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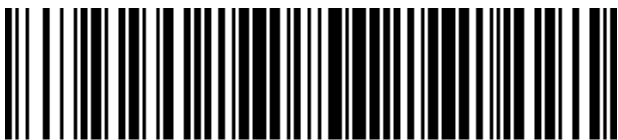
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A Critical Analysis of the Surrogacy (Regulation) Bill, 2020

Siddhart Behera

INTRODUCTION

In the present context, the concept of surrogacy is evolving rapidly and is of prime importance for individuals and therefore it is important to regulate the same and remove any ambiguity which is faced by the masses. The Surrogacy (Regulation) Bill, 2020 (hereinafter ‘the Bill’) was approved by the Union Cabinet on 26th February 2020 and currently awaits the assent of Rajya Sabha following which it’ll be in force. It seeks to establish operational rules and institutional infrastructure to protect the bonafide interests of the parties wanting a child through surrogacy. Regulations in the field of surrogacy, and bringing clarity for prospective parents and surrogate mothers is the objective of this Bill. Further, it also aims to curb commercial surrogacy altogether to put a check on unethical practices. The Bill seeks to act as an ethical, moral and social legislation which protects the reproductive rights of a surrogate mother as well as the rights of the child born through surrogacy. It will also help in establishing regulatory frameworks to monitor surrogacy. The main objective of the Bill is to prevent exploitation of surrogate mothers, abandonment of children born out of surrogacy and the import of human embryos and gametes which have been reported over the years. It can be stated that the Bill, 2020 has a positive impact on ‘Mother-workers’. It is an initiative to protect the interest of women who are involved in it, to promote fair play in the trade and to ensure that commercial surrogacy is banned. Further, the Bill mainly focuses on the regulation of surrogacy in India and seeks to establish National Surrogacy Board at the central level and State Surrogacy Board along with appropriate authorities at the Union and State territories. The Bill is with a view to set at rest all the controversies that was surrounded on different aspects of surrogacy. Since the Bill has been approved by the Union Cabinet with a progressive view, it is very important to understand and analyse it in order to address the shortcomings of the same.

The Bill includes various provisions, which focus on a plethora of issues relating to commercial and altruistic surrogacy, registration, contractual relations etc. This article shall be inclusive of the provisions of the Bill and shall analyse registration, contractual relations, eligibility criteria, penal provisions and hurdles in the implementation of the Bill. However, since the Bill has been proposed recently in 2020, it’s in its nascent stage and therefore this acts as a limitation in analysing the Bill. This paper focuses on transparency, safety, penalties and other provisions of the Bill as well as the current issues. This article also addresses the loopholes of the Bill.

SALIENT FEATURES OF THE BILL

Surrogacy has been prevalent in our country since ancient times. It can be traced back to mythological surrogate mothers such as Yashoda and Gandhari.¹ India has become the favourite destination for infertile couples from across the globe because of the lower cost, less restrictive laws, lack of regulation of ART clinics and availability of surrogate mothers. Also, India is considered as the surrogacy capital of the world due to the advancements in IVF technology and the growth of IVF clinics across the country.² But surrogacy arrangements are drawn up in a random fashion and can be exploitive, especially since surrogates are mostly from socioeconomically weaker sections. With India fast emerging as a favoured destination for childless couples across the world, commercial surrogacy raises a host of moral, ethical as well as legal issues. In the landmark judgment of *Baby Manji Yamada v. Union of India*³, the Apex Court has defined surrogacy and held that it is legal. However, aspects such as commercial surrogacy have been unregulated which are considered as the root cause of evils surrounding surrogacy in India. With the intent of curbing such loopholes, the 2020 Bill was proposed.

In 2016, the Bill was proposed in the Parliament. However, it could not be passed due to the dissolution of Parliament. It was reintroduced in 2019 which was approved by the Lok Sabha and referred to the Select Committee of Rajya Sabha. The 2020 Bill incorporated all the recommendations of the Select Committee and the same was approved by the Union Cabinet.

PROVISIONS

Section 2 of the Bill is the definition clause. Terms such as ‘altruistic surrogacy’, ‘commercial surrogacy’, ‘intending woman’ have been defined coherently. ‘Compensatory Surrogacy’ has been omitted since it could have led to commercialisation of surrogacy.

Section 3 of the Bill deals with ‘parentage and abortion of surrogate child’. It entails that a child born through surrogacy will be deemed to be the biological child of the intending couple or intending woman. Further, the Bill has strengthened the provision in terms of abortion of

¹ Anu Aneja and Shubhangi Vaidya, *Embodying Motherhood: Perspective of Contemporary India* 140-141 (1st edn, SAGE Publications India Pvt. Ltd. 2016).

² Chinmoy Pradip Sharma, ‘Surrogacy Laws in India – Past Experiences and Emerging Facets’ (*Bar & Bench*, 23 November 2019) <<https://www.barandbench.com/columns/surrogacy-laws-in-india-past-experiences-and-emerging-facets>> accessed 20 October 2020.

³ AIR 2009 SC 84.

surrogate child. It requires the consent of the surrogate mother and the authorization of appropriate authority as per the Medical Termination of Pregnancy Act, 1971⁴.

Sections 4-10 are divided into four distinct parts – the first part deals with the permissible purposes of surrogacy. The Second Part deals with eligibility criteria for intending couples which include ‘certificate of essentiality’ and a ‘certificate of eligibility’ issued by the appropriate authority. These requirements of certification have strengthened the regulatory mechanism which will facilitate the contractual relations in a smooth manner. Further, the insurance coverage of the surrogate mother has been extended to 36 months from 16 months. The Third Part deals with the eligibility criteria of the surrogate mother. The 2020 Bill has widened the scope by allowing any married and willing woman between the age of 25 to 35 years having a child of her own can act as a surrogate mother. Lastly, the Fourth Part deals with the ‘rights of the surrogate child’ which states that a surrogate child will be treated equally as a natural child and shall be entitled to all the rights and privileges under law. Further, sections 11-14 deal with the process of ‘registration of surrogacy clinics. The registration will be valid for a period of 3 years and will be renewed thereafter.

Sections 15-32 deal with National and State Surrogacy Board which consists of various members from Parliament, State Legislative Assemblies, Executives, and ten expert members appointed by the Central and State Government. The function of Boards is to advise the Central Government on policy formulation relating to surrogacy, monitor and review the implementation of the Act or rules and regulations, laying down the code of conduct of surrogacy clinics, supervise the functioning of State Surrogacy Board and performance of various bodies constituted under the Act.

Sections 33-35 deal with the functioning of ‘appropriate authority’. To put a stricter regulatory mechanism in place, the Bill empowers the appropriate authority to issue, suspend, or cancel the registration of surrogacy clinics; recommend the accurate standards; investigate and take actions in case of any deviation from the Bill; and lastly to take into account the change in technology and social conditions.

⁴ Medical Termination of Pregnancy Act, 1971.

Sections 36-43 include the penal provisions. The penalty enlisted is up to 10 years imprisonment and fine up to 10 lakh rupees in case of violating any provision of the Bill. Ensuring stringent punishment helps in fulfilling the obligations arising out of surrogacy contracts. Lastly, sections 44-52 deal with miscellaneous provisions.

To put it in a nutshell, the striking features of the Bill are as follows: -

- The Bill allows the practice of ethical altruistic surrogacy;
- The Bill allows an ‘willing woman’ to be a surrogate mother;
- The period of infertility has been reduced to one year as compared to the previous Bills which suggested five years for the same;
- The insurance coverage for surrogate mothers has been extended to a period of 36 months;
- Through the establishment of National Surrogacy Board at the central level and State Surrogacy Board and appropriate authorities in states and Union Territories, the Bill seeks to regulate the practice of surrogacy and monitor it closely;
- The Bill makes it mandatory for the couple to obtain a certificate of essentiality and also a certificate of eligibility for surrogacy;
- It proposes for the prohibition of commercial surrogacy including sale and purchase of human embryo and gametes;
- Live-in couple, divorced women, widows, non-resident Indians (NRIs), persons of Indian origin (PIO), overseas citizenship of India (OCI) etc. have been covered under the Bill.

It is very vital to note that childlessness has important psychological, social and economic consequences, especially in developing countries such as India. Traditionally, it is pictured that a family is only complete when there are children. Acceleration of birth technologies into a fertility industry has given a new hope to eradicate social stigma associated with infertility. Further, the growth in surrogacy has made India a “Reproductive Tourism Industry”. Owing to such wide-reaching implications, the Bill seeks to establish a strong regulatory mechanism. The following sections deal with the impact and shortcomings of the Bill.

IMPACT OF THE BILL ON SURROGACY CONTRACTS

Since the Bill has introduced stringent regulatory mechanisms, it is pertinent to analyse the issue of validity of surrogacy contracts. Surrogacy contracts play a vital role in the process of surrogacy. In the absence of a surrogacy contract, it becomes very difficult to regulate the process since it could lead to a lot of legal hassles. The major purpose of surrogacy contracts is to protect the surrogate mothers, the intending parent(s) and the child equally. The financial and legal issues are taken care by such contracts. The issue of surrogacy contracts raises three conflicting questions: -

1. Do surrogacy contracts amount to baby selling?
2. Whether surrogacy contracts are forbidden by any law or opposed to public policy?
3. Is the purpose of surrogacy contract unlawful in lieu of s. 24 of Indian Contract Act, 1872?

The most conflicting issue raised on surrogacy contracts is that whether such contracts amount to baby selling. The 2020 Bill has put an end to all such speculations by seeking to put a blanket ban on commercial surrogacy. Proponents of commercial surrogacy argue that a woman has a right to procreate and can claim compensation for the gestation period. However, such an argument does not stand valid in the eyes of law because commercial surrogacy contracts ignore the rights of the surrogate mothers and undermine them.

In the *Baby M case*⁵, the court observed that it is very difficult to understand consent in cases of surrogacy. The surrogate mother may develop deep attachment with a child which leads to changes in the will to part with the child. Therefore, the 2020 Bill takes into consideration this aspect and has stipulated that a child born through surrogacy will be deemed to be the biological child of the intending couple or intending woman.

Another question which arises is whether surrogacy contracts are forbidden by any law or opposed to public policy. In certain situations, courts can refuse to enforce a contract on considerations of public policy.⁶ Many objectors state that altruistic surrogacy in itself is an immoral bargain since it is against the interests of the child. The SC has applied section 23 of Indian Contracts Act⁷, to agreements injuring public interest or public welfare.⁸ However, it is very difficult to establish a

⁵ 537 A.2d 1227, 109 N.J 396.

⁶ Avtar Singh, *Contracts and Specific Relief* (10th edn, Eastern Book Co. 2008).

⁷ Indian Contracts Act 1872, s 23.

⁸ *Ratanchand Hirachand v Askar Nawaz Jung* 1991 3 SCC 67.

material link between permitting surrogacy and public interest, and in such cases public policy doesn't fit in.⁹ Further, Indian courts have as well upheld all forms of surrogacy contracts, and in fact recognized reproductive rights as part of the right to privacy.¹⁰ In the case of *Jan Balaz v. Anand Municipality*¹¹, the Gujarat High Court held that although regulations are required to protect the rights of a surrogate mother, guardianship, responsibilities of the fertility clinic, etc., the position of law remains the same i.e. public welfare and policy does not affect the enforceability of surrogacy contracts. The 2020 Bill seeks to fulfil these lacunae by substantiating the provisions governing surrogacy.

Further, it cannot be claimed that the object of surrogacy contracts is unlawful in lieu of section 24 of Indian Contracts Act¹² since section 35 of the 2020 Bill strictly prohibits commercial surrogacy, exploitation of surrogate mothers and children born through surrogacy. It also penalises the same. Therefore, the 2020 Bill has ensured that the validity of surrogacy contracts remains intact. Moreover, regulatory bodies have been assigned to implement the safeguards.

JUDICIAL APPROACH

The last two decades have seen an exponential growth in the sector of surrogacy. With an aim to effectively regulate surrogacy, prohibit commercial surrogacy and allow ethical surrogacy, the 2020 Bill was proposed. For any Bill to be widely accepted amongst the masses, it must satisfy the Golden Triangle Test. However, certain clauses of the Bill fail to be in consonance with constitutional provisions. A closer look reveals that the Bill fails to pass the '*Golden Triangle Test*'¹³ as laid down by the Hon'ble Supreme Court. The current section throws light upon the constitutional validity of the Bill.

ARTICLE 14

Article 14 of the Indian Constitution guarantees every citizen 'equality before law and equal protection of laws to all persons.' It forbids class legislation but permits reasonable classification. The Hon'ble Supreme Court laid down two tests which must be satisfied to pass the test of

⁹ *Fender v John Mildmay* 1938 AC 1.

¹⁰ *B. K. Parthasarthi v Government of Andhra Pradesh* AIR 2000 AP 126.

¹¹ AIR 2010 Guj 21.

¹² Indian Contract Act 1872, s 24.

¹³ *Minerva Mills Ltd. & Ors. v Union of India & Ors.* AIR 1980 SC 1789.

reasonable classification i.e. intelligible differentia and rational nexus. Further, the traditional concept of equality was broadened in the case of *E. P. Royappa v. State of Tamil Nadu* wherein it was held that equality is a dynamic concept and its dimensions cannot be cribbed, cabined, and confined with traditional doctrinaire limits. When the classification is not on the basis of intelligible differentia and has no nexus with the object sought to be achieved, then the differentiation is deemed to be invalid.¹⁴

Recently, the Supreme Court struck down Section 377 of the Indian Penal Code i.e. it decriminalized consensual sexual relations between two adults of any sexuality. However, the Bill goes against this judgement. It denies the rights of homosexual couples to commission a child and refuses to acknowledge these couples as 'legitimate'. Furthermore, the Supreme Court recognized transgenders as third genders in the leading case of *National Legal Services Authority v. Union of India*. But the Bill is silent on providing equal rights to the third genders. The grounds mentioned in the Bill are very narrow and it disentitles same-sex couples and transgenders from commissioning surrogacy.

There is no reasonable nexus of allowing altruistic surrogacy to Indian citizens who are married, widowed or divorced and exclusion of others with the object of the Bill. A closer look at the Bill reveals that the classification is based on marriage and such a classification is not reasonable under Article 14 of the Indian Constitution. Even more, when single parents i.e. non-married individuals are allowed to adopt children. The Bill seeks to prevent misuse of this practice and protect women from exploitation. However, domestic surrogacy mechanism can prove to be a breeding ground for corruption and malpractices.

ARTICLE 19

Article 19(1)(g) of the Indian Constitution provides for the 'freedom of trade and profession'. Article 19(6) enlists the grounds on which the said right could be reasonable restricted. Apparently, the Bill presents itself in the interest of general public, however, an in-depth analysis proves that it fails to do so. In the case of *Chintaman Rao v. State of Madhya Pradesh*, the Apex Court has held that 'reasonable restriction' must not be arbitrary and excessive. It has also been held that there must be a reasonable balance between the freedom granted and the restriction imposed. The

¹⁴ *State of West Bengal v Anwar Ali Sarkar* AIR 1952 SC 75.

Supreme Court held that a total ban on bar dancing is unconstitutional as many women would then be forced to take up odd jobs to survive. Similarly, a blanket ban on commercial surrogacy would be violative of Article 19(1)(g). The threat of surrogacy being operated underground also lurks as a result of the blanket ban.

ARTICLE 21

The Apex Court held that right to life as enshrined in Article 21 of the constitution also includes the ‘right to livelihood’ in the leading judgement of *Consumer Education and Research Centre and Ors. v. Union of India*¹⁵. The same principle was previously acknowledged in the case of *Olga Tellis v. Bombay Municipal Corporation*.¹⁶ However, by enforcing a blanket ban on commercial surrogacy, the Bill tends to violate the right to livelihood since poor women eager to earn desperately to make ends meet are at the losing end. It also has a negative impact on women who want to achieve some kind of financial independence or stability for themselves and their families by giving consent to be surrogates instead of monetary compensation.

Further, in the case of *Devika Biswas v. Union of India*¹⁷, the Hon’ble Supreme Court held that right to reproduction is an important component of ‘right to life’ under Article 21. Reproductive rights of a woman include the right to carry a baby, give birth and raise children. Rights to privacy, dignity and integrity are also included. In the matter of *R. Rajagopal v. State of Tamil Nadu*,¹⁸ after referring to *Kharak Singh*¹⁹ and American decisions, the learned Judge stated the law in the following words: “any right to privacy must encompass and protect the personal intimacies of the home, the family, marriage, motherhood, procreation and child rearing”. Therefore, denying the rights of surrogacy to people belonging to LGBTQ community, single persons, older couple and restricting it only to heterosexual couples, widows and divorcee women of a certain age violates the fundamental right to life under Article 21 of the former.

Recently, in the landmark judgement of *K. S. Puttaswamy v. Union of India*²⁰, the Supreme Court held that privacy of a person extends to his/her personal autonomy relating to mind, body and other

¹⁵ (1995) 42 SCC 3.

¹⁶ AIR 1986 SC 180.

¹⁷ (2016) 10 SCC 726.

¹⁸ AIR 1995 SC 264.

¹⁹ *Kharak Singh v State of Uttar Pradesh* 1964 SCR (1) 332.

²⁰ (2017) 10 SCC 1

choices. The Supreme Court also looked into the case of *B. K. Parthasarthi v. Government of Andhra Pradesh*²¹, wherein the Andhra Pradesh High Court held that State's interference on procreation amount to a direct encroachment on one's "right to privacy". Therefore, considering the fact that reproduction or procreation is a very personal and private decision and must be respected, the Bill must ensure that there is minimum interference by the State in such a decision-making process. The Government, on many accounts, has failed to justify why unmarried and childless women could not become surrogates. A woman alone should be entitled to decide upon the right to control her body, fertility and motherhood choices²². Hence, the Bill has partially aligned with the right to livelihood, right to privacy, and right to reproductive autonomy under Article 21.

Looking at the above precedents and reasonings, it can be concluded that Bill fails to pass the Golden Triangle Test. It must be borne in mind that in India, surrogacy is not just any other sector, it is the primary source of income for women who are economically crippled. It is also a main source of income for all those who work at surrogacy clinics. Therefore, the Bill must not jeopardize the interests of all the stakeholders involved in the process. It must be modified to strike a correct balance between its provisions and the rights of citizens. The Bill in its entirety is not flawed, it needs minor modifications to turn into a broad piece of legislation.

LOOPHOLES AND SUGGESTIONS

The purpose of law in a society is to protect the liberty of individuals as well as act as an instrument to distribute positive entitlements. In order to fulfil its obligations, law must keep pace with the emerging technologies so that the benefits arising can reach to the needy. The Bill puts a blanket ban on commercial surrogacy and only allows altruistic surrogacy. However, it seems as if this step has not been properly seen through. In many instances, commercial surrogacy acts as an attractive alternative for the parties. This is because it provides financial stability to the poor surrogate mother and it also includes foreign currency investment. India faces the severe problem of poverty, and with the advent of surrogacy in the country, poor women indulge themselves in the process.²³

²¹ (1999) 5 ALT 715.

²² Arijeet Ghosh & Nitika Khaitan, 'A Womb of One's Own: Privacy and Reproductive Rights' (EPW Engage, October 31 2017) <<https://www.epw.in/engage/article/womb-ones-own-privacy-and-reproductive-rights>> accessed 21 October 2020.

²³ S. Das Gupta, *Globalization and Transnational Surrogacy in India* (Lexington Books 2014).

Therefore, it is necessary to arrive at a mid-way that facilitates commercial surrogacy but in a better and sufficient regulatory manner. The prices must be fixed by the appropriate authorities and bargaining shouldn't be permitted.

Although the Bill promotes altruistic surrogacy, the same can lead to corruption, black-marketing and a clandestine surrogacy procedure. In the case of an altruistic agreement, the gestational carrier could incur more out of pocket costs, and the intended parents could also end up paying more due to misinformation or other various outliers.²⁴ The same has not been addressed by the Bill. It merely assumes that altruistic surrogate mothers are not exploited and blatantly ignores the fact that unpaid surrogacy is also exploitative. Further, the Bill expects a surrogate mother to go through the entire process of surrogacy out of compassion. Ironically, the 'altruistic model' promotes forced labour.²⁵ Therefore, in order to tackle this problem, the concept of 'compensatory surrogacy' must be put in place. This would make good for the losses suffered by the surrogate mother in terms of health, wages, sufferings, and death; etc. and hence the word 'altruistic surrogacy' should be replaced with the word 'compensatory surrogacy'.²⁶

With regards to the compliance, the Bill proposes that the parties need a certificate of eligibility prior to entering into the process of surrogacy. However, it is silent on the time limit for the certificates being issued. Similarly, the Bill provides for approval of the competent authority and consent of the surrogate mother for an abortion, but it does not mention about the intending parents' consent for abortion. It creates a loophole which can be misused grievously and surrogate mothers may take advantage. Surrogacy is more of a personal thing than a contractual obligation, therefore, such loopholes shouldn't be allowed because it can create a rift in the regulatory mechanism leading to severe disputes between the concerned parties. Further, it must be ensured that a lady medical practitioner appointed for a full-time basis at the district and state levels in

²⁴ 'Pros and Cons of Altruistic Surrogacy' (*ConceiveAbilities*, 4 June 2019) <<https://www.conceiveabilities.com/about/blog/pros-and-cons-of-altruistic-surrogacy/>> accessed 24 October 2020.

²⁵ Simran Aggrawal & Lovish Garg, 'The new surrogacy law in India fails to Balance Regulation and Rights' (LSE Human Rights, 23 November 2016) <<https://blogs.lse.ac.uk/humanrights/2016/11/23/the-new-surrogacy-law-in-india-fails-to-balance-regulation-and-rights/>> accessed 24 October 2020.

²⁶ Bhumitra Dubey & Yash Tiwari, 'Analysis of the Surrogacy (Regulation) Bill, 2020 (2020) Indian Law Journal <<https://www.indialawjournal.org/analysis-of-the-surrogacy-regulation-bill>> accessed 24 October, 2020.

fertility clinics. Such a provision would ensure the faith of the parties involved therein. Therefore, such unorthodox moves must be put in place in order to give effect to the provisions of the Bill. Owing to large-scale problems such as poverty and unemployment, women who are engaged in daily wage activities also readily accept to be a surrogate mother. The situation is so dire that women look beyond the idea of ‘renting their wombs’ to feed their families. Unfortunately, there is no such provision in the Bill which talks about reimbursing the surrogate mother the loss of wages faced by her during pregnancy. Proper compensation must be guaranteed to the surrogate mother and the same must be regulated by the government itself.

Surrogacy also invites the problem of forced labour. Firstly, it always involves the very life of human beings, their bodies and their identity. Secondly, most people depend on labour for their livelihood. This dependency places certain individuals at a disadvantage with respect to the buyer of their work.²⁷ Taking note of this problem of forced labour, provision regarding the inclusion of a counselling department at every reproductive clinic must be stressed upon. This could prove to be an effective method to understand the mental condition of the surrogate mother. The surrogate mother must be made aware of the entire process of the surrogacy and the risks associated with it in a fair and unbiased manner. Further, the unforeseen conditions of divorce between the intending couple or any rift between them must be taken into account. Although, it’s difficult to foresee such situations, the Bill must include clear and unambiguous provisions regarding roles and responsibilities of intending couples and surrogate mothers in cases of abandonment of surrogate children by intending parents. Therefore, the legislation must assure high standards of care, consent and compensation for all involved in the delivery of reproductive services in India.²⁸ Surrogacy is a part of Assisted Reproductive Technology (hereinafter ‘ART’). The Surrogacy Bill must be aligned with the ART Bill. Both the Bills are closely intertwined since ART Bill prescribes the mode, the procedures, and the technology of reproductive medicine in surrogacy whereas the Surrogacy Bill deals with the implications and the ethical issues arising from such arrangements. Bringing the ART Bill before the Surrogacy Bill would raise quite a few concerns. The ART Bill sets a comprehensive framework and since it does not impinge on surrogacy, the government must

²⁷ R. Macklin, ‘Is there anything wrong with surrogate motherhood? An Ethical Analysis’ [1988] *The Journal of Law, Medicine & Ethics* 57.

²⁸ B. Parry & R. Ghoshal, Regulation of Surrogacy in India: Whenceforth Now? (*BMJ Global Health*, 8 October 2018) <<https://gh.bmj.com/content/3/5/e000986>> accessed 24 October 2020.

ensure that there's increased synchrony between both the Bills. Hence, the Surrogacy Bill should come into force only after the enactment of the ART Bill.²⁹ The ART Bill, the Surrogacy Bill, the amendment to the Medical Termination of Pregnancy Act³⁰, and the older Pre-Conception and Pre-Natal Diagnostic Techniques Act³¹ together form the regulatory authority and protect the reproductive rights and choices of women in India.³²

Since surrogacy is a socially and culturally sensitive area in India, no loopholes regarding the same must exist. It also has profound psychological implications and is a grave matter of privacy. Therefore, the authorities must be open to recommendations and suggestions to serve the best interests of the parties.

CONCLUSION

The advent of science and technology has brought a great change in the life of human beings. At the same time, it has also brought problems which were otherwise unheard of. The study of biotechnology has helped us to discover sex determination techniques and other scientific developments like DNA testing, fingerprinting etc., to facilitate for administration of justice. The recent development in the field of embryonic stem cell has affected human life in numerous ways. The concept of motherhood has also been broadened and has been changed to include genetic mother, surrogate mother, biological mother and social mother. In the past three decades, there has been a spectacular change in the field of reproductive technologies. Reproductive sciences have come up with techniques like donor insemination, *in vitro* fertilisation and embryo transfer methods which have completely revolutionised the reproductive environment. The technological solution has saved an awful lot of heartache for many families, and this solution has become a blessing for many families now have a child of their own.

²⁹ Simran Aggrawal & Lovish Garg, 'The new surrogacy law in India fails to Balance Regulation and Rights' (*LSE Human Rights*, 23 November 2016) <<https://blogs.lse.ac.uk/humanrights/2016/11/23/the-new-surrogacy-law-in-india-fails-to-balance-regulation-and-rights/>> accessed 24 October 2020.

³⁰ The Medical Termination of Pregnancy (Amendment) Bill, 2020.

³¹ Pre-Conception and Pre-Natal Diagnostic Techniques Act, 1994.

³² 'ART of Life: On Assisted Reproductive Technology Regulation Bill' *The Hindu* (India, 21 February 2020) <<https://www.thehindu.com/opinion/editorial/art-of-life-on-assisted-reproductive-technology-regulation-bill/article30873613.ece>> accessed October 25 2020.

In modern times, surrogacy has become the need of the society. It is the last hope for infertile couples and who for those who are unable to have their biological child. Surrogacy will remain to be an important issue since it is based on childlessness which has a profound social and psychological impact on families. Therefore, surrogacy must be viewed with the lens of fundamental rights. Further, since public policy is an ever-evolving concept, the government must enact such laws which take into consideration the changing social patterns.

The proposed Bill is a unique blend of social, moral, ethical, legal and scientific issues. It makes a strong attempt to balance out the conflicting interests. It bans commercial surrogacy and has established punishment for the same, however, it is more important to first secure the interest of the person providing a womb for surrogacy. Some sort of monetary compensation must be assured to the surrogate mothers including the provision of proper insurance and medical expenses that is bore by the surrogate mother along with physical and mental sufferings. This must be done without fail since surrogacy is an economic factor in addition to being a social and emotional factor. It is considered as the primary and most important factor that has a direct connection with the right to livelihood. The procreative rights of the surrogate mother must also be respected and properly safeguarded and further special care must be accorded during pregnancy. The mental and physical health of the surrogate mother must be taken care of. Proactive steps must be undertaken to counsel the parties before they enter into surrogacy agreements or contracts. Lastly, the ART Bill must be enacted prior to the Surrogacy Bill so as to enhance the smooth functioning between both the Bills leading to a stronger and better regulatory mechanism.

In conclusion, surrogacy is a very crucial sector in India which is estimated to grow by leaps and bounds in the subsequent years. Since it is closely related with the social and psychological fabric of the society, due care must be taken while regulating it. The concerned authorities must leave no stone unturned to prevent the existence of any lacunae or loopholes. Various stakeholders such as infertility clinics, healthcare providers, medical tourism companies, the broader tourism industry, the concerned governments and the women who provide surrogacy services must be counselled about the entire process and must be made aware of the health and legal issues that surround surrogacy. Informed stakeholders can help regulate the law better.