India and outlawed all forms of commercial surrogacy. Section 2 (b) of the Act gives a definition of altruistic surrogacy. It specifically excludes all costs and fees. Except for the surrogate mother's insurance coverage and medical expenses, no other forms of compensation or monetary incentives are paid to the surrogate mother. Instead, they are distributed either directly to her dependents or through her representative.
- It offers a comprehensive explanation of commercial surrogacy.
- Child sex selection is strictly prohibited.
- It supplanted the term 'proven infertility' to 'medical indication necessitating gestational surrogacy' as it was recommended by the Rajya Sabha Select Committee report.

<sup>30</sup> Swati Gola, The Indian surrogacy Regulation Bill 2020: Enforcing Gender Norms? Academia Letters, Article 843 <https://doi.org/10.20935/AL843>

<sup>31</sup> Synopsis of debates, Lok Sabha, 1 December 2021

<sup>32</sup> Synopsis of debate, Rajya Sabha, 7 December 2021

- It empowered the Director or in-charge of the Surrogacy clinic to decide the need of surrogacy for commissioning couple recorded as a hard copy with reasons.
- It allowed Indian couples, including those of Indian descent and intending mothers, to use surrogacy services. In this context, an intending woman is a widow or divorcee between the ages of 35 and 45.
- It permitted just a willing woman to go act as surrogate mother, who should to be a married woman having her very own offspring and between the ages 25 to 35 years on the day of plantation.
- It granted the surrogate child the status of a natural child because he will be considered a biological child of the commissioning couple and will be eligible for all natural rights.
- It set up a Registry, namely 'The National Assisted Reproductive Technology and Surrogacy Registry' for the purpose of registering surrogacy clinics in accordance with the Act.
- The provision in Chapter V for the establishment of "The National Assisted Reproductive Technology and Surrogacy Board" and "The State Assisted Reproductive Technology and Surrogacy Board" to regulate, supervise, and monitor both surrogacy clinics and assisted reproductive technology clinics. Chapter VII forced preclusion on practice of commercial surrogacy in any conceivable structure and infringement of these standards add up to commission of Offenses under the Act 2021 and punishment endorsed is detainment upto a decade and fine upto ten lakh rupees.

### Criticism of the Act 2021

It allows only heterosexual couples to use Surrogacy arrangement to beget their own genetically child. It completely ignores the reproductive rights of Gay couples when Supreme Court decriminalised the same sex relationship with its decision in Navtej Singh Johar case. Beside them it also debars Single unmarried man, woman, divorcee or widow, live-in couple to use Surrogacy arrangement. If they want to become parents either they have to adopt a child or stay childless, which is antagony to their reproductive rights and right to form family.

Recently a petition Karan Balraj Mehta v. Union of India in Delhi High Court challenging the some clauses of The Surrogacy (Regulation) Act 2021 and The Assisted Reproductive Technology (Regulation) Act 2021 because they are discriminatory against unmarried man who want to become father with the help of Surrogacy Arrangement and married woman who want to use Surrogacy to have more children. The Centre Government in response stated that if these clauses are diluted, the whole purpose of both the acts shall be defeated<sup>33</sup>.

### Conclusion

Prior to the enactment of The Surrogacy (Regulation) Act 2021 due to paucity of proper law Surrogacy practice was very liberal which caused mushrooming of IVF/ART/Surrogacy clinics in India especially in Anand(Gujarat), New Delhi, Hyderabad, Mumbai, Bangalore etc. Surrogacy was condemned by the Scholars on the ground of commodification of the Child, financial exploitation of intended couples, and control/surveillance over the body of Surrogate. This Act made Commercial Surrogacy completely banned in India and permitted only altruistic surrogacy to be practiced in India. Banning Commercial Surrogacy adversely affected the entire system related to 'Surrogacy Industry' in India whether those IVF clinics who earned millions through foreign intended couples as well as Individuals, whether those poor Surrogate Mothers who were made able to earn big money, Surrogacy agents and other stakeholders. This Act permits only Heterosexual couples to avail this service and ignores the reproductive rights of same sex couples, single man, woman and the married women who is suffering from secondary infertility and want more children via Surrogacy arrangement.

<sup>33</sup> Mishra Gautam, Acts Enacted to regulate ART and Surrogacy Restrict Sale, Purchase of Embryos: Centre to Delhi HC, Microsoft news [www.google.com/amp/s/www.msn.com/en-in/news/techandscience/acts-enacted-to-regulate-sale-purchase-of-embryos-centre-to-delhi-hc/amp/ar-AA13VdCl](http://www.google.com/amp/s/www.msn.com/en-in/news/techandscience/acts-enacted-to-regulate-sale-purchase-of-embryos-centre-to-delhi-hc/amp/ar-AA13VdCl)

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