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## The Surrogacy Regulation (2019) Bill of India: A Critique

By Astha Srivastava<sup>1</sup>

### Abstract

Assisted Reproductive technologies (ARTs) like In Vitro Fertilization (IVF) and surrogacy have made aspirations of parenthood come true for many. With quality medical services, low costs and an indifferent regulatory regime, the surrogacy industry, particularly of the commercial and trans-border variety, has boomed in India so much so that India had once been termed as the 'baby factory' of the world. Through successive administrative measures the government of India has tried to regulate surrogacy with a view to prevent exploitation of women. At least two comprehensive bills to regulate various aspects of surrogacy arrangements have been tabled in the Parliament, viz: The Assisted Reproductive Technologies Bill -2008 and the Surrogacy Regulation (2016) Bill, both of which did not see light of the day. The Government's initiative to table a new bill on this subject is a welcome move. The Surrogacy Regulation (2019) Bill brings clarity on the rights of stakeholders in surrogacy arrangements and seeks to protect the vulnerable. This is an opportune time for a comprehensive discussion on all aspects related to surrogacy arrangements in India so that the legislation becomes an effective tool for social progress. In particular, considerable thought is needed on pressing issues arising out of the provisions of this bill, such as the possibility of a flourishing grey market in cases where commercial surrogacy is completely banned and the possibility of soft coercion of women by relatives, against their own choices, for altruistic surrogacy by matrimonial families. The rights of the child in cases of arrangements in contravention with the proposed law also need deliberation. This paper discusses the lacunae in the bill on the above aspects taking into consideration the Indian experience and that of the world and attempts to propose possible alternatives that may be adopted for a more meaningful and just legislation.

*Keywords:* Assisted Reproductive Technology (ART), Commercial surrogacy, Altruistic surrogacy, Surrogate, Surrogacy Regulation (2019) Bill.

### Introduction

Black's Law Dictionary defines "surrogacy" as the process of carrying and delivering a child for another person (Garner, 2009). This arrangement is often referred to as 'renting of the womb'. There are multiple emotional, legal, medical and ethical dilemmas and complex possible scenarios involved in this arrangement. On the one hand, are the hopes and desires of commissioning parents which can be fulfilled by using technology; on the other, there are chances

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of the surrogate mother developing an emotional bond with the child in her womb<sup>2</sup>. There is also the question of agency and autonomy of a woman over her own body and womb. The possibility of poor women in developing countries being exploited by middlemen who lure them into surrogacy contracts for a paltry sum cannot be ruled out. There are also chances of separation or death of the commissioning parents before the birth of the child, in which case such a child becomes unwanted and faces uncertainties regarding his or her rights and future. Children born with congenital physical or mental disabilities like Down's Syndrome are often abandoned by the intending parents<sup>3</sup>. When such an arrangement involves a cross border agreement, which is often cheaper for the commissioning parents<sup>4</sup>, there are issues related to visas and transfer of the child to a jurisdiction other than in which he or she is born and where laws may not recognize surrogacy contracts and parentage arising out of them<sup>5</sup>. There is the creation of haves and have-nots as the process of surrogacy often involves engaging surrogate mothers in emerging economies to bear children for more wealthy intending parents from developed nations. Amongst all these issues the most prominent question is that of the commodification of children and of human life.

Surrogacy may be of two types: traditional surrogacy and gestational surrogacy (Garner, 2009). In traditional surrogacy the surrogate mother is also the biological mother of the child as she is impregnated with the sperm of the intended father. One of the earliest references<sup>6</sup> to traditional surrogacy comes from around 2000 B.C. and finds mention in the Quran and the Bible. It is stated that Sarah, wife of Abraham, was unable to conceive and a maidservant of Sarah was asked to carry a child for them.

In gestational surrogacy, the surrogate mother does not share any genetic connection with the fetus as she is impregnated with an embryo through in-vitro fertilization or any other similar procedure. If the embryo was created with the gametes of the commissioning parents, then such parents would also be the biological parents of the child.

Surrogacy may also be classified as commercial or altruistic based on whether the surrogate mother has been paid by the prospective parents or not (other than expenses attendant to the pregnancy).

The Surrogacy Regulation (2019) Bill (hereinafter referred to as SRB 2019) has been introduced in the Parliament of India recently. The SRB 2019 seems to be a comprehensive document covering every aspect on the subject. However, its history and the fate of its predecessor, the SRB 2016 which could not become a law despite extensive discourse in the legislature and the public domain, hints at the fact that there are several crucial and contentious issues which need a thorough deliberation. This motivated my present study to assess if the new Bill measures up to the needs and expectations of contemporary Indian society on the parameters of desirability and relevance. I begin with an overview of the regulatory environment on the subject around the world in Section 2. Steps taken by India for regulation of surrogacy are discussed in Section 3. Provisions of the bill as tabled in the Parliament of India are also listed. In section 4, I make a critique on these provisions followed by conclusion.

<sup>2</sup> See, (In re Baby M, 1988) for a case where the surrogate mother, after initially relinquishing the baby to commissioning parents, went to the extent of kidnapping the baby to get her back. Interestingly in this case, the court accepted the parentage of surrogate mother (who was also the biological mother) and allowed her visitation rights.

<sup>3</sup> The Baby Gammy Incident that took place in 2014 in Thailand where Australian intending parents refused to accept a child who was born with Down's Syndrome (Hawley, 2014)]

<sup>4</sup> In (Brugger, 2012), Kristiana Brugger highlights that the cost of surrogate pregnancy in India is anywhere between 1/6<sup>th</sup> to 1/3<sup>rd</sup> of the cost in U.S.

<sup>5</sup> See, for example, *Menesson and Ors. v France*, *Foulon v France*, *Paradiso and Campanelli v Italy*.

<sup>6</sup> See, *Genesis* 16:1-4; 30:1-10.

## The Global Regulatory Environment

Different levels of regulations prevail in different jurisdictions around the world. In some countries like Sweden, Norway, France and Italy, surrogacy is totally prohibited. Surrogacy remains unregulated in India, Ukraine, USA and the Middle East. In some jurisdictions like the UK surrogacy remains legal although surrogacy contracts are unenforceable. Altruistic surrogacy is legal in jurisdictions like those of the United Kingdom, in a few states in the USA and in Australia.

France banned surrogacy of all kinds by the Bioethics Act, 1994; and this has also been enshrined in the Civil Code<sup>7</sup>. French courts have denied recognition to children adopted and born abroad to surrogate mothers. It is a fundamental principle to register a child only under the name of a woman who gave birth to her. In 2017, France's Cour-de-Cassation court ruled that the partner of the biological father could adopt his child. In 2019, the same court officially acknowledged the parenthood of a French couple who had twins 19 years back in the USA through surrogacy in the *Mennesson* case<sup>8</sup>.

Sweden has adopted a blanket ban on surrogacy in 2016 after a government led report<sup>9</sup> concluded that, "There is no proof that legalizing "altruistic" surrogacy would do away with the commercial industry. International experience shows the opposite – citizens of countries such as the USA or Britain, where the practice of surrogacy is widespread, tend to dominate among foreign buyers in India and Nepal." The report also says that there is evidence that surrogates still get paid under the table, which is the case in Britain. One cannot, says the inquiry, expect a woman to sign away her rights to a baby she has not even seen nor got to know yet – this in itself denotes undue pressure (Ekman, 2016).

Surrogacy in the UK is regulated by the Surrogacy Arrangements Act 1985 and the Human Fertilization and Embryology Act 2008. The regulation on the subject has not been updated recently even though much technological progress has been made in reproductive medicine. The surrogate is the child's legal mother at birth, and the intended parents must apply for a parental order after the birth of the child to become the legal parents of the child. Surrogacy arrangements are not enforceable in the UK.<sup>10</sup> Advertising for seeking a surrogate mother or expressing willingness to enter into a surrogacy arrangement is prohibited.

Thailand, which had emerged as a surrogacy hub, has banned foreigners and same sex couples from taking the surrogacy route for having children. Also, commercial gains related to the process are not allowed.

The issue of inconsistent legal and practical regimes across different jurisdictions creates a jurisdictional arbitrage and cherry-picking: in fact, a global surrogacy market has sprung up due

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<sup>7</sup> Article 16-7 of Code Civil (France). "All agreements relating to procreation or gestation on account of a third party are void."

<sup>8</sup> See (rfi, 2019). The report talks about the struggle of Dominique and Sylvie Mennesson who had to undergo a harrowing legal battle for recognition of their children, and even went as far as appealing to the ECHR European Court of Human Rights. Earlier the French authorities ruled that "the acts had been committed on US territory, where they were not classified as an offence, and therefore did not constitute a punishable offence in France" but had not given legal recognition to the children. See, *Mennesson and others v France*.

<sup>9</sup> Authored by Justice Eva Wendel Rosberg (2016).

<sup>10</sup> Section 1A of Surrogacy Arrangements Act 1985.

to this reason. The lack of consistent regulation or uniformly accepted global standards leads to increasingly relaxed regulations and hampers the development of effective regulatory regimes.<sup>11</sup>

In this context the rulings of the European Court of Human Rights (ECHR), relating to international surrogacy cases are illuminating. The ECHR gave a 'de facto' recognition to surrogacy contracts concluded by intending parents to protect the interests of the child in *Foulon v. France*<sup>12</sup> and *Bouvet v. France*<sup>13</sup> even though their nations had refused to recognize their parentage as surrogacy agreements were in contravention to municipal laws.

On the contrary in *Paradiso and Campanelli v. Italy*<sup>14</sup> the ECHR observed that the domestic laws which banned surrogacy served weighty public interests. The state's refusal to recognize the illegal surrogacy agreement was held proportionate, and it was proposed to provide the child a family, through the process of adoption. In this case the judgement was also influenced by the fact that the child was not genetically related to the commissioning parents. The only genetic link of the child that could be established was that with the biological mother.

In almost all such cases in the ECHR, viz. *Menesson and others v France*<sup>15</sup>, *Labassee v France*<sup>16</sup>, *D and others v Belgium*<sup>17</sup> and *Laborie v France*<sup>18</sup>, applicants have relied on Article 8 of the European Convention on Human Rights to challenge administrative decisions in their home states refusing to legally recognize parent-child relationships established abroad between children born through surrogacy.

Article 8 of the European Convention on Human Rights provides a right to respect for private and family life. It states:

*"Everyone has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except... for the protection of health or morals, or for the protection of the rights and freedoms of others."*

During the 37<sup>th</sup> session of the United Nations Human Rights Council (UNHRC) in March 2018, the Special Rapporteur Maud de Boer-Buquicchio presented a report on surrogacy and the sale of children.<sup>19</sup> The report made a clear assertion that commercial surrogacy as it is currently practiced usually constitutes the sale of children under international human right law. The report advised States, regardless of their perspectives on surrogacy, to create safeguards to prevent the sale of or traffic in children in the context of surrogacy. It also included some much-needed suggestions for reforms. It was recommended that clear and comprehensive legislation that prohibit sale of children in the context of surrogacy, both commercially and altruistically, should

<sup>11</sup> "This patchy regulation of the surrogacy issue in different jurisdictions means authorities are left in a very difficult situation: the global surrogacy market has sprung up due to the inconsistency of laws around the world, but it is precisely because of these differences that they are unable to regulate the practice effectively" (Glynn, 2019).

<sup>12</sup> Application No. 9063/14 ECHR.

<sup>13</sup> Application No. 10410/14 ECHR.

<sup>14</sup> Application No 25358/12 ECHR.

<sup>15</sup> Application No 65192/11 ECHR.

<sup>16</sup> Application No 65941/11 ECHR.

<sup>17</sup> Application No 29176/13 ECHR.

<sup>18</sup> Application No 44024/13 ECHR.

<sup>19</sup> The 37<sup>th</sup> session of the United Nations Human Rights Council (UNHRC) was held on 26 February – 23 March 2018, at the Palais des Nations, in Geneva, Switzerland. At the 19<sup>th</sup> meeting, on 6 March 2018, the Special Rapporteur on the sale and sexual exploitation of children, Maud de Boer-Buquicchio, presented her report (Boer-Buquicchio, 2018).

be brought into force. Safeguards may include prohibition of commercial surrogacy unless proper regulations are put in place to ensure that the prohibition on sale of children is upheld. There should be strict regulation of commercial surrogacy, which ensures that the surrogate mother retains parentage and parental responsibility at birth and that all payments made to the surrogate mother are made prior to any legal or physical transfer of the child and are non-reimbursable<sup>20</sup>. The best interests of the child should be of paramount consideration in making any decision by the competent authorities and the legal status of the surrogacy arrangement in national or international laws should not make any difference in this aspect. All financial arrangements and intermediaries should be carefully reviewed and regulated by competent authorities. It is also suggested that any international regulation that is developed must cover aspects of both Public International Law as well as Private International Law.

The report further suggests that focus should be on the “Rights of the child” and not “Right to a child”.<sup>21</sup> It is aptly suggested that other Human Rights enablers such as the Committee on the Rights of the Child and the Committee on the Elimination of Discrimination against Women, and United Nations must aid in research on surrogacy and its impact on the human rights of women and children and to prevent their abuse and violation.

As far as international collaboration on surrogacy is concerned, intergovernmental bodies such as the Hague Conference on Private International Law are taking steps towards framing internationally accepted rules to recognize parenthood of children abroad through surrogacy. However, it may not be easy to come to an international agreement due to the widely differing attitudes towards surrogacy in different jurisdictions.

### **The Indian Experience with Surrogacy**

India’s tryst with surrogacy can be traced to the beginning of the 21<sup>st</sup> century. India became a hub of surrogacy with all conditions conducive to its growth (Bindel, 2015). There were qualified doctors, reliable medical facilities and women ready to carry other people’s babies for a fraction of an amount that would have to be paid to their counterparts in a developed nation. It grew to a 400-million-dollar business (Kumar, 2019).

As the surrogacy industry grew there were growing concerns of exploitation of women who became surrogates, of the commodification of motherhood and human rights abuses. Many surrogate mothers used to sign contracts agreeing that even if they were to be seriously injured during the later stages of pregnancy, or suffer any life-threatening illness, they would be “sustained with life-support equipment” to protect the fetus. Further, they usually agreed to assume all medical, financial, and psychological risks—releasing the genetic parents, their lawyers, the doctors and all other professionals from all liabilities (Desai, 2012).

India saw the case of *Baby Manji Yamada v. Union of India and Another* (2008), where baby Manji Yamada, a child born via the surrogacy procedure was stranded in India for at least three months after her birth due to lack of clarity about her citizenship. She was neither an Indian citizen nor Japanese and her intended parents had separated before her birth. Her intended mother did not desire to have her custody. Her father did, but he had to leave India as his visa had expired. The case was resolved after she was granted a visa on humanitarian grounds. The case was filed

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<sup>20</sup> “The surrogate mother should have non-exclusive parentage and parental responsibility at birth, which would ensure her freedom of choice, thus protecting her autonomy and removing the sale component.”: Statement by Ms. Maud De Boer – Buquicchio in 37th session of UNHRC.

<sup>21</sup> *Supra* S. No 18-p.20.

by the baby's genetic paternal grandmother, Emiko Yamada on behalf of baby Manji, challenging the Habeas Corpus writ passed by the High Court of the state of Rajasthan for production of Baby Manji. In the judgement, while defining the commercial surrogacy, the Supreme Court of India observed "This medical procedure is legal in several countries including in India ...". The authority on which the learned judges have relied upon while making this observation is not clear. This observation seems to be a mere obiter dictum of the case. In fact, the decision of the court in this case has only been to direct the aggrieved parties to raise the matter before the Commission for Protection of Child Rights under the Protection of Child Rights Act 2005 of India. In a similar case of Baby M in USA, the New Jersey Superior court dwelt upon the legality of surrogacy arrangements. The Supreme Court of India, in Baby Manji case, missed an opportunity to deliberate upon the legality of the surrogacy arrangements and the rights of the child. However, this judgement is widely treated as an authority in support of the fact that commercial surrogacy is indeed legal in India.

Shortly thereafter, in the case of *Jan Balaz v. Anand Municipality* (2010), decided by the Gujarat High Court, important questions about the legal status of surrogacy contracts and of the child born therefrom were raised. The court had highlighted the void in the regulatory regime in this regard and observed that "in India there is no law prohibiting artificial insemination, egg donation, lending a womb or surrogacy agreements". The court went on to hold, "in the present legal framework, [we] have no other go but to hold that the babies born in India to the gestational surrogate are citizens of this country" even though the commissioning parents were both foreign citizens.<sup>22</sup>

The governmental approach to surrogacy has also undergone a transformation over the years. Before 2002 there were no guidelines on the subject. In 2002, the Indian Council of Medical Research (hereinafter ICMR) proposed its draft national guidelines for the accreditation, supervision, and regulation of Artificial Reproductive Technology (ART) clinics in India. These guidelines received the approval of the Ministry of Health and Family Welfare in 2005. It must be highlighted that commercial arrangements were not prohibited under these guidelines. In any case, these guidelines were only applicable to the medical fraternity involved in ARTs. With the aim of providing a comprehensive legal framework for the regulation of this medical procedure, and for defining the rights and duties of stakeholders in a surrogacy arrangement, the draft ART Bill 2008 was initiated, which, apart from laying down provisions for the regulation of ART clinics, also for the first time, enumerated the rights and duties of patients, donors, surrogates and children born through ART. Interestingly, the original draft of the ART bill allowed the surrogate mother to receive monetary compensation from the intending parents for agreeing to act as a surrogate. The ART bill also allowed the commissioning parents to advertise seeking surrogacy arrangements and there was no requirement of the surrogate mother being a close relative. Although the bill has not been enacted the draft indicates that till 2008, the legislative intent was to regulate but not to prohibit commercial surrogacy. However, this opinion changed and the first regulatory intent for banning commercial surrogacy can be found in the Report 228 of the Law Commission of India, which was submitted to the Ministry of Law and Justice in August 2009. The Ministry of Home Affairs issued notifications in 2012 and 2014 that restricted the grant of medical visa for commissioning of surrogacy only to certain categories of "eligible" commissioning parents.

Subsequently, the Ministry of Home Affairs issued another notification on 3<sup>rd</sup> November 2015, which banned the issue of visa to foreign nationals for commissioning surrogacy in India.

<sup>22</sup> Available on <https://www.casemine.com/judgement/in/56b48efa607dba348fff6a16> (last accessed: 08.01.2021). An appeal against this judgement is under consideration of Supreme Court of India as on 08.01.2021.

Concurrently Ministry of Commerce has banned the import of embryos except for the purpose of research. Therefore, effectively no kind of surrogacy commissioned by foreigners is possible under the current regulatory regime in India.

SRB 2019, as discussed in the next section, goes a step further and seeks to ban commercial surrogacy altogether and not merely when commissioned by foreign nationals.

### *The Surrogacy (Regulation) Bill, 2019*

The Surrogacy (Regulation) Bill 2019 is the successor to the Surrogacy (Regulation) Bill 2016, which could not be passed by the Parliament of India. The bill defines surrogacy as a practice whereby one woman bears and gives birth to a child for an intending couple with the intention of handing over such child to the intending couple after the birth. It seeks to prohibit *commercial surrogacy* which includes trading human embryos and gametes and buying and selling of the services of a surrogate by a monetary reward except insurance but allows *altruistic surrogacy* which involves no monetary incentives or rewards to the surrogate mother other than the medical expenses incurred and insurance coverage.

SRB 2019 envisages that surrogacy related medical procedures shall take place only at designated surrogacy clinics. It also regulates them through registration and prohibits taking services of unqualified professionals or inducing women to become surrogates through advertisements or other means. It bans these clinics from conducting abortions on surrogate mothers except with their consent and authorization of appropriate authority. Storage of embryos and human gametes and sex selection of surrogate children is also prohibited.

A surrogate mother will have to obtain a certificate of eligibility from the appropriate authority by fulfilling conditions like being a close relative of the intending couple. She should also be a married woman in the age bracket of 25 to 35 years and have a child of her own. A woman can become a surrogate only once in her lifetime. She must also possess a certificate of medical and psychological fitness for surrogacy. Further, the surrogate mother cannot provide her own gametes for surrogacy, hence providing for only gestational surrogacy.

The intending couple would also need a ‘certificate of essentiality’ and a ‘certificate of eligibility’ issued by the appropriate authority in order to be eligible to opt for the procedure. A certificate of essentiality will be issued only if infertility affects the intending couple and certain other conditions.

The certificate of eligibility to the intending couple is issued to the couple if they are Indian citizens and married for at least five years, between 23 to 50 years old (wife) and 26 to 55 years old (husband), they cannot have any children excluding mentally or physically challenged children.

A child born out of a surrogacy procedure will be deemed to be the biological child of the intending couple. 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 or birth defect, any other medical condition, the defects developing subsequently, the sex of the child, or conception of more than one baby, and the like.<sup>23</sup>

SRB 2019 clearly states that the surrogacy procedure is permitted only for intending parents who are proven to be infertile and not for commercial purposes. Producing children for sale, prostitution, or other forms of exploitation are not permitted. Offences and penalties have been prescribed for advertising commercial surrogacy, exploiting the surrogate mother,

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<sup>23</sup> See s.7 of Surrogacy Regulation Bill, 2019 (India)



abandoning, exploiting or disowning a surrogate child and selling or importing human embryo or gametes for surrogacy.

### **Ethical & Legal Issues Related to Surrogacy: A Critique of the Proposed Surrogacy Bill of India**

Surrogacy arrangements raise several issues both from the ethical and legal perspective. At the outset a discussion on the relevance and desirability of surrogacy and the need for its regulation is required. While the concept of family has been fluid throughout history and across cultures, the development of reproductive technology over recent decades has seen significant changes in our understanding of family, parenthood, and the creation of life itself.<sup>24</sup> Society is now more accepting of heterogeneous families ranging from gay couples and their children to single parents who do not feel the necessity to marry before having children of their own. Feminists, legal professionals, nations, and international organizations have diverse views and opinions on surrogacy as a means of having children.

Feminists, while understanding gender roles and inequalities in the society have expressed their views on reproduction and contracted or surrogate motherhood and its implications. Among feminist perspectives, radical-libertarian and the radical-cultural feminists have dichotomous views about reproductive freedom and surrogacy.

Radical-libertarian feminists (Tong, 2018) believe that collaborative reproduction arrangements from contracted or surrogate motherhood, increase women's reproductive freedom. Surrogates and commissioning parents can share responsibilities in rearing the child that they collaboratively bring into this world and which none of them could have individually accomplished. Although they take into consideration the aspect of autonomy of a woman over her body, they do not take into consideration that such a collaboration seldom occurs, more so when the surrogate belongs to a developing country and is paid for the surrogate pregnancy.

Radical cultural feminists (Tong, 2018) are opposed to surrogate motherhood. Their opposition to contracted motherhood is based on the grounds that it creates divisions amongst women, the economically privileged, and the disadvantaged. The privileged can hire the disadvantaged to fulfill their reproductive needs, adding gestational services to the child rearing services that the latter have traditionally provided. The social acceptance of this practice will perpetuate the notion that the wombs of poor women can be used as a service (Bindel, 2015).

The desire of couples (or single parents) to have a child cannot overshadow the externalities that may be generated by adopting surrogacy. There is no such thing as "Right to a child" and its regulation, even curtailment, of access to surrogacy is valid wherever needed.

At the same time, while curtailment of access to surrogacy is valid, such curtailment should always be based on just, fair, and reasonable grounds. There is stark arbitrariness in the way the SRB 2019 restricts the people who can use surrogacy to have a child. The bill provides that only married couples of a particular age group, who have obtained a certificate of eligibility from the designated authority are be allowed to opt for this mode. Such a certificate can only be issued to infertile couples. The definition of infertility as the inability to conceive, is also very restrictive as there may be several other reasons that the couple may not be able to, or may not wish to,<sup>25</sup> conceive. These conditions make opting for this route a difficult choice. In a society that has

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<sup>24</sup> See (Pascoe, 2018). John Pascoe is the former Chief Justice of the Family Court in Australia.

<sup>25</sup> See, for example, Baby M's case where the commissioning parents could conceive on their own, but decided not to, on account of the mother suffering from Multiple Sclerosis, which could have been inherited by the child.

become more open to alternative sexuality<sup>26</sup>, late marriages and women making the choice of remaining single, the bill fails to augment women's rights and support people's choices, in the name of regulation. The option of surrogacy should be made available to every lawfully married infertile couple and to every Indian citizen whether married or single including not married; separated; widowed irrespective of their ability to bear the child.<sup>27</sup>

Having established the need for regulation of surrogacy, the first and foremost aspect that should draw the attention of law makers is that of the legal status and the rights of the child born out of surrogacy. Many times, adoption is compared to surrogacy, perhaps because both the means are often used in circumstances where parents cannot have a child of their own by the natural process of reproduction. But there is an inherent difference between the two, which must be highlighted to emphasize that surrogacy is not a procedure adopted for the welfare of the child. From the perspective of the rights of the child, adoption is a welfare measure where the needs of an already existing child are taken care of by adoptive parents, although it cannot be denied that in the process, they obtain the emotional satisfaction of parenthood. In surrogacy, on the other hand, a child is "produced" on the explicit desire of the commissioning parents to have a fulfilling family life.

This should not, in any way, lead to commodification of the child so born. She is a human being and must be afforded all avenues to avail her rights as a child. SRB 2019 takes the right step by laying down that a child born out of surrogacy shall be deemed to be the child of the commissioning parents, thereby giving her rights, as against the commissioning parents, for adequate care and maintenance necessary for her growth and development.

There remains a possibility that some parties may covertly enter into illegal arrangements to have a child through surrogacy. While punishment has been laid down under the bill for this offence, no mention is made about the rights of the child born in such cases. One option is to give the commissioning parents the custody of child. This is the approach adopted by the European Human Rights Council in several cases, as discussed in previous sections. However, this defeats the very purpose of prohibiting such acts, as the commissioning parents know that they will get custody of the child despite the surrogacy arrangement being illegal. The other option is to give the custody to the surrogate mother on the grounds that she is the 'natural mother' in absence of any legal contract to the contrary. This is similar, to the position adopted in UK law where the surrogate mother has parentage rights and the child is adopted by the commissioning parents after her birth. This, however, may not be a suitable option either, considering that the surrogate mother may not be willing or possess the financial wherewithal to support and care for the child. A third option can be to give the custody of the child to the state. While fraught with the complex question of whether this is in the best interest of the child, the last approach seems to be the most logical and just as far as protecting the rights of the child are concerned. In deserving cases, the state can always, at a later stage and after due scrutiny, give the child to the commissioning parents in adoption.

After the child, the most vulnerable stakeholder in a surrogacy arrangement is the surrogate mother. Societal structures prevalent in countries like India are such that women often do not

<sup>26</sup> The Supreme Court of India decriminalized all consensual sex including homosexual sex in *Navtej Singh Johar v. Union of India* on 6<sup>th</sup> September 2018. Section 377 of the Indian Penal Code was declared unconstitutional.

<sup>27</sup> 102<sup>nd</sup> report on Surrogacy Regulation (2016) Bill, Presented to the Rajya Sabha on 10<sup>th</sup> August 2017.

realize their right to bodily freedom and surrogacy contacts are more of a family decision taken to pull the family out of poverty<sup>28</sup>.

Particularly in cases of commercial surrogacy, the relationship between the commissioning parents and the surrogate is fraught with inequity.<sup>29</sup> The surrogate, often from a disadvantaged background and without proper education, is not in a position to either understand completely the ramifications of the agreement she is about to enter into, nor has any bargaining position. Thus, she is prone to be, and indeed often is, exploited. Medical practitioners, looking for gains from the procedure, are also likely to influence the potential surrogate by misrepresenting or not disclosing all the relevant information. It is thus clear, that surrogacy agreements cannot be adequately treated under ordinary contract provisions and require special protective clauses for ensuring the interest and wellbeing of the surrogate mother. In this regard SRB 2019 proposes to ban commercial surrogacy altogether and permits only altruistic surrogacy and that too by a close relative of the commissioning parents.

However, there are concerns that such a ban only on commercial surrogacy may shift the market underground and such commercial surrogacies shall continue to flourish, albeit illegally. If there are eager parents and women ready to become surrogates, arrangements legal or illegal will be made<sup>30</sup>. If the law regulates efficiently, there will be a lesser chance of the surrogacy industry flourishing in black markets and of exploitation of surrogates. If surrogacy is banned for large segments of the society, there is every possibility that people will resort to satisfying their needs through suitable illegal arrangements.

Altruistic surrogacy is not without dangers either. In the Indian context, the woman is seldom the final decision-maker in these matters. Where the family feels the need for a child through surrogacy, there is the significant possibility that soft coercion may be called upon to convince a woman in the family to accept being the surrogate. In any case, as the Swedish report<sup>31</sup> suggests, even after legalizing altruistic surrogacy, commercial surrogacy will, in all likelihood, continue to thrive illegally.

The definition of a “close relative” does not exist in SRB 2019. One wonders why altruistic surrogacy can be carried on only by a close relative that is also a married woman. These provisions place undue restrictions on the bodily autonomy and reproductive rights of women who would like to be surrogates for friends and family but do not fulfill these conditions. The government has offered no logical rationale for why unwed and childless women should not be surrogates. With the absence of such a justification, the decision of any physically and mentally fit woman to go ahead with a surrogacy arrangement should be her decision alone (Kumar, 2019).

SRB 2019 only permits gestational surrogacy, which may have two consequences for the surrogate mother. On the one hand, there is less chance of the surrogate mother developing a bond

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<sup>28</sup> See (Pande, 2010). She notes that in Indian families, the decision to enter into a surrogacy arrangement is often considered a family/team effort ignoring the fact that the woman working as a surrogate carries the physical responsibilities and much of the emotional labour. She succinctly points out that disproportionate emphasis is laid on the “morality” and “generosity” of husbands in giving permission to their wives to be surrogates and that the women feel that they must overcompensate for this generosity.

<sup>29</sup> In an economic analysis of contracts for surrogate motherhood by Posner (1989) states that surrogacy is not exploitive in the sense of making the surrogate mothers worse off, but a systematic study is needed to answer questions including: Are surrogate mothers responsible adults making apparently rational decisions? In India, the answer to this question is a definite “No”.

<sup>30</sup> An example is the case of continued sex selection in India even after passing of the Pre-Conception and Pre-Natal Diagnostic Techniques Act, 1994. When demand and supply persist, circumventing regulations is not impossible.

<sup>31</sup> Supra S. No 8

with the child who is genetically different from herself (perhaps inspired by the circumstances that arose in Baby ‘M’ case, where the surrogate mother was also the genetic mother and refused to surrender the baby to the commissioning parents). On the other hand, there may be greater and graver repercussions on a surrogate mother’s health as the rejection rate of such embryos is much higher than embryos from the biological mother.

A selective ban therefore would be counterproductive, particularly in the Indian scenario. One is, therefore, constrained to make a choice between two antipodal alternatives of a complete ban or a permissive environment for all forms of surrogacy, including commercial surrogacy (though in a regulated fashion). A technology that satisfies people’s needs will find its users even if it is illegal. It therefore appears prudent to opt for permitting all forms of surrogacy, but with strict controls, to prevent exploitation of the surrogate mothers.

## Conclusion

The modern state has taken a commanding role in the regulation of family life. These functions of the state are based on the premise that the state should act as the guardian of the weak and unprotected. In India, specialized tribunals such as the Juvenile Justice Boards and family courts perform these functions. The social importance of family and the responsibility which the State has traditionally felt towards children have always been the driving principles for adoption and enactment of legislations related to family.

Various kinds of regulations on surrogacy in the form of statutes exist around the world today. India is at a crossroads where it must choose a suitable form of regulation; further procrastination in this matter cannot be tolerated. India seems to have chosen a model of regulation through the SRB 2019 which has its own pros and cons discussed in this article. This analysis led to the conclusion that the provisions of the SRB 2019 need amplification and modifications in some respects. A clear rule regarding the custody of a child born through an unlawful surrogacy is essential. I suggest that the custody of such a child should fall upon the state. I also recommend extending the avenue of surrogacy as means of having children to same sex couples and single persons. My study shows that curtailing compensated surrogacy may turn out to be counterproductive. It is also recommended that artificial restrictions on access to surrogacy like the requirement of surrogate being a close relative and her being a married woman can be dispensed with. A definition of infertility may also be introduced in consonance with that adopted by the World Health Organization (ICMART and WHO, 2009).<sup>32</sup>

A thorough debate, keeping in mind the socio-economic realities of the Indian society, is needed before the SRB 2019 becomes an Act, otherwise India will end up with another piece of legislation which is either unimplementable or which the society disapproves of.

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<sup>32</sup> WHO-ICMART glossary defines infertility as “a disease of the reproductive system defined by the failure to achieve a clinical pregnancy after 12 months or more of regular unprotected sexual intercourse”. The Indian Bill on the other hand defines infertility as “the inability to conceive after five years of unprotected coitus or other proven medical condition preventing a couple from conception” (s.2(p) of SRB 2019).

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