

# No More Womb on Hire: A Critical Analysis of the Surrogacy (Regulation) Bill, 2019

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## Introduction:

The Government introduced the Surrogacy (Regulation) Bill, 2019 in the Lok Sabha which would ban commercial surrogacy and allow only close relatives to act as surrogates to infertile couples for “ethical altruistic” reasons. The bill, introduced by Health and Family Welfare Minister, Sh. Harsh Vardhan, stipulates the constitution of surrogacy boards at the national and state levels. The couples will not be able to abandon a child produced through surrogacy under any condition.

Surrogacy is a medical procedure where, an egg is removed from the intended mother or an anonymous donor and fertilized with the sperm of the intended father or anonymous donor. The fertilized egg, or embryo, is then transferred to a surrogate who carries the baby to term. The child is thereby genetically related to the woman who donated the egg and the intended father or sperm donor, but not the surrogate. The woman whose egg is used is called biological mother and woman who delivered the baby is called surrogate mother. "Commercial surrogacy" is a form of surrogacy in which a gestational carrier is paid to carry a child to maturity in her womb.

Commercial surrogacy has been legal in India since 2002. India is emerging as a leader in international surrogacy and a sought after destination in surrogacy-related fertility tourism. Indian surrogates have been increasingly popular with fertile couples in industrialized nations because of the relatively low cost. Indian clinics are at the same time becoming more competitive, not just in the pricing, but in the hiring and retention of Indian females as surrogates. Clinics charge patients roughly a third of the price compared with going through the procedure in the UK. Surrogacy in India is relatively low cost and the legal environment is favorable. According to a 2012 study by the Confederation of Indian Industry, the size of India's surrogate motherhood industry was \$2 billion a year<sup>1</sup>. Another 2012 study backed by the United Nations estimated the economic scale of the Indian surrogacy industry to be 400 million dollars a year with more than 3,000 fertility clinics

## Need for new legislation:

### *Issues relating Parentage Statelessness and Nationality*

While some countries recognise the surrogate as the legal parent, others allocate parenthood to the commissioning parents from the moment of birth - a clash of laws meaning children can be left stateless, with neither country recognising them as citizens.

<sup>1</sup><https://www.theguardian.com/world/2011/dec/06/surrogate-mothers-india>

### The Case of Baby Manji<sup>2</sup> :

In June 2008, the Yamadas divorced. A month later, on July 25, 2008, Baby Manji was born to the surrogate mother. Although Ikufumi Yamada wanted to raise the child, his ex-wife, Yuki, did not. The way she saw it, she was unrelated to the baby biologically, genetically and legally. Under the terms of the agreement with the clinic, the egg donor's responsibility had ended once she provided the egg, and the surrogate's job was finished as soon as she gave birth. Suddenly, Baby Manji had three mothers—the intended mother who had contracted for the surrogacy, the egg donor, and the gestational surrogate—yet legally she had none. Was she Indian? Was she Japanese? Could she have an identity and a nationality without having a mother? The surrogacy contract did not cover a situation such as this. Nor did any existing laws help to clarify the matter. In fact, no binding regulations on the surrogacy industry existed in India at all. The Japanese Embassy in India refused to grant Manji a Japanese passport or visa in keeping with the Japan civil code which states birth mother is the legal mother thus the surrogate mother is the legal mother which created further legal issues. Meanwhile, during the pendency of proceeding the couple divorced there after the ex-wife did not want the child. Considering the absence of any law on surrogacy in India, the court provided for adoption of the surrogate child Manaji in India by the intending father but this adoption of the baby girl by a single male was not permissible under Guardians and Wards Act 1890, as this law does not allow single men to adopt baby girls.

The court made a legal exception and granted birth certificate stating intending father as the legal father to the child and based on the birth certificate the Japanese authority granted passport, visa on humanitarian grounds for safeguarding the interest of surrogate child.

### The case of Jan Balaz<sup>3</sup>:

A German couple Jan Balaz commissioned surrogacy availing donor eggs and surrogate mother, the child was biologically related to Mr Balaz through donated sperm, resulting in the birth of two surrogate twins. But subsequently the German consulate refused to issue passports to the surrogate child based on the German law which strictly prohibits surrogacy and does not recognize surrogacy as a means of establishing parenthood accordingly the Balaz's had no legal filiation to the children. Eventually, the matter reached the supreme court which requested Central Adoption resource Agency, (CARA) is an autonomous body under the Ministry of Women & Child Development, Government of India. It deal with inter- country adoptions in accordance with the provisions of the Hague Convention on Inter-country Adoption, 1993, ratified by Government of India in 2003) to make a onetime exception on humanitarian ground considering the child welfare and facilitate adoption for these twins. Accordingly these surrogate twins were adopted by the German Couple and they were taken back to Germany

### *Exploitation of Surrogate Mothers:*

There were multiple reports concerning unethical practices, exploitation of surrogate mothers, abandonment of children born out of surrogacy and rackets involving intermediaries importing human embryos and gametes prompting the need for a stringent law on surrogacy. The surrogates generally turn out to be poor

<sup>2</sup>Baby Manji Yamada V. Union Of India &Anr[2008] INSC 1656

<sup>3</sup>Jan Balaz v. AnandMunucipality and OrsAIR2010Guj21

illiterate women of rural background who are persuaded by their spouse or middlemen to enter such deals to earn easy money. These women have no power to decide about their own body and life. After recruitment by the commercial agencies, these women are shifted to hostels on the pretext of taking antenatal care. The real motive is to cart them and avoid social stigma of being made outcaste by their community. These women end up spending the whole tenure of pregnancy worrying about their household and children. The worst part is that in case of unfavourable outcome of the pregnancy they are unlikely to be paid and there is no provision of insurance or post-pregnancy medical and psychiatric support for them. Due to lack of proper legislation, sometimes, both surrogate mothers and intended parents are exploited. Only middlemen and commercial agencies profit from the arrangement. The most unequal party in the surrogacy contract, however, remains the child that results from it. There are also incidents when the child given to the couple after surrogacy is not genetically related and in turn is disowned by the intended parent and the child has to spend his/her life in an orphanage

There is exploitation of poor, needy women. Researchers have chalked out diverse reasons for commercial surrogacy to be exploitative — moral, financial and emotional. It is considered morally reprehensible to allow poor fertile women to “rent their womb” for rich women. As an extension of this, some have even described it as modern-day slavery and a mockery of motherhood. However, exploitation has another dimension. It can also be emotional, It is important to understand the levels of psychological distress a surrogate faces upon parting with the newborn. Aspects such as surrogates not knowing the number of embryos inserted or aborted, not having a say in wanting to see/meet the baby, not even being aware of the nationality of the intending parents, and not receiving psychological counselling are undoubtedly tantamount to exploitation. From a monetary standpoint, “selling a womb” or “buying a baby” raises many ethical questions.

### **Development of Law of Surrogacy in India**

These cases above opened a flood gate of unresolved legal issues as the court has not laid down any guidelines but provided for adoption as a provisional measure for saving the surrogate child from being rendered stateless and parentless. The Supreme Court of India in the Manji's case (Japanese Baby) has held that commercial surrogacy is permitted in India with a direction to the Legislature to pass an appropriate Law governing Surrogacy in India. There is no law to govern Assisted Reproductive Technology (ART) clinics that provide such services.

#### *ICMR guidelines<sup>4</sup> :*

To address and to regulate surrogacy arrangements the Government of India has taken certain steps such as introduction and implementation of National Guidelines for Accreditation, Supervision and Regulation of Assisted Reproductive Technology (ART) Clinics in India, 2005 by the Indian Council of Medical Research (ICMR) under the Ministry of Health and Family Welfare, Government of India. But, till now there is no such legal provisions directly dealing with surrogacy laws to protect the rights and interests of the surrogate mother, the child or the commissioning parents.

Below are the main points from these guidelines:

<sup>4</sup>[https://www.icmr.nic.in/sites/default/files/guidelines/Guidline\\_content.pdf](https://www.icmr.nic.in/sites/default/files/guidelines/Guidline_content.pdf)

- a) DNA tests are compulsory to determine that the intended parents are indeed the genetic parents. If this is not the case the child must be adopted instead.
- b) Surrogacy should normally only be an option for patients for whom it would be physically or medically impossible/ undesirable to carry a baby to term.
- c) The payments received by the surrogate mothers should be documented and cover all genuine expenses associated with the pregnancy.
- d) The responsibility of finding a surrogate mother should rest with the couple, or a semen bank, not the clinic.
- e) A surrogate mother should not be over 45 years of age.
- f) The ART clinic should ensure possible surrogate woman satisfies all the testable criteria to go through a successful fullterm pregnancy.
- g) No woman may act as a surrogate more than three times in her lifetime.
- h) The surrogate mother must declare that she will not use drugs intravenously, and not undergo blood transfusion excepting of blood obtained through a certified blood bank.
- i) A relative, a known person, as well as a person unknown to the couple may act as a surrogate mother for the couple.

*Law Commission of India Report<sup>5</sup>:*

On 5th of August, 2009 the Law Commission of India submitted the 228th Law Commission Report titled “Need for Legislation to regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of parties to a Surrogacy”.

The following observations had been made by the Law Commission: -

- (a) Surrogacy arrangement will continue to be governed by contract amongst parties, which will contain all the terms requiring consent of surrogate mother to bear child, agreement of her husband and other family members for the same, medical procedures of artificial insemination, reimbursement of all reasonable expenses for carrying child to full term, willingness to hand over the child born to the commissioning parent(s), etc. But such an arrangement should not be for commercial purposes.
- (b) A surrogacy arrangement should provide for financial support for surrogate child in the event of death of the commissioning couple or individual before delivery of the child, or divorce between the intended parents and subsequent willingness of none to take delivery of the child.
- (c) A surrogacy contract should necessarily take care of life insurance cover for surrogate mother.
- (d) One of the intended parents should be a donor as well, because the bond of love and affection with a child primarily emanates from biological relationship. Also, the chances of various kinds of child-abuse, which have been noticed in cases of adoptions, will be reduced. In case the intended parent is single, he or she should be a donor to be able to have a surrogate child. Otherwise, adoption is the way to have a child which is resorted to if biological (natural) parents and adoptive parents are different.
- (e) Legislation itself should recognize a surrogate child to be the legitimate child of the commissioning parent(s) without there being any need for adoption or even declaration of guardian.

<sup>5</sup><http://lawcommissionofindia.nic.in/reports/report228.pdf>

- (f) The birth certificate of the surrogate child should contain the name(s) of the commissioning parent(s) only.
- (g) Right to privacy of donor as well as surrogate mother should be protected.
- (h) Sex-selective surrogacy should be prohibited.
- (i) Cases of abortions should be governed by the Medical Termination of Pregnancy Act 1971 only.

The Report has come largely in support of the Surrogacy in India, highlighting a proper way of operating surrogacy in Indian conditions. Exploitation of the women through surrogacy is another worrying factor, which the law has to address. The Law Commission has strongly recommended against Commercial Surrogacy.

*Assisted Reproductive Technologies (Regulation) Bill, 2010*<sup>6</sup>:

Considering the growing number of Surrogacy cases in India and the challenges that the Surrogacy would face in the future, the Government of India has decided to come up with a law which would govern the surrogacy and ART in India in future. A committee of experts has been set up and the said committee has now submitted a draft of the proposed bill to the Government of India. The said bill is still pending with the government and has not yet been presented in the Parliament. The proposed draft has taken into consideration the various aspects of surrogacy and has built in safe guards for both commissioning parents and to the surrogate mother.

Some of the features of this proposed bill are as under:

- a) Constitution of an authority at National as well as State level to register and regulate the IVF clinics and ART centers.
- b) Creation of a forum to file complaints for grievances against clinics and ART centers.
- c) Imposing duties and responsibilities on the clinics and ART centers.
- d) Regulations for sourcing, storage, handling, record keeping of Gametes, Embryos and other human reproductive materials.
- e) Placing rights and duties on Surrogate and commissioning parents.
- f) Imposing stringent penalties for breach of the duties and regulations under this Act.

The above features are still dynamic in nature, but will take a long way in making the entire surrogacy procedure transparent and fair. The chances of any exploitation of the Intended Parents and Surrogate cannot be eliminated with mere introduction of the proposed bill; better implementation across the country must be needed.

*Union Home Ministry Guidelines for Regulating the Practice of Commercial Surrogacy (2012)*<sup>7</sup>: Now, foreign nationals intending to visit India for commissioning surrogacy will not be allowed to come on a tourist visa with the Home Ministry ordering strict adherence of surrogacy laws. First time, for the practice of surrogacy in India, the Union home ministry of India has issued stringent guidelines for visas being

<sup>6</sup><https://www.icmr.nic.in/sites/default/files/guidelines/ART%20REGULATION%20Draft%20Bill1.pdf>

<sup>7</sup><http://surrogacylawsindia.com/admin/userfiles/notification-page1.pdf>

issued to foreigners seeking child or children from surrogacy procedure in India. These guidelines for foreigners planning surrogacy in India came up in July 2012 following allegations that commissioning parents from abroad were cheating the surrogate mothers. There are also few reported cases that the children were ill-treated in foreign land and that they are not treated as citizens there.

The Union ministry of home affairs had noticed that some foreign nationals visited India for surrogacy on tourist visas, which was not appropriate, so the ministry had decided and sent a circular to foreign embassies in July 2012, that such foreigners would be eligible to enter the India only on "medical" visas, if they fulfilled certain criteria formulated by home ministry. The circular was notified by the Foreign Regional Registration Office in Mumbai on December 17, 2012 and was subsequently sent to fertility clinics in India.

Under this order, a letter from the embassy of the foreign country in India or the Foreign Ministry of the country should be enclosed along with the visa application stating clearly that the country recognizes surrogacy and the child or children to be born to the commissioning couple through the Indian surrogate mother will be permitted entry into their country as a biological child or children of the couple commissioning surrogacy. This is particularly significant, as many babies born out of cross-border surrogacy in recent years have been trapped in legal tangles between the home country and India. A Norwegian woman, who had twins by an Indian surrogate in 2009, was stranded for over two years as Norway refused to accept her as the biological mother of her children. Many countries, like France, Germany, Italy and Norway do not recognize commercial surrogacy.

The couple will have to furnish an undertaking that they would take care of the child or children born through surrogacy, the treatment should be done only at one of the registered Assisted Reproductive Treatment (ART) clinics recognized by Indian Council of Medical Research. Besides, the couple should produce a duly notarized agreement between the applicant couple and the prospective Indian surrogate mother. "If any of the above conditions are not fulfilled, the visa application shall be rejected," the Home Ministry said.

The Ministry also told Indian missions abroad that before the grant of visa, the foreign couple needs to be told that before leaving India for their return journey, "exit" permission from the Foreigner Regional Registration Offices or Foreigner Registration Offices (FRRO /FRO) would be required. Before granting "exit", the FRRO/FRO will see whether the foreign couple is carrying a certificate from the ART clinic concerned regarding the fact that the child or children have been duly taken custody of by the foreigner and that the liabilities towards the Indian surrogate mother have been fully discharged as per the agreement and guidelines.

A copy of the birth certificate(s) of the surrogate child or children will be retained by the FRRO or FRO along with photocopies of the passport and visa of the foreign parents. It may be noted that for drawing up and executing the agreement, the foreign couple can be permitted to visit India on a reconnaissance trip on tourist visa, but no samples may be given to any clinic during such preliminary visit," the order said.

According to this new rule, gay couples and single parents living abroad will not be given an Indian medical visa if they are visiting to commission a surrogacy. Also, commissioning parents have to

be heterosexual couples married for at least two years before commissioning a surrogacy, and will have to apply for a medical visa only. Apart from this, commissioning parents will now have to get documents from clinics certifying that they are heterosexual couples who cannot have children under normal conditions and need medical treatment.

*Government notification prohibiting surrogacy for foreign nationals 2015<sup>8</sup>:*

MHA's circular no. 25022/74/2011-F.1(Vol. III) dated 3 Nov. 2015 directed The Indian Missions/ Posts/ FRROs/ FROs are directed to ensure the following, with immediate effect-

- (i) No visa should be issued by the Indian Missions/ Posts to foreign nationals intending to visit India for commissioning surrogacy
- (ii) No permission should be granted by the Foreigners Regional Registration Officers (FRROs)/ Foreigners Registration Officers (FROs) to Overseas Citizen of India (OCI) cardholders to commission surrogacy in India.
- (iii) No exit permission should be granted by the FRROs/ FROs to the children to be born through surrogacy to foreign nationals including OCI cardholders. However, for child/children born through surrogacy already commissioned on or before issue of this Circular, exit permission will be decided by FRROs/FROs on case to case / case 'basis.

#### **The Surrogacy (Regulation) Bill<sup>9</sup>:**

The Surrogacy (Regulation) Bill, 2019 was introduced by the Minister of Health and Family Welfare, Dr. Harsh Vardhan in Lok Sabha on July 15, 2019. The Bill defines surrogacy as a practice where a woman gives birth to a child for an intending couple with the intention to hand over the child after the birth to the intending couple.

*Salient features of the bill:*

- *Regulating surrogacy:* The Bill prohibits commercial surrogacy, but allows altruistic surrogacy. Altruistic surrogacy involves no monetary compensation to the surrogate mother other than the medical expenses and insurance coverage during the pregnancy. Commercial surrogacy includes surrogacy or its related procedures undertaken for a monetary benefit or reward (in cash or kind) exceeding the basic medical expenses and insurance coverage
- *When surrogacy is Permissible:* Surrogacy is permitted when it is:
  - (i) for intending couples who suffer from proven infertility;
  - (ii) altruistic;
  - (iii) not for commercial purposes;
  - (iv) not for producing children for sale, prostitution or other forms of exploitation; and
  - (v) for any condition or disease specified through regulations.

<sup>8</sup><http://mea.gov.in/images/attach/surrogacy03112016.pdf>

<sup>9</sup>[https://www.prsindia.org/sites/default/files/bill\\_files/Surrogacy%20%28Regulation%29%20Bill%2C%202019.pdf](https://www.prsindia.org/sites/default/files/bill_files/Surrogacy%20%28Regulation%29%20Bill%2C%202019.pdf)

- *Eligibility of Intending Couple:* following conditions must be satisfied by intending couple:
  - (i) the couple being Indian citizens and married for at least five years;
  - (ii) between 23 to 50 years old (wife) and 26 to 55 years old (husband);
  - (iii) they do not have any surviving child (biological, adopted or surrogate); this would not include a child who is mentally or physically challenged or suffers from life threatening disorder or fatal illness; and
  - (iv) other conditions that may be specified by regulations
  - (v) Certificate of Essentiality.
  
- *Certificate of Essentiality:* A certificate will be issued upon fulfilment of the following conditions:
  - (i) a certificate of proven infertility of one or both members of the intending couple from a District Medical Board;
  - (ii) an order of parentage and custody of the surrogate child passed by a Magistrate's court;
  - (iii) Insurance coverage for a period of 16 months covering postpartum delivery complications for the surrogate.
  
- *Eligibility of Surrogate Mother:* To obtain a certificate of eligibility from the appropriate authority, the surrogate mother has to be:
  - (i) a close relative of the intending couple;
  - (ii) a married woman having a child of her own;
  - (iv) 25 to 35 years old;
  - (v) a surrogate only once in her lifetime; and
  - (vi) possess a certificate of medical and psychological fitness for surrogacy. Further, the surrogate mother cannot provide her own gametes for surrogacy.
  
- *Appropriate Authorities:* The central and state governments shall appoint one or more appropriate authorities within 90 days of the Bill becoming an Act. The functions of the appropriate authority include;
  - (i) granting, suspending or cancelling registration of surrogacy clinics;
  - (ii) enforcing standards for surrogacy clinics;
  - (iii) investigating and taking action against breach of the provisions of the Bill;
  - (iv) recommending modifications to the rules and regulations.
  
- *Clinic Registration:* Surrogacy clinics cannot undertake surrogacy related procedures unless they are registered by the appropriate authority. Clinics must apply for registration within a period of 60 days from the date of appointment of the appropriate authority.



- *Surrogacy Boards:* The central and the state governments shall constitute the National Surrogacy Board (NSB) and the State Surrogacy Boards (SSB), respectively. Functions of the NSB include:
  - (i) advising the central government on policy matters relating to surrogacy;
  - (ii) laying down the code of conduct of surrogacy clinics; and
  - (iii) supervising the functioning of SSBs.
  
- *Parentage of child:* A child born out of a surrogacy procedure will be deemed to be the biological child of the intending couple.
  
- *Abortion :* An abortion of the surrogate child requires the written consent of the surrogate mother and the authorisation of the appropriate authority. This authorisation must be compliant with the Medical Termination of Pregnancy Act, 1971. Further, the surrogate mother will have an option to withdraw from surrogacy before the embryo is implanted in her womb.
  
- *Offences and penalties:* The offences under the Bill include:
  - (i) undertaking or advertising commercial surrogacy;
  - (ii) exploiting the surrogate mother;
  - (iii) abandoning, exploiting or disowning a surrogate child; and
  - (iv) selling or importing human embryo or gametes for surrogacy.

The penalty for such offences is imprisonment up to 10 years and a fine up to 10 lakh rupees. The Bill specifies a range of offences and penalties for other contraventions of the provisions of the Bill.

- It also specifies that no sex selection can be done when it comes to surrogacy.

### Criticism of the bill:

- ***Rights of Same Sex Couples, Singles, Aged Persons and Foreigners Being Disregarded:*** The Bill prevents same sex couples from having surrogate children even though there is a credible scientific research to show that same sex parents are as good as heterosexual parents, thus it violates the Article 14 of the Constitution<sup>10</sup>. *Article 14 of the Constitution guarantees 'equality before the law and equal protection of laws to all persons'. Article 21 guarantees 'protection of life and personal liberty of all persons'*<sup>11</sup>.

*Restricting conditional surrogacy to married Indian couples and disqualifying others on the basis of nationality, marital status, sexual orientation or age, does not appear to pass the test of equality and there is no connection with the intended objectives of the proposed legislation.*

<sup>10</sup> Article 14 Equality before law- The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth

<sup>11</sup> Article 21- Protection of life and personal liberty- No person shall be deprived of his life or personal liberty except according to procedure established by law.

Why is access to surrogacy limited to married couples? When live-in couples are recognised under the law, why not permit them to form a family? Necessitating marriage will also lead to psychological stress between couples who desire to have a child, and surrogate parenthood is premised on the notion of providing the opportunity of parenthood to everyone incapable or unwilling to have a child naturally. The restriction on single parents is unjustified too, because in many cases, single parents have successfully nurtured children.

- *Right to Privacy Violated:* The Bill also violates the *Justice K. S. Puttaswamy (Retd.) and Anr. vs Union Of India And Ors*<sup>12</sup>, judgement of the Supreme Court where right to privacy was added in the list of fundamental rights guaranteed by the Constitution.
- *Violation of Right to Reproduce:* The eligibility condition under the Bill amounts to unreasonable restriction on the reproductive rights of a married Indian couple, violative of Article 21 of the constitution. In *Suchita Srivastava v. Chandigarh Administration*<sup>13</sup>, the Supreme Court equated the right to make a choice in relation to reproduction with personal liberty under Article 21 and clarified that such right includes within it the 'privacy, dignity and bodily integrity' of the woman and further stated that 'taken to its logical conclusion, reproductive rights includes a woman's entitlement to carry a pregnancy to its full term, to give birth and to subsequently raise children'.
- *Fallacious Definition of Infertility:* The Bill defines infertility as the inability to conceive after five years of unprotected coitus or other medical condition preventing a couple from conception. This definition does not cover all cases in which a couple is unable to bear a child. For example, there may be medical conditions where the woman may conceive but is unable to carry a child through the period of the pregnancy, i.e., the period of nine months following the conception. This includes cases where an intending mother may be able to conceive a child, but may have multiple miscarriages that result in her inability to bear a child. There are also other medical conditions like multiple fibroids in the uterus, hypertension, and diabetes that affect successful pregnancies. Such persons will not be covered under the definition of 'infertility' proposed in the Bill and therefore will not be eligible to undertake altruistic surrogacy.
- *Excessive Delegation of Powers to National Surrogacy Board (NSB):* The Bill allows the NSB to prescribe additional conditions that need to be fulfilled by the intending couple through regulations. The question is whether this is excessive delegation of legislative powers. It may be argued that all conditions that make persons eligible to commission a surrogacy should be specified in the parent law and not be delegated to regulations.
- *"Any Other Condition or Disease" not defined:* The Bill allows the NSB to prescribe through regulations 'any other condition or disease' for which surrogacy may be allowed. It is unclear what is implied by 'any other condition' i.e., whether it relates to only a medical condition or would be of any other nature.

<sup>12</sup> (2017) 10 SCC 1.

<sup>13</sup> (2009) 9 SCC 1

- *No Set Time Limit and No Procedure of Appeal or Review:* In order to initiate a surrogacy procedure, the surrogate mother and the intending couple are required to obtain certificates of eligibility and essentiality upon fulfilling various conditions from the relevant appropriate authorities. However, the Bill does not specify a time limit by which the authority will grant these certificates. Further, the Bill does not specify a review or appeal procedure in case the surrogacy applications are rejected.
- *Definition of “Close Relative” Missing:* The Bill specifies various conditions that need to be fulfilled by a surrogate mother in order to be eligible for a surrogacy procedure. Upon fulfilling these conditions, the surrogate mother may obtain an eligibility certificate from the appropriate authority. One of the conditions to be proved is that the surrogate mother is a ‘close relative’ of the intending couple who commission the surrogacy. However, the Bill does not specify who will be a ‘close relative’.
- *No Time Limit To Decide Abortion Application :* Under the Bill, authorisation of the appropriate authority is mandatory for an abortion to be done during the period of surrogacy. The authorisation also has to comply with the provisions of the Medical Termination of Pregnancy (MTP) Act, 1971, which specifies the grounds for termination of pregnancy. However, the Bill does not specify the time period by which such authorisation for abortion has to be given.
- *No say of Intending Couple in Abortion Approval:* An abortion of the surrogate child requires the written consent of the surrogate mother and an authorisation by the appropriate authority. The Bill further states that no person may force the surrogate mother to abort the foetus. However, after the birth, the child is considered the biological child of the intending couple and they are responsible for bringing up the child. If a child being born out of surrogacy arrangement is at the risk of physical or mental abnormalities, under the Bill only the surrogate mother’s consent will be required to abort the child. The intending couple will have no role in this decision. Under the provisions of the MTP Act, 1971, abortion in such cases is allowed with the consent of the ‘pregnant woman’. The complexity in the case of surrogacy is that the surrogate mother (who is carrying the child) is different from the intending couple who has to bring up the child.
- *Unnecessary Burden of Proof :* If a surrogate mother renders surrogacy services other than those permitted under the Bill, it shall be presumed that she was compelled to do so by: (i) her husband; (ii) the intending couple; or (iii) any other relative. They will be liable for abetting the offence of initiating commercial surrogacy. The burden of proof is on these parties to establish that they did not compel the surrogate mother. Further, the Bill does not define ‘relative’ for this purpose. It is unclear why the Bill seeks to reverse the burden of proof from the prosecution to the defendants.
- *Prohibition on Storage of Eggs and Sperms:* The Bill prohibits storage of embryos and gametes (unfertilised egg and sperm) for the purpose of surrogacy. This differs from the current ICMR guidelines (2005) which allow the storage of embryos for a period of five years. The prohibition on storage of egg or sperm may have adverse health implications for the intending mother. Typically, for a surrogacy, the eggs are extracted from the intending mother and are implanted in the surrogate mother’s uterus. The success rate of one implantation is below 30%, therefore, multiple implantation attempts may be required to ensure

availability of eggs for the multiple attempts, extra eggs are extracted and stored. Note that the intending mother needs to undergo extensive hormonal treatment for this extraction. Repeated stimulation for extraction of eggs leads to the risk of Ovarian Hyperstimulation Syndrome (OHSS) for the intending mother. In some rare cases, OHSS may lead to complications like blood clots and kidney failure.

- *Difficulty in Identifying Unauthorized Surrogate Mother:* Enforcement agencies are unable to distinguish surrogate mothers from other pregnant women. They have no mechanism to know whether a foreigner woman flying back has been implanted with sperm and egg.
- *Right o Livelihood:* Commercial surrogacy is simultaneously, a source of income for many unemployed women. The body is not being ‘sold’, it is being appropriately utilised in order to earn a livelihood. It is very easy to defame a profession with populist remarks, it is very easy to ban a whole industry and not provide any subsequent compensation to the stakeholders. The Government should provide monetary reparations to the women whose families are now at stake due to a lack of stable income and make immediate provisions for a minimum wage allowance (unemployment allowance) or create compensatory jobs. The surrogacy bill has only made surrogate mothers more vulnerable to exploitation because of their joblessness, such a blanket ban on surrogacy will only turn out to be more distressing for women previously engaged in the practice. It is also in violation of Article 19 of the Constitution of India<sup>14</sup>.
- *Adverse effect on Economy:* Banning commercial surrogacy will send the booming medical tourism industry crashing to its doom. . According to a 2012 study by the Confederation of Indian Industry, the size of India’s surrogate motherhood industry was \$2 billion a year<sup>15</sup>. Another 2012 study backed by the United Nations estimated the economic scale of the Indian surrogacy industry to be 400 million dollars a year with more than 3,000 fertility clinics across the country<sup>16</sup>.
- *Exploitation of Close Relatives:* Altruistic surrogacy is another form of exploitation in itself. It will lead to emotional abuse of female relatives by making surrogacy, a social obligation. It will just transport reproductive labor from the markets to the households by making women’s reproductive capacities into a free resource available for unquestionable consumption within families. Furthermore, since it is supposed to be altruistic in nature, the relatives cannot demand any compensation for the physiological risks of gestation that are a part of pregnancy, not to forget the emotional implications as well. This is just another form of labor that is both emotionally and socially detrimental.

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<sup>14</sup>19. Protection of certain rights regarding freedom of speech etc

(1) All citizens shall have the right

(a) to freedom of speech and expression;

(b) to assemble peaceably and without arms;

(c) to form associations or unions;

(d) to move freely throughout the territory of India;

(e) to reside and settle in any part of the territory of India; and

(f) omitted

(g) to practise any profession, or to carry on any occupation, trade or business

<sup>15</sup>Supra note at 2

<sup>16</sup>Supra note at 3

### Appreciations to the Bill:

- *Promotion of adoption:* As commercial surrogacy will not be an option in the near future, intended single parents or couples willing to have a baby will look at adoption to fulfil the need. This may possibly boost the dismal adoption figures in India. The draft law has a provision for a jail term of up to 10 years and a fine of ₹ 10 lakh for violations such as abandoning a child and choosing commercial surrogacy. That the stringent rules and regulations may encourage couples to turn toward adoption.
- *Issue of statelessness addressed:* By banning commercial surrogacy for foreigners there will be no question of statelessness.
- *Issue of Parentage:* that any child born out of surrogacy procedure, shall be deemed to be a biological child of the intending couple and the said child shall be entitled to all the rights and privileges available to a natural child under any law for time being in force.
- *Issue of abandonment of child:* This clause provides that the intending couple shall not abandon the child, born out of a surrogacy procedure, whether within India or outside, for any reason whatsoever, including but not restricted to, any genetic defect, birth defect, any other medical condition, the defects developing subsequently, sex of the child or conception of more than one baby and the like.
- *Health and safety of surrogate mothers:* The bill provides for insurance coverage for a period of 16 months covering postpartum delivery complications for the surrogate. no woman, other than an ever married woman having a child of her own and between the age of 25 to 35 years on the day of implantation, shall be a surrogate mother or help in surrogacy by donating her egg or oocyte or otherwise. No woman shall act as a surrogate mother more than once in her lifetime. There is necessity of a certificate of medical and psychological fitness for surrogacy and surrogacy procedures from a registered medical practitioner
- *Regulating Clinics:* Registration of clinics is compulsory. The surrogacy clinics shall be registered only after the appropriate authority is satisfied that such clinics are in a position to provide facilities and can maintain equipment and standards including specialised manpower, physical infrastructure and diagnostic facilities as may be provided in the rules and regulations. It is provided that no person, organisation, surrogacy clinic, laboratory or clinical establishment of any kind shall undertake commercial surrogacy, issue advertisements regarding commercial surrogacy, abandon the child born through surrogacy, exploit the surrogate mother, sell human embryo or import human embryo for the purpose of surrogacy and contravention of the said provisions shall be an offence punishable with imprisonment for a term which shall not be less than ten years and with fine which may extend to ten lakh rupees.

### Conclusion:

Gift of child is the most precious one for a couple. Those who are deprived of this wonderful gift always feel inferior and frustrated. Surrogacy is a wonderful gift that would bring the big smile on their face. Concerns over the commodification of reproductive practices and changes to natural family relations must be balanced against empathy for those who desire to have children and support of reproductive freedom. Surrogacy is both a threat and an opportunity. On the one hand it gives infertile couples and surrogate

mothers the possibility to fulfil their desires: a child and the opportunity to take better care of their family respectively. On the other hand there is a risk that with the commoditisation of children and parenthood, women are exploited and turned into baby producers. Several reasons for and against surrogacy have been given and one cannot easily decide what is morally right and what is wrong. Although regulation is valid, urgent and necessary, the Bill falls short on several counts. The purpose of the bill should be to regulate commercial surrogacy and not just ban it. Based on this, it can be concluded that this matter should be debated in public or in media. It is submitted that the people's representatives should step in to preserve the interest of the surrogate mother, intended parents and child to be born. The legislature should also take into account the loopholes which were pointed out in the Draft Bill. But if this area remains unoccupied with both the legislature and executive having not stepped in, under the constitution then the judiciary should come forward to address the issue of surrogacy in larger public interest.

