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Visibilising Vulnerability through a Constitutional Lens

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Thesis Abstract – English

Surrogacy, the act of a woman birthing a child for another, stands apart from other reproductive technologies due to its very nature and the circumstances of its application: it creates a triangular relationship between the surrogate, the intending parents and the baby born in an arrangement fraught with conflicting needs, leading to tension. The surrogacy industry in India has burgeoned since 2002 and at its zenith in 2014 was said to be worth over INR 2000 crores or USD 500 million. In 2005-2006, the Indian Council for Medical Research (ICMR) anticipated that profits from the surrogacy industry would reach USD 6 billion in the coming years. However, this did not come about as India has started changing its policies on surrogacy from highly supportive ones to a near ban. In these developments, the impact for and on woman acting as surrogates has not been considered.

This thesis facilitates the understanding of how visibilising the vulnerabilities of surrogate mothers through a constitutional lens can impact the trajectory of policy development on surrogacy in India. Its' endeavour is that the eventual legislation on surrogacy in India be representative of its most vulnerable stakeholder - the surrogate. To do this, the voice of the surrogate needs to be made visible - a process referred to in this thesis as visibilising or visibilisation.

The results help us conclude that that the transnational dimensions to the issue of surrogacy and the rhetoric they have generated have distracted attention from the core concerns of ethics in clinical practice and legal practice when treating surrogate mothers. The 2019 Bill (a proposed law on surrogacy) is causing a juxtaposition of conditions, which are more in sync with commercial arrangements than onto an altruistic arrangement through close relatives and this results in discord and gaps between the objective of the regulation and its practical impact. We also found that the proposed law may not be constitutionally sound.

Here, in the thesis we develop a Constitutional lens through which the various vulnerabilities of a surrogate can be visibilised and conceptualized as the Vulnerability Construct, and we brought up the importance of legal vulnerability and the role it plays in ameliorating or exacerbating vulnerability. We have reviewed the disconnects made apparent by the Prevention-Proliferation-Prohibition spectrum which showed all of the elements of each part of the spectrum considered with regard to surrogacy.

The thesis then suggests how the law and the legislators might bridge the divide between the surrogate and the law and strengthen her in a manner that is constitutionally sound and derives from a strengths-based approach that is in line with the objectives of a welfare state.