

ISSN: 2582 - 2942



LEX FORTI

LEGAL JOURNAL

VOL- I ISSUE- III

APRIL 2020

DISCLAIMER

No part of this publication may be reproduced or copied in any form by any means without prior written permission of Editor-in-chief of LexForti Legal Journal. The Editorial Team of LexForti Legal Journal holds the copyright to all articles contributed to this publication. The views expressed in this publication are purely personal opinions of the authors and do not reflect the views of the Editorial Team of LexForti. Though all efforts are made to ensure the accuracy and correctness of the information published, LexForti shall not be responsible for any errors caused due to oversight otherwise.



ISSN: 2582 - 2942

EDITORIAL BOARD

EDITOR IN CHIEF

ROHIT PRADHAN

ADVOCATE PRIME DISPUTE

PHONE - +91-8757182705

EMAIL - LEX.FORTII@GMAIL.COM

EDITOR IN CHIEF

MS.SRIDHRUTI CHITRAPU

MEMBER || CHARTED INSTITUTE
OF ARBITRATORS

PHONE - +91-8500832102

EDITOR

NAGESHWAR RAO

PROFESSOR (BANKING LAW) EXP. 8+ YEARS; 11+ YEARS WORK EXP. AT ICFAI; 28+ YEARS WORK EXPERIENCE IN BANKING SECTOR; CONTENT WRITER FOR BUSINESS TIMES AND ECONOMIC TIMES; EDITED 50+ BOOKS ON MANAGEMENT, ECONOMICS AND BANKING;

EDITOR

DR. RAJANIKANTH M

ASSISTANT PROFESSOR (SYMBIOSIS INTERNATIONAL UNIVERSITY) - MARKETING MANAGEMENT

ISSN: 2582 - 2942

EDITORIAL BOARD

EDITOR

NILIMA PANDA

B.SC LLB., LLM (NLSIU) (SPECIALIZATION BUSINESS LAW)

EDITOR

DR. PRIYANKA R. MOHOD

LLB., LLM (SPECIALIZATION CONSTITUTIONAL AND
ADMINISTRATIVE LAW)., NET (TWICE) AND SET (MAH.)

EDITOR

MS.NANDITA REDDY

ADVOCATE PRIME DISPUTE

EDITOR

MS. P SAI SRADDHA SAMANVITHA

STUDENT EDITOR

ABOUT US

LexForti is a free open access peer-reviewed journal, which gives insight upon broad and dynamic legal issues. The very objective of the LexForti is to provide open and free access to knowledge to everyone. LexForti is highly committed to helping law students to get their research articles published and an avenue to the aspiring students, teachers and scholars to make a contribution in the legal sphere. LexForti revolves around the firmament of legal issues; consisting of corporate law, family law, contract law, taxation, alternative dispute resolution, IP Laws, Criminal Laws and various other Civil issues.



**A Critical Analysis of the Medical Termination of Pregnancy Act, 1971 and
the Surrogacy (Regulation) Bill, 2019 in the light of Protecting the Rights of
the Mother and the Surrogate**

Maruthanayagam Venkatesh N

ABSTRACT:

The Medical Termination of Pregnancy Act, 1971 is considered to be one of the liberal laws in the world which regulate abortions in India. But the Act lacks in regulating the needs of the current generation where technological and scientific advancements have developed in a multifold manner and we have reached a time where the Abortion and Surrogacy have become very essential for various personal, survival and societal benefits. The current laws on Abortion as given under the MTP Act, 1971 does not deal with provision of aborting a child in the process of Surrogacy. India is one of the few countries to ban Commercial Surrogacy to protect the innocent women of this country from being exploited by people from all over the world. But Parliament is also trying to regulate Surrogacy as it has become essential for certain genuine couples to opt for this process to give birth to their offspring. Hence the Surrogacy (Regulation) Bill of 2019 was proposed in the parliament to regulate the process of Altruistic Surrogacy in India. In addition to that the Medical Termination of Pregnancy (Amendment) Bill was proposed in the parliament in 2020. Through the course of this paper the author tries to critically analyze both the bill and also suggest the changes that are to be made in the laws to protect the rights of Mother and the Surrogate. As Abortion and Surrogacy involves the multiple human beings it becomes very vital to ensure the rights of all the involved parties are protected.

Keywords: Abortion, Surrogacy, Commercial Surrogacy, Altruistic Surrogacy

RESEARCH QUESTION:

Whether abortion should be considered as a right to bodily autonomy over one's body or is it to be considered as the right to choose motherhood?

INTRODUCTION:

Abortion is as old as Indian civilization itself.¹ It would seem reasonable to speculate that, in spite of the universality of abortion, nearly all cultures and social systems attempt to control and regulate it through moral codes, religious taboos and governmental laws.² Moral codes and religious taboos of some of the earliest civilization that flourished in western and southern Asia before the Christian era dealt with abortion.³ The primary debate around abortion revolves under the conflict of interest between the interest of the mother and the interest of the unborn. The Pro-Choice theory supports the argument that the interest of the mother should be given utmost

¹ Raj Pal Mohan & Raj Pa Mohan, *Abortion in India*, 50, PI GAMMA MU, INTERNATIONAL HONOR SOCIETY IN SOCIAL SCIENCES 141, 141 (1975)

² Ibid

³ Ibid

importance as she should have the right to choose what has to be done over her body.⁴The Pro-Life Theory supports the argument that the interest of the unborn should be given the utmost importance as the unborn inside the womb of the mother is a life and hence his right to life has to be protected. Reproductive choice is a decision having direct impact and the greatest bearing only on the concerned individuals.⁵ Hence Reproductive choice is an aspect of Right to Privacy. In cases of Surrogacy the commission mother is the one who intends to reproduce hence the it is her privacy which the law tries to protect. Never the less both the commissioning mother and the surrogate are equally important in the eyes of laws and hence should be equally protected from exploitation.

ABORTION AND WOMEN

Women are not equal to men as they naturally undergo lot of pain multiple times in their lives which men never have to face in their lifetime. Such pains include pregnancy and abortion as it affects the physical and mental health of women. In spite of regulating abortions all over the world, there still lies a lacuna which leads to women subjecting themselves to unsafe abortion methods.⁶ Hence the countries all over the world are inclining themselves more towards the Pro-Choice theory which gives women the bodily autonomy to choose what has to done over their body.⁷ Hence we see that Abortion laws all over the world are becoming more liberal which tries to protect the bodily autonomy and choice of women. Also seeking abortion was relatively easy for married women but not for women conceived outside wedlock.⁸

ABORTION LAWS IN INDIA

The Medical Termination of Pregnancy Act, 1972 allows women to access to abortion in certain circumstances, but does not see abortion as a right. The Act allows for termination of pregnancy on two grounds. The first condition on which abortion is allowed is when the pregnancy poses a

⁴ Emma Green, *Science is giving the Pro-Life Movement a Boost*, THE ATLANTIC, (January 05, 2020, 10:04 AM) <https://www.theatlantic.com/politics/archive/2018/01/pro-life-pro-science/549308/>

⁵ Simi Rose George, *Reproductive Rights: A Comparative Study of Constitutional Jurisprudence, Judicial Attitudes and State Policies in India and the U.S.*, 18 STUDENT ADVOCATES COMMITTEE 69, 72 (2006)

⁶ Joanna N. Erdman, *Theorizing Time in Abortion Law and Human Rights*, 19 THE PRESIDENT AND FELLOWS OF HARVARD COLLEGE ON BEHALF OF HARVARD SCHOOL OF PUBLIC HEALTH 29, 30 (2017)

⁷ Kerry L. D. MacQuarrie & Jeffery Edmeades, *Whose Fertility Preferences Matter? Women, Husbands, In-laws, and Abortion in Madhya Pradesh, India*, 34 SPRINGER IN COOPERATION WITH THE SOUTHERN DEMOGRAPHIC ASSOCIATION 615, 617 (2015)

⁸ Leela Visaria, et al., *Abortion in India: Emerging Issues from Qualitative Studies*, 39 ECONOMIC AND POLITICAL WEEKLY 5044, 5047 (2004)

threat to the life of the mother and it will affect the mental and physical health of the mother.⁹ The second condition when abortion is allowed is when the unborn inside the mother's womb has a good chance of being born with mental or physical abnormalities. If the gestation period is less than 12 weeks then suggestion of 1 medial practitioner is necessary to conduct an abortion.¹⁰ If the gestation period between 12 to 20 weeks then endorsement by 2 registered medical practitioner is essential to abort a pregnancy. If he pregnancy has gone beyond 20 weeks then direction by the court is necessary to abort a pregnancy. This Act was passed on three grounds

- 1) As a eugenic measure to prevent birth of deformed child.
- 2) As a humanitarian gesture when pregnancy is caused through sex crimes especially when such sex crimes involves mentally ill women.
- 3) As a health measure to protect the rights of women.
- 4) To curb illegal and unsafe abortion. Justice Misra, "Women's right to reproductive choice is also a dimension of personal liberty as understood under Article 21 of the Constitution." It is important to recognise that reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that women's right to privacy, dignity and bodily integrity should be respected.

In case of failure of contraceptives, women are not left with any other option but to abort. In countries having strict abortion laws women resort to unsafe abortion methods. Unsafe abortions in one of the most neglected problems of health care in developing countries.¹¹ The decision to abort may be a result of some pressing financial or psychological needs. Therefore, the argument that it is important to allow a woman authority in choosing to abort is widely prevalent and gaining more significance all over the world. However, the feminist perspective does not completely undermine the value of a foetus because it supports reproductive freedom of women whereby they make voluntary choices about their reproductive life and for the development of social values that recognise the rights of the foetus. While the feminist discourse has developed along the line of women's autonomy, the theological and moral discourse continues to view abortion as murder. The International feminist movement has been concerned with abortion since the early 1960s and 1970s. India was initially irresponsive to this feminist current. 'Abortion seeking remains a private, sensitive act with negative moral and emotional connotations ...'. Abortion is expected by family elders when a pregnancy, otherwise highly

⁹ Section 3(2), Medical Termination of Pregnancy Act, 1972

¹⁰ *Ibid.*

¹¹ Yamini Mishra, *Unsafe Abortions and Women's Health*, 36 ECONOMIC AND POLITICAL WEEKLY 3814, 3814 (2001)

valued, results from serious violation of sexual norms. For example, a pregnancy before marriage or post-widow - hood causes social stigma for the family and calls for abortion. The family decides to obtain a clandestine abortion. Contextualised by sexual norms, abortion largely obviated the fervent pro-life and pro-choice stances in Indian society.¹² Legalised abortion followed the national campaign for safe motherhood and focus on unsafe abortions in 1960s and 1970s. The Indian Penal Code, prior to 1970, was premised on the British Offences against the Person Act, 1861. It viewed abortion as a criminal offence, until it was performed to save a woman's life.¹³ The MTP Act in India was passed in 1971 to circumvent the criminality clause of the penal code. The Act laid down the conditions under which women could seek abortion from legally recognised facilities. That babies are given by god, and humans cannot decide to abort is an old-fashioned logic in India today. However, the Act was passed largely for demographic considerations. The stated objective was that women in India were dying during child birth in large numbers and more so due to resorting to unsafe and illegal abortion of unwanted foetuses. It decriminalised abortion-seekers and medical practitioners. The intention of enacting the Act can be and has been questioned by many. While trying to dent the general mindset that abortion is sinful, abortion became easier under the following liberal conditions for the times:

1. within 20 weeks of gestation for women 18 years and above;
2. women below 18 years and mentally challenged to have legal guardian's permission;
3. opinion of two RMPs (Registered Medical Practitioners) if gestation between 12 and 20 weeks;
4. if risk to life or grave injury to the woman's physical or mental health;
5. pregnancy caused by rape, or contraceptive failure in a married woman (both presumably injuring mental health);
6. performed by medically trained or gynaecology diploma-holding personnel with three years' experience;
7. by those having assisted gynaecologists in 25 cases of abortion; at approved sites for abortion.

Clearly, the MTP Act 1971 has provision to abort for foetal anomalies. However, the peculiar scenario in India proved anti-women with the arrival of pre-natal diagnostic technology that fine fitted with its son-preference culture. It popularised back door misuse of the MTP Act 1971.

¹² Ibid

¹³ Indian Penal Code, 1860, Section 312

Foetal gender testing accelerated the number of sex-selective abortions in the country. To counter this trend, the government of India, passed the Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act (1994), and the Pre-Conception PC-PNDT Act (2002). These laws prohibit the use of pre-natal diagnostic techniques for testing the sex of the foetus and limit its use only in cases involving foetal non-viability or abnormality. The Act also states that such services could only be provided by qualified and registered medical practitioners and only in certified facilities. A major criticism of the MTP Act is its strong medical bias. The “physicians only” policy for providers excludes mid-level health providers and practitioners of alternative systems of medicine. The requirement of a second medical opinion for second trimester abortion further restricts access, especially in rural areas.¹⁴ The attitude of the Indian judiciary, thus, reveals a complete disregard of the pregnant woman's right to privacy, and her right to make independent reproductive choices.¹⁵ Post the 1994 Act, the ultrasonography technique could, in principle, be used only to detect abnormalities in the foetus.¹⁶ While this Act tried to stop detection of foetal sex with intent to seek sex-selective abortions, it contrarily gave rise to back door service providers.¹⁷ Very often these back door practitioners conduct ultrasound to detect foetal sex, after which the couple may choose to undergo an abortion in a registered facility, acceptable by the MTP Act.¹⁸ These illegal service providers offer not only ultrasound services but also abortion services. Since the law does not allow abortion after 20 weeks, couples also resort to these service providers for aborting foetus over 20 weeks old. Importantly, many of these service providers are often not fully qualified and equipped to conduct such medical procedures and harm the health of the woman. The complex current Indian situation is peculiar, as minimal use of technology is legalised for preventing abortion of female foetuses, but newer reproductive technologies are deployed to accentuate patriarchal structures disallowing female foetuses the right to life.¹⁹ The right of the foetus as against that of the pregnant woman is not a simple one in this scenario. Selective abortion of female foetuses does not mean women are autonomous and choose to abort. While the MTP Act 1971 upholds women’s right to abort under certain conditions, illegal, under-the-table, abortion of female foetuses is evident through the constant reduction of females at birth since the 1991 decennial Census of India. Educational programmes and those supporting the girl child through cash transfers have had little impact on

¹⁴ Siddhivinayak S. Hirve, *Abortion Law, Policy and Services in India: A Critical Review*, 12 TAYLOR & FRANCIS, LTD. 114, 116 (2004)

¹⁵ Sushil Kumar Verma v. Usha, A.I.R. 1987 Del. 86

¹⁶ Ravi Duggal & Vimala Ramachandran, *The Abortion Assessment Project – India: Key Findings and Recommendations*, 12 TAYLOR & FRANCIS LTD. 122, 123 (2004)

¹⁷ Ibid

¹⁸ Ibid

¹⁹ Anitha Jain, *Sex Selection and Abortion in India: Efforts to curb sex selection must not retard progressive safe abortion policies*, 346 BMJ: BRITISH MEDICAL JOURNAL 8, 9 (2013)

sex ratios, led by the educated and the wealthy. This trend reflects that the abortion policy in India had two major drawbacks. First, the technology began to be misused for sex-selective abortions. Secondly, however liberal in its formation, the policy did not allow women to demand abortion. It has been only conditionally permissible on medical practitioner's advice. Further, the 1971 Act only allows abortion between 12 and 20 weeks of pregnancy, beyond which even medical practitioners cannot choose to terminate pregnancy. Women exceeding the upper limit of 20 weeks have been denied the choice of abortion, even if the pregnancy would result in an unhealthy baby or its inevitable death.²⁰ The Bill of 2017, is pending in the parliament which liberalises the abortion where pregnancy can be terminated till 24 weeks with the endorsement of two registered medical practitioners.

SURROGACY (REGULATION) BILL, 2019:

The Surrogacy (Regulation) Bill, 2019 was introduced by the Minister of Health and Family Welfare in Lok Sabha on July 15, 2019.²¹ The Bill defines surrogacy as a practice where a woman gives birth to a child for an intending couple with the intention to hand over the child after the birth to the intending couple.²² The Bill prohibits commercial surrogacy, but allows altruistic surrogacy.²³ Altruistic surrogacy involves no monetary compensation to the surrogate mother other than the medical expenses and insurance coverage during the pregnancy.²⁴ This step has been taken to prevent exploitation of women especially from poor and rural background. Commercial surrogacy includes surrogacy or its related procedures undertaken for a monetary benefit or reward (in cash or kind) exceeding the basic medical expenses and insurance coverage. Surrogacy is permitted when it is: (i) for intending couples who suffer from proven infertility; (ii) altruistic; (iii) not for commercial purposes; (iv) not for producing children for sale, prostitution or other forms of exploitation; and (v) for any condition or disease specified through regulations.²⁵ The intending couple should have a 'certificate of essentiality' and a 'certificate of eligibility' issued by the appropriate authority.²⁶ A certificate of essentiality will be issued upon fulfilment of the following conditions: (i) a certificate of proven infertility of one or both members of the intending couple from a District Medical Board; (ii) an order of parentage and

²⁰ Tulsi Patel, *Experiencing abortion rights in India through issues of autonomy and legality: A few Controversies*, 13 GLOBAL PUBLIC HEALTH 702, 708 (2018)

²¹ The Surrogacy Regulation Bill, 2019, PRS LEGISLATIVE RESEARCH, (January 10, 2020, 10:30 AM), <https://www.prsindia.org/billtrack/surrogacy-regulation-bill-2019>

²² Ibid

²³ Ibid

²⁴ Ibid

²⁵ Ibid

²⁶ Ibid

custody of the surrogate child passed by a Magistrate's court; and (iii) insurance coverage for a period of 16 months covering postpartum delivery complications for the surrogate.²⁷ This step has been taken to protect the health of the Surrogate even after the pregnancy. In the past, Surrogates are generally not provided with post pregnancy care which created a burden on the Surrogates to deal with the medical complication on their own. The certificate of eligibility to the intending couple is issued upon fulfilment of the following conditions: (i) the couple being Indian citizens and married for at least five years; (ii) between 23 to 50 years old (wife) and 26 to 55 years old (husband); (iii) they do not have any surviving child (biological, adopted or surrogate); this would not include a child who is mentally or physically challenged or suffers from life threatening disorder or fatal illness; and (iv) other conditions that may be specified by regulations.²⁸ To obtain a certificate of eligibility from the appropriate authority, the surrogate mother has to be: (i) a close relative of the intending couple; (ii) a married woman having a child of her own; (iii) 25 to 35 years old; (iv) a surrogate only once in her lifetime; and (v) possess a certificate of medical and psychological fitness for surrogacy.²⁹ Further, the surrogate mother cannot provide her own gametes for surrogacy. The central and state governments shall appoint one or more appropriate authorities within 90 days of the Bill becoming an Act. The functions of the appropriate authority include; (i) granting, suspending or cancelling registration of surrogacy clinics; (ii) enforcing standards for surrogacy clinics; (iii) investigating and taking action against breach of the provisions of the Bill; (iv) recommending modifications to the rules and regulations. Surrogacy clinics cannot undertake surrogacy related procedures unless they are registered by the appropriate authority. Clinics must apply for registration within a period of 60 days from the date of appointment of the appropriate authority. The central and the state governments shall constitute the National Surrogacy Board (NSB) and the State Surrogacy Boards (SSB), respectively. Functions of the NSB include, (i) advising the central government on policy matters relating to surrogacy; (ii) laying down the code of conduct of surrogacy clinics; and (iii) supervising the functioning of SSBs.³⁰ A child born out of a surrogacy procedure will be deemed to be the biological child of the intending couple. An abortion of the surrogate child requires the written consent of the surrogate mother and the authorisation of the appropriate authority.³¹ This provision is too vague because it does not provide any specific remedies in case if the surrogate mother refuses to consent for abortion. In cases where the surrogate mother refused to consent for abortion and the actual mother calls for abortion there arises a conflict of

²⁷ Ibid

²⁸ Ibid

²⁹ Ibid

³⁰ Ibid

³¹ Ibid

interest which is not addressed in the Bill. This authorisation must be compliant with the Medical Termination of Pregnancy Act, 1971. Further, the surrogate mother will have an option to withdraw from surrogacy before the embryo is implanted in her womb.³² The Surrogacy (Regulation) Bill, 2019 regulates altruistic surrogacy and prohibits commercial surrogacy. It defines surrogacy as a practice where a woman gives birth to a child for an eligible couple and agrees to hand over the child to them after the birth. The Bill allows altruistic surrogacy, which involves a surrogacy arrangement where the monetary reward only involves medical expenses and insurance coverage for the surrogate mother. Commercial surrogacy is prohibited under the Bill. This type of surrogacy includes a monetary benefit or reward (in cash or kind) that exceeds basic medical expenses and insurance for the surrogate mother. A bill which seeks to ban commercial surrogacy in the country was passed in the Lok Sabha and is yet to be passed in the Rajya Sabha. The Surrogacy (Regulation) Bill, 2019 also provides for constitution of surrogacy boards at national and state levels, as well as that the intending couples should not abandon such a child under any condition. Surrogacy can be performed if a healthy unmarried lady volunteers to be a surrogate shall be the close relative of the mother or the father in most cases. By the preliminary understanding of the Bill, it can be clearly inferred that India is not ready to allow exploitation of women. In India women were exploited for a long time and this bill seeks to prevent commercialisation of women's natural potential to procreate. Hence this move is widely appreciated. This Bill bans commercial surrogacy but it still allows and regulates altruistic surrogacy. One major point to be noted in this Bill is that it states that the intended parents should not abandon the child under any circumstances. This clause is very wide and is subject to multiple interpretations.

SURROGACY AND ABORTION:

Generally abortion and surrogacy are considered to be two extreme processes which should never meet each other and law makers should take proper measures to ensure the same. A surrogacy involves a lot of physical and mental pain and compromises which is done after multiple tests to prove the highest success rate. The factors considered before performing a surrogacy involve ensuring the physical fitness of the surrogate mother, confirming the willingness of the mother to undergo this process to help the poor couple who are not able to produce a child on their own, etc. In case of commercial surrogacy the surrogate and the actual parents enter into an agreement where various terms and conditions are discussed and accepted by both the parties. The terms which shall be present in such an agreement include the monetary benefit which the

³² Ibid

surrogate will earn through this process, the medical and other expenses related to pregnancy which shall be taken care by the actual parents, etc. In rare cases the terms may also include issues related to abortion. Now India is slowly moving to a situation where commercial surrogacy will be banned and the couples intending to go for surrogacy will have to look for a close relative or friend who will be willing to do that for them without expecting any monetary benefit. This has been made to prevent the exploitation of Indian women for money. When this becomes a reality we may face a situation where a close relative of the couple, say the younger or elder sister of the woman or the sister of the man will be acting as surrogate. In this situation the surrogate will be subjected to various counselling session to confirm their whole hearted acceptance to become surrogate as it will leave permanent scar on the physical and mental health. The counselling session is generally conducted by a registered medical practitioner who will be assisting the couple and the surrogate in the whole of process of giving birth to a new life. After the counselling session and successful physical examinations the surrogate will be ready to undergo the process. In circumstances like this the creation of contracts with various terms and condition is not strictly made. Hence the whole process works on mutual understanding between the couple, doctor and the surrogate. Even if any formal contract is signed between the couple and the surrogate it may not be enforceable as it does not fulfil most of the conditions to form a legal contract. Because these contracts involves parties who are close relatives and who may have the influence to coerce each other. And also the element of consideration will be missing in such contracts as an woman agrees to act as the surrogate only with the motive the helping the deprived couple. Hence no legal contract can be made in such situations.

CONFLICT OF INTEREST

The need for law to govern the entire world is based on one primary characteristic of all the human beings, i.e. human beings have different interests. Hence law came into picture which interest should be given prominence than other which can be brought down in simple terms to say that who decides what. In the issue of Surrogacy various conflict of interest may arise right from the commencement of the process, throughout the course of the process and even after the completion of the process. Once such conflict may arise in case of abortion. As we discussed earlier in this paper , the world is moving towards liberalising abortion laws to protect the rights of the women. In cases of surrogacy there are two women who are pregnant at the same time, the Actual mother and the Surrogate mother. The actual mother is considered to be pregnant because the baby which is growing inside the surrogate is made up physical components taken from her body and the relationship between surrogate mother and the baby is disconnected

immediately after the birth except for purposes like breastfeeding the baby. Hence the actual mother is the person who is going to take care of the child and will also acquire the legal status of mother. Hence we say the actual mother is pregnant along with the surrogate mother. According to the MTP Act, the mother has the ultimate call to decide on abortion after the endorsement made by the physician as required by the provisions of the Act. In cases where the doctor says that the unborn has a high risk of developing physical or mental deformity the mother has an option to choose whether to abort a child or not. If the grounds for abortion are fulfilled the mother becomes the ultimate decider to abort her baby or not. This right given to the mother is based on the argument of right to bodily autonomy available to all the human beings. In cases of surrogacy similar situation may arise in rare cases where the doctor has determined that the baby has a high of having a physical or mental deformity. In such cases the ground for abortion is fulfilled. The recent abortion bill states that the intending couple should not abandon the child under any condition is made with the intention to protect the children born with deformities through surrogacy. Hence the actual parents shall have the ultimate duty to take care of such deformed child after birth. The extremely rare situation which may arise in these circumstances is where the actual mother calls for an abortion but the surrogate mother disagrees to such a decision made by the actual mother. This situation gives rise to a debate on whether abortion of a pregnancy is to be considered as right to choose or not to choose motherhood or is it an exercise of one's right to bodily autonomy over ones body. The surrogate mother do have the right to bodily autonomy over her body. At the same time the actual mother has the right to choose whether she wants to be mother of a deformed child or not. Even the laws of the country do promote abortion of deformed children during pregnancy as a deformed child affects the overall health and economic status of the country. The surrogate mother may argue that she has consented to deliver the child and undergoing abortion at later stages of pregnancy shall cause a greater physical and mental harm to her which she has not consented for. Hence this conflict of interest between the actual mother and the surrogate mother is very crucial as it involves the lives of three people generally.

RIGHT TO MOTHERHOOD V. RIGHT TO BODILY AUTONOMY

The interest of the actual mother should be given a greater priority than the interest of the surrogate mother. The fact that the surrogate mother has consented to deliver the child which is not of her own can be inferred that the surrogate mother has consented to subject her body to certain biological process to benefit the intending couple. The surrogate only acts as a living tool to assist the intending couple to fulfil their interest. Hence giving the ultimate right to call for an

abortion to a surrogate mother in case of deformity of the child cannot be justified on the ground that the surrogate has the right to choose what has to be done over her body. The surrogate mother shall decide on abortion if it is proved that the pregnancy is going to cause a serious physical injury if further proceeded. But in cases of deformities of child the choice of the actual mother should be respected as she is one who has to choose whether she wants to be a mother of a special child or not. The actual mother is the one who is going to establish the relationship with the baby as its mother after its birth. She is one who will be engaged in nourishing the child and taking care of the baby throughout the early stages of growth. The present bills pending in parliament on MTP Act and the Surrogacy Regulation Bill fails to address such issues significant issues which may pose a great threat of exploitation of women and the unborn.

CONCLUSION

The amendment in the Medical Termination of Pregnancy Act has to be made to incorporate the needs of both the actual mother and the surrogate mother. The new Surrogacy (Regulation) Bill, 2019 which is pending in the parliament should focus on addressing the conflict of interest between the actual mother and the surrogate mother. Laws should be made in such way that it address all the future problems which may arise in the subject matter which it tries to govern and regulate.