INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS

Open Access, Refereed JournalMulti Disciplinary
Peer Reviewed Edition :

www.ijlra.com

ISSN: 2582-6433

DISCLAIMER

No part of this publication may be reproduced or copied in any form by any means without prior written permission of Managing Editor of IJLRA. The views expressed in this publication are purely personal opinions ofthe authors and do not reflect the views of the Editorial Team of IJLRA.

Though every effort has been made to ensure that the information in Volume 2 Issue 7 is accurate and appropriately cited/referenced, neither the Editorial Board nor IJLRA shall be held liable or responsible in any manner whatsever for any consequences for any action taken by anyone on the basis of information in the Journal.

Copyright © International Journal for Legal Research & Analysis

ISSN: 2582-6433

EDITORIAL TEAM

EDITORS

Megha Middha

Megha Middha, Assistant Professor of Law in Mody University of Science and Technology, Lakshmangarh, Sikar

Megha Middha, is working as an Assistant Professor of Law in Mody University of Science and Technology, Lakshmangarh, Sikar (Rajasthan). She has an experience in the teaching of almost 3 years. She has completed her graduation in BBA LL.B (H) from Amity University, Rajasthan (Gold Medalist) and did her post-graduation (LL.M in Business Laws) from NLSIU, Bengaluru. Currently, she is enrolled in a Ph.D. course in the Department of Law at Mohanlal Sukhadia University, Udaipur (Rajasthan). She wishes to excel in academics and research and contribute as much as she can to society. Through her interactions with the students, she tries to inculcate a sense of deep thinking power in her students and enlighten and guide them to the fact how they can bring a change to the society

Dr. Samrat Datta

Dr. Samrat Datta Seedling School of Law and Governance, Jaipur National University, Jaipur. Dr. Samrat Datta is currently associated with Seedling School of Law and Governance, Jaipur National University, Jaipur. Dr. Datta has completed his graduation i.e., B.A.LL.B. from Law College Dehradun, Hemvati Nandan Bahuguna Garhwal University, Srinagar, Uttarakhand. He is an alumnus of KIIT University, Bhubaneswar where he pursued his post-graduation (LL.M.) in Criminal Law and subsequently completed his Ph.D. in Police Law and Information Technology from the Pacific Academy of Higher Education and Research University, Udaipur in 2020. His area of interest and research is Criminal and Police Law. Dr. Datta has a teaching experience of 7 years in various law schools across North India and has held administrative positions like Academic Coordinator, Centre Superintendent for Examinations, Deputy Controller of Examinations, Member of the Proctorial Board

ISSN: 2582-6433

Dr. Namita Jain

Head & Associate Professor

School of Law, JECRC University, Jaipur Ph.D. (Commercial Law) LL.M., UGC -NET Post Graduation Diploma in Taxation law and Practice, Bachelor of Commerce.

Teaching Experience: 12 years, AWARDS AND RECOGNITION of Dr. Namita Jain are - ICF Global Excellence Award 2020 in the category of educationalist by I Can Foundation, India.India Women Empowerment Award in the category of "Emerging Excellence in Academics by Prime Time & Utkrisht Bharat Foundation, New Delhi.(2020). Conferred in FL Book of Top 21 Record Holders in the category of education by Fashion Lifestyle Magazine, New Delhi. (2020).Certificate of Appreciation for organizing and managing the Professional Development Training Program on IPR in Collaboration with Trade Innovations Services, Jaipur on March 14th, 2019

Mrs.S.Kalpana

Assistant professor of Law

Mrs.S.Kalpana, presently Assistant professor of Law, VelTech Rangarajan Dr. Sagunthala R & D Institute of Science and Technology, Avadi.Formerly Assistant professor of Law,Vels University in the year 2019 to 2020, Worked as Guest Faculty, Chennai Dr.Ambedkar Law College, Pudupakkam. Published one book. Published 8Articles in various reputed Law Journals. Conducted 1Moot court competition and participated in nearly 80 National and International seminars and webinars conducted on various subjects of Law. Did ML in Criminal Law and Criminal Justice Administration.10 paper presentations in various National and International seminars. Attended more than 10 FDP programs. Ph.D. in Law pursuing.

Avinash Kumar

Avinash Kumar has completed his Ph.D. in International Investment Law from the Dept. of Law & Governance, Central University of South Bihar. His research work is on "International Investment Agreement and State's right to regulate Foreign Investment." He qualified UGC-NET and has been selected for the prestigious ICSSR Doctoral Fellowship.He is an alumnus of the Faculty of Law, University of Delhi. Formerly he has been elected as Students Union President of Law Centre-1, University of Delhi.Moreover, he completed his LL.M. from the University of Delhi (2014-16), dissertation on "Cross-border Merger & Acquisition"; LL.B. from the University of Delhi (2011-14), and B.A. (Hons.) from Maharaja Agrasen College, University of Delhi. He has also obtained P.G. Diploma in IPR from the Indian Society of International Law, New Delhi.He has qualified UGC – NET examination and has been awarded ICSSR – Doctoral Fellowship. He has published six-plus articles and presented 9 plus papers in national and international seminars/conferences. He participated in several workshops on research methodology and teaching and learning.

ISSN: 2582-6433

ABOUT US

INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANLAYSIS ISSN 2582-6433 is an Online Journal is Monthly, Peer Review, Academic Journal, Published online, that seeks to provide an interactive platform for the publication of Short Articles, Long Articles, Book Review, Case Comments, Research Papers, Essay in the field of Law & Multidisciplinary issue. Our aim is to upgrade the level of interaction and discourse about contemporary issues of law. We are eager to become a highly cited academic publication, through quality contributions from students, academics, professionals from the industry, the bar and the bench. INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS ISSN 2582-6433 welcomes contributions from all legal branches, as long as the work is original, unpublished and is in consonance with the submission guidelines.

www.ijlra.com
Volume 2 Issue 7 | Aug 2023
ISSN: 2582-6433

BALANCING ACTS: UNRAVELING THE CONSTITUTIONAL CONUNDRUM OF INDIA'S SURROGACY (REGULATION) BILL, 2020

AHTHORED BY - NIKHIL SRIVASTAVA
3rd Year BA LLB (Hons)
Symbiosis Law School, Pune- 411014
Symbiosis International (Deemed) University, Pune, INDIA
Email: 21010125341@symlaw.ac.in

INTRODUCTION

Surrogacy is not an over the top, new principle in Indian society. Instances can be traced to the mythological surrogate mothers such as Yashoda and Gandhari.[1] Surrogacy is the act of having a child with the aid of another individual with the help of advanced medical facilities. India has seen a rapid increase in medical technology in the field of IVF. India has been able to set up a hefty amount of IVF clinics and has made its name in 'Reproductive tourism'. An increasing number of poor Indian women are turning to paid surrogates for childless foreign couples. The Indian reproductive tourism is now 5000 million dollars with around 3000 fertility clinics.[2] India has thus been termed as "*The Surrogacy Capital of the World*". [3]

India has been a global leader in surrogacy-based tourism due to the poor populace willing to act as surrogates for money. Other reasons for the increase in surrogacy are lax surrogacy laws and an increase in IVF clinics. In the present scenario, reform is very much needed. Surrogacy is an important topic that affects the people of our country issue such as 'surrogacy' must be regulated. Commercial surrogacy remains unregulated and is the root of evils regarding surrogacy in our nation. Regulation and a new law are the need of the hour. The Surrogacy (Regulation) Bill, 2020, was approved by the Union Cabinet and, on 9th December 2021, was approved by the Rajya Sabha. It will be sent back to Lok Sabha for approval. [4]

[1] Anu Aneja and Shubhangi Vaidya, Embodying Motherhood: Perspective of Contemporary India 140-141 (1st edition, published in 18 July, 2016).
[2] Shubhangi Priya, Evaluating Surrogacy Legislation in India, Social & Political Research Foundation, https://sprf.in/evaluating-surrogacy-legislation-in-india/ , (Last Visited: 20/12/2021, 1:20 am)
[3] Chinmoy Pradip Sharma, Surrogacy Laws in India – Past Experiences and Emerging Facets, Bar & Bench,https://www.barandbench.com/columns/surrogacy-laws-in-india-past-experiences-and-emerging-facets, (Last Visited: 20/12/ 2021, 2:33am)
[4] Indian Express, https://indianexpress.com/article/india/surrogacy-regulation-bill-art-bill-passed-by-rajya-sabha-7663054/ (Last Visited: 20/12/2021, 2:45 am)

ISSN: 2582-6433

The Surrogacy (Regulation) Bill, 2020, aims to establish stringent rules and regulations to protect the interests of the surrogate and the parties wanting a child. However, its main objective is to ban commercial surrogacy to avoid any form of unethical practice in the process. Further, the bill focuses on the regulation of surrogacy and seeks to launch a National Surrogacy Board and State Surrogacy Board at the central level and state level, respectively. The bill aims to rectify the mistakes made by prior bills. The Surrogacy Bill of 2020 takes a strong stance against commercial surrogacy, unlike the Bills of 2008 and 2014, which permitted commercial surrogacy.

OBJECTIVES OF RESEARCH

1. To critically analyze the impact of Surrogacy (Regulation) Bill 2020 on the potential parents, surrogate mothers and commercial surrogacy clinics
2. To critically examine the legality of the bill and analyze the Surrogacy (Regulation) Bill 2020 with the Fundamental Rights of the citizens.
3. To analyze the views of researchers, legal professionals, politicians and people impacted by the Surrogacy (Regulation) Bill 2020.

RESEARCH HYPOTHESIS

H1: A complete ban on commercial surrogacy is not the right way to go.

H2: The Bill violates the public interest and cannot deliver its primary objective.

H3: The Bill will do worse to the dynamic of the society than good.

H4. The bill violates the rights of foreign nationals by banning them to act as potential parents as guaranteed by the Constitution of India.

RESEARCH QUESTION

1. Does the bill violate Article 14 of the Indian Constitution?
2. Does the bill violate Article 19 of the Indian Constitution?
3. Does the bill violate Article 21 of the Indian Constitution?
4.

METHODOLOGY

The study was conducted using a combination of Doctrinal and Non-Doctrinal Research. The study has a vast amount of relevant information accessible through online research. Information from journal articles, books, reports and judgements formed the foundation of this research.

ISSN: 2582-6433

Source of Data: Primary Sources – Legal opinion of the Legal Professionals and Secondary Sources – Journals, Books, News articles, Judicial precedents.

Information Collection Plan: Opinions and people's views in the legal field were utilized in writing this research. Articles of the Indian Constitution were referred. Journal such as Indian Law Journal was referred, and judgements given by courts of India were also considered.

Method of Citation: The Uniform System of Citation (Bluebook) 20th Edition

Time and Place of Data Collections: Online (December 18, 2021, to December 24 2021)"

RELEVANCE OF THE THEME

The Surrogacy (Regulation) Bill, 2020, has been a controversial Bill; it has taken a radical approach to overrule the laws laid down in bills of 2008 and 2014 and laying down conservative rules for the practice of surrogacy. In the year 2008, the case of Baby Manji Yamada v. Union of India[5] laid down that surrogacy is legal. The bill has impacted potential parents, surrogate mothers and legal professionals. The legal validity of the bill is still a significant issue, as the bill violates the fundamental rights of surrogates and potential parents.

The topic of Surrogacy (Regulation) Bill, 2020 is a topic that affects many people in our nation. The surrogacy bill takes a strong stand against commercial surrogacy. Such a radical stand impacts many people, starting right from the potential parents. The bill forbids foreigners, NRIs, and PIOs from commissioning surrogacy in the country. This bill has had a negative impact on potential parents; until now, couples from across the world used to come to India to have a baby delivered through a surrogate. They used to pay a lot of money to surrogates to have a baby and live a happy life. The ban on commercial surrogacy completely stops such a possibility for infertile couples who wish to achieve the happiness of having a child.

"*It is rightly said that there is nothing more beautiful than someone who goes out of their way to make life beautiful for others*."[6] A surrogate is a blessing for infertile couples. Surrogate mothers go through a lot of pain; every pregnant mother does but surrogate mothers, after bearing the amount of pain that cannot be put into words, have to give the child to the rightful parents. This

[5] Baby Manji Yamada v. Union of India AIR 2009 SC 84
[6] Mandy Hale

ISSN: 2582-6433

process is an emotionally draining and can have a psychological impact on the surrogate mothers. Most of the surrogates in India are financially weak and act as a surrogate to earn a livelihood. However, this Bill impacts harmfully impacts their livelihood as it stops any form of commercial surrogacy.

LITERATURE REVIEW

The present literature review is based on selected, recent and well-cited research and news articles on the issues determined by the researcher. The literature review also refers to the Surrogacy (Regulation) Bill itself as a primary literature for review along with numerous case laws to understand the legal issues at hand. The present literature review is undertaken to identify the gaps in the bill with the assistance of numerous scholarly articles and landmark judgements.

I. Review of literature on the issue of violation of Article 14 of the Indian Constitution.

Article 14 of the Indian Constitution is a fundamental right that guarantees 'equality before the law and equal protection of laws to all persons[7]. The bill is against the decision of the Supreme Court in the case of Navtej Singh Johar v. Union of India,[8] where Section 377[9] was struck down. This decriminalized consensual sexual relations between two adults of any sexuality.[10] This bill refuses to recognize homosexual couples as 'legitimate' and denies the rights of homosexual couples.

The bill violates Article 14 of the transgender couples as the current bill has a particular criterion that would disentitle transgender from commissioning surrogacy. According to Chapter III (Section 4-10)[11] of the Surrogacy (Regulation) Bill, 2020, point no. 2 lays down the eligibility of an intending couple the requirements allow only a heterosexual couple to take part in the process of altruistic surrogacy "*between the ages of 23 to 50 years old (wife) and 26 to 55 years old (husband)*"[12]. The bill is not equal for every gender; it leaves the third gender, which the Supreme Court of India recognized in National Legal Services Authority v. Union of India.[13]

[7] Art.14, the Constitution of India.
[8] Navtej Singh Johar v. Union of India, AIR 2018 SC 4321
[9] Section 377, Indian Penal Code
[10] Shubhangi Priya, Evaluating Surrogacy Legislation in India, Social & Political Research Foundation, https://sprf.in/evaluating-surrogacy-legislation-in-india/
[11] The Surrogacy (Regulation) Bill, 2020(Reported by The Select Committee).
[12] Surrogacy Bill, supra 11
[13] National Legal Services Authority v. Union of India, AIR 2014 SC 1863.

ISSN: 2582-6433

In the present literature, Karti Chidambaram MP from INC expressed his dissatisfaction with how the bill excludes more people rather than it includes. Chidambaram also claims that the bill violates the rights of the LGBTQ population, live-in couples and single men. TMC's Dr Kakoli Ghosh Dastidar agreed with Mr Chidambaram stating the bill violates the fundamental right of equality. It clearly differentiates between the potential parents by laying down strict eligibility. [*Harikrishnan*[14]]

Article 14 is not just a right guaranteed to the Indian citizens, and it is a right for both citizens and non-citizens. "*The state shall not deny to any person equality before the law*"[15] the term any person shows that the right is for all. Yet this bill only allows Indian citizens to be a part of surrogacy as surrogates and potential parents and does not permit foreigners.[16]

II. Review of literature on the issue of violation of Article 19(1)(g) of the Indian Constitution.

The proposed law is in violation of Article 19(1)(g), which guarantees the "freedom of trade and profession"[17] Article 19(1)(g) is not an absolute right. It can be reasonably restricted on specific grounds, one of such grounds is 'interest of the general public. The Surrogacy (Regulation) Bill 2020 presents itself as a bill in the general public's interest. However, it is pretty contradictory to that. In the case of Chintaman Rao v. State of MP,[18] the Supreme Court of India held that restrictions should be reasonable. The reasonable restriction should be in the public's interest and not excessive in nature. The Supreme Court also held that the law should strike the proper balance between the freedom guaranteed under Article 19(1)(g) and the social control according to Article 19(6).[19] A complete ban on commercial surrogacy violates this right, and the bill is unable to strike a balance between social control and individual freedom. In State of Maharashtra v. Indian Hotel and Restaurant Association[20], the Supreme Court had held that a total ban on bar dancing is unconstitutional as the ban stating that the "*cure is worse than the disease*" given that contrary to

[14] Harikrishnan Sharma - Reproductive tech Bill: Oppn welcomes regulation, but flags exclusion of single men, LGBTQ people, https://indianexpress.com/article/india/reproductive-tech-bill-opposition-lgbtq/
[15] Art 14, supra. 7
[16] Aparajita Amar & Arjun Aggarwal, The emerging laws relating Surrogacy: A procreational right for Single Parent, Transgenders and Foreigners, The SCC Online Blog, https://www.scconline.com/blog/post/2018/04/10/the-emerging-laws-relating-surrogacy-a-procreational-right-for-single-parent-transgenders-and-foreigners/.
[17] Art. 19(1)(g), the Constitution of India.
[18] Chintaman Rao v. State of MP, AIR 1951 SC 118.
[19] Saraswat & Jain, Yet another creation of crime, Law and Other Things, https://lawandotherthings.com/2019/02/yet-another-creation-of-crime/.
[20] State of Maharashtra v. Indian Hotel and Restaurant Association, AIR 2013 SC 2582.

ISSN: 2582-6433

its purpose that is in favour of societal good, it is resulting in many unemployed bar dancers are being forced into the societal evil of prostitution. The court also observed that banning bar dancing also violated their right to carry on profession or occupation under Article 19(1)(g) of the Constitution.[21]

In her article, the author has examined the situation of Savita Vasva, a 34-year mother of three from Dakor, a small town in Gujarat. Savita is currently acting as a surrogate mother and is waiting for her pregnancy's doctor's report. She mentions that even if she works day and night, she won't be able to earn the money that she will earn from acting as a surrogate. The surrogates at the hospital where Savita is acting as surrogate pay a total of $6,230 (roughly 4,67,321 rupees) for a single kid. If the surrogates produce a twin, they are paid $7,395 (roughly 5,54,710 rupees). The bill will steal the livelihood away from these people who are using surrogacy just to support their families like Savita. [Neha[22]]

Similarly, banning commercial surrogacy will not achieve the primary goal of this potential Act, as surrogates will now be exploited and taken advantage of and will not even be paid for their services. Furthermore, the ban will harmfully impact society as it will force the commercial surrogacy industry to go underground like the drug, illegal liquor and prostitution industry. This bill does more harm to society than good, and it also takes away the source of income for surrogate mothers. It also hampers the economic growth of numerous surrogacy clinics. This bill doesn't create a balance between social control and the rights of surrogates.

III. Review of literature on the issue of violation of Article 21 of the Indian Constitution.

Article 21 of the Indian Constitution[23] is one of the most sacred rights; it lays down the fundamental right to life and personal liberty and plays a vital role in every person's life.[24] In the case of Olga Tellis v. Bombay Municipal Corporation, the Supreme Court recognized that the term life in Article 21 has a broader meaning and ultimately includes the right to livelihood. However, the Surrogacy Bill appeals for a complete ban on commercial surrogacy, threatening the livelihood of many poor surrogate women who act as surrogates to earn a livelihood. Banning

[21] State of Maharashtra & Anr. v Indian Hotel and Restaurants Association & Ors.Civil Appeal No. 2705, Escr-Net,https://www.escr-net.org/caselaw/2015/state-maharashtra-anr-v-indian-hotel-and-restaurants-association-ors-civil-appeal-no.
[22] Neha Thirani Bagri/Anand - A Controversial Ban on Commercial Surrogacy Could Leave Women in India With Even Fewer Choices https://time.com/6075971/commercial-surrogacy-ban-india/
[23] Art. 21, the Constitution of India
[24] Durga Das Basu, Commentary on The Constitution of India, 350 (8th edition 2010).

ISSN: 2582-6433

commercial surrogacy violates their right to livelihood, which is guaranteed to them by the Constitution of India.

An article in The Indian Express covered the statements of independent Rajya Sabha MP Ajit Kumar Bhuyan and BJD's Dr Amar Patnaik. They were shocked by the criteria laid down by the bill. They raised the issue of violation of the rights guaranteed to the LGBTQ community and how this bill is clearly contrary to the Supreme Court's judgment in the case of Devika Biswas v Union of India [*The Indian Express*][25]

In the case of Devika Biswas v. Union of India,[26] the Hon'ble Supreme Court recognized that the right to reproductive and reproductive autonomy is an integral component of Article 21. This right also includes the right to the integrity of one's body. However, the current bill restricts the practice of surrogacy only to heterosexual couples, widows or divorcee women with a specific age criterion. This action violates the right of LGBT, unmarried single people and old age couples.

IV. Review of the literature on the positivity of the bill

The author highlights the positivity in the Surrogacy (Regulation) Bill 2020. The bill lays down stricter rules and regulations to an industry where exploitation can be prominent due to no regulations whatsoever. The bill proposes a stringent process where the candidates must obtain certificates that would state whether they are eligible to act as surrogates.

The present literature also shows how the bill protects the surrogates and the rights of the child born out of surrogacy as the bill makes it a compulsion that the surrogacy clinics have to be registered so that there is no medical malice. The bill protects the unborn child but clearly specifies that surrogacy must not be sex-selective [*Legal Service India E-Journal*[27]]

[25] Surrogacy regulation Bill and ART Bill passed by Rajya Sabha, https://indianexpress.com/article/india/surrogacy-regulation-bill-art-bill-passed-by-rajya-sabha-7663054/
[26] Devika Biswas v. Union of India, (2016) 10 SCC 726.
[27] Surrogacy (Regulation) Bill, 2020: Doing more harm than good? https://www.legalserviceindia.com/legal/article-3945-surrogacy-regulation-bill-2020-doing-more-harm-than-good-.html

ISSN: 2582-6433

CONCLUSION

The Surrogacy (Regulation) Bill, 2020, stands as a pivotal point of contention, where legal, ethical, and societal considerations converge. As India grapples with its position as a surrogacy hub and confronts the need for comprehensive regulation, the implications of this bill resonate across various domains. This research journey delved into the intricate facets of the bill, spanning its historical context, objectives, research hypotheses, and critical analysis.

The study illuminated the multifaceted impact of the bill on key stakeholders: potential parents, surrogate mothers, and commercial surrogacy clinics. While the bill's intent to establish stringent norms for surrogacy practices cannot be undermined, the complete ban on commercial surrogacy raises pertinent concerns. The bill's implications on fundamental rights, particularly Articles 14, 19(1)(g), and 21 of the Indian Constitution, unveil a complex interplay between public interest and individual liberties. The literature review further underscored the divergence of perspectives on the bill's constitutionality. The violation of **Article 14**, which guarantees equality before the law, emerged as a significant contention, as the bill discriminates against LGBTQ couples and excludes transgender individuals. Similarly, the bill's conflict with **Article 19(1)(g)**, the freedom to carry on trade and profession, raises questions about striking a balance between societal control and individual rights. The breach of **Article 21**, the right to life and personal liberty, became evident in the potential threat to the livelihood of surrogate mothers due to the ban on commercial surrogacy.

While the bill showcases efforts to enhance regulation and accountability, its restrictive measures could inadvertently lead to unforeseen consequences. The positive aspects of the bill, such as curbing potential exploitation and ensuring medical standards, need to be weighed against the broader impact on the lives of surrogate mothers and potential parents longing for a child.

In essence, the research underscores the necessity for a nuanced approach. Striking a balance between safeguarding individual rights, fostering equality, and maintaining public welfare requires meticulous deliberation. The ***Surrogacy (Regulation) Bill, 2020***, challenges India's legal and ethical landscape, necessitating comprehensive discourse, engagement with diverse perspectives, and perhaps even revisions that uphold the spirit of both justice and compassion in this rapidly evolving field. As India navigates the complexities of surrogacy, achieving this balance becomes paramount to ensure that the future of surrogacy is founded on principles that respect the rights and dignity of all parties involved.