“SURROGACY IN INDIA: ETHICS v. LEGALITY”

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ABSTRACT:
Humans consider it true that birth is the foundation of women’s strength and vigour. The origin of a child is a woman and she is a woman. This is the essence of a woman. Yet, sadly, a few women because of specific physiological conditions can’t bear offspring of their own. The desire to turn into a mother drives them to look to options like Artificial Reproductive Technology (ART), In Vitro Fertilization (IVF), Intrauterine Infusions (IUI), Surrogacy and that’s only the tip of the iceberg.
Surrogacy (Regulation) Bill, 2019 in recent times has agitated the discussion as to the legal and moral questions that remain relevant in context of law. The paper is intended to understand the Ethical, Legal & Socio-Economic issues relating to surrogacy and its applicability in India. The proposed bill overlooks the socio-cultural reality of the patriarchal system that has taken root in Indian society by introducing restricted provisions such as "close relatives" and "couples."
Single and lesbian, gay, bisexual, transgender and queer (LQBTQ) communities are discriminated against the right to form a family. Discriminating single and transgender (LGBTQ) communities discriminate against the right to form a family. Although India is going through a progressive time by which the residents' reasoning interaction is going through an extreme shift away from the male-centric standards to more feminist ethos; the proposed surrogacy regulation fills in as a dark spot on the dynamic development of the thought of equity in India.
The paper concludes that current laws about surrogacy in India are very vague and inefficient by their nature. The paper explains many ethical quandaries related to surrogacy and how different types of surrogacy may enable or hinder autonomy and/or protection potential surrogates and finally makes suggestions and recommendations for better enforcement of surrogacy laws in India, especially for benefit of the population as a whole.
Key Words: Surrogacy, Artificial Reproductive Technology (ART), Socio-cultural reality, Discriminate, Male-centric standards, Feminist Ethos.
OBJECTIVES OF THE STUDY:

- To know about the notion of surrogacy
- To review about the status of surrogacy in India and around the world
- To critically analyse the aspect of Altruistic Surrogacy under the Surrogacy (Regulation) Bill, 2019.
- To understand the legal, social and ethical aspects of Surrogacy laws in India
- To suggest coherent measures rather than outright prohibition of commercial surrogacy

RESEARCH METHOD:

This research is highly theory-based. The lack of self-tailored extensive empirical data can be considered as its limitation. There is a lack of field research on the researches part. This is a derived research project which tries to put forth an analysis. This research has been done based on qualitative data. The researchers have used journal articles and reports written in various law reviews. The insights they provided on the regulations and their effects have been at the core of the project. Also, this research does include data collected by different agencies or researchers.

The researchers have also tried to correlate surrogacy laws of various countries with that of India which will be a support in knowing about the surrogacy markets around the world. Many salient landmark cases of India will be read to understand the legitimateness of surrogacy in India.

LITERATURE REVIEW:

To make sure that the effects, opinions, and outcomes are analysed while maintaining integrity, this is an analysis of the article we have referred to.

(PROF. RANBIR SINGH ONE)

SURROGACY IN INDIAN LEGAL CONTEXT- A BLISS OR CURSE¹:

This research paper had tried to explore the boons and banes of Surrogacy in India, encouraging for making surrogacy legal in the Indian market and trying to move beyond the doubt that surrogacy is favoured on mankind. The author has focused on the joys of surrogacy as well as commercial surrogacy, which is a great option for both commissioning couples and surrogate mothers as it is beneficial to both of them.

Aditya (2015) noted that surrogacy has always been the topic of conversation on account of socio, economic and legal aspects associated with it. The war of the world over the standing of surrogacy, unsolved question regarding its moral and constitutional righteous has been the cause of confusion to nations whether to authorize surrogacy or not. Surrogacy is mostly allowed in altruistic countries, not commercial ones, where it is exclusively done for the goal of serving others in exchange for monetary recompense for medical expenses paid by the commissioning parents. Western Europe and the Oceania region show the tendency of having very stringent laws giving legal rights to the surrogate mother over the baby in their womb and leaving no space for commercial surrogacy. However, in Eastern Europe and Asia, it is customary to enter into contracts between the test run parents and the surrogate mother, who has no rights to the baby in their utero. Aditya (2015) distinguished, "India, the legislation has not done anything on it from the point of legal context." Both Altruistic and Commercial Surrogacy had been permitted in India since 2002 without any legitimate stature in the country (which changed in the year 2019).

Aditya (2015) equated the reproductive rights of women with customs and theology. In Hinduism, they never bantered on the Assisted Reproductive Technology because of their belief that it is after the birth of one’s child, one’s whirl of karma begins. They considered those assisted means of reproduction as equitable and not against existing moral standards. Reproductive Rights including the surrogacy now has been included in the International Human Rights."

Aditya (2015) argues that adoption is considered the best alternative for the parents unable to conceive naturally but the urge to have a blood relation has been ubiquitous since remote ages. The researcher has analysed various data to conclude that surrogacy has turned about to be more damaging than helpful distinctly in India as a consequence of the quintessential depiction
of mother and motherhood. Surrogates chose in India generally belong to the underprivileged section of the society.

The author concludes that because the advantages of surrogacy outweigh the disadvantages, society might consider it a happy thing to have children differently. The purpose of this research report is to help readers understand the various aspects that result from research related to surrogacy. This is significant because people far and wide are of the view that surrogacy is reprehensible, often not realizing there are other points of view. There has been much research and discussion conducted on these opinions of surrogacy, involving debates of rights versus morality. Most of the research found was the meaning of surrogacy, its types, and just discussing the surrogacy trends around the globe. More research and testing are required to gain a better understanding of social, economic, and legal costs concerning surrogacy. It is important to conduct more studies on the constitutionality of surrogacy to settle the question regarding its rightfulness of it.

INTRODUCTION:

❖ DEFINATION OF SURROGACY

- According to Section 2(b) Surrogacy (Regulation) Bill, 2019, “Altruistic surrogacy means a surrogate mother in which the surrogate mother or her dependents or surrogates act on behalf of the surrogate mother. No fees, costs, fees, remuneration or monetary incentives of any kind, except for medical expenses borne by the surrogate mother and covered by insurance of the surrogate mother2”.

- According to section 2(f) Surrogacy(Regulation) Bill, 2019, “commercial surrogacy” means commercialisation of surrogacy services or procedures or its component services or component procedures involving selling or buying of human embryo or trading in the sale or purchase of human embryo or gametes or selling or buying or trading the services of surrogate motherhood by way of giving payment, reward, benefit, fees, remuneration or monetary incentive in cash or kind, to the surrogate mother or her dependents or her representative,

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except the medical expenses incurred on the surrogate mother and insurance coverage for the surrogate mother\(^3\).

**TYPES OF SURROGACY:**

There are two types of surrogacy: traditional surrogacy and pregnancy surrogacy. Traditional surrogacy uses the eggs of the surrogate mother for conception. In contrast, pregnancy surrogacy is performed by transplanting an IVF-generated embryo containing oocytes from the intended mother or donor. Therefore, the advent of IVF helped surrogacy of pregnancy.

**SURROGACY AROUND THE WORLD:**

- **TABULAR COMPARISON OF SURROGACY RULES ACROSS THE WORLD:**

<table>
<thead>
<tr>
<th>SERIAL NUMBER</th>
<th>REGION</th>
<th>COUNTRIES</th>
<th>REGULATORY STATUS OF SURROGACY</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>East Asia</td>
<td>Japan</td>
<td>Legal and openly practiced (no laws to regulate surrogate birth and remains not forbidden)</td>
</tr>
<tr>
<td>2</td>
<td>East Asia</td>
<td>China</td>
<td>Prohibits all kinds of surrogacy</td>
</tr>
<tr>
<td>3</td>
<td>East Asia</td>
<td>South Korea</td>
<td>Absence of laws on surrogacy</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th></th>
<th>Region</th>
<th>Country</th>
<th>Status and Regulations</th>
</tr>
</thead>
<tbody>
<tr>
<td>4</td>
<td>South-East Asia</td>
<td>Singapore</td>
<td>All provisions of surrogacy service illegal</td>
</tr>
<tr>
<td>5</td>
<td>South-East Asia</td>
<td>Malaysia</td>
<td>Prohibited by fatwa</td>
</tr>
<tr>
<td>6</td>
<td>South-East Asia</td>
<td>Philippines</td>
<td>Law silent on commercial surrogacy (no laws directly prohibiting and regulating the medical practice)</td>
</tr>
<tr>
<td>7</td>
<td>South-East Asia</td>
<td>Thailand</td>
<td>Allowed for only married heterosexual Thai couples (illegal for foreign intended couples)</td>
</tr>
<tr>
<td>8</td>
<td>South Asia</td>
<td>India</td>
<td>Only altruistic surrogacy allowed</td>
</tr>
<tr>
<td>9</td>
<td>South Asia</td>
<td>Pakistan</td>
<td>Prohibited as it is illegal in Islam</td>
</tr>
<tr>
<td>10</td>
<td>South Asia</td>
<td>Nepal</td>
<td>Allowed for married Nepalese nationals (prohibited for singles, transgender and foreign nationals)</td>
</tr>
<tr>
<td></td>
<td>United States Of America</td>
<td>United states of America</td>
<td>Surrogacy in USA is a state matter so regulations differ across states</td>
</tr>
<tr>
<td>---</td>
<td>---------------------------</td>
<td>--------------------------</td>
<td>-------------------------------------------------------------------</td>
</tr>
<tr>
<td>12</td>
<td>Western Europe</td>
<td>Germany</td>
<td>Surrogacy banned for all</td>
</tr>
<tr>
<td>13</td>
<td>Western Europe</td>
<td>France</td>
<td>Surrogacy banned for all</td>
</tr>
<tr>
<td>14</td>
<td>Western Europe</td>
<td>United Kingdom</td>
<td>Commercial surrogacy prohibited while altruistic surrogacy not allowed</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>(surrogacy contracts are unenforceable and available to just UK nationalist)</td>
</tr>
<tr>
<td>15</td>
<td>Western Europe</td>
<td>Sweden</td>
<td>Surrogacy illegal</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>(still remains largely unregulated)</td>
</tr>
<tr>
<td>16</td>
<td>Western Europe</td>
<td>Belgium</td>
<td>Altruistic surrogacy allowed but commercial surrogacy banned</td>
</tr>
<tr>
<td>17</td>
<td>Western Europe</td>
<td>The Netherlands</td>
<td>Altruistic surrogacy allowed</td>
</tr>
<tr>
<td>Region</td>
<td>Country</td>
<td>Status</td>
<td></td>
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<tr>
<td>---------------------</td>
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<td>---------------------------------------------</td>
<td></td>
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<tr>
<td></td>
<td></td>
<td>(all surrogacy arrangements void and unenforceable)</td>
<td></td>
</tr>
<tr>
<td>18</td>
<td>Central Europe</td>
<td>Switzerland</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Completely illegal</td>
<td></td>
</tr>
<tr>
<td>19</td>
<td>Northern Europe</td>
<td>Norway</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Surrogacy is prohibited</td>
<td></td>
</tr>
<tr>
<td>20</td>
<td>Eastern Europe</td>
<td>Russia</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Both gestational and commercial surrogacy allowed</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>(open to both local and foreigners)</td>
<td></td>
</tr>
<tr>
<td>21</td>
<td>Eastern Europe</td>
<td>Ukraine</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Surrogacy completely legal</td>
<td></td>
</tr>
<tr>
<td>22</td>
<td>South-East Europe</td>
<td>Bulgaria</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>All forms of surrogacy banned</td>
<td></td>
</tr>
<tr>
<td>23</td>
<td>Oceania</td>
<td>Australia</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Commercial surrogacy banned (other regulations vary across states)</td>
<td></td>
</tr>
</tbody>
</table>

**THE SURROGACY (REGULATION) BILL, 2019:**

- All surrogacy arrangements are void and unenforceable.
- Surrogacy is completely prohibited in some regions.
- Both gestational and commercial surrogacy are allowed in some regions, open to both local and foreigners.
- Surrogacy is completely legal in some regions.
- All forms of surrogacy are banned in some regions.
- Commercial surrogacy is banned in some regions, with other regulations varying across states.
The new bill permits any woman to freely surrogate, whereas the previous bill only permitted close relatives to do so. To make surrogacy more accessible, the section describing infertility has been deleted. This new suggested bill is an improvement over the previous bill from 2019. Many of the flaws in the previous bill have been addressed, but it still emphasises a need-based approach rather than a rights-based one. Commercial surrogacy is prohibited, whereas altruistic surrogacy is encouraged. The Surrogacy (regulation) bill, 2019 discusses about the many relevant terms and definitions abandoned child, altruistic surrogacy, commercial surrogacy, intending couple, surrogacy, surrogacy clinic, surrogacy procedures, surrogate mother and zygote.

Section 2(b) of the act reads the definition of altruistic surrogacy as the surrogacy in which the surrogate mother, her dependents, or her agent receives no charges, expenditures, fees, payment, or monetary inducement of any kind, save for medical expenses borne by the surrogate mother and insurance coverage for the surrogate mother.

Section 2(f) defines commercial surrogacy as the commercialization of surrogacy services or procedures, or their component services or procedures, such as the selling or buying of human embryos or gametes, or the selling, buying, or trading of surrogate motherhood services, in exchange for a payment, reward, benefit, fees, remuneration, or monetary incentive in cash or kind, to the surrogate mother, her dependents, or her representative.4

The Standing Committee earlier said that the economic prospects accessible to surrogates through surrogacy services should not be rejected paternally. It is terribly unjust and arbitrary to allow women to perform reproductive labour for free to another individual while denying them payment for their reproductive labour.

The bill restricts the circle of relatives who can choose a surrogate mother. Given the patriarchal family structure and power dynamics within families, not every family member can resist being asked to be a surrogate for another family member. An intended couple's close family may be coerced to become a surrogate, which might be even more exploitative than commercial surrogacy. Surrogacy for the sake of altruism by close relatives will always be motivated by force and coercion, not charity.

Section 35 explains about Prohibition of commercial surrogacy, exploitation of surrogate mothers and children born through surrogacy. The bill forbids and punishes surrogate mother exploitation, although the word "surrogate mother exploitation" is not defined in the bill, leaving it unclear and confusing. As a result, the Bill should contain all conceivable forms of exploitation that have been deemed illegal.

The bill proposes that no person shall establish a surrogacy clinic for the purpose of performing surrogacy or providing surrogacy operations in any manner unless such clinic is officially registered under this Act. Every surrogacy clinic that conducts surrogacy or surrogacy treatments, either partially or entirely, must apply for registration within sixty days following the appointment of authorised authorities.

The bill also prohibits conduct of abortion during the time duration without the surrogate mother's written approval. Because of large-scale issues such as poverty and unemployment, women who works for a living frequently accept the role of surrogate mother. Women are considering alternatives to 'renting their wombs' to feed their family since the situation is so grave.5

**FACTORS WHILE CHOOSING A SURROGATE:**

The practice of surrogacy is one of the most controversial procedures in the field of assisted reproduction. Surrogates are usually paid financially by the biological parents of the baby they carry, while occasionally women volunteer to be surrogates as a gift to a friend or family member. Although monetary remuneration may play a role in a woman's decision to become a surrogate, the fundamental goal of a good surrogate is to assist others experience the joys of parenthood. Above all, she is dedicated to delivering a healthy kid into the world and providing a lovely present to the baby's intended parents. Before choosing a proper surrogate mother, these are the three key questions, a couple must keep in view:

1. What is her medical background?
2. Why is she doing this?

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3. Do we want to have a relationship with our surrogate after the baby is born? A suitable surrogate candidate will be between the ages of 21 and 44. She will have to disclose details on difficult pregnancies and delivery, including any miscarriages or abortions. Although a surrogate mother should have had at least one successful pregnancy and delivery, a woman who has had multiple pregnancies may not be a good choice since her body may be unable to manage another pregnancy. A possible surrogate must be tested for sexually transmitted illnesses and confirm that she has received all of the essential vaccines, including chickenpox, measles, and rubella.

Article 41 of the Constitution provides that “the State shall within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want”\(^7\). Surrogate mother does have a fundamental right to work as a surrogate and no individual can take this right away from her. The surrogate mother is unable to supply her own egg for surrogacy and is required to give up all parental rights to the surrogate child\(^8\).

**SURROGACY IN INDIA- THEN AND NOW:**

According to the WHO Report, the global incidence of infertility, including India, is roughly 10-15\%. The Indian surrogacy industry is believed to be worth between Rs 1,000 and 5,000 crore rupees which is significantly smaller than the global market (about, a fourth of what they would cost in the United States. Surrogacy instances in India have increased by more than 150 percent in the last few years. India is the only country in the world that has made commercial surrogacy legal (in 2002) with a $500 million-a-year business currently and at least 350 facilities offering surrogacy services\(^9\). According to a research conducted by the Confederation of Indian Industry, around 10,000 couples from other nations visit India for this purpose each year. Nearly 30 percent of this group is single or gay. When compared to other nations, the cost of surrogacy in India is around half that of the other countries. This has boosted foreign interest in surrogacy in India once more. Surrogacy is being used to meet the material and financial

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\(^7\)INDIA CONST. art 41.


requirements of the status-conscious lower middle class. According to statistics produced by the National ART (artificial reproductive methods) Registry of India (NARI), there has been an almost 300 percent increase in instances from 50-odd cases in 2004 to 158 cases in 2005. The reproductive tourism sector is projected to be worth over 25,000 crore rupees. India has reached unprecedented heights in the field of surrogacy on a global scale because medical expenditure just cost around 10-15 lakh rupees which is negligible as compared to other nations. Based on the facts and numbers presented above, we may infer that commercial surrogacy is most popular in India.

CONSTITUTIONAL VALIDITY OF SURROGACY IN INDIA:

❖ ARTICLE 14:

Article 14 of the Constitution states, “the state shall not deny to any person equality before the law and equal protection of laws within the territory of India”. Everyone no matter who they are, where they come from, whether affluent or impoverished, are indistinguishable and will be treated uniformly, however only in akin circumstances. Ensuring equality means preventing any form of discrimination, and article 15 and 16 denies any form of discrimination, even based on sex. The article not only ensures impartiality but also guarantees that the individual’s right is not violated. Here, equality is also bounded by way of exemptions (special privileges to the President and the Governor) and reservations. Stating precisely, class legislation means a class of people, all of whom stand in the same relation to the privilege granted, is wrongly discriminated against by a law which confers particular privileges upon a group of persons arbitrarily selected from a large number of other individuals who are not afforded the privilege. Article 14 under no circumstances allow for class legislation by serving equals heterogeneously without any justification. Though class legislation does not have a mounting in the law, principle of reasonable restriction and intelligent differentia should not be disregarded.

The reasonable classification as laid down in the case of Shri Ram Krishna Dalmia v. Shri Justice S. R. Tendolkar & others has been the instrument for quantifying

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11 INDIA CONST. art. 14, cl. 1.
arbitrariness if any in the classification whenever done. The test gave way for two important stances i.e. classification being based on intelligent differentia should separate those clubbed together from others and the differentia should be coherent. Henceforth, the classification should be rational by not being based on any singular characteristics being present only in some people grouped and absent in people being left out of the arena. Shedding light on the notable case of State of West Bengal v. Anwar Ali Sarkar, it was the one which gave new dimension to Article 14. Concretely, the case inferred that there must exist a reasonable nexus between the fundamental principle of classification and the purpose of the action shapes the classification.

The Surrogacy (Regulation) Act, 2019 allows only married couples (aged between 23-50 for females and 26-55 for males) to avail the service of surrogacy and necessities a waiting period of five years to be eligible. What makes the provision more groundless is that single parents, unmarried couples, live-in couples, and homosexual couples have been completely overlooked, thereby enduring criticism from far and wide. Here, it's miles pertinent to be aware that being gay or living in a live-in relationship isn't always unlawful in line with se within side the country, and restricting to getting hold of altruistic surrogacy is a clean example of discrimination towards those minorities. One does not find a palpable reason with which the classification has been created in the Surrogacy (Regulation) Act, 2019 by the framers of the act. Undoubtedly, it is evident that parliament is still of the opinion that “marriage is a social necessity and only the married couples are accorded respect in the society.” Whatsoever done outside the institution of marriage is believed to be unethical and intolerable including conceiving a child naturally or through other mean. To the exclusion of everything else, unmarried or someone single has been mentioned as ineligible for reaping the benefit of surrogacy under the Surrogacy (Regulation) Act, 2019, because of the belief that homosexuals and unmarried people cannot be affectionate and responsible parents.

In addition, surrogacy can be sanctioned by only Indian citizens, thus foreigners and overseas Indians have been excluded. Classification based on age, gender, marital

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status, and duration of marriage and exclusion of a group based on the same disobeys the ethos of the constitution since it violates Article 14 of the constitution\textsuperscript{15}.

\textbf{ARTICLE 21:}

Article 21 reads, “No person shall be deprived of his life or personal liberty except according to procedure established by law”\textsuperscript{16}. Right to life may be a fundamental aspect of life without which we cannot live as a person's being and it includes all those aspects of life which attend make a person's being life meaningful, complete, and price living. It's only this article within the constitution that has received the widest possible interpretation.

Though the constitution has been the ultimate etymology of the law of land, it is the Supreme Court who is the conservator of the Indian Constitution. Our judiciary requires an earnest appreciation for the efficacious work it has been doing persistently. For the constitution to have its bearing while the society transforms, it becomes essential that the judiciary illuminates the constitution in an all-embracing manner.

Nonetheless, the doctrine of Progressive Realization of Rights requires that the legislature in the country keeps pace with changing culture and spirituality of the country. It should be circumspect with constantly enhancing the outlook of the citizens. This mandates the state not to come up with laws that degenerate the rights of citizens affirmed under the constitution. Side by side, we all unanimously agree that a finer world ensures a finer life to be lived. However, retrogression has followed India in one field or the other while it was intricate in the crucible of war, whether it's related to economics, law, or diplomacy.

Denial of rights of the third gender, depriving them for their choice and personal liberty and various other constant prejudice negates the very own doctrine of Progressive Realization of Rights India as a society has forever lacked gender consciousness and additionally the identical is not only mirrored entirely in the general angle of the society but the law of the land too. Without a doubt, because they do not consent to the "norms" that society general do, they face not only complete denial of rights together with conjointly regular bodily and intellectual violence\textsuperscript{17}.


\textsuperscript{16} INDIA CONST. art 21.

\textsuperscript{17} \textit{NALSA Case}, BYJUS (Mar. 3, 2022, 11: 50 PM), \url{https://byjus.com/free-ias-prep/nalsa-case-2014-sc-judgements/}.
Sex and Gender have always been thought of as the same but they are very distinct in complexion. Sex refers to biological traits been given to an individual through birth, something which they don’t acquire but get unthinkingly. While gender is more of a socially built trait, it may be as opposed to one’s physical mannerism. One has the freedom to choose what one wants to be identified as. The court emphasized that Article 21 includes the right to life and personal liberty. Thus, under this one has a right to live a dignified and peaceful life keeping any displeasing arising due to their choice at arm’s length.

The judgment in the case of National Legal Service Authority (NALSA) v. Union of India was a landmark one, it was the first one to identify non-binary gendered individuals and rights of the third gender. The major issue regarding the case was whether individual both men or women not identifying themselves through the assigned gender have a right to be identified as the third gender. Article 14, 15, 16, 19(1)(a), and 21 of the Indian Constitution were superintended to fundamental rights of the third gender18.

The government is obliged to ensure equal legal recognition to all the gender, whether male, female or third-gender. Concluding, the third gender is entitled to all fundamental rights as the other two genders and the right to equality and reproductive autonomy is a part of it. “The community deserves equal rights and respect as any other individual and discrimination against an individual based on sexual orientation is deeply offensive to the dignity and self-worth of the individual”19. Thus, exclusion of homosexual couples from being surrogate parents predominately violates their fundamental right since their banishment from the Surrogacy Act is against the doctrine of just, fair and reasonable. In this way, the act treats married homogenous and unmarried heterogeneous couples on varying proportions though such discrimination on grounds of marital gender and marital status is solely prohibited.

Speaking about the right to privacy and personal liberty, it also comprises women’s right to reproductive autonomy, whether to have a child or not. The critical attention is that a woman’s proper privacy, dignity, and physical integrity need to be respected. “The right to autonomy for women, together with the right to determine what to do with

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their bodies, together with whether or not or now no longer to get pregnant, and if pregnant, whether or not or now no longer to preserve the being pregnant and supply the child, i.e. the proper to motherhood, contributes to their empowerment and is in step with the International Covenant on Human Rights”\textsuperscript{20}. Thus, putting an embargo on single mother from availing the process of surrogacy is completely delinquent.

It was the case of Suchitha Srivastava v. Chandigarh Administration\textsuperscript{21} where the court distinguished about reproductive rights of women in India. The judgment gave a clearer insight that even though no fundamental rights explicitly deal with reproductive rights, it is a section of women’s liberty under Article 21. Interpreting Article 21 extensively, it also comprises the Right to Privacy. It is prominent how right to privacy as a part of Article 21 has grown in importance in the contemporary world. Justice K.S. Puttaswamy (Retd.) & Anr. vs. Union of India & Ors\textsuperscript{22} was the one that explicitly announced privacy as a fundamental right by overruling the Kharak Singh Case\textsuperscript{23}. The right to privacy is enshrined in art. 21 of the Constitution as a part of the right to ‘life’ and ‘personal liberty’

Thus, the state’s intrusion in reverence of demanding of certificate of ineligibility from infertile couples violates the right to privacy. “A fundamental aspect of the right to life is the right to sexual autonomy, which includes the right to procreation and parenthood. The modes of parenthood are not determined by the state”\textsuperscript{24}.

Article 21 also bestows us with right to livelihood for the reason that right to livelihood is a part and parcel of right to life as by no means a person can survive without any forms of livelihood. It is the responsibility of the state to ensure citizens have a means of survival for themselves and if they don’t, then the state shall provide them with such means. In the case of Olga Tellis v. Bombay Municipal Corporation, widely recognized as the “Pavement Dwellers Case” held that no person should be deprived of any means of livelihood except according to procedure established by law and if a person is deprived of such right arbitrarily, he can take a defense as under Article 21.\textsuperscript{25}

The Surrogacy(Regulation) Bill, 2019 allows only an immediate family member to be a

\textsuperscript{20} Marimuthu vs The Inspector of Police on 19 September, WP(MD) No. 12212 of 2016.
\textsuperscript{21} Suchitha Srivastava v. Chandigarh Administration, (2009) 9 SCC.
\textsuperscript{22} Justice K.S. Puttaswamy (Retd.) & Anr. vs. Union of India & Ors, (2017) 10 SCC 1.
\textsuperscript{23}Kharak Singh vs The State of U. P. & Others, (1963) AIR 1295.
\textsuperscript{24}ACADEMIA, \url{https://academic.oup.com/humrep/article/18/10/2196/622680} (last visited Feb. 23,2022).
\textsuperscript{25}supra note 10.
surrogate, forbids a non-member of a family to do the same and thus averting a women’s opportunity to earn reasonable amount of money and gaining financial independence. By not allowing an outsider to serve as a surrogate, the bill definitely violates their right to livelihood. This restrictive clause of the bill is certainly not fair, just and reasonable as it ought to be.

Allowance of only close relatives increases the chances of coercion among women in the society. In the ever existing bursting need of having a child of own, family by all means intends to avail the service of surrogacy and forces any immediate female to act as their surrogate and bless them with a healthy child. Time after time women are forced to do things for their family against their will and contest. Thus, this disrupts women’s fundamental right to life and personal liberty.

Minerva Mills v. Union of India gave the intrinsic golden triangle concept. By using equal rights, liberty, and freedom as the standard, the test of golden triangle verifies the constitutionality of the laws. However, all in all, the Surrogacy Bill 2020 distinctly contravenes the theory of golden triangle i.e. violates Article 14, Article 19 and Article 21 of the constitution in one mouthful. Thus introduction of this legislature, is a fruitless effort to prevent irruption of unregulated market of surrogacy ill treating surrogate mothers who generally pertain to lower strata of the society. The legislation appears to do more harm than good by making country’s state of affairs more complex than earlier.

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RECOMMENDATIONS AND CONCLUSIONS:

It is categorically cited in Article 13(2) of the Constitution that no law should be made by the state which is violate of the spirit of the constitution or curtail citizen’s rights as mentioned under Part III of the Constitution. However, any such law being made shall be void up to the area to it being violate. In constitutional terms, the courts have the authority to adjudicate upon the validity of all laws made by the state legislatures or parliament. If a law committed by either violates one or more provisions of the Constitution, the Supreme Court has the authority to declare it invalid or unconstitutional. The case of Kesava Nanda Bharti highlighted the power of the Parliament to enact and amend any laws and illuminated the judicial review doctrine of the courts. Taking the bad with the good, the Parliament proposed the Surrogacy(Regulation) Bill, 2019 to synchronize the disorderly surrogacy market in India.

However, the goals with which the legislation was brought into being have not been made. The bill rather than regulating, puts a whimsical ban on the service of surrogacy in the country. The bill appeared to have been passed without a genuine objective in a completely incautious causing the ball game to intensify further. Thus, it is apparent that the courts in present circumstances can implement its judicial review doctrine to look over the righteousness of the act.

We oppose the ban on commercial surrogacy and the proposed regulatory framework in India due to the fact that it will drive surrogacy services underground in India and potentially involve more exploitation of socio-economically vulnerable women.

Adoption and surrogacy both involves embracing parenthood by way of external means when couples cannot conceive naturally. Surrogacy and adoption can be said to be similar but not quite the same as surrogacy involves a party as opposed to adoption where there is none. However, the difference in nature of the two does not empower the state to come up with two differentiating legislations where it is allowing and forbidding analogous things at the same time. The Hindu Adoption and Maintenance Act, 1956 permits adoption irrespective of the

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27 INDIA CONST. art. 13.
28 Kesava Nanda Bharti Case Vs State of Kerala, AIR 1973 SC 1461.
marital status of an individual or whether one adopting has a surviving child or not (a single female adopt a child of any gender while a single male is not permitted to adopt a girl child). This implies that even homosexuals are eligible to adopt a child and relish the joy of parenthood. While on the other hand, Surrogacy(Regulation) Act, 2019 excludes homosexuals from the ambit of being commissioning parents. This beyond any doubt creates an inappropriate difference violating Article 14, 19 and 21 of the Indian Constitution.

The state not only made a mistake in implementing this discriminatory act but also overlooked the recommendations of the select committee formed by the Rajya Sabha. The select committee suggested removing the single parent clause, clause of close relative and five year waiting period of the couple but as settled, the Rajya Sabha passed the bill stativity. The bill gives the impression of having infinite means of evasions as it fails to speak about various provision relating to the surrogate and the commissioning parents. It is readily apparent that colossal exploitation of surrogate mother has taken place due to deregulated framework of surrogacy in our country. Citizens anticipated that the Surrogacy(Regulation) Bill, 2019 would be a tipping point for surrogacy market in India but it ceased to function as many important provisions were left unnoticed.

The bill remains tongue-tied by not mentioning about any course of action in case the infant is abounded by the commissioning parents. There is even no mention about the liabilities about the commissioning parents if they indulge in these kind of objectionable behaviour. This set of circumstances are inevitable because the surrogacy contract has not been successful in binding the two parties in case of breach of contract. The bill customarily fails to give clarity in case of desertion of the child leading to doubt regarding the citizenship of that child. Often we have witnessed that semantic and linguistic barriers have confined successful communication among people resulting in far-reaching miscommunication. The same thing happens during the process of surrogacy as the commissioning parents and the surrogate struggle to communicate due to their inability to understand one another’s dialect. That being so non-existence of third party like a mediator or an interpreter between doctor and surrogate mother can surely be the reason for such complication. To put in a nutshell, the parliament has made a desultory attempt through the bill to control the ever-augmenting surrogacy market. The bill rather lessening the extremity of surrogate mother has magnified it by bringing into being new legal complications. The already existing illegitimate business of surrogacy may even grow bigger due to downright ban on commercial surrogacy.
In the mild of prison troubles related to commercialization of surrogacy, the primary and the maximum essential suggestion (as recommended by the select committee of Rajya Sabha) is replacing the phrase ‘close relative relative’ with ‘willing women’. Restricting the commissioning paper in choosing a surrogate only among their close relative influences the real want to have infant their own. It is acknowledged that in order to ensure that practice of surrogacy has a purpose and direction immune to any kind of exploitation, it needs effective administration backed by proper set of guidelines. Hence, by formulating injudicious sections in the act like ‘close relatives’, childless couples will be further inconvenienced by the fact that a woman cannot carry a child without being remunerated for nine months. Although surrogacy establishes genetic connection between the commissioning parents and the surrogate, selecting ‘close relative’ to be a surrogate also increases the chances of genetic disorder being passed to the infant that has been existing in the family’s medical history. Farther, it is indispensible that surrogacy should be accessible to the third gender because it serves as only means of procreation for them after adoption. Restricting homosexuals to embrace parenthood beyond a doubt transgresses their fundamental rights. So, clause like ‘single parents’, ‘married couples’ should be removed because parenthood should not be restricted on account of marital status and gender of an individual. Into the bargain, forbidding additional payment to surrogate beyond their medical expenses on the whole violates article 19(1)(g) of the constitution.

One has to be convinced that surrogacy involves payment given for service provided by the surrogate. It is vital that one gets paid for the discomfort that one has gone though for a prolonged period of nine months. Simplifying, in the surrogacy agreement the surrogate gets for her service and not for a child which is inappropriately assumed as ‘trade of children’. To ensure that surrogate gets adequately paid for her service, the state can either allow payment of money in altruistic surrogacy or remove ban on commercial surrogacy.

Another suggestion is to waive the five-year waiting period.' Infertility becomes more difficult as people become older, and waiting five years disturbs the natural cycle of both adult males and females. These issues are already difficult because to the stigma associated with infertility and single parenthood, as well as standards that take such meanings into account. We all are aware of various medical conditions which completely terminates the possibility of pregnancy,

\[30\text{INDIA CONST. art. 19 cl. 1 sub-cl g.}\]
so necessitating these long waiting period is completely impractical because assisted reproductive technology like surrogacy remains the last hope to complete their family\textsuperscript{31}.

Besides, to manage the mammoth surrogacy market, the country requires a central authority which protects and prohibits unregulated practices. Just like the Central Adoption Resource Authority (CARA) which administer the process of adoption on the central level and State Adoption Resource Authority (SARA’S) operating in state levels, the state can establish a nodal agency for surrogacy under Ministry of Women and Child Development which would monitor unlawful activities concerning surrogacy in the country.

Thus, it can be concluded that in the fullness of time, considerations of every aspect of a project must be balanced with its advantages and disadvantages, implying that thought practice of surrogacy welcomes indefinite problems in the society, it has to be death with seriousness because as there are many advantages of surrogacy over the disadvantages of it, so it can be considered as bliss to the society. Therefore, it should definitely get the legal status in the India for the sake of people.

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