

## **POVERTY, NEED AND IMMORAL CHARACTER OF COMMERCIAL SURROGACY: NEED FOR A PANACEA**

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### **ABSTRACT**

This article attempts to highlight the need to regulate surrogacy in India and to understand the very less conspicuous but grave problem dealt by the poor and desperate women. In a country like India with such high rates of population and poverty, unemployment strikes these women into despair and have lead them into gallows of exploitation of their body. The Surrogacy Regulation Bill 2016, which bans commercial surrogacy, has not been converted into an act yet. Surrogacy is still governed by the contractual obligations among the parties rather than any potent law which is need of the hour. The legislatures doubt straddles between two conflicting interest. Whether to cater to interest of a nation to ban commercial surrogacy which is not a suitable way to earn livelihood at the cost of exploitation of women's body, or the interest of individuals to earn their way out of vicious circle of poverty which is created due to the gaps in the administration of law causing failure of providing suitable and respectable ways of earning a higher and respectable form of living. Commercial surrogacy is just a branch to the tree of poverty, to which unemployment is the root. The solution is not to ban the commercial surrogacy straight off but to create and form a mechanism which provides these surrogates with better alternatives to escape the vicious circle of desperate need.

## INTRODUCTION

Surrogacy is defined as an arrangement where a woman carries a child in her womb with the intention to hand over the child to another. Surrogacy is generally of two types: 1) Traditional Surrogacy 2) Gestational Surrogacy. When using traditional surrogacy, the surrogate acts as both, the egg donor and as the actual surrogate for the embryo, and she is impregnated using a process known as intrauterine insemination, or IUI. With gestational surrogacy, the surrogate's eggs are not used at all. Therefore, the child will not be related to the surrogate biologically. Using the gestational type of surrogacy, the Embryo is actually created by using both the biological father's sperm and the biological mother's egg through a process called In Vitro Fertilization. Surrogacy is not only a concern for India but it has been widely debated internationally as well.

The reason behind the rise of surrogacy in India is poverty and lack of education. There have been various examples where the trend of economy in a nation changes with advent or modification of law of the land, the advent of commercial surrogacy as result of the case **Baby Majhi Yamada v. Union of India**, 2008, the business of commercial surrogacy boomed in India. The makers of law and the authors of future legal policy of a nation are yet to decide the disputed question, whether the policy makers should straddle between moral rights and economic welfare or provide employment to its needy citizens which is not related to women's body. India, being the second highest populated country and majority of the population being poverty stricken, is a prime priority for the foreign nationals for having a surrogate child. The legislative inaction regarding surrogacy may prove to be detrimental for the interest of society as a whole.

## SURROGACY NOT AN UNIVERSALLY ACCEPTED PRACTICE

There is baffling difference of opinion regarding the validity and morality of surrogacy. India is a country with an increasing scope for surrogacy. As India is a diverse country and having a wide variety of people adhering to different religions, where a few religions condemn surrogacy while some acknowledge it. In Islam, it is considered forbidden to form the embryo by the fusion of an ovum of a woman with the sperm of a man other than her husband, whereas

in Hinduism transfer of embryo is considered as a legal act. In Christianity, surrogacy is evident, but Bible too raises questions on the ethics of surrogacy. The Bible says that, children are a gift not a right.<sup>1</sup>

Countries like UK, Australia, New Zealand, Canada ban surrogacy altogether except some form of altruistic surrogacy. Nations such as Germany, Italy and France ban surrogacy in all forms. In the USA surrogacy is not regulated by straight jacket legislation in a few states whereas few of them legalize commercial surrogacy. For-profit surrogacy flourished in Thailand until 2015 when the country banned it for foreigners after a series of high-profile cases, including an Australian couple who were accused of abandoning a baby born with Down's syndrome (research this topic). Georgia and Ukraine are breeding ground for the upcoming surrogacy industries.<sup>2</sup> The fertility industry of India is not well accounted. A U.N.-backed study in July 2012 estimated the surrogacy business at more than \$400 million a year, with over 3,000 fertility clinics across India. Reasons for such boom in surrogacy industry in India are primarily the relatively cheaper cost of surrogacy in India and the lack of supply of such service internationally. **Why is India still indulging in commercial surrogacy? It still hasn't been answered.**

According to the National Commission for Women (NCW), there are more than 3,000 clinics across India offering surrogacy services to couples from North America, Australia, Europe, and the other continents.<sup>3</sup> Commercial surrogacy is rampant without any guiding stick and without any objective. A surrogacy arrangement, including IVF, costs about Rs 5, 00,000 in India, which is relatively cheap as compared to United States and United Kingdom while in the United States surrogacy alone, excluding ART charges, costs Rs 6, 75,000. In the UK, an IVF cycle costs about Rs 5, 00,000 and surrogacy costs about Rs 7, 00,000.<sup>4</sup> The cheap availability

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<sup>1</sup>Predicament of Commercial Surrogacy in India-Dr. Lulabi Pattanayak  
<http://www.worldpulse.com/en/community/users/lulabi-pattanayak/posts/36932>

<sup>2</sup> Reuters, European Parliament, The Parentage/Surrogacy Project of Hague Conference on Private International Law  
<https://www.reuters.com/article/us-india-women-surrogacy-factbox/fatcbox-which-countries-allow-commercial-surrogacy-idUSKBN1530FP> , Thomas Reuters foundation

<sup>3</sup> Nita Bhalla, Mansi Thapliyal <https://www.reuters.com/article/us-india-surrogates/india-seeks-to-regulate-its-booming-rent-a-womb-industry-idUSBRE98T07F20130930>

<sup>4</sup> Birthing a Market, Sama-Resource Group for Women and Health, 2012.

of women's body for surrogacy and numerous available options of IVF clinics have given rise to a **new area of medical negligence**. In the year 2012, Premila Vaghela, 30, died days after delivering a child for an American couple at a clinic in Gujarat. It was recorded as an "accidental death" by police.<sup>5</sup> The surrogate mother opted for this procedure as the parents were willing to pay higher amounts of money which would supplement her effort to provide her own two kids a bright future. She gave birth to the child but died due to unexplained reasons. Commercial surrogacy not only involves the essentials of contract but also risk of business. Many surrogates who intend to use their body to benefit their family or for the mere survival by making money for the very basic requirements like food and shelter, often take the risk of their lives.

## **COMMODIFICATION OF WOMEN'S BODY AND DEVALUATION OF A CHILD**

Surrogacy has a close nexus with contracts; commercial surrogacy fulfils all such essentials as are needed to conclude a contract. Commercial surrogacy calls for delivery of a child in exchange of monetary benefits with various conditions imposed such as providing essential services to the surrogate which are required to deliver the child. Anderson expressed body of a surrogate as a commodity of reproductive labour.<sup>6</sup> Since the process of commercial surrogacy involves consideration to the surrogate mother in exchange of her service for providing the child to the surrogate parents, the surrogate is just a commodity to the surrogate parents rather than women favoring them. This theory commodifies the women body as a vessel to deliver a child.

Nussbaum focused his work on the ethical issues dealt by working classes and their morality. The conservative, class privileged, the bureaucrats, the socially accepted upper strata of the society have denounced the dancing and singing women (the women who earn living by using their body or deviating from preconceptions of the society) as immoral. This has lead to class

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<sup>5</sup> Available at <https://timesofindia.indiatimes.com/city/ahmedabad/Surrogate-mother-dies-of-complications/articleshow/13181592.cms>

<sup>6</sup> Anderson, E.S. (1990). Is Women's Labor a Commodity? *Philosophy and Public Affairs*, Vol.19, 71-92.

based prejudices.<sup>7</sup> However, Nussbaum has used the commercial surrogacy with dancing and singing and compares various employment areas such as nursing and teaching which stereotypical to women and argues about their unjust and exploitative terms. But surrogacy is very much different from such other stated works. The surrogates who use their womb not by choice but by ardent need to feed their family face similar problems as that faced by the singing and dancing girls. The problem does not lie in dancing, singing in night clubs or bars, or surrogacy, but lies in the inability of a nation in providing these women in employment of their choice and inability to build a society with no class based prejudices

Amrita pande (2010) has pointed out surrogacy as 'immoral commercialization of motherhood'. She points out that women see surrogacy as less immoral than sex work. Pande points out the surrogate in India see sex workers as less immoral and use this belief to resist the stigma attached to surrogates by the society in which they live in. the surrogates thrive to preserve their sense of self-worth, while opting to be a surrogate by focusing on spiritual belief of helping someone and higher power of god.<sup>8</sup> The women who are in need have seen various kinds of works on a scale of immorality. Sex workers are on the bottom of scale of immorality, commercial surrogacy as comparatively less immoral and altruistic surrogacy as moral. The surrogates are struggling to disguise commercial surrogacy under the veil of morality. A nation should rather struggle to provide needy women with work which are preconceived as moral in the eyes of these needy women rather than the women adjusting bar of morality in their eyes. While discussing the issue of morality and immorality in commercial surrogacy, it is not a doubt that immorality is not universally classified and is subjective. Morality and immorality may be considered synonyms with the widely interpreted 'right' and 'wrong', but they are in reality just transecting to each other. Any one not opting for charity may be right for one person and wrong for other, it may be right and immoral for some at the same time. Commercial surrogacy is moral for some and immoral for some. The need is to understand that the question is not of morality or immorality. The need is to understand that the necessity, which compels a woman to indulge in a work which requires her body to be exploited or exhausted of the natural processes (giving birth to a child) for commercial purposes, is the enemy of legislature.

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<sup>7</sup> Nussbaum, M. (1998). Whether from Reason or Prejudice: Taking Money for Bodily Services. *Journal of Legal Studies*, 693–723.

<sup>8</sup> Pande, A. (2010). Commercial Surrogacy in India: Manufacturing a Perfect Mother–Worker. *Signs*, 969–92.

Commercial surrogacy also opens for the conflict between ethics of a service provider and a mother, “When one’s identity as a mother is regulated and terminated by a contract, being a good mother often conflicts with being a good worker, which makes the perfect surrogate subject rather difficult to produce.”<sup>9</sup>

Surrogacy, where a women provides her womb at the disposal of surrogate parents, where womb is not a good which can be traded in a commercial transaction because of its limited use which intersect with the right to have children, Qadeer regards surrogacy as human-organ donation, where human organ donation has been restricted to a non-commercial transaction by the state. According to Qadeer, this “distinction between human body parts donated and those rented, and the equating of goods and living beings in commercial surrogacy” is irrational.<sup>10</sup> Merrick (1990) also takes a stand against the process of surrogacy. Merrick highlights the social and moral issues in commercialization of surrogacy; Merrick regards the handing over of delivery of child to surrogate parents as sale of a child, which undoubtedly is immoral in nature. The intention of the surrogate parents lies in the possession of the child not in the service rendered by the surrogate, hence the process of surrogacy is a mere contract underlining exchange of money for a child which in lay man’s language is sale of a child. This transaction is a sale that turns the child into a product and devalues him/her as a human being. It is also argued that surrogacy should be banned also because it increases the possibility of the child being abandoned due to birth defects, and because it inflicts psychological harm on the players involved. Such a ban may also not be effective, and may serve only to create a market in ‘back alley’ surrogate arrangements, which render the actors vulnerable to abuse and manipulation.<sup>11</sup>

A surrogacy arrangement, including IVF, costs about \$11,000 (approximately Rs 5,00,000) in India, while in the United States surrogacy alone, excluding ART charges, costs \$15,000 (approximately Rs 6,75,000). In the UK, an IVF cycle costs about £7,000 (approximately Rs 5, 00,000) and surrogacy costs about £10,000 (approximately Rs 7, 00,000).<sup>12</sup>

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<sup>9</sup> SAMA Resource group for Women and Health (2010: 970).

<sup>10</sup> SAMA Resource group for Women &Health,(2012), “Birthing Market-A study on commercial surrogacy”

<sup>11</sup> SAMA Resource group for Women &Health,(2012), “Birthing Market-A study on commercial surrogacy”, <http://www.samawomenshealth.in/birthing-market/>

<sup>12</sup> SAMA Resource group for Women and Health, 2010

## THE TRANSLUSCENT LEGISLATURE'S INTENT

The legislature has gone through a road of avoidance of expressly banning commercial surrogacy to expressly banning such surrogacy, but all have been a failed attempt as the bill are not given any legal enforcement. In India Surrogacy is governed by the contractual obligations and the ICMR guidelines<sup>13</sup>. The legislature drafted many bills on surrogacy which bans commercial surrogacy in India but none of them is given a legal sanctity of an act. **The Assisted Reproductive Technology (Regulation) Draft Bill** as drafted in the year 2008, 2010 and 2013. The bill of 2010 did not ban commercial surrogacy and also did not approve it expressly. The bill provided for draft surrogacy agreements. The bill banned advertisement relating to pre-natal sex determination. However the bill did impose heavy scrutiny on the surrogate clinics, surrogate agents and the surrogate parents. In the case of **Baby Majhi Yamada v. Union of India** the Supreme Court gave effect to the legality of commercial surrogacy in an affirmative manner. Since, there is not any law legalizing commercial surrogacy and this judgment gave the much called for legitimacy of surrogacy. Soon after the above stated case the surrogacy industry witnessed **a growth of 25000 crore in estimate**.<sup>14</sup> In the year 2016 **The Surrogacy Regulation Bill, 2016** was introduced. The bill introduced by the legislature is not yet enacted into an act with the assent of the president and hence not enforceable. The preamble of the bill states the intention of the legislature to constitute state and national surrogacy boards and various regulatory authorities to regulate the system of surrogacy in India. **The bill states that no surrogacy clinic, pediatrician, gynecologist, human embryologist, registered medical practitioner or any person shall conduct shall indulge in commercial surrogacy.** It not only bans the commercial surrogacy, but also the advertisement of any kind which induces a woman to be a surrogate mother. The surrogacy should only be altruistic in nature. The bill requires the surrogate parents to be Indian citizens, as a blow to the potential threat of trafficking of women as a result of cheap surrogacy prices in India which has led to India being a favoured nation for surrogacy. Any of the parent must be infertile, hence, infertility is the only cause which admitted by the legislature to approve surrogacy. A set pattern of procedure is given for the intending parents to apply for a grant

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<sup>13</sup> National Guidelines for Accreditation, Supervision, and Regulation of ART clinics in India, 2005.

<sup>14</sup> Dr. Justice Lakshman, "Surrogacy-boon or bane", Madras law journal, volume 241 issue 3

eligibility certificate, which is to be mandated for such parents in order to have a surrogate child.

**In 2018, the union cabinet headed by Prime Minister Narendra Modi has approved amendments to Surrogacy (Regulation) Bill, 2016.** The Surrogacy (Regulation) Bill, 2016 intends to regulate surrogacy in India by establishing National Surrogacy Board at the central level and, State Surrogacy Boards and Appropriate Authorities in the States and Union Territories. The above step was sparked by the objectives of National Health Protection Scheme. The Surrogacy (Regulation) Bill, 2016 bans commercial surrogacy completely considering the unethical nature of commercial surrogacy.

When the legislature bends towards banning commercial surrogacy after the bill of 2016, courts are in support of it. The Delhi HC had in July 2015 pronounced a judgment on plea by a Kendriya Vidyalaya teacher who had a pair of twins through a surrogate mother but the mother was denied the 180-day maternity leave on the ground that she was not the biological mother. The high court held that the commissioning mother is the legal mother of the child, HC laid down guidelines and filled the gap in law as the Centre or state governments have no maternity benefit policy for women employees who opt to have children through a surrogate pregnancy. The department of personnel and training (DoPT)<sup>15</sup> instructed all Central ministries and departments to implement a 2015 order of the Delhi High Court for granting maternity leave to female employees who chooses to have a child by commissioning a surrogacy. The Legislature has not yet passed an act to ban commercial surrogacy whereas the courts in the above said case of Baby Majhi and 2015 rules by Delhi High court is in support of such surrogacy.

### **STRICT STATE CONTROLLED ADMINISTRATION: A PANACEA**

The Surrogacy Bill, 2016 which has been approved by the cabinet in 2018 is based on 228<sup>th</sup> report of law commission of India. The proposed bill bans commercial surrogacy completely and establishes national and state surrogacy boards. The problem of unethical use of the

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<sup>15</sup> Department Of personnel and Training rules, 2018



surrogacy technology cannot be controlled and accounted by such boards alone. The government needs to establish a proper framework.

It can also be observed that surrogacy is life saver for extremely needy women who, if not for surrogacy, see sex work as the last resort for a living. Hence a banning surrogacy or giving commercial surrogacy full effect is not a solution.

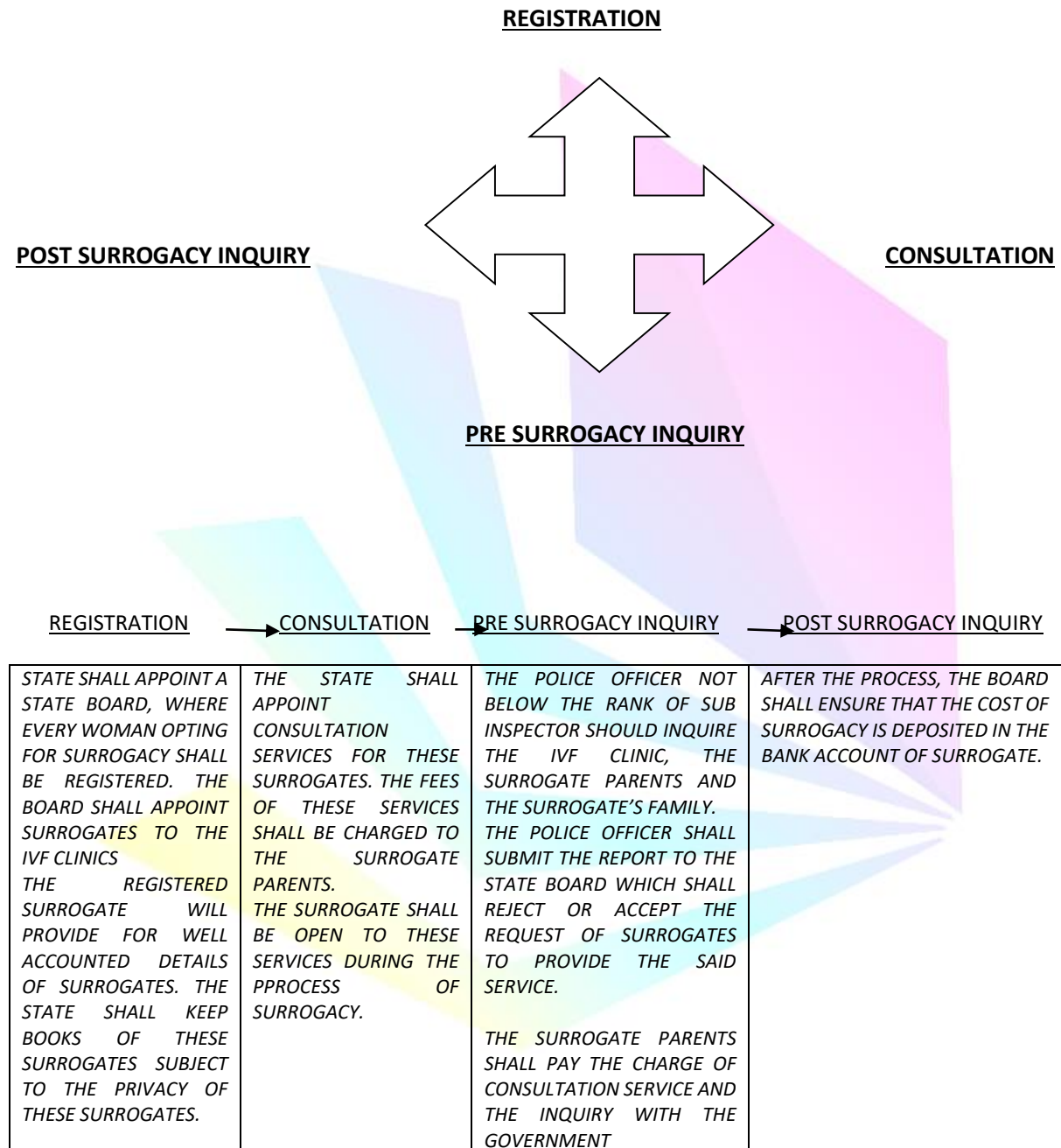
Rather than banning commercial surrogacy government should regulate it. The government shall form policy to increase employment amongst women, but shall not ban commercial surrogacy in near future as it supports many destitute and is not of an immoral nature. The government shall set up a registration where each surrogate should register herself and the reason for opting commercial surrogacy. The government shall aim to increase cost of surrogacy for foreign nationals.

The legislature shall focus on a regulation mechanism for commercial surrogacy by forming surrogacy state boards. These boards shall create a registration mechanism where every woman who wants to enter into surrogacy agreement, should register herself. Such board shall be responsible for maintenance of record of all surrogates in a state and also of keeping it confidential. The state board shall appoint such surrogates to the IVF clinics for surrogacy.

For the mental fitness and the social stigma dealt by the surrogates, the state board shall appoint consultants and young scholars (to inculcate sense of social service among the new scholar) to the surrogates to provide them support which they need, the charge for these services shall be reimbursed by the surrogate parents. This will serve a twin fold object: 1) provide employment to young scholars and consultants 2) provide mental support to the surrogates. The aim should be to educate the surrogates of new employment options for needy women before they opt for such process of surrogacy.

The legislature shall empower the police to inquire regarding the surrogate parents, the IVF clinics, the family of surrogate and make sure that 1) the surrogate parents do not have any criminal record in the state in which they live 2) the surrogate parents have bona fide intention to have a child 3) the IVF clinic confirm to the relevant norms 3) the surrogate's family consents with such surrogacy and does not face social stigma to a great extent. The legislature

shall also give provision for post surrogacy to ensure that the cost of surrogacy is deposited in bank account of the surrogate



## CONCLUSION

The state government should develop a well accounted system for each surrogacy conducted in its state. It should appoint officers to be responsible to check that any kind of exploitation is not subjected to the surrogate mother. The above framework will provide for a well-established and controlled surrogacy under the scrutiny of government as a watchful protector. The surrogate mother shall be awarded with a good financial credit.

The state shall fix a minimum rate for surrogacy in classes of cases in accordance with relevant circumstances minimum rate will give provide the surrogates a boon by not agreeing to a below average price under desperate conditions.

In situations where foreign nationals are attracted to the Indian surrogacy market, the relevant authority shall subject them to heavy scrutiny regarding the living standard of the surrogate parents, the source of income, family background and other relevant facts. The state should form a system for security of the child if the child is born with any deformity or any defect. The security should be in form of monetary benefit to the unborn child in case the surrogate parents run away leaving the child behind.

A firm and cogent step is needed to be taken by the state to deal with this minor sect of the society that decide a earn by way of surrogacy or the childless parents who desire to have their own child by this method with intent to pay any amount of money in return. With the advent of new technologies, new problems have emerged; these hurdles are not being ignored but are to be dealt with. Legislature's attention towards this issue is the need of the hour. Branding commercial surrogacy as immoral and banning it is not how a wise nation evolves by resolving its issues.