“You know my name, not my story. You've heard what I've done, but not what I've been through.”

— Jonathan Anthony Burkett, Neglected But Undefeated
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Printing: Kaushal Graphics Art, New Delhi


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VISIBILISING VULNERABILITY
THROUGH A CONSTITUTIONAL LENS:
Revisiting Policy Making For Surrogacy In India

ACADEMISCH PROEFSCHRIFT

ter verkrijging van de graad Doctor aan
de Vrije Universiteit Amsterdam,
op gezag van de rector magnificus
prof.dr. V. Subramaniam,
in het openbaar te verdedigen
ten overstaan van de promotiecommissie
van de Faculteit der Bètawetenschappen
op maandag 11 november 2019 om 09.45 uur
in de aula van de universiteit,
De Boelelaan 1105

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geboren te Lucknow, India
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copromotor: dr. S.R. Pathare
In dedication to those that take on a hobson’s choice with
dignity and grace and triumph over life’s ignominies...
and to my parents for all of what they are and all of what they
mean to me.
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Devika Singh, D Nadkarni and J.G.F Bunders, ‘The Forced Gift: Birth of an Indian Position at Odds with the Surrogate Mother’ (Accepted for an edited volume titled ‘Surrogacy, the Reproductive Technology: Socio-Legal and Ethical Issues, Babasaheb Bhimrao Ambedkar University, Lucknow)

Chapter 7

Chapter 8
The idea for this thesis came to me during a particularly irksome conversation that had nothing to do with surrogacy. It was 2012, and I was working at the National Mission for Empowerment of Women, Ministry of Women and Child Development, Government of India. Predominantly a think tank that worked as a convergence node between various ministries to keep alive women’s issues on their agendas, I headed the National Mission’s Gender Rights, Gender-based Violence and Law Enforcement group.

It was part of my job description to have conversations with many stakeholders. This particular conversation was about the declining child sex ratio in India and why the PCPNDT Act is failing to help reverse that trend. As I was beginning to explain to the representative of the ministry concerned that we need to adopt a more long-term approach by increasing the intrinsic value put on women by providing them with equal property/inheritance rights, reconsidering patri-location, etc., he began to talk about implementing a policy involving the compulsory registration of pregnancies and the monitoring of pregnant women through the panchayat to ensure abortion does not take place, and how pregnant women who refused to register their pregnancy with the panchayat by the third month could be named and shamed in panchayat gatherings on the assumption that they were hiding the pregnancy to do a sex-selective abortion.

As a lawyer, I was aghast, and I blurted – that defeats the right of privacy and reproductive freedoms... He asked me which laws enshrined those rights, and I answered – It’s all in the Constitution (of India), then he laughed and said, it will be years before this policy is challenged in the Supreme Court. We need to think about what can be done immediately to improve numbers.

Pragmatism or utility has often dictated law and policy making in India. We usually leave it to the Supreme Court of India to act as the conscience keeper and apply the
Prologue

touchstones of the Constitution of India. This sometimes allows bad laws to be made and inequities to accumulate that may be halted by the Supreme Court years later but can never be undone.

The question is, should we wait for courts to weed out bad law or should we look at the Constitution of India as a starting point during the development of the law itself? How can the Constitution of India be taken into account at an early stage of law making?

This is where a question emerged that would eventually lead me to my thesis – "How can we make the Constitution of India work in daily life law-making practices?"

This was a broad question, and any attempt to answer it would be impossible in the space of a singular thesis. To narrow the focus, I decided to take on the question in the area of surrogacy in India.

***
CHAPTER 1 - INTRODUCTION

“A ban is an overreaction and difficult to implement. When you ban something, you just drive the whole business underground.”
- Ranjana Kumari, Head of Centre for Social Research

“Our concern now is, how do you regulate a ban? The surrogate women will again be the ones who get affected the most.”
- Deepa V. of Sama, a New Delhi-based resource group that works with issues of women and health

“They call us baby-making machines. But they will not call us that when we bear our husband’s child one after another. For us, there is little difference between the two.”
- Unnamed surrogate mother in a hospital in Anand, Gujarat to Hindustan Times

“In any case, selling your body should not be a livelihood option, and the new legislation will tighten the noose.”
- Dr. Soumya Swaminathan, Architect of the draft Surrogacy (Regulation) Bill, 2016

***

1.1 SURROGACY – AN INTRODUCTION

New technologies in human genetics give humanity a power of intervention on itself and its environment that has never been seen before; a power so huge that it is still

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2 Sayantan Bera, Nikita Doval, ‘India Govt Moves to Ban Commercial Surrogacy’ (LiveMint, 25 August 2016)
3 ‘Motherhood and morality (n 1)
not resolved whether it is wisdom to attempt its regulation and supervision or to simply surrender to its inevitability. The advent of germinal technology, the unraveling of the human genomic code – these advances have spurred the evolution of humankind. In conjunction with germinal technology, the advent of assisted reproductive technologies (ARTs) such as artificial insemination, surrogacy and in-vitro fertilization (IVF), have indelibly changed human global interpersonal relationships in the interface of technology, health and society.

The popular usage of surrogacy is to describe the act of a woman birthing a child for another. Surrogacy, though often clubbed under the umbrella of ARTs, is actually an arrangement and not a technique as it instrumentalizes several types of ARTs to achieve its goal. It 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.

1.1.1 Surrogacy, historically

Historically, examples of rudimentary forms of surrogacy are recounted in the Old Testament of the Bible. The book of Genesis relates the story of Sarah asking Abraham to lie with her servant Hagar and get her pregnant, and the child resulting from this union was brought up by Abraham and Sarah. Similar arrangements were even noted between Leah and Rachel, the wives of Jacob who had similar arrangements with their servants. Technically, such examples are not of surrogacy but of consented adulterous relationships. However, as such relationships were only consented to for the objective of bearing children, they fall within the parameters of surrogacy.

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5 A term used to broadly define human self-design through medicine and biology, e.g. Cloning, germline engineering, PGD genetic screening and embryo selection and other such emerging reproductive technologies


To “surrogate” means “to replace or substitute one person or thing for another”. In this sense, the use of the phrase “surrogate motherhood” or “surrogate mother” is imprecise as in terms of motherhood, it is the intending parent who replaces the natural mother (who biologically births the child), thus making the intending parent the true surrogate.

This position can be aptly postulated through an incident found in Indian mythology. Krishna was born as the eighth child of Devaki, sister of King Kamsa who, due to a prediction that one of Devaki’s children would kill him, had imprisoned her and her husband and seized each of her children on birth. To save Krishna’s life, he was secretly exchanged for a cowherd’s daughter and brought up by the cowherd’s wife Yashoda. Yashoda is recognized and revered as the surrogate mother to Krishna, and most stories surrounding Lord Krishna in his infant years are about the loving bond between him and his surrogate mother Yashoda. It is ironical that despite such examples, in modern-day usage, the term surrogate has come to describe a woman who is not a mother, but a womb donor in an industry created on the fixation of genetic lineage.

Throughout history, in several cultures, women external to a marital relationship have been used to bear children for women who were unable to conceive. In such cases, the surrogates would often be a second wife, a concubine or a maid. The practice of employing wet nurses, as was prevalent in Europe in the Middle Ages, with the natural mother making only occasional visits, is also a form of surrogacy.

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10 ibid.
Chapter 1

However, surrogacy assumed a new meaning when medical techniques were developed that were able to divorce conception first from sex and later from gestation.

1.1.2 The New Face of Surrogacy

With In Vitro Fertilization (IVF), it became possible to separate the genetic mother from the gestational mother. Legally, this split meant that the connection between the surrogate and the baby would be far less powerful than under traditional surrogacy arrangements. The separation of eggs and wombs facilitated a market for surrogacy, and created the conditions in which it could thrive. It also marked a significant move away from the discursive modes that guided earlier forms of traditional surrogacy.\(^\text{12}\)

In traditional surrogacy, as the gestational mother\(^\text{13}\) also provided the genetic material, intending parents paid close attention to finding a woman with the ‘right’ genetic makeup which matched with their own or with the qualities they wanted in the resulting child. As gestational surrogacy became an option, the intending parents no longer cared about the gestational mother’s genes. In fact, some studies have documented an increasing preference to have gestational mothers of a race or colour completely distinct from the genetic heritage of the child being gestated so as to avoid parentage being challenged and also to weaken the maternal bond created between the child and the gestational mother.\(^\text{14}\)

Moreover, traditional surrogacy with Intra-Uterine Insemination (IUI), by far the easier medical process with a relatively low incidence of harm to the surrogate, did

\(^{12}\text{Amrita Pande (n 9)}\)

\(^{13}\)For the purposes of this thesis, the parties are referred to as **gestational or biological mother** (for the woman who births the child and has hitherto been described as a surrogate mother) and **social parent or intending parent** (for the person who intended that the child come into existence for the purpose of raising the child socially).

not involve as much pharmacological dependence compared to IVF, which is required in gestational surrogacy. However, as the medical market embraced gestational surrogacy, it was posited as being a convenient, hassle-free for the intending parents, thus making it their preferred mode of surrogacy.

The move from traditional to gestational surrogacy allowed the surrogacy market to go global, making it possible for couples to hire gestational mothers in India despite the huge difference in genetic make-up, looks and other attributes. In the business of surrogacy, it is the phenomenon of globalization that created both demand and supply. In a positive sense, the trend of reproductive tourism was a direct consequence of globalization, which has made nations part of one “knowledge society”. In a negative sense, globalization also led to growing disparities between those who can grab opportunities and those who are left behind in the race.\(^\text{15}\) Progressive liberalization of trade in health services in developing countries contributed to widening inequalities in health and healthcare, increasing disparities between urban and rural areas and between rich and poor. It is against this context that reproductive tourism became increasingly viable and financially sustainable in India, facilitating a willing pool of persons for whom surrogacy was among the few available options for economic empowerment.

1.1.3 The Surrogacy Industry in India

The surrogacy industry in India has burgeoned since 2002 and at its zenith in 2014 was said to be worth over INR 2000 crores\(^\text{16}\) or USD 500 million. In 2005-2006, the Indian Council for Medical Research (ICMR) anticipated that profits from the

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surrogacy industry would reach USD 6 billion in the coming years.\textsuperscript{17} Within reproductive tourism, surrogacy has been described as a “pot of gold”.\textsuperscript{18}

As an industry, the arrangement of surrogacy expanded to include several more factors – key was the Assisted Reproductive Technology (ART) Clinic, which conducted the medical procedures on the intending parent(s) and the surrogate mother. Surrogacy agencies and lawyers helped source and screen the surrogates, bring together the intending parent(s) with the ART Clinic, and cobble the dynamics of the arrangement legally and practically. Often brokers would participate in this arrangement by introducing the surrogate for a fee that they collect from the ART Clinic and the surrogate. Brokers are usually husbands of surrogates or even women who have acted previously as surrogates.

Surrogacy hostels that could be in-house with the ART Clinics took care of the surrogates during the period of the pregnancy. Some surrogate hostels allowed children to live with surrogates and permitted family visits, and others regulated interactions. It has been documented by other researchers that surveillance and regulation are sometimes selling points\textsuperscript{19} Some US clients hire Indian surrogates because most surrogates stay either in the clinic or in the supervised homes and that kind of control would just not be possible in the United States.\textsuperscript{20}

Fancier hotels sprung up next to popular ART Clinics to house the intending parent(s) during the procedures, with in-house travel agencies providing sightseeing packages.

\textsuperscript{17} Aditya Ghosh, ‘Cradle of the World’ Hindustan Times (23 December 2006) 18
\textsuperscript{18} Government Of India, Law Commission Of India, Need For Legislation To Regulate Assisted Reproductive Technology Clinics As Well As Rights And Obligations Of Parties To A Surrogacy, (Report No. 228, August 2009)
\textsuperscript{20} ibid
In 2011, it was documented that an average surrogate package was available for anything between INR 7,00,000 to INR 15,75,000 in India. In sharp contrast, the amount paid to a surrogate was INR 1,00,000 – 3,50,000. In the final calculation, in the business of surrogacy, the smallest player in the ART business was the surrogate, who received only about 15 to 20 percent of the total share. An overwhelming 80 to 85 percent actually went to the other players, including the ART clinics, independent infertility experts, surrogacy agencies, brokers and lawyers, some of whom our primary researcher extensively interacted with between 2010 and 2015.

Researchers have also documented an increasing domestic market for surrogacy. Parry Bronwyn, based on a 2015 ethnographic study, wrote that in Mumbai and Jaipur, most commissions are now coming from India's very rapidly gentrifying middle and upper classes, who now have the financial resources necessary to ‘outsource’ their reproductive needs.

1.1.4 The complexities involved in dealing with Surrogacy on a regulatory level

India has had little to no regulation of its thriving surrogacy market - the sole exception being a set of voluntary guidelines from the Indian Council for Medical Research for assisted reproductive clinics. A prohibition has been announced by the Government of India, but the law to bring about that ban has only been passed by the Lok Sabha and is yet to become law. In practice, surrogacy continues, and it

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21 Namita Kohli, ‘Moms on the Market, Sunday Hindustan Times (New Delhi, 13 March 2011)
is being reported that surrogacy contracts are even predated to cover the possibility of a future legal ban.25

The interactions that our primary researcher had with the doctors in charge, the persons running surrogacy agencies and the surrogates themselves led us to identify inequities not only in terms of payment to the surrogate mother but also in terms of treatment. It has been seen the world over that surrogacy arrangements create a conflict of rights and interests, and they may often result in exploitation of the surrogate, particularly those from economically disadvantaged backgrounds.

Yet, in 2015, when Indian regulators banned the availability of surrogacy to foreign nationals and also started taking steps towards banning commercial surrogacy outright and only allowing altruistic surrogacy arrangements, which involved a close relative of the intending couple acting as a surrogate, comingled amongst the voices of those decrying the prohibitionary stance were those of women who had acted as surrogates and even social workers who had worked amongst surrogates and researched their conditions.26

It appears that in the period of about a decade in which surrogacy was allowed to mushroom in India, unhindered by legislation, it created an expectation of being a labour option or opportunity. It also became a matter about the surrogate mother’s sexual and bodily autonomy – which meant allowing her to decide what is best for her.

The steps that the Indian Government has now taken of prohibition appear too simplistic to deal with the innate complexity of an industry that had been up and running for much too long. Also, anecdotally, the policy reversal of the Government of India has not been welcomed or supported by the women whom it had identified

25 National Human Rights Commission, Report of a Study to Understand the Legal Rights and Challenges of Surrogates from Mumbai and Delhi (Centre for Social Development, New Delhi)
as being exploited. This shows the clash or disconnect between the women who would have identified themselves as past or potential surrogates and the regulators.

Surrogacy as a technology-driven innovation challenges existing social thought on parenthood and existing legal concepts in family law. It raises questions in law on the identity of the mother as the legal identity of a parent shifts. This impacts the legal identity of the child. Surrogacy leads to a constant tension between the perspective of the gestational mother and the genetic mother – rights over genetic matter and bodily integrity compete for balance. When treated as a legal contract, surrogacy challenges the remedies available for breach of contract and raises questions about the morality of the contract itself. If premised in a labour framework, in a patriarchal society, women are more vulnerable where inequities exist in the surrogacy arrangement, and women belonging to disadvantaged socio-economic backgrounds are even more at risk in the arrangement. The socio-ethical concerns of exploitation in commercial surrogacy are premised on asymmetric vulnerability and the commercialization of women’s reproductive capacity to suit individualistic motives. 27 It is difficult to satisfy the touchstones of ethics in all these approaches—essentiality, non-commodification, informed consent or voluntariness.

India has seen multiple attempts to formulate regulation on surrogacy. Starting from the ICMR’s efforts in 2000, 2002, 2005, through its guidelines and attempts to draft legislation for Assisted Reproductive Technologies in 2008, 2010 and 2014, to the specific surrogacy regulation bill of 2016 – the journey has been long with many shifts in approach. However, that journey has not ended with any firm or satisfactory results. Even the latest attempts at prohibition have been severely critiqued by factions in the Government itself 28 and also the opposition. 29 It is criticised as out of

27Saravanan S., ‘An ethnomethodological approach to examine exploitation in the context of capacity, trust and experience of commercial surrogacy in India’ Philosophy, Ethics, and Humanities in Medicine: PEHM (2013) 8,10
29PTI, ‘Lok Sabha passes Bill which will ban commercial Surrogacy’ (News18, 05 August 2019)
sync with realities on the ground\textsuperscript{30} drafted without adequate stakeholder consultation,\textsuperscript{31} patriarchal\textsuperscript{32} in approach and moralistic.\textsuperscript{33} Concerns have been raised that a complete moratorium may well push the industry underground,\textsuperscript{34} putting the surrogate mother in a worse-off position.\textsuperscript{35}

Such criticism, after a period of more than 10 years has been invested in the development of a law on the subject, suggests a strong need for analysis. The fact is that so many changes have taken place in the regulatory position itself that this is a source of tension on its own.

What needs to be seen is whether the surrogate herself has become a victim of these tensions or whether the shifts have given her strength. It is possible that the correct viewpoint has not been found, or voices or actors have been ignored in this process. How can we suggest in policy making that central voices who may not have been heard on account of their unequal position in society are in fact heard and the legislation that comes about speaks to them and their needs while also being constitutionally sound?

Here I go back to the question that came to my mind when the idea of this thesis was born. Can the Constitution of India provide a better starting point and tempering of the legal position on surrogacy?

\textsuperscript{28}Department Parliamentary Standing Committee on Health and Family Welfare, Supra note 28

\textsuperscript{29}ibid

\textsuperscript{30}ibid

\textsuperscript{31}Deepanshu Mohan & Shivkrit Rai, ‘Surrogacy Bill: Patriarchal Mindset Shines through’ \textit{Deccan Herald} (01 January, 2019)

\textsuperscript{32}Karitekeya Bahadur, ‘Missing the Point on Surrogacy’ (\textit{Pragati}, 04 February 2019)

\textsuperscript{33}Sruthi Sagar Yamunan, ‘The Daily Fix: Surrogacy bill aims to end exploitation of vulnerable women-but has serious flaws’ (\textit{Scroll}, 20 December 2018)

\textsuperscript{34}Saumya Sahni & Aparimita Singh, ‘Surrogacy Bill exploits the people it seeks to protect’ (\textit{Delhi Post}, 26 December 2018)
1.2 **SURROGACY, THE CONSTITUTION OF INDIA & THE AIM OF THE THESIS**

“The Constitution of a country is, in essence, adjectival rather than substantive; it does not seek to prescribe what should be done, but how the authority of a government should be exercised. It is strictly procedural in character. The procedure thus laid down is always based on a specific political philosophy, which when it strongly emphasises the consent of the governed, will be the philosophy of democracy with its insistence on the necessity of free persuasion in time for every substantial decision for change in the order of things.”

In principle, the Indian Parliament makes laws, which are in accordance with the provisions of the Constitution, and the courts are the interpreters of the Constitution. In practice, the Parliament devotes only 20-25% of its time to legislative business. In 2009, 8 Bills were passed in less than 5 minutes (27% of the Bills passed by Lok Sabha in 2009). In 2008, 16 out of 36 Bills (excluding finance and appropriation bills) were passed by Lok Sabha in less than 20 minutes, most of them without any debate. In this period only 5 Bills were debated for more than 3 hours.

In the latest session of the Lok Sabha, 29 Bills were passed by Parliament, but only five of them were scrutinised.

As explained above, the law-making process on surrogacy is not recent. It has been in the making for more than 10 years. Despite this, after its passage in the Lok Sabha recently, it has been severely critiqued for flaws which range from not being

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38 [https://www.prsindia.org/](https://www.prsindia.org/)
workable\textsuperscript{41}, being myopic\textsuperscript{42}, refusing to recognize women’s agency\textsuperscript{43} to not being in sync with constitutional jurisprudence.\textsuperscript{44}\textsuperscript{45} The last flaw reflects events that unfolded in Utah, just days before the passage of the 2019 Bill on surrogacy, where a restrictive law on surrogacy was declared unconstitutional.\textsuperscript{46} Indeed, it is unclear if the Surrogacy Bill and its development in India have in any way engaged with the Constitution of India or even with its primary stakeholders.

In India, the subject of surrogacy has seen a lot of public discourse but been subject to limited academic study from a legal or constitutional viewpoint. A few ethnographic studies have been conducted,\textsuperscript{47} with some of the seminal work on the lives and circumstances of Indian surrogates being done by Amrita Pande.\textsuperscript{48} She introduced the concept of “sexualized care work”\textsuperscript{49} to describe a new type of care work – commercial surrogacy. Through the interviews she conducted amongst surrogates in India, she concluded that a high degree of sexualized stigma surrounds the act of commercial surrogacy. It is often compared to sex work, and rather than independent workers, the surrogates themselves and the industry that surrounds them reinforces their primary identity as dependent mothers.

\textsuperscript{41}Himani Chandna & Apoorva Mandhani, ‘Restricting surrogacy to relative won’t work, doctors say as bill is tabled in Lok Sabha’ \textit{(The Print}, 16 July 2019) \texttt{<https://theprint.in/india/restricting-surrogacy-to-relatives-wont-work-doctors-say-as-bill-is-tabled-in-lok-sabha/263285/>} accessed 07 August 2019
\textsuperscript{42}Aloka A Dutta, ‘Surrogacy Regulation Bill 2018: 8 questions that we should be asking’ \textit{(Youth ki Awaaz}, January 2019) \texttt{<https://www.youthkiawaaz.com/2019/01/surrogacy-regulation-bill-2018-8-questions-that-we-should-be-asking/>} accessed 07 August 2019
\textsuperscript{45}Sruthi Sagar Yamunan, Supra note 34
\textsuperscript{46}Ben Winslow, ‘Utah Supreme Court says law banning same sex couples from gestational agreements is unconstitutional’ \textit{Fox13} (Salt Lake City, 02 August 2019) \texttt{<https://fox13now.com/2019/08/01/utah-supreme-court-says-law-banning-same-sex-couples-from-gestational-agreements-is-unconstitutional/>} accessed 07 August 2019
\textsuperscript{48}Amrita Pande(n 9)
\textsuperscript{49}Amrita Pande (n 9)
Amrita Pande’s research shows us that surrogacy in India needs to be analyzed beyond the Euro-centred and ethics-oriented framework. In a developing country like India, concepts like autonomy, choice and informed consent are often misplaced and not truly understood in context with a woman’s position in Indian society and her actual circumstances, which may be quite contrary to free will. The stigma that surrounds any act that pertains to a woman’s sexuality could lead to her being marginalized and thus unable to represent herself in a truly autonomous manner without fear of censure. Moreover, the dynamics of poverty render surrogacy a survival strategy\textsuperscript{50} and a temporary occupation for poor women, who are systematically recruited by agencies and middlemen with no accountability to the system of responsibility towards the intending parents or the surrogate. This in turn renders the surrogate vulnerable to exploitation and also limits her from pricing her reproductive capacities freely. In order to address the issues surrounding surrogacy, it is necessary not to view it through the blinkered vision of morality or ethics, but to understand it in the Indian context as a structural reality with real actors and real consequences.\textsuperscript{51}

Despite the extensive public discourse on surrogacy, there is a dearth of scientific articles or legal analysis of the legislative journey undertaken by India so far in its attempts to regulate it. Some works on the subject are “Regulation of surrogacy in India: whenceforth now?”\textsuperscript{52} and “Ending commercial surrogacy in India: significance of the Surrogacy (Regulation) Bill, 2016,”\textsuperscript{53} which hold diametrically opposing views. In “Insight into Different Aspects of Surrogacy Practise”\textsuperscript{54} the authors speak of legal requirements such as counselling, drawing up of contracts and submission of

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supporting documents, but in a very rudimentary manner. Raywat Deonandan explored opportunities for policy development in his work\(^55\) on reproductive tourism and international surrogacy, but his work became dated with the drastic change in India’s legal position in 2014. The case was similar with Dr. R. S. Sharma’s\(^56\) writings\(^57\), when the ART Bill proposed by the ICMR was completely discarded.

Insufficient work has been done that bridges social research amongst surrogates with legal theory, and hence a gap has been created between realities on the ground and regulatory action, leading to the disconnect described above and to the 2019 Bill being described as a casual approach to a serious concern.\(^58\) For the further development of surrogacy regulation, it is imperative that this gap be bridged.

This would allow a more nuanced analysis and the development of a legal position that moves beyond a universalistic moralizing position\(^59\) and develops the concept and arrangement of surrogacy in the more transparent and non-stigmatized context that is highly pertinent to surrogate mothers, who have been identified as key stakeholders that the law should aim to save from exploitation.\(^60\)

The aim of this thesis is, hence, to make an explicit attempt to operationalise the Constitution of India in early law making. While this contribution may serve several social issues, in this thesis I utilise surrogacy in India as a case study to explore methods through which the Constitution of India can be operationalised in the process of making law on surrogacy. My endeavour is that the legislation on surrogacy be representative its most vulnerable stakeholder - the surrogate. To do

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\(^{56}\)Scientist-G & Sr. Dy. Director-General, Division of Reproductive Health & Nutrition, Indian Council of Medical Research, New Delhi 110 029, India & Member Secretary Drafting Committee, ART (Regulation) Bill

\(^{57}\)Sharma R. S. (2014), ‘Social, Ethical, Medical & Legal aspects of Surrogacy: An Indian Scenario’ The Indian Journal of Medical Research, 140 (Suppl 1) S13–S16


\(^{59}\)Amrita Pande(n 9)

\(^{60}\)The Surrogacy Regulation Bill 2016, Statement of Objects and Reasons
this, the voice of the surrogate needs to be made visible - a process I refer to as visibilising or visibilisation.

The main research question that this thesis answers is formulated as follows:

**How can visibilising the vulnerabilities of surrogate mothers through a constitutional lens impact the trajectory of policy development on surrogacy in India?**

1.3 **Structure of this thesis**

This thesis comprises 9 chapters. In chapter 2, I elaborate on the concepts and theories this thesis uses and contributes to. In Chapter 3, I present the research framework and methodological design of the thesis. The findings of this study are given in the Chapters 4-8. In Chapter 9, I revisit the main research questions, discuss the results and reflect on the impact of the findings and possible future steps.
REFERENCES

Aditya Ghosh, ‘Cradle of the World’ Hindustan Times (23 December 2006)

Aloka A Dutta, ‘Surrogacy Regulation Bill 2018: 8 questions that we should be asking’ (Youth ki Awaaz, January 2019)<https://www.youthkiawaaz.com/2019/01/surrogacy-regulation-bill-2018-8-questions-that-we-should-be-asking/>


Ben Winslow, ‘Utah Supreme Court says law banning same sex couples from gestational agreements is unconstitutional’ Fox13 (Salt Lake City, 02 August 2019) <https://fox13now.com/2019/08/01/utah-supreme-court-says-law-banning-same-sex-couples-from-gestational-agreements-is-unconstitutional/>


Chapter 1


Genesis 30:1-13 English Standard Version (ESV)


Government Of India, Law Commission Of India, Need For Legislation To Regulate Assisted Reproductive Technology Clinics As Well As Rights And Obligations Of Parties To A Surrogacy, (Report No. 228, August 2009)


Chapter 1


Namita Kohli, ‘Moms on the Market, Sunday Hindustan Times (New Delhi, 13 March 2011)

National Human Rights Commission, Report of a Study to Understand the Legal Rights and Challenges of Surrogates from Mumbai and Delhi (Centre for Social Development, New Delhi)


Saravanan S., ‘An ethnomethodological approach to examine exploitation in the context of capacity, trust and experience of commercial surrogacy in India’ Philosophy, Ethics, and Humanities in Medicine: PEHM (2013) 8,10


Sayantan Bera, Nikita Doval, ‘India Govt Moves to Ban Commercial Surrogacy’ (Live Mint, 25 August 2016)
Chapter 1

Scientist-G & Sr. Dy. Director-General, Division of Reproductive Health & Nutrition, Indian Council of Medical Research, New Delhi 110 029, India & Member Secretary Drafting Committee, ART (Regulation) Bill


Sharma R. S. (2014), ‘Social, Ethical, Medical & Legal aspects of Surrogacy: An Indian Scenario’ The Indian Journal of Medical Research, 140 (Suppl 1) S13–S16


Sunita Reddy and Imrana Qadeer, ‘Medical Tourism in India: Progress or Predicament?’ Economic & Political Weekly XLV, No. 20 (n.d.).


The Surrogacy Regulation Bill 2016

Chapter 1

CHAPTER 2 - THEORETICAL FRAMEWORK

In the previous chapter, I aimed to show the challenges that the practice of surrogacy in India is posing, with a particular focus on the tensions created in a regulatory journey which, despite having covered a period of more than a decade, is still unable to shed its flaws and achieve stakeholder acceptance or constitutional soundness.

In this chapter, I present the central concepts and theories that are relevant to the discourse on surrogacy - bioethics, reproductive rights and freedom and medical ethics. The chapter is divided into two parts. In the first part, the relevant theories of utilitarianism, human dignity and human rights are discussed and conceptualised in terms of what we call the ‘bioethical triangle’. The relevance of each theory to surrogacy is also discussed.

The second part demonstrates how most of the theories are encompassed by the Constitution of India and discusses the Constitution of India and the theory of basic structure which propounds that the dignity of the individual (secured by the various freedoms and basic rights in Part III and the mandate to build a welfare State contained in Part IV) is a primordial right necessary for the development of human personality.\(^1\) This is read in the context of the surrogate’s right to equality, non-discrimination, opportunity, freedom, life and liberty, and rights against exploitation. I assume that the Constitution can serve as a critical lens, which encompasses within it all the approaches to surrogacy to help us find a balanced regulatory position for the Indian context.

2.1 THEORIES FOR REGULATING NEW TECHNOLOGIES

\(^1\)Golaknath v State of Punjab AIR 1967 SC 1643
Roger Brownsword in his seminal works\(^2\) raised the concern that while it is common understanding that technological advances can bring about a host of opportunities and threats, it is the regulatory challenges that new technologies pose that need precise articulation to cut through the uncertainty that surrounds scientific innovation. While the focus of his later works was on the use of technology as a regulatory tool, building on the work of Lawrence Lessig,\(^3\) his earlier works were concerned with maintaining the legitimacy of regulatory solutions whilst regulating in the face of scientific and technological change. The dilemma is that once science proves that something previously impossible is possible – say surrogacy – what can regulators draw on to make regulatory paths or needs acceptable to regulatees. Furthermore, regulatees may pose questions like: Why should there be a ban on surrogacy? What does such a ban achieve? Who will this ban benefit? All questions that regulators need to answer to ensure the legitimacy of the law proposed.

In Roger Brownsword’s book, *Rights, Regulation and the Technological Revolution*,\(^4\) the key concepts introduced were those of regulatory channelling (smart interventions that are an optimal mix of various regulatory modes like law, social norms, the market and architecture/code), regulatory pitch (the way in which regulators seek to engage with their targets), regulatory phasing (i.e., the phase of practice in which the law is introduced to regulate it) and regulatory range (the concepts of rights of individuals, community of rights and shared standpoints). To deal with the plurality involved, Roger Brownsword’s starting point was the bioethical triangle.

### 2.1.1 The Bioethical Triangle

“Technology has made all kinds of things possible that were impossible, or unimaginable in an earlier age. Ought all these things to be carried into practice?”

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\(^3\) Lawrence Lessig, *Code and other laws of Cyberspace* (Basic Books, 1999)

When Baronness Mary Warnock posed the above question in the context of genetic engineering, she went on to provide two potential forms that the question might take:

“In the first place, we may ask whether the benefits promised by the practice are outweighed by its possible harms. This is an ethical question posed in strictly utilitarian form....It entails looking into the future, calculating probabilities, and of course evaluating outcomes. “Benefits” and “harm” are not self evidently identifiable values. Secondly we may ask whether, even if the benefits of the practice seem to outweigh the dangers, it nevertheless so outrages our sense of justice or of rights or of human decency that it should be prohibited whatever the advantages.⁶

This tension that was described by Warnock is the constant struggle between utility and dignity.

2.1.1.1 Utility

The doctrine of utilitarianism was founded by Jeremy Bentham, a 19th-century English moral philosopher. Conceptually, it is a calculus of pain and pleasure – the highest morality being to maximise happiness or pleasure over pain. Utilitarianism advances teleological or goal-oriented thinking.⁷ Mill, another utilitarian thinker, argued that an act that contributes to the maximisation of happiness and security of the greatest number of citizens justifies the measure itself, whether or not it is a harsh one. In Bentham’s theory, the utility of an act is independent

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⁶Ibid
of its originating motive(s). In effect, there is no such thing as a good or bad motive – an act is to be judged solely by its consequences, i.e., the costs of benefits that result.

Bentham has played a pivotal role in law and governance – his fundamental axiom, “it is the greatest happiness of the greatest number that is a measure of right and wrong” – influenced the first articulations of civil and penal law.\(^8\) He argued that legal science ought to be built on the same immovable basis of sensation and experience as that of medicine, declaring “what the physician is to the natural body, the legislator is to the political: legislation is the art of medicine exercised upon a grand scale.”

In 1990, Peter H. Schuck\(^9\) reviewed surrogacy on the scale of utility and argued that surrogacy creates ardently wanted life. Describing infertility as a personal calamity of enormous dimensions,\(^10\) Schuck rationalized that the benefit of children being born for parents who cherish them, the benefit of creating life that would not otherwise exist, the benefit of allowing women who wish to become surrogates and reap both economic and altruistic rewards are considerations that weigh heavily in favour of legalising surrogacy. He identified the major risks in surrogacy as inadequate information and the possibility of people changing their minds. He felt that these risks can be minimised through straightforward regulatory methods such as increasing the amount and quality of information concerning surrogacy, standardizing contractual provisions, reducing the uncertainties around the enforcement of surrogacy obligations, and protecting the child from abandonment. According to him, if these measures are adopted, the residual risks of surrogacy are likely to be very low, especially when compared with the benefits.\(^11\)

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\(^8\) Jeremy Bentham, *Traités de législation civil et pénale* (1802)


\(^10\)ibid.

\(^11\)Schuck (n 9)
Later authors have written about the unparalleled social utility of surrogacy\textsuperscript{12} and even suggested neoclassical models of the market for surrogate motherhood contracts\textsuperscript{13} based on the utility-maximizing decisions of potential surrogate mothers and commissioning parties.\textsuperscript{14}

However, an examination of such works reveals limits to this approach, as expressed by the authors themselves. For example, though Schuck was furthering the cause of legalisation of surrogacy on the shoulders of Bentham, he too recognised limits to the specific performance of the surrogacy contract provisions, stating, for example, that we should not specifically enforce the surrogate’s obligation to surrender the child to the father. He did add as a caveat that evidence that the unavailability of specific performance would deter infertile couples who were otherwise anxious to enter such contracts might alter this principle.\textsuperscript{15} This hesitation suggests that a utilitarian approach to surrogacy may not be completely appropriate.

Commentators have indeed questioned such economic relations based on utility in surrogacy and suggested a need to look beyond the expectation of reciprocity between equals to the more ethical construct of relational autonomy.\textsuperscript{16}

**2.1.1.2 Autonomy and Dignity**

The most influential theories of dignity and autonomy are those put forth by Immanuel Kant. Dignity and value are concepts that are essential to Kant’s ethics, with individual autonomy

\textsuperscript{14}G. Hewitson, ‘The Market for Surrogate Motherhood Contracts’ Economic Record (1997) 73 212-224
\textsuperscript{15}Schuck (n 9)
\textsuperscript{16}Krause F., ‘Caring Relationships: Commercial Surrogacy and the Ethical Relevance of the Other’in Krause F., Boldt J. (eds) Care in Healthcare: Reflections on Theory and Practice (Palgrave Macmillan, Cham, 2018)
being the axis.\textsuperscript{17} Autonomy is related to dignity because autonomous beings are ends in themselves, and since ends in themselves have dignity, autonomous beings have dignity. Two ways of conceptualising dignity arise from this: 1) every rational nature has dignity in as much as rational beings are autonomous; 2) in our way of thinking, dignity means a person of morally good disposition or virtue, or one who fulfils his duties. In ethical contexts, dignity is just a catchword for absolute inner value. It causes us to ask when faced with a dilemma, “What ought I to do?”

The concept of law is central to Kant’s philosophy. For Kant, the State is a moral being whose essential meaning is to give an ethical dimension to the various determinations of activity and human relationships. These are expressed as liberty, equality and independence, with Kant placing independence before liberty and equality. Kant is not the theoretician of constitutional review. However, Kant’s political and legal theory is now thought to be one of the most important contributions to the theory of modern constitutionalism.\textsuperscript{18}

For Kant, freedom includes several fundamental rights, such as equality, the protection of privacy and freedom of speech, which can be deduced from the Kantian concept of freedom from the outset. In terms of contemporary constitutional law, Kant discusses fundamental constitutional freedoms or constitutional rights as “innate” rights, and as such that they are due to each person equally, and freedom (that is, fundamental rights) does not have to be “acquired” or “deserved” like ordinary rights under any legal system.\textsuperscript{19}

In his ethical theory, Kant argues for a certain understanding of personhood as it is related to embodiment: the “absolute unity of human person”. According to this view, it is morally impermissible to make use of one’s body (as a whole or of its part) in a way that degrades a

\textsuperscript{18}András Bragyova, Kant and the Constitutional Review Kantian Principles of the Neo-constitutionalist Constitutionalism Acta Juridica Hungarica 114 (2011) 52 No. 2 97
\textsuperscript{19}ibid.
person morally.²⁰ Kant follows the early modern contractarian tradition, according to which some contracts are illegitimate; to use the early modern jargon, some contracts are “invalid” or “void”. A contract can be “void” on the grounds that at least one party offers that which is not to be bargained for, for example, one’s natural freedom or one’s physical body.

When considering surrogacy, Kant’s views on prostitution become relevant. According to him, acquiring a member of a human being [in his or her sexual organs] is at the same time acquiring the whole person, since a person is an absolute unity. According to him, contracts such as this (e.g., for prostitution) are void and contrary to morality for the same reason: when persons “give themselves” to one another, they “let their person be used as a thing”.

On the same scale, Kantian theory would treat surrogacy as a moral wrong. The same brush would also paint organ sales from living donors and patent rights over human genes, making animal-human chimeras or pornography contrary to human dignity.

Kant has several critics who argue that his ethical theory is too cerebral in its neglect of the significance of human emotions, psychological complexities, non-rational (or pre-rational) commitments, and our very embodiment. It also serves as a complete conversation stopper as even the possibility of dialogue on how there can be circumstances that justify certain activities is not there. However, none of the critics attack dignity itself or suggest that the word itself is meaningless,²³ though it has been described as useless!²⁴

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²¹ibid.
²³ibid.
²⁴Macklin R., ‘Dignity is a useless concept’ BMJ 2003 327:14 19-20
Kant’s theories remain very relevant in contemporary conceptual approaches to surrogacy.\(^{25}\) Surrogacy in fact has been described as blight,\(^{26}\) an affront,\(^{27}\) an attack\(^{28}\) and a violation of human dignity.\(^{29}\) Contemporary commentators have argued that surrogacy, by its nature, necessarily undermines the human dignity of both the woman and child born through such arrangements, and thus neither commercial nor altruistic surrogacy can ever be justified.\(^{30}\)

In Europe, this moral absolutism is translated in the form of fundamental rights, i.e., non-derogable rights.\(^{31}\) According to the European Convention on Human Rights, no derogation is permitted to the right to life, and no one is to be subjected to slavery, cruelty, inhuman or degrading treatment.\(^{32}\)

Bentham and Kant appear to be on opposite sides of the spectrum as either theory focuses on singular concepts, i.e., outcomes and intentionality, respectively.\(^{33}\)

Here, the works of Deryck Beyleveld and Roger Brownsword\(^{34}\) serve as a useful bridge. They contrast two senses of dignity: dignity as the basis of freedom to pursue one’s autonomously


\(^{31}\)Monica den Boer (n 7)

\(^{32}\)H. Born & I. Leigh, ‘Making Intelligence Accountable. Legal Standards and Best Practice for Oversight of Intelligence Agencies’ (Oslo: Publishing House of the Parliament of Norway, 2005) 18

\(^{33}\)C. M. Donaldson, ‘Using Kantian ethics in medical ethics education’ Medical Science Educator, (2017) 27(4) 841-845
chosen goals, and dignity as the basis of legal barriers to pursuing (or inflicting on others) certain goals that are “contrary” to dignity.\textsuperscript{35} Both senses are related to agency and build on the work done by Alan Gewirth\textsuperscript{36} for the development of human rights and agency. Beyleveld and Brownsword argue that the important part is whether dignity is autonomy or the capacity for it and suggest special considerations to ensure respect for those without autonomy or with a limited capacity for exercising it. This obligation is put on a virtuous agent in respect of those who are vulnerable or marginalized. Here the doctrine of Human Rights becomes the dominant moral doctrine for evaluating the moral status of the virtuous agent, the vulnerable and the marginalised.

\textit{2.1.1.3 Human Rights}

Described as basic moral guarantees that all people have universally, simply because they are people, the moral doctrine of human rights aims at identifying the fundamental prerequisites for each human being leading a minimally good life.\textsuperscript{37} Hence, while the absence of torture would certainly allow people to lead a minimally good life, the presence of good health care would also have the same impact. The doctrine of human rights allows within it a wider range of necessities to better the human condition. The Universal Declaration of Human Rights (1948), the European Convention on Human Rights (1954) and the International Covenant on Civil and Political Rights (1966) together form a common framework for determining the basic economic, political, and social conditions required for all individuals to lead a minimally good life. The doctrine of human rights does not claim or even aim to be a fully comprehensive moral doctrine but rather attempts to provide criteria for determining fundamental public moral norms.

\textsuperscript{34}D Beyleveld (n 25)
\textsuperscript{35}Ashcroft (n 22)
\textsuperscript{36}A Gewirth, \textit{Reason and Morality} (Chicago, IL: University of Chicago Press, 1978)
Many writers on human rights agree on the identification of three generations of human rights. First-generation rights are rights to security, property and political participation. Second-generation rights are construed as socio-economic rights – to education, welfare, leisure. Third-generation rights refer to the right to a clean environment, rights of indigenous minorities, right to national self-determination and the like.

Despite the generational description, human rights are typically understood to be of equal value; each right is conceived to be as equally important as every other. This becomes particularly problematic when there is a conflict of rights because treating all human rights, as equal would make it impossible to address such a conflict or resolve it in any meaningful manner that maintains the equality of all rights. In practice, the responsibility for securing human rights does not fall on individuals but on domestic governmental institutions or international or inter-governmental bodies. Human rights call upon national and international institutions to create a politically democratic society in which all human beings have the means of leading a minimally good life. Ronald Dworkin wrote of rights as trumps, such as an individual’s right to an adequate diet should trump over other individuals’ desires to eat lavish meals even when the aggregate gain in pleasure is more. This is how human rights function beyond utility as public policy seeks the substantive distribution of public benefits in a society that usually would have limited resources to distribute.

2.1.1.4 Reconciling utility, dignity and human rights

According to Bentham, there could be no such thing as human rights existing prior to or independent of legal codification. According to Kant, human rights would arise inherently with the human as an inalienable fact, which lack of legal recognition cannot take away. Reconciling these theories plays a special role in the field of bioethics.

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39 Andrew Fagan (n 37)
In 1997, the International Bioethics Committee (IBC) of UNESCO published the Universal Declaration on the Human Genome and Human Rights.\footnote{United Nations, \textit{Universal Declaration on the Human Genome and Human Rights}, (UNESCO, 29th Sess., at 41, 29 C/Res. 16, 1997) <http://portal.unesco.org/en/ev.php-URL_ID=13177&URL_DO=DO_TOPIC&URL_SECTION=201.html> accessed on 07 August 2019} In this Declaration it was recognized that “research on the human genome and the resulting applications open up vast prospects for progress in improving the health of individuals and of humankind as a whole”. However, in the context of such research and the resulting applications, the Declaration introduced a critical touchstone, which was the emphasis “that such research should fully respect human dignity, freedom and human rights, as well as the prohibition of all forms of discrimination based on genetic characteristics”.

The fruit of the IBC\footnote{Roger Brownsword, ‘Stem Cells and Cloning: Where the Regulatory Consensus Fails’ New England Law Review Vol. 39 (2005)} was the Universal Declaration on Bioethics and Human Rights adopted by acclamation in October 2005 in the General Conference of UNESCO (“Declaration”), which consistently declares that while biotechnology promises to contribute to human welfare, it must always be applied in ways that respect both human rights and human dignity.\footnote{Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine 1996, Preamble} In its length and breadth, the Declaration aims to unite a plurality of approaches with the common thread of justice and equality- human dignity, human rights and utility - three views which have been described to not only be divergent but have been likened to the opposing vertices of a bioethical triangle (see Figure 1).\footnote{Roger Brownsword, ‘Three Bioethical Approaches: A Triangle to be Squared’, paper presented at International Conference on Bioethical Issues of Intellectual Property in Biotechnology held at the Tokyo International Exchange Centre Japan}

![Figure 1](image)
Chapter 2

One view drawn from the philosophical background is that the ethical views of Human Dignity and Utility symbolized by philosophical giants like Kant and Bentham, respectively, have converged upon the more modern compromise of Human Rights.  

Another view is that the bioethical triangle represents a shift in stance from Human Dignity to Human Rights to Utility.

The latter view is further reinforced by the breakdown of Human Dignity itself into two standpoints – Human Dignity as restraint and Human Dignity as empowerment, where empowerment is a shift towards Human Rights on the chance/choice/freedom boundary (Figure 2).

This departure on Kantian absolutism suggests an emphasis on individualism and freedom - theoretically stated as the interests theory approach and the wills theory approach to human rights. In the former approach, the principle function of human rights is to protect and promote certain essential human interests, which are the social and biological prerequisites for human beings to lead a minimally good life. This is broken down to the level of the individual, and it is argued that each individual owes a basic and general duty to respect the rights of every other individual, and the basis for this duty is not mere benevolence or altruism, but individual self-interest. Here lies the controversy, however. Minimal conditions for a good life are socially and culturally relative. The residents of an upscale neighbourhood may have completely different views on what represents a minimally good life from the residents of a slum.

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45 D Beyleveld (n 25)
46 Andrew Fagan (n 37)
Geographical disconnects may compound the inability of the residents of the upscale neighbourhood to care for the interests of the slum dwellers.

In contrast to the interests theory that emphasises individual self-interest, the wills theory argues that human rights are philosophically only valid as long as they further the capacity for freedom of a human being. According to H.L.A. Hart, all rights are reducible to a single, fundamental right which he refers to as the equal right of all men to be free. Will theorists like Gewirtha and Dworkins have further developed this concept of freedom to mean personal autonomy - positioning human rights to be a manifestation of the exercise of personal autonomy. This would then include within it the right to contract, the ability to give consent or not, and other such acts that make up personal autonomy.

In the context of surrogacy, this marks a major departure from the moral prohibition of Kant. This approach may be reframed as an approach that roots itself in human dignity but takes a more empowering view looking towards the human rights approach of individual interest and personal autonomy, suggesting that freedom or liberty of the individual is of primary concern.

In surrogacy this could mean the freedom of the individual to enter into surrogacy arrangements and to act as a surrogate.

2.2 Reproductive Freedom

Reproductive freedom involves the freedom of an individual to make decisions with respect to family planning, timing and the number of children a woman wants to have. Expression of these freedoms may involve access to resources like contraception, safe abortion and also negative rights, such as the right to non-violation of female bodily integrity and the right to non-interference in a woman’s way of living.

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50 Bodenheimer (n 48)
Reproductive freedom may be approached quite differently in a developed society than in a developing society. In a developed society, one may emphasise the role of choice or voluntariness in remaining childless as an expression of reproductive freedom. In a developing society on the other hand, it may represent the freedom to access means to have children. It has been documented that voluntary childlessness is rare in Kerala (India) since bearing and rearing children is central to a woman’s power and status in a family and therefore being able to reproduce would have an impact on her wellbeing.

The knowledge that reproductive choices are exercised within and shaped by the social order creates a more subjective understanding of reproductive rights and freedoms which is relevant for understanding and addressing historic and contemporary processes of reproductive oppression. This framework is able to visibilise marginalization, stigmatization and oppression on account of poverty, racism, environmental degradation, sexism, homophobia and injustice.

When placed in a rights-based discourse, the State becomes obligated to play a crucial role in furthering reproductive rights and freedoms so as to improve reproductive health. For example, the Cairo Programme of Action summed reproductive rights as human rights and advised on the promotion of such rights to achieve better standards of reproductive and sexual health, bodily integrity and security of a person. This came to be described as the human rights approach, which provides a useful framework for analysing and understanding the socio-structural roots of reproductive health.

Reproductive health may not be attained without acknowledging and addressing societal vulnerabilities. The most important component of a public health approach to reproductive health is to improve reproductive rights. The United Nations in 1994 in Cairo and in 1996 in Beijing focussed on the adage that reproductive rights are women’s rights, and women’s rights are human rights. This was a consequence of placing the reproductive experience in a broader framework of human rights with a social justice approach.

In India, reproductive freedoms have been recognised in the rights-based discourse as recently as 2009, when the Supreme Court in the case of Suchita Srivastava v Chandigarh Administration (2009) elaborated on reproductive freedoms as fundamental rights. Contemporary writers have drawn such elaborations to surrogacy and argued that the choice to act as a surrogate or have a child through surrogacy is itself a constitutionally protected right, which is a choice private to an individual, and the state cannot impinge upon it.

But are things that easy in an unequal world? In surrogacy, the quality of consent and the opportunity of exercising freedom and liberty by the individual herself become the most important considerations. Within a medical setting, theories on medical ethics also concern surrogacy.

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57 Wang (n 55)
2.3 **Medical Ethics**

Decisions that influence health and access to health care are necessarily a matter of ethics. Ethics is the notion of what is good and right in society that guides human action. In periods of transition, new understandings emerge of what is ethical practice. This emergence is not a linear process but a trajectory interspersed with conflicts of ideas and interests in various arenas of the technology-society interface. In medicine, for example, the principles of patient autonomy, informed consent, confidentiality, beneficence, non-maleficence and confidentiality guide clinical practice. In bioethics, four foundational principles have been framed: autonomy, justice, beneficence and non-maleficence. This suggests that a surrogacy arrangement, to the extent expressed as a clinical procedure, should necessarily conform to and uphold such principles.

The right to make free and informed decisions about health care and medical treatment, including decisions about one’s own fertility and sexuality, is enshrined in Articles 12 and 16 of the Convention on the Elimination of all Forms of Discrimination Against Women (1978). India, as a signatory to the International Conference on Population and Development, 1994, has committed itself to ethical and professional standards in family planning services, including the right to personal reproductive autonomy and collective gender equality. This understanding is reflected in the Medical Termination of Pregnancy Act, 1971 and the National Population Policy 2000.

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66 International Conference on Population and Development (n 58)
In India, many health social movements organised their activities within the framework of ‘rights-based’ approaches, within conceptions of bioethics and social justice, and have focused on health inequalities (especially, but not only, those based on gender). In the Belmont Report, justice as a concept has been used to equitably distribute benefits and burdens in research involving human subjects and ensure that people are treated equally.

The ICMR’s first reference to surrogacy was in 2000, when the ICMR brought out the ICMR Research Guidelines, 2000 (“ICMR Ethical Guidelines of 2000”) to provide guidance on ethical standards and barriers for medical research being conducted in India, which used human beings as subjects. In October 2006, the ICMR released revised Ethical Guidelines for Biomedical Research on Human Participants (“Revised Ethical Guidelines, 2006”) in light of developments in science and technology since 2000. To date, these are the ethics that guide clinical practice and also biomedical research in India.

The aforesaid discussion suggests that bioethical issues like surrogacy cannot possibly be approached from a singular viewpoint. In fact, the approaches themselves of dignity, utility and human rights are dichotomous and require much reconciliation. Neo-cultural understandings of reproductive freedoms and rights and an appreciation of the universal ethics that have traditionally bound medical settings also merit consideration and balancing. Moreover, any preferred regulatory approach requires focus and context of the social, cultural and geographical realities of the issue they are to be applied to practically.

In India, the regulatory concern has moved from ‘whether surrogacy at all’ to ‘yes, surrogacy but how’ because the prohibition in the making is not an outright ban on surrogacy in all forms.
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but a nuanced ban on particular forms of surrogacy. One of the primary objectives that the law
in making seeks to achieve is the elimination of the exploitation of surrogate mothers.

2.4 Vulnerability Theories

Theories on vulnerability describe the universality and constancy of vulnerability,\textsuperscript{71} which is not
just reserved for special groups. This makes a compelling argument for a more active and
responsive state that seeks to reduce vulnerability for everyone to achieve substantive
equality.\textsuperscript{72} It also suggests that the universal experience of vulnerability requires law makers
not to proceed on assumptions but rather to attempt to visibilise the sources of vulnerability
because people are unavoidably embedded in a variety of dependencies. A major emphasis of
theories on vulnerability is that institutions can give people the capacity to overcome
vulnerability and develop resilience.\textsuperscript{73} The institutions in question – health care, criminal law,
schools, family, and more – are all reinforced, given legitimacy, established, benefitted,
regulated, and/or funded by the state.\textsuperscript{74}

Nina Kohn criticizes vulnerability theory by arguing that Fineman’s application of vulnerability
theory shows its lack of specificity, violation of autonomy, and inevitable inconsistency.\textsuperscript{75} The
argument that everyone is vulnerable gives little guidance as to how to prioritize among
vulnerable subjects when allocating limited financial resources and political capital.\textsuperscript{76} She seeks
prioritization by the State of certain issues on account of limited resources. This lends a real
world perspective.

\textsuperscript{71}Martha Albertson Fineman, ‘Fineman on Vulnerability and Law, New Legal Realism Conversations’ (New Legal
\textsuperscript{72}ibid.
\textsuperscript{73}Peadar Kirby, Vulnerability and Violence (Plutobooks, 2006)
\textsuperscript{74}Phillip Rich, ‘What Can We Learn from Vulnerability Theory?’ (Honors Projects, 2018) 352-<https://scholarworks.bgsu.edu/honorsprojects/352> accessed on 07 August 2019
\textsuperscript{75}Nina A. Kohn, ‘Vulnerability Theory and the Role of Government’ (2014) 26 Yale J.L. & Feminism 1
\textsuperscript{76}ibid.
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Theorists on vulnerability have also linked vulnerability to exploitation.\textsuperscript{77} In surrogacy, the surrogate mother has been described as the most marginalized and vulnerable one in this triad.\textsuperscript{78} Research studies have suggested that this position of vulnerability is a worrying reminder of the potential of exploitation.\textsuperscript{79} The recent ban on offering commercial surrogacy services in India today is predicated on the argument that the practice is highly exploitative of the women involved.\textsuperscript{80}

For this reason, vulnerability of the surrogate mother and remedying her exploitation form a central theme of this thesis.

When seeking a regulatory position on surrogacy in India which can take a nuanced ban forward while addressing vulnerability or remedying exploitation, the philosophical approaches of Bentham and Kant or even the rights enshrined in the Universal Declaration on the Human Genome and Human Rights may appear too out of context and disconnected. It is the search for something closer to home that leads our enquiry to the Constitution of India.

2.5. \textbf{The Constitution of India}

"A state is known by the rights it maintains"

- Prof. H.J. Laski\textsuperscript{81}

The Constitution of India has often been described as a bulky document\textsuperscript{82} physically. However, philosophically it becomes bulkier still because as a living constitution, it gets analysed and interpreted every day by the courts of India, more particularly the Supreme Court of India.

\textsuperscript{77} Hallie Liberto, ‘Ethical Theory and Moral Practice’ Vol. 17 No. 4 (August 2014) 619-629
\textsuperscript{78} Dr. Ranjana Kumari, ‘Surrogate Motherhood: Ethical or Commercial’ Centre for Social Research 39<https://wcd.nic.in/sites/default/files/final%20report.pdf> accessed on 07 August 2019
\textsuperscript{79} ibid.
\textsuperscript{82} D.D. Basu, \textit{Constitutional Law of India} (8\textsuperscript{th} cdn. LexisNexis Butterworths, 2008)
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The beauty of this is that almost every theological or philosophical theory comes to be read into the Constitution of India.

In Rajive Raturi v Union of India,\(^{83}\) the Supreme Court of India went so far as to say that, “Insofar as India is concerned, we are not even required to take shelter under theological or philosophical theories. We have a written Constitution which guarantees human rights that are contained in Part III with the caption “Fundamental Rights”. One such right enshrined in Article 21 is right to life and liberty. Right to life is given a purposeful meaning by this Court to include right to live with dignity. It is the purposive interpretation, which has been adopted by this Court to give a content of the right to human dignity as the fulfilment of the constitutional value enshrined in Article 21. Thus, human dignity is a constitutional value and a constitutional goal.” (emphasis supplied)

This judgment concerned the needs of the visually disabled in respect of safe access to roads and transport facilities, to which the Supreme Court responded positively and constitutionally.

In a judgment of the Kerala High Court (India)\(^{84}\) considering the constitutional validity of a policy that banned the sale of liquor, the doctrine of utilitarianism was discussed at length in the benefit to the state of alcohol consumption (through taxation) and the revenue generated along with the right of an individual to choose (read as the right to life and the right to privacy) and the considerations of the moral theory of law. The objective of the discussion was to arrive at a constitutionally sound position of regulation.

The Madras High Court ruled on the rights of under-trials\(^{85}\) stating, “The settled legal position is that the prisoners have got their Fundamental Rights, and the Human Rights Theory, which is

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\(^{84}\)M.S. Anoop v State of Kerala Civil Writ Petition 33709/2015 (High Court of Kerala, 06 August 2016)

\(^{85}\)Esakkimuthu v The Government Of Tamil Nadu, Writ Petition No.12396 Of 2002 (High Court of Madras, 12 April 2002)
propounded, is applicable to them, and that even though they are under-trials, or they are even convicts, they have to be treated in a humane manner....”

The above three examples suggest that the Constitution of India forms an integrated framework that subsumes within it all the other theoretical approaches on bioethics and surrogacy – such as utility, dignity and human rights, which have been clearly positioned in a balanced way. It is also a highly practical application to a very Indian problem, and there is a strong legitimacy in the argument of what is constitutionally sound or unsound in India as the general populace and lawmakers recognize the overarching position of the Constitution of India as supreme law. The Constitution of India also has its guardian in the Supreme Court of India. With respect to surrogacy or in fact any policy, in India, it needs to be in line with the Constitution of India. Hence, criticizing or preparing new law always takes into account the Constitution.

To utilize the Constitution of India as a lens for us to be able to understand surrogacy, why it is described as problematic for the surrogate mothers, how law-making has developed for it, and how it can be progressed further to take a constitutionally sound position, it is important to first understand the fundamentals of the Constitution of India and how they are interpreted by the Supreme Court of India.

2.5.1 What is fundamental to the Constitution of India – The theory of Basic Structure

Perhaps the most important Indian judgments establishing the fundamentals of the Constitution are Golaknath v State of Punjab\textsuperscript{86} and Keshavananda Bharathiyar v State of Kerala\textsuperscript{87}.

In the case of Golaknath, the Supreme Court was considering the power of the Parliament to amend the Constitution, and it stated,

\textsuperscript{86}Golaknath v State of Punjab, AIR 1967 SC 1643
\textsuperscript{87}Keshavananda Bharati v State of Kerala (1973) 4 SCC 225
“Fundamental rights are the primordial rights necessary for the development of human personality. They are the rights which enable a man to chalk out his own life in the manner he likes best. Our Constitution, in addition to the well-known fundamental rights, also included the rights of minorities and other backward communities in such rights. The fundamental rights are given a transcendental position under our Constitution and are kept beyond the reach of Parliament. At the same time Parts III and IV of the Constitution constituted an integrated scheme forming a self-contained code. The scheme is made so elastic that all the Directive Principles of State Policy can reasonably be enforced without taking away or abridging the fundamental rights.…… Our Constitution has given a guaranteed right to the persons whose fundamental rights are affected to move the Court. The guarantee is worthless if the rights are capable of being taken away.”

This interpretation of the Constitution challenged the power of the Parliament so grievously that it led to the Parliament amending Article 13 of the Constitution by the 24th Amendment Act in 1971 to circumvent Golaknath’s reading. This then precipitated the Supreme Court’s judgment in Keshavananda Bharati – a landmark judgment from a bench comprised of all 13 sitting judges of the Supreme Court in which the doctrine of Basic Structure was formulated.

In this, the judges of the Supreme Court88 concurred in their various opinions that:

“...The basic structure of the Constitution is not a vague concept and the apprehensions expressed on behalf of the respondents that neither the citizen nor the Parliament would be able to understand it are unfounded. If the historical background, the Preamble, the entire scheme of the Constitution, the relevant provisions thereof including Article 368 are kept in mind there can be no difficulty in discerning that the following can be regarded as the basic

88Keshavananda Bharati v State of Kerala (1973) 4 SCC 225
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elements of the Constitutional structure. (These cannot be catalogued but can only be illustrated).

1. The supremacy of the Constitution.

2. Republican and Democratic form of Government and sovereignty of the country.


4. Demarcation of power between the legislature, the executive and the judiciary.

5. The dignity of the individual (secured by the various freedoms and basic rights in Part III and the mandate to build a welfare State contained in Part IV.

6. The unity and the integrity of the nation.”

They further went on to opine:

“705. On a careful consideration of the various aspects of the case, we are convinced that the Parliament has no power to abrogate or emasculate the basic elements or fundamental features of the Constitution such as the sovereignty of India, the democratic character of our polity, the unity of the country, the essential features of the individual freedoms secured to the citizens. Nor has the Parliament the power to revoke the mandate to build a Welfare State and egalitarian society....”

With the individual freedoms enshrined in Part III of the Constitution as Fundamental Rights becoming protected as the basic structure of the Constitution, some important interpretations of other judgments of the Supreme Court become very relevant to this thesis to develop our analytical lens.
Individual Rights / Freedoms postulated in Part III of the Constitution of India

Right to Equality and Rights against Discrimination

Articles 14, 15, 16, 17 and 18 are a class of rights that build on Article 14, which reads, “The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.” Article 15 adds to this by not allowing the State to discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. Article 16 assures that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State and that no citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State. Article 17 abolishes untouchability and makes it an offence, and Article 18 does not allow any title – which is not a military or academic distinction – to be conferred by the State.

Fundamental Freedoms

Article 19 of the Constitution states the freedoms available to citizens of speech and expression, to assemble peaceably and without arms, to form associations or unions, to move freely throughout the territory of India, to reside or settle in any part of the territory of India and to practice any profession or to carry on any occupation, trade or business.

The fundamental freedoms come with conditions attached however. For example, the freedom of speech and expression is qualified by Article 19(2) which imposes reasonable restrictions on the exercise of the right conferred in the interests of the sovereignty and integrity of India, the
security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.

Similarly, the freedom to practice any profession or carry on any occupation, trade or business is qualified by Article 19(6) which allows the State to make laws relating to the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise.

The fundamental freedoms in Article 19 are not to be read in isolation of the other articles, particularly Article 21, which also speaks of personal liberty. In *Maneka Gandhi v Union of India*,\(^9\) the Supreme Court emphasised the symbiotic relationship of each article in part II of the Constitution, stating in the context of Article 21 and Article 22 concerning preventive detention and personal liberty that, “*In what may be called unoccupied portions of the vast sphere of personal liberty, the substantive as well as procedural laws made to cover them must satisfy the requirements of both Arts 14 and 19 of the Constitution.*”

*The right to life or personal liberty*

Article 21 is possibly one of the shortest clauses of the Constitution which has received the widest possible interpretation. The article simply reads, “No person shall be deprived of his life or personal liberty except according to procedure established by law.”

Though at first reading it may appear that Article 21 speaks also of the right to freedom already addressed in Article 19, it appears that the Constitution wished, by this separate treatment, to place Article 21 in a space distinct yet analogous to Article 19. The Supreme Court also

expressed the same in *Maneka Gandhi v Union of India* largely on account of the inclusion of a safeguard for personal liberty in Article 21. It said,

“Article 19(1) does not purport to cover all aspects of liberty or of personal liberty. In that article only certain phases of liberty are dealt with. 'Personal liberty' would primarily mean liberty of the physical body. The rights given under article 19(1) do not directly come under that description. They are rights which accompany the freedom or liberty of the person. By their very nature they are freedoms of a person assumed to be in full possession of his personal liberty. If article 19 is considered to be the only article safeguarding personal liberty several well recognized rights, as for instance, the right to eat or drink, the right to work, play, swim and numerous other rights and activities and even the right to life will not be deemed protected under the Constitution. I do not think that is the intention. It seems to me improper to read article 19 as dealing with the same subject as article 21. Article 19 gives the rights specified therein only to the citizens of India while article 21 is applicable to all persons.

Interpretations of Article 21 have grown into a complex jurisprudence. Various judgments have come to interpret that Article 21 protects the dignity of human life, one’s right to privacy, one’s right for recognition of gender identity, the right to die with dignity, the right to immediate medical aid, reproductive freedom, etc.

The complex bundle of rights developed under Article 21 need to be looked at from the perspective of the subject of this thesis, i.e., surrogate mothers or potential surrogate mothers,

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96. Francis Coralie Mullin v Administrator, Union Territory of Delhi (1981) 1 SCC 608 7-8
97. R. Rajagopal @ RR Gopal & Anr. v State of Tamil Nadu & Ors. (1994) 6 SCC 632
98. National Legal Services Authority v Union of India (2014) 5 SCC 438
100. Pt. Parmanand Katara v Union of India AIR 1989 SC 2039
and the reproductive freedoms of the parties in the surrogacy arrangement as well as the medical ethics applicable to it.

Specific Protections against Exploitation

Articles 23 and 24 of the Constitution make special mention of rights against exploitation. Under Article 23, traffic in human beings and begars and other similar forms of forced labour is prohibited, and any contravention of this provision is a punishable offence. Under Article 24, no child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment.

One might wonder why exploitation has been treated differently from inequality or discrimination. The reason I bring this up is because in separating the treatment of exploitation, it appears that the Constitution implicitly acknowledges that there are not only inequalities but also limits to anti-discrimination treatment in treating such inequalities and that some people are much more vulnerable. In this thesis, the dynamic of vulnerability and exploitation is strongly explored. I argue that vulnerability is the breeding ground for inequality, discrimination and exploitation, and by separately and distinctly dealing with these three concerns in its rights-based approach, the Constitution of India demonstrates what may be an innate understanding of vulnerability.

This is an important lens for this thesis to apply to approach surrogacy and the constitutional position on it and make the vulnerability inherent to surrogate mothers explicit and visibilised.

To conclude, the tensions contained in the surrogate arrangement are complex and multifaceted. The individual may be at odds with the State, and it is paramount that these positions are balanced without obscuring the voice of the surrogate and while ensuring her equal protection of the law and equal treatment in law. This is consonant with ethical notions and necessitates ensuring safeguards against discrimination, for the movement from formal
equality to substantive equality. This involves a detailed understanding of her circumstances, an exercise that cannot be completed without giving her an opportunity to be heard. The next touchstone for understanding is the preservation of the surrogate’s constitutional freedoms and assuring that any restrictions imposed on them are derived from factors relevant to her. Central to this exercise is preservation of the surrogate’s right to life, liberty and reproductive freedom, and bioethical considerations as understood by the wide interpretations of Article 21. The theme in this thesis involves assessing the risk of exploitation, which needs to be safeguarded against. Keeping in mind that the surrogacy arrangement entails competing rights, analysis is also necessary to identify the overriding rights of the surrogate so fundamental to her that they cannot be bargained away in a manner that reverberates with medical-ethical principles.

In the following chapter, I will present the sub-questions to the main research question, which is to reiterate – ‘How can visibilising the vulnerabilities of surrogate mothers through a constitutional lens impact the trajectory of policy development on surrogacy in India?’
REFERENCES


András Bragyova, Kant and the Constitutional Review Kantian Principles of the Neo-constitutionalist Constitutionalism Acta Juridica Hungarica 114 (2011) 52 No. 2 97


C. M. Donaldson, ‘Using Kantian ethics in medical ethics education’ Medical Science Educator, (2017) 27(4) 841-845


*Chandigarh Administration* (2009) 9 SCC 1; Ramakant Rai (I) & Anr.v Union of India & Ors. (2009) 16 SCC 56
Chapter 2


*Common Cause v Union of India* (2004) 5 SCC 222


Dr. Ranjana Kumari, ‘Surrogate Motherhood: Ethical or Commercial’ Centre for Social Research 39 <https://wcd.nic.in/sites/default/files/final%20report.pdf>

Dr. Ranjana Kumari, ‘Surrogate Motherhood: Ethical or Commercial’ Centre for Social Research 30 <https://wcd.nic.in/sites/default/files/final%20report.pdf>


*Esakkimuthu v The Government Of Tamil Nadu*, Writ Petition No.12396 Of 2002 (High Court of Madras, 12 April 2002)

*Francis Coralie Mullin v Administrator, Union Territory of Delhi* (1981) 1 SCC 608


*Golaknath v State of Punjab* AIR 1967 SC 1643

H. Born & I. Leigh, ‘Making Intelligence Accountable. Legal Standards and Best Practice for Oversight of Intelligence Agencies’ (Oslo: Publishing House of the Parliament of Norway, 2005) 18

Hallie Liberto, ‘Ethical Theory and Moral Practice’ Vol. 17 No. 4 (August 2014) 619-629


Jeremy Bentham, Traités de législation civil et pénale (1802)


Justice K S Puttaswamy v Union of India (2017) 10 SCC 1

Keshavananda Bharati v State of Kerala (1973) 4 SCC 225


Lawrence Lessig, Code and other laws of Cyberspace (Basic Books, 1999)


M.S. Anoop v State of Kerala Civil Writ Petition 33709/2015 (High Court of Kerala, 06 August 2016)

Macklin R., ‘Dignity is a useless concept’ BMJ 2003 327:14 19-20


Chapter 2


National Legal Services Authority v Union of India (2014) 5 SCC 438


Peadar Kirby, Vulnerability and Violence (Plutobooks, 2006)

Phillip Rich, ‘What Can We Learn from Vulnerability Theory?’ (Honors Projects, 2018) 352 <https://scholarworks.bgsu.edu/honorsprojects/352>

Pt. Parmanand Katara v Union of IndiaAIR 1989 SC 2039

R. Rajagopal @ RR Gopal & Anr. v State of Tamil Nadu & Ors. (1994) 6 SCC 632


Chapter 2


Roger Brownsword, Rights, Regulation and the Technological Revolution (Oxford University Press, 2008)

Salla Sariola, Roger Jeffery, Amar Jesani & Gerard Porter, ‘How Civil Society Organisations Changed the Regulation of Clinical Trials in India’ Science as Culture (2019) 28:2 200-222


Suchita Srivastava v Chandigarh Administration (2009) 9 SCC 1


The Constitution of India

The Medical Termination of Pregnancy Act, 1971, as amended by Act No. 64 of 2002


Watson C, ‘Womb Rentals and Baby-Selling: Does Surrogacy Undermine the Human Dignity and Rights of the Surrogate Mother and Child?’ *New Bioeth.* (2016) Nov 22(3) 212-228
CHAPTER 3 - RESEARCH FRAMEWORK

3.1 RESEARCH DESIGN

Chapter 1 presented the historical and modern face of surrogacy in India and painted the backdrop of the industry within which surrogacy arrangements have taken place. In this context, the complexities involved in dealing with surrogacy at a regulatory level have been discussed. Despite extensive public discourse on surrogacy and shifting regulatory stances there appears to be a lack of understanding in India of the practice of surrogacy or the position of the surrogate and there is a dearth of scientific research and legal analysis that might result in robust legislation that is constitutionally sound. There is insufficient academic work that bridges social research among surrogates with legal theory, although the law has been in discussion for more than 10 years.

In Chapter 2, I explored central concepts and theories that are relevant to the discourse on surrogacy – bioethics, reproductive rights and freedom and medical ethics. We saw that the Constitution of India has certain fundamentals which, based on a primordial rights and welfare state matrix, can be used to analyse the regulatory positions on surrogacy to produce a constitutionally sound regulatory approach. We also saw how theories relevant to surrogacy may be subsumed and help resolve the disconnections and gaps in regulatory positions through the lens of the Constitution.

3.2 RESEARCH QUESTIONS

A central argument of this thesis is that the surrogate mother, by virtue of her structural reality, is vulnerable to exploitation, subject to the legal framework that is designed around her. In order to design a regulatory approach that takes her structural realities into account, it is necessary to expose her vulnerabilities, understand if those involved in designing regulations
have been listening to her sufficiently, and if the current proposed regulatory regime ameliorates or exacerbates her vulnerabilities.

The central question to this thesis is framed as follows:

**How can visibilising the vulnerabilities of surrogate mothers through a constitutional lens affect the trajectory of policy development on surrogacy in India?**

Three related sub-questions are:

1) What are the structural realities of a surrogate mother or potential surrogate in India that contribute to her vulnerabilities?

2) What is the trajectory of policy development on surrogacy, the role of the surrogate in it and the impact of the policy developments on her?

3) What are the gaps between policy objectives and practice, and are there any ways of dealing with such gaps in order to help the surrogate cope with her vulnerabilities and also result in policies that are constitutionally sound?

These questions form a common preface, which, over the course of five chapters, this thesis progressively attempts, to answer the main question.

### 3.2.1 Sub-question 1: What are the structural realities of a surrogate mother or potential surrogate in India that contribute to her vulnerabilities? (Chapter 4)

In Chapter 4, we¹ develop an understanding of the construct of the surrogate and also aim to understand how the possibilities of exploitation and its regulation are necessarily framed by interconnected legal, social, medical and economic structures. We closely analyse the key

¹Chapters 4 to 8 of this thesis are co-authored and any reference to these chapters or the results therein is to collaborative work and efforts. Consequently, I have used ‘we’ or ‘our’ whenever referring to the same in the thesis.
characteristics of the surrogate in India, and the potential vulnerabilities arising from this background. We then go on to examine the ways in which legislators and policy-makers can understand these key vulnerabilities in a visible manner in order to examine their potential for exploitation.

The Government of India’s changing stance on surrogacy was supposedly to end exploitation, but we cannot really begin to understand what exploitation entails without an adequate idea of who it is that is being exploited and the source of this exploitation. The question of the surrogate’s vulnerability to potential exploitation forms one of the central aspects of this chapter as it attempts to understand the construct of the surrogate in the Indian context. Another key element is to understand the relationship between the law, vulnerability and the possibility of exploitation before we ask how this relates more specifically to the issue of surrogacy.

3.2.2 Sub-question 2: What is the trajectory of policy development on surrogacy, the role of the surrogate in it and the impact of the policy developments on her? (Chapters 5 and 6)

In Chapter 5, we analyse the changes in the position and rights of surrogate mothers over the course of two proceedings before the Supreme Court of India, which took place in 2008–2009 (The Baby Manji case) and 2014–2015 (The Jayshree Wad PIL in the Jan Balaz case). This analysis takes as its starting point; the vulnerability of the surrogate mother, and the central aim is to understand the consequences for her of the rulings of the Supreme Court in the context of a highly controversial procedure.

Surrogacy is a grey legal area in India. Social views are unsettled and changing. In most debates the voice of the surrogate is scarcely heard while proposed and realised legislative changes have a potentially major impact on her. In this chapter, I focus on perspectives of the surrogates themselves and show how little is done to listen to and understand them in legislation and policy-making that directly affect them. This is done by analysing how the
position and rights of surrogate mothers were changed by the two proceedings before the Supreme Court of India referred to above. The two events are examined in relation to Supreme Court records, first-hand experiences, interactions with stakeholders and media accounts. In critically analysing these events, we ask what can be done to ensure a more democratic process in the future, which is inspired by the ideals enshrined in the Constitution.

In Chapter 6 we ask how the 2016 bill affects the vulnerability of a surrogate mother and whether it serves as a constitutionally sound approach to end her exploitation. In this chapter, we critically examine the extreme shifts in the Indian legislation on surrogacy in the past decade, with a specific focus on the 2016 Surrogacy (Regulation) Bill. This proposed legislation now permits only altruistic surrogacy with an added condition that the surrogate must be a close relative. The stated objective of the proposed law is to prevent the exploitation of surrogates. Through the conceptual lens of vulnerability, developed in Chapter 4, this chapter asks how the 2016 bill affects the vulnerability of a surrogate mother and whether it serves as a constitutionally sound approach to end her exploitation.

3.2.3 Sub-question 3: What are the gaps between policy objectives and practice, and are there any ways of dealing with such gaps in order to help the surrogate cope with her vulnerabilities and also result in policies that are constitutionally sound? (Chapters 7 and 8)

In Chapter 7, we examine the changing vulnerabilities of a surrogate or potential surrogate mother in India with respect to spectrum of movement in law and policy from protection to proliferation and finally to prohibition. We further examine whether by comparing this with similar legal positions internationally we can identify any gaps between policy objectives and practices.

In Chapter 8, our focus is to see how the proposed law can successfully prohibit the potential exploitation of surrogate mothers in a manner that strengthens them and is constitutionally sound. We summarise what is known about the surrogate mother or the potential surrogate
mother (referred to as a surrogate in this thesis) and their structural realities. We briefly describe the theoretical approaches to surrogacy and suggest that these are subsumed in the Constitution of India. We summarise the trajectory of policy development on surrogacy and demonstrate the gaps between the structural reality and legislation. We then suggest 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.

3.3 Research Methodology

Chapters 4–8 reflect different stages of an eight-year research journey during which the draft law saw three major shifts from the 2014 Bill to the 2016 Bill to the present 2019 Bill. To answer the main research question and three sub-questions of this thesis, a mixed-methods approach was adopted – including qualitative research and a literature review, analysis of law and case-law searches, comparative studies and first-hand observations and interactions with stakeholders, courtroom visits and participation in discussions on surrogacy.

Table X states the use of methodologies in the research by study chapter.

Table X: Summary of methodologies used by chapter

<table>
<thead>
<tr>
<th>S. No</th>
<th>Research sub-question</th>
<th>Methods</th>
<th>Chapter</th>
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<tbody>
<tr>
<td>1</td>
<td>What are the structural realities of a surrogate mother or potential surrogate in India that contribute to her vulnerabilities?</td>
<td>Literature review of existing qualitative and quantitative surveys</td>
<td>Chapter 4</td>
</tr>
<tr>
<td>2</td>
<td>What is the trajectory of policy</td>
<td>Literature review, first-hand</td>
<td>Chapters 5 and 6</td>
</tr>
<tr>
<td>Chapter 3</td>
<td>development on surrogacy, the role of the surrogate in it and the impact of the policy developments on her?</td>
<td>observation and critical analysis</td>
<td>observation and critical analysis of case-law search and comparative analysis</td>
</tr>
</tbody>
</table>

| 3 | What are the gaps between policy objectives and practice, and are there any ways of dealing with such gaps in order to help the surrogate cope with her vulnerabilities and also result in policies that are constitutionally sound? | Literature review, comparative analysis | |

The following section presents the methodology of each chapter in brief:

**Chapter 4**

**THE CONSTRUCT OF AN INDIAN SURROGATE: QUALIFYING FOR VULNERABILITY**

In Chapter 4, we analyse the concept of vulnerability presented in existing studies and literature and legitimise its use and value for our analysis. Copies of the Indian Council of Medical Research’s Ethical Guidelines for Biomedical Research on Human Participants, 2000; The Belmont Report: Ethical Principles And Guidelines for the Protection of Human Subjects Of Research, The National Commission For The Protection Of Human Subjects of Biomedical and Behavioural Research (1978) and the Constitution of India were obtained. These were examined for their formulations on vulnerability.

Three research studies available on women acting as surrogates were then obtained and reviewed. The first is an exploratory study by the Centre of Social Research (CSR) titled *Surrogate Motherhood – Ethical or Commercial* (2012), in which 100 surrogates from Anand,
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Surat and Jamnagar were interviewed (hereinafter referred to as the CSR ASJ Study). The second is a study conducted by Sama – Resource Group for Women and Health titled Birthing A Market – A study on Commercial Surrogacy (2012), which interviewed 12 surrogates in total, of whom four were interviewed in depth (hereinafter referred to as the Sama Study). The third is also by the CSR, Surrogate Motherhood – Ethical or Commercial (2014), in which 100 surrogates from Delhi and Mumbai were interviewed (hereinafter referred to as the CSR DM Study). The studies by CSR were funded and recognised by the Ministry of Women and Child Development, Government of India. By focusing on the interviews conducted and comparing the data collated in these studies, we identified and analysed the common, operational circumstances that define the demographic and socio-economic background of a woman wishing to act as a surrogate. Data culled from the reviews informed the development of the vulnerability construct as a paradigm for visibilising various kinds of dependencies that influence a surrogate as a legal subject.

Chapter 5
THE PREFERABLY UNHEARD SURROGATE: THE SUPREME COURT OF INDIA’S VOLTE FACE ON SURROGACY AND ITS CONSEQUENCES

In Chapter 5, we analysed how the position and rights of surrogate mothers were changed by the two proceedings before the Supreme Court of India, which took place in 2008–2009 and 2014–2015. The two events are examined in relation to Supreme Court records, first-hand experiences, interactions with stakeholders and media accounts. Copies of the daily orders and filings before the Supreme Court were obtained along with the judgments of the Supreme Court.

The impact of the 2008–2009 proceeding of the Supreme Court was examined on the then drafted Assisted Reproductive Technologies (Regulation) Bill, 2010 (ART Bill 2010) and copies of the various forms used by doctors under it were obtained and examined for their constitutional soundness.
I engaged in a first-hand observation of a case proceeding on surrogacy in the Supreme Court of India courtroom visits between September 2014 and January 2016. During this I also conducted informal discussions and interactions with stakeholders attending the courtroom proceedings, particularly surrogate mothers and activists.

Chapter 6
THE FORCED GIFT: BIRTH OF AN INDIAN POSITION AT ODDS WITH THE SURROGATE MOTHER

For Chapter 6, we conducted an extensive legal and critical analysis of surrogacy regulations in India in order to understand their internal coherence. The surrogacy regulations analysed were five revisions to the draft legislation for the regulation of Assisted Reproductive Technologies (ART): the 2008, 2010, 2013, 2014 and the 2016 Bills. In the same chapter, we conducted a critical analysis of the 2016 Bill (which is now the 2019 Bill) through the conceptual lens of vulnerability developed in Chapter 4. We also examined the provisions for constitutional soundness.

Copies of the National Guidelines for Accreditation, Supervision And Regulation of ART Clinics in India, ICMR and the National Academy of Medical Sciences, India (2005) and the Assisted Reproductive Technology (Regulation) Bill, 2010 and 2014 and copies of the Surrogacy (Regulation) Bill 2016, Bill No. 257 of 2016 were obtained along with press briefing and cabinet notes developed as background to announce the draft bill.

Chapter 7
STILL VULNERABLE AND PRECARIOUS? INTERNATIONAL LEGAL INSIGHTS FOR THE SURROGACY (REGULATION) BILL (2019)
In Chapter 7, we conducted two comparative analyses: 1) regulatory positions in India from 2000 to 2019; and 2) how surrogacy has been treated in other selected jurisdictions, which take legal positions similar to the one proposed by Indian legislators.

In the first analysis we asked how the different policies and regulations fit together whether they are consistent in their approach to the widely differing social realities of surrogate mothers as legal subjects. To answer this we used the methodology of a literature review of contemporary legal, political and social writings. Copies of the Surrogacy (Regulation) Bill, 2019 were obtained and a spectrum was developed to capture the shifts in legal positions from 2000 to 2019. Broad elements and key features were identified in this spectrum.

In the second analysis, we explored the meaning and validity of Indian surrogacy regulations in the context of other (international) normative systems with a specific emphasis on the key features identified in the spectrum developed in the first comparative analysis. This systematic analysis included contemporary anecdotes on such laws and legal positions as reported by each jurisdiction’s media.


Chapter 8
FROM VULNERABILITY TO STRENGTH? SURROGACY THROUGH THE CONSTITUTION’S LOOKING GLASS
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Chapter 8 was being written more than a year after Chapter 1, in which we articulated the vulnerability construct. To ensure continuing relevance we further reviewed a 2018 study conducted by the Council for Social Development submitted to the National Human Rights Commission (CSD Study). In this study, 36 surrogates were interviewed (28 from Delhi and eight from Mumbai) over an eight-month period. The study is important because it was conducted in a time period when the Government had already announced its ban on commercial surrogacy.

We then explored methods through which the Constitution of India can be operationalised in the process of developing legislation on surrogacy. In order to do this, we conducted a literature review of various articles conceptualising theoretical approaches to surrogacy and case-law search and analysis to identify the fundamentals of the Constitution that become relevant to surrogacy and subsume various theoretical approaches. This was done in order to create a constitutional lens through which we then examined the gaps in the regulatory positions on surrogacy.

3.4 Validity

Within this thesis, multiple strategies were used to enhance the validity of the results and conclusions and to minimise the effects of researcher bias.

- To increase my familiarity with the subject, I spent a month in Anand, Gujarat in 2009 with visits to clinics offering surrogacy and to surrogate hostels. Here I saw the various stakeholders in action and saw the practical realities of the surrogate arrangements. I made field notes and participated in the presentation and discussion of the Law Commission’s 228th report on surrogacy.  

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2 National Human Rights Commission, Report of a Study to Understand the Legal Rights and Challenges of Surrogates from Mumbai and Delhi (Centre for Social Development, New Delhi) 17

3 Government Of India, Law Commission Of India, Need For Legislation To Regulate Assisted Reproductive
• In 2011, I conducted six months of observational research in Delhi, during which I visited clinics and interviewed doctors involved in offering surrogacy services and presented papers on my insights at the National Conference on Surrogacy: Issues and Challenges organised by the GNLU Centre for Private International Law, Gandhi Nagar, Gujarat, India in September 2011. The discussion was attended by representatives of governments, Ministry of Women & Child Development, Ministry of Social Justice & Empowerment, Ministry of Law & Justice, the National Human Rights Commission, State Human Rights Commission(s), National Commission for Protection of Child Rights (NCPCR), Central Adoption Resource Authority (CARA), National Commission for Women, Medical Council of India and members from the State Commission (s) for Women. Also present were representatives of inter-governmental organisations such as United Nations Development Fund for Women (UNIFEM, now UN Women), non-government organisation (NGOs), social activists, academics, researchers, law firms, medical practitioners and students.

There is an extensive interpretation of legal concepts in all the papers. To maintain accuracy and consistency and remove possible bias, as the interpretations were developed, they were presented in various forums for discussion, debate, and validation. These included a national consultation in 2012 on assisted reproductive technologies organized by ILS Law College, Pune where I made a presentation on the legal aspects of surrogacy. I also participated in a panel discussion, ‘Round Table Discussion on the Policy Recommendations’ at a seminar on ‘Surrogacy in India: Empirical Evidences and Policy Recommendations’ organised by the Indian Council of Social Science Research in Delhi in 2012, supported by the Ministry of Women and Child Development.

• In 2014, I presented my work at a National Conference on Surrogacy in Delhi to discuss the Assisted Reproductive Technology Bill, 2013 conducted by the Centre for Technology Clinics As Well As Rights And Obligations Of Parties To A Surrogacy, (Report No. 228, August 2009) <http://lawcommissionofindia.nic.in/reports/report228.pdf> accessed 07 August 2019
Social Research (CSR) and also at a seminar on ‘Commercial Surrogacy in India’ organised by the Amity Legal Aid Cell of Amity Law School, Noida.

In 2016, I participated as a member of an interactive audience for a very special edition of the show ‘We The People’ moderated by Ms Barkha Dutt for the NDTV channel in which the discussion topic was how justified it is to pass the recent Surrogacy Bill. Renowned personalities from various fields such as politics, entertainment, sports etc. joined in as guests along with an audience of 70–80 people.

- Analysis of law and comparative studies involved identifying the existing legal and ethical situation based on expert opinions, comparatively analysing existing legislation and regulatory frameworks in key jurisdictions and recognised standards in national and international policy documents on the subject, and critically analysing judicial interpretations and directions of the Supreme Court of India to synthesise a constitutional framework. Moreover, evolving perspectives were presented and debated in the discussions mentioned above, and this has contributed further to the validity.

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REFERENCES

Government Of India, Law Commission Of India, *Need For Legislation To Regulate Assisted Reproductive Technology Clinics As Well As Rights And Obligations Of Parties To A Surrogacy*, (Report No. 228, August 2009)< http://lawcommissionofindia.nic.in/reports/report228.pdf>

National Human Rights Commission, *Report of a Study to Understand the Legal Rights and Challenges of Surrogates from Mumbai and Delhi* (Centre for Social Development, New Delhi)
CHAPTER 4 - THE CONSTRUCT OF AN INDIAN SURROGATE:
QUALIFYING FOR VULNERABILITY

“People say it is the conscious choice of the woman. Our stand is that it is a very wrong notion of the family as a whole to use the woman’s body to make money. Is she a child-producing factory?”

- Anupriya Patel, Union Minister of State, Health and Family Welfare

“The press calls surrogates machines. If you have three children instead of two would your family call you a machine?”

- Rashida Banoo, five-month pregnant surrogate

“In my village, one woman has nine boys and two girls but no one calls her a baby-making factory.”

- Sera, seven-month pregnant surrogate

A. INTRODUCTION: SURROGACY, VULNERABILITY AND THE LAW

Surrogacy is a practice in which a woman decides to act as a gestational mother for the offspring of another person. Surrogacy may be traditional, i.e., the gestational mother (the

2 Nergish Sunavala, ‘Humans of Anand: “We’re not baby making machines’ The Times Of India (08 September, 2016)
3 ibid.
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surrogate) is also the genetic mother of the offspring she carries, or it may be genetic, i.e., the intending mother or a donor provides the ovum for the procedure. Surrogacy is a widespread practice in India and a complex phenomenon and poses great many legal, ethical and political questions that are as yet unanswered.

In 2015, the Government of India made a radical shift in its stance on surrogacy, claiming that commercial surrogacy would no longer be legally permitted in the country. Surrogacy was to be, henceforth, only altruistic. This stance on surrogacy was diametrically opposite to the Indian Supreme Court’s stance in 2008-2009 when during the case of Baby Manji Yamada v. Union of India, it legally recognized and in effect legitimized the commerce of the surrogacy industry in India. This legitimacy in effect led to surrogacy becoming a multi-million dollar industry. While the industry burgeoned and India came to be known as the cradle of the world, ground research revealed that all concerned parties - identifiably surrogate mothers, commissioning parents and surrogate babies - were being potentially short-changed in the unregulated surrogacy industry. Concerns were raised that surrogate mothers were being made to sell their motherhood - exploited under the control of a handful of medical experts. The shift of the Government in 2015 towards a ban was ostensibly to end the exploitation of surrogate mothers.

Media reports consequently highlighted various surrogate mothers objecting to this shift in position, which suggested a conflict of interest between the government and the surrogates.

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4 Baby Manji Yamada v Union of India and Anr. AIR 2009 SC 84

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November 2015, a group of surrogate mothers moved the Supreme Court. They said the changes by the Government of India were discriminatory and projected surrogacy in a very negative light. However, their attempt to be heard was opposed by the Union of India itself in its counter affidavit dated 29 January 2016, which rejected the surrogates’ contention that they had been rendered jobless by the government’s changed stance. The basis of this rejection was the claim that surrogate mothers are not directly affected by the ban – a problematic stance, given that the ban was enforced to end the exploitation of surrogates.

In the wake of this changed stance, there have been numerous debates about whether surrogacy is immoral, exploitative and commodifying. There have also been significant discussions led by social workers, women’s rights activists, public intellectuals, and law and policy makers on how the industry is to be regulated, who is to be regulated, whose rights are to be protected, what can and cannot be permitted and so on. In the throes of these raging debates, however, little is known about the ‘surrogate mother’. Who is she? What are her needs, opinions and expectations? What options does she have? Does she identify her state as immoral? Does she consider herself exploited or commoditized, and if yes, then by what specifically? Where and how does she anticipate her own vulnerability in the face of potential exploitation? There is no doubt that the surrogate mother is vital for the success of the surrogacy arrangement and plays a pivotal role with the longest and toughest investment in the arrangement. Yet, it appears that draft after draft of any proposed regulation on surrogacy has failed to involve her in the law-making process or make her central to it.

13 Margaret Atwood, The Handmaid’s Tale (McClelland and Stewart 1985). Dystopian novel where some women are subordinated to the sole purpose of being a surrogate.
The Government’s changing stance on surrogacy was supposedly to end exploitation, but we cannot really begin to understand what exploitation entails if we don’t first have an adequate idea of who it is that is being exploited and where this exploitation comes from. The main aim of this paper is thus to develop an understanding of the construct of the surrogate and, concomitantly, understand how the possibilities of exploitation and its regulation are necessarily framed by interconnected legal, societal, medical and economic structures. In this regard, the question of the surrogate’s vulnerability to potential exploitation forms one of the central aspects of this paper in its attempt to understand the construct of the surrogate in the Indian context. Another key element is understanding the relationship between the law, vulnerability and the possibility of exploitation before we ask how this relates more specifically to the issue of surrogacy. This understanding is highly relevant today as actions seeking to protect vulnerable individuals or groups may often appear paternalistic, and therefore are questioned by the very groups for whom protection is sought.\footnote{Ruth Macklin, \textit{Bioethics, Vulnerability and Protection} (Blackwell Publishing Ltd. 2003) 473<http://www.unige.ch/medecine/ieh2/files/8714/3472/9172/me-12-Macklin-vulnerability-and-protection.pdf.>}

This appears to have also been the case in India, as surrogates themselves have opposed the steps of the Indian Government to presumably end the exploitation of surrogates.

A.1 Methodology

In India, there exist very few systematic studies that have attempted to understand the demographic and socio-economic backgrounds of women acting as surrogates. At the time of writing this paper, only three research studies were available on women acting as surrogates. The first is an exploratory study by the Centre of Social Research (CSR) titled \textit{Surrogate Motherhood – Ethical or Commercial} (2012), in which 100 surrogates from Anand, Surat and Jamnagar were interviewed (hereinafter referred to as the CSR ASJ Study). The second is a study conducted by Sama – Resource Group for Women and Health titled \textit{Birthing A Market – A study on Commercial Surrogacy} (2012), which interviewed 12 surrogates in total, of whom 4 were interviewed in depth (hereinafter referred to as the Sama Study). The third is also by the
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CSR, *Surrogate Motherhood – Ethical or Commercial* (2014), in which 100 surrogates from Delhi and Mumbai were interviewed (hereinafter referred to as the CSR DM Study). The studies by CSR were funded and recognized by the Ministry of Women and Child Development, Government of India.

Even in these studies, there is a dearth of analysis of the surrogates’ strengths and vulnerabilities due to their demography and socio-economic background. Without this understanding as a starting point, the various attempts to put a law in place to regulate surrogacy might not be able to take into account the vulnerabilities experienced by the surrogate mother nor identify the potential for exploitation or discrimination in the various levels of interaction in the process.

The aim of this paper is to know the surrogates better with the help of their demographics, and begin to clarify ways for the legislation to take their vulnerabilities into account in a way that helps support their interests. By focusing on the interviews conducted and comparing the data collated in these studies, we identify and analyze the common, operational circumstances that define the demographic and socio-economic background of a woman wishing to act as a surrogate. Then through the development of a concept of vulnerability, we provide a deeper insight into how such a background may or may not make her vulnerable in the surrogate arrangement and how potential legislation can make provisions to address vulnerabilities, if any, and narrow the possibility of exploitation or discrimination.

In order to fulfill this aim, the argument of this paper proceeds as follows: 1] we analyse the concept of vulnerability as developed in existing studies and legitimize its use and value for the purpose of this paper; 2] we analyse the three available studies to identify who the surrogate is and what her circumstances are; 3] in a meta-analysis that draws from the two earlier sections, we conceptualise a vulnerability matrix specific to this context in relation to the law.
B. THE CONCEPT OF VULNERABILITY

In an influential 2013 collection of essays on the subject, Mackenzie et al.\textsuperscript{16} defined vulnerability as an ontological human condition. Our lives, they observed, are “conditioned by vulnerability”\textsuperscript{17} since, to a large extent, we depend on others for our wellbeing, care and support. With this broad definition as their starting point, they began to theorise vulnerability “in connection with a range of other concepts, including harm, need, dependency, care, and exploitation”.\textsuperscript{18} Drawing from theorists like Judith Butler\textsuperscript{19} and Martha Nussbaum\textsuperscript{20}, vulnerability is understood as something that is always relational and infrastructural. Where quality of life is defined by relationships and dependencies, vulnerability is not only an undeniable fact, but also a “socially induced condition”.\textsuperscript{21} We are always already vulnerable, as Butler would have it, to certain “symbolic systems”\textsuperscript{22} which fundamentally structure how we act and identify with others and ourselves. On this theoretical base, Mackenzie et al. developed a taxonomy of vulnerability that distinguishes between two kinds of vulnerabilities: inherent and situational. The former refers to those “sources of vulnerability that are intrinsic to the human condition. These vulnerabilities arise from our corporeality, our neediness, our dependence on others, and our affective and social natures”.\textsuperscript{23} Situational vulnerability on the other hand refers to a context-specific vulnerability, “caused or exacerbated by the personal, social, political, economic, or environmental situations of individuals or social groups”.\textsuperscript{24}

Another significant definition of vulnerability is offered by Chandrima B. Chatterjee in her work on vulnerability and health for CEHAT (The Centre for Enquiry into Health and Allied

\textsuperscript{17}ibid.
\textsuperscript{18}ibid.
\textsuperscript{19}Judith Butler, ‘Precarious life, vulnerability, and the ethics of cohabitation’, (2012) 26(2) The Journal of Speculative Philosophy 134-151. Symbolic systems encompass nearly all social relations – gender, race, class, caste, age, marital and educational status – which define, legitimise or delegitimise, and determine the contexts and possibilities of the ways in which we relate to one another.
\textsuperscript{20}Martha C. Nussbaum, Frontiers of Justice: Disability, Nationality, Species Membership (Belknap Press 2007).
\textsuperscript{22}Butler (n 19)
\textsuperscript{23}Mackenzie(n 16)
\textsuperscript{24}ibid. 8
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Themes).\textsuperscript{25} Diverging from Butler and Mackenzie et al.’s dependency-based model, Chatterjee defines vulnerability specifically as the state of being exposed or susceptible to danger or abuse. She writes that vulnerability “comprises of weakness of physical or mental strength, defenselessness, unprotectedness, fragility and exposure to undesirable conditions/factors.”\textsuperscript{26}

For the purpose of this paper, this definition is a crucial refinement of those presented above. Although vulnerability may be an ever-present condition of human life, being vulnerable isn’t necessarily tantamount to being exploited. The link between vulnerability and exploitation is indeed the exposure to detrimental conditions. In the case of surrogacy, it could be argued that a careful identification of those detrimental conditions that render a surrogate negatively vulnerable could constructively inform regulatory interventions to prevent exploitation.

While Mackenzie et al.’s taxonomy (inherent and situational vulnerability) marks an important point of departure for this paper, there are nevertheless significant differences in the way the construction of vulnerability is deployed here. The vulnerability construct for surrogacy in this paper could be considered a situational one on the whole: A surrogacy arrangement marks a very context-specific vulnerability. Our own categorization of vulnerability involves a distinction between intrinsic, extrinsic and relational vulnerabilities that a surrogate mother could be subjected to. This will be defined and elaborated in Section C.

A further refinement and legitimization of our classification are possible by recourse to biomedical research on human subjects, in which the measurement of vulnerability of the subject has been largely guided by universal ethical principles formulated by the National Commission for the Protection of Human Subjects of Biomedical and Behavioural Research. Historically, this concept vis-à-vis biomedical research on human subjects links with surrogacy intimately as the Indian Council of Medical Research’s (ICMR)\textsuperscript{27} first reference to surrogacy was

\textsuperscript{25} Chandrima Chatterjee & Gunjan Sheoran, Vulnerable Groups in India, The Centre for Enquiry into Health and Allied Themes (CEHAT) 1998

\textsuperscript{26} ibid. 23

\textsuperscript{27} The Indian Council of Medical Research [hereinafter ICMR] was set up as the Indian Research Fund Association in 1911, has evolved over the years in line with changing health research needs. Today, it is the apex body in India
in its Ethical Guidelines for Biomedical Research on Human Participants, 2000. In the year 2000, the practice of surrogacy was likened to biomedical research being conducted on the human subject, and we argue that the surrogate mother and her vulnerabilities should therefore be visibilised similarly.

In the Belmont Report in 1978, vulnerability came to be understood in eight categories, briefly defined here:

1. **Cognitive or Communicative Vulnerability** concerns the capacity of a person to be able not only to consent but also understand, appreciate and reason through the consent documentation and/or explanations.

2. **Institutional Vulnerability** includes individuals who are subject to a formal authority and whose consent may be coerced directly or indirectly.

3. **Deferential Vulnerability** recognizes informal subordination to authority figures. These may arise in doctor/patient relationships or husband/wife relationships where one person feels obligated to follow the advice of the other.

4. **Medical Vulnerability** includes individuals whose medical state may cloud their ability to make a decision regarding participation. As surrogates are not receiving medical treatment for any of their own ailments, such a category of vulnerability would not usually apply to the surrogate.

5. **Economic Vulnerability** includes individuals whose economic situation may make them vulnerable to the prospect of free medical care and/or the payments issued for participating in the arrangement.

6. **Social Vulnerability** recognizes the vulnerability of participants who are at risk for discrimination on account of race, gender, ethnicity and age.

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for the formulation, coordination and promotion of biomedical research. It is one of the oldest medical research bodies in the world.

28Ethical Guidelines For Biomedical Research On Human Participants(Indian Council of Medical Research, 2000)<http://whoindia.org/linkfiles/hsd_resources_ethical_guidelines_for_biomedical_research_on_human_subjects.pdf> accessed 07 August 2019


(7) Legal Vulnerability would concern the legal situation of an individual such as the ability or inability to provide proof that would allow a situation to be legalized, presence without legality, undeclared professional activity, etc. It would include participants who do not have the legal right to consent or who may be concerned that consenting could have legal repercussions for them.

(8) Study Vulnerability includes participants who are made vulnerable by the study’s design. As this is specific to medical research studies, it is not immediately applicable to the surrogate in our general assessment of her vulnerabilities.

Section D will elaborate further on the connection between these types of vulnerabilities and the classification we develop. We now turn to the relation between vulnerability and the legal system of India.

B.1 Vulnerability in Indian Law

The Constitution of India, adopted in November 1949, is prefaced by a preamble that is a solemn resolution of the people of India to secure Justice, Liberty and Equality for all its citizens, with an objective to promote fraternity. In 2017, the President of India reiterated once again that this is not an abstract ideal and has to be made meaningful to the lives of ordinary people in every street, village and mohalla [neighborhood] of India. “It has to somehow connect with their everyday existence and make it more comfortable,” he said. However, in the face of ever growing economic and developmental disparities, how can the...
conventional ideals of liberty and equality possibly be realized? This is where the country’s legal structure is undeniably important. Law is what bridges the gap between the ideals of the constitution and reality by ensuring that every legislation in India mirrors these ideals or standards, converts them to rules\(^{34}\) and reduces discrimination.

Reducing discrimination is a direct mandate of the Constitution of India, which provides that the State shall not discriminate against any citizen on grounds of religion, race, caste, sex or place of birth.\(^{35}\) The Constitution inherently recognizes structural discrimination, which refers to rules, norms, generally accepted approaches and behaviors in institutions and other social structures that constitute obstacles for subordinate groups to enjoying the equal rights and opportunities possessed by dominant groups.\(^{36}\) Clause 4 of Article 15\(^{37}\) was added in the first amendment to the Constitution in 1951 as a consequence of a Supreme Court judgment on equality to clarify that the State can make special provisions for the educational, economic, or social advancement of any backward class of citizens and not be challenged on grounds of being discriminatory. The Constitution in its original form recognized in Article 15(3) the inherent vulnerability of women and children, thus providing as an express exception that nothing in Article 15 shall prevent the State from making special provisions for women and children.

Specifically in the field of bioethics and human rights, India is a signatory of the 2005 UNESCO Universal Declaration on Bioethics and Human Rights.\(^{38}\) Article 8 of the Declaration lays down a categorical respect for human vulnerability and personal integrity and states, “In applying and

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\(^{35}\) Constitution (n 31) Art. 15(1)

\(^{36}\) Constitution (n 31) Arts. 14, 15(3), 23, 39 and 42

\(^{37}\) Constitution (n 31) Article 15(4). Nothing in this article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.

advancing scientific knowledge, medical practice and associated technologies, human vulnerability should be taken into account. Individuals and groups of special vulnerability should be protected and the personal integrity of such individuals respected.”

Discrimination may be visible or invisible, and intentional or unintentional. In order to reduce discrimination, however, every legislation under the Constitution of India needs to first recognize discrimination, and acknowledge possibilities, and constantly strive to identify areas in which discrimination can take place. We would argue that an analysis of vulnerability becomes a necessary exercise preceding any legislation on surrogacy – to adhere to constitutional standards as well as universal commitments.

C. ANALYSIS OF RESEARCH STUDIES & THEIR RELATIONSHIP WITH VULNERABILITY

The characteristics identified in the three empirical studies – one conducted by the CSR in Delhi and Mumbai;\(^{39}\) another by it in Anand, Surat and Jamnager;\(^ {40}\) and one conducted by the Sama-Resource Group for Women and Health (Sama) in two Indian cities\(^{41}\) – that define the socio-economic background of the surrogate have been classified as intrinsic, extrinsic or relational. Intrinsic signifies something that is part of essential nature or possibly biology. For example, a potential surrogate is necessarily female. Age is another intrinsic characteristic. Extrinsic characteristics are those which operate and affect from the outside. Characteristics such as education, previous employment, household income are all identified as extrinsic characteristics of a surrogate. Regarding relational characteristics, the term relational is borrowed from concepts and theories on interpersonal communication in the study of relationship development as propounded by D.H. Solomon and Knobloch.\(^ {42}\) As the term

\(^{39}\)Dr. Ranjana Kumari, ‘Surrogate Motherhood: Ethical or Commercial’ Centre for Social Research 39<https://wcd.nic.in/sites/default/files/final%20report.pdf>accessed 07 August 2019

\(^{40}\)ibid.


suggests, characteristics that are indicative of relationships such as marital status and children are grouped under this heading for the purposes of this paper.

Each of these characteristics, as we discovered, plays a crucial role in the woman’s choice to be a surrogate and at a systemic level in whether or not she is likely to be engaged as one. It is important to point out here that these characteristics can be distinguished analytically but in reality appear deeply interwoven in ways that pose particular problems at the legal level of legislation and policies.

In this section, we will first introduce the characteristics under each classification alongside the research data of the three studies being reviewed. We shall see what the position of the proposed regulation is in those terms. As India has yet to arrive at a final legal position on surrogacy, these positions are drawn from the ICMR’s 2005 Guidelines (which is loosely regulating the practice presently), the Assisted Reproductive Technology (Regulation) Bill, 2010 (which was proposed though not enacted, but is one of the most detailed drafts with forms and schedules that are currently being used by ART Clinics under ICMR guidance) and the Surrogacy (Regulation) Bill, 2016 which was the latest attempt of the Union to prohibit commercial surrogacy but has yet not been passed by the Parliament of India and is still pending in the Lok Sabha (lower house). We shall see how each characteristic is linked to vulnerability and where the opportunities lie for legislative intervention to reduce possible exploitation that may arise due to the vulnerability exposed.

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43 National Guidelines For Accreditation, Supervision And Regulation Of Art Clinics In India, ICMR and the National Academy of Medical Sciences, India (2005) <http://icmr.nic.in/art/art_clinics.htm> accessed 07 August 2019
C.1 Intrinsic characteristics

(i) The sex of a surrogate

The sex of the surrogate is necessarily female. Therefore, none of the research studies has specifically identified this as a characteristic or analyzed the links between sex and vulnerability.

Ruth Macklin wrote with disquiet,

Although it is surely a mistake to construe women in general as a class of human beings who are vulnerable, it remains sadly true that women in many parts of the world not only lack power and self-determination within the family and in the culture in which they reside, but they are also subjected to the grossest forms of physical harm and psychological degradation.\(^{48}\)

In Indian society, women have a low status compared to men.\(^{49}\) Chandrima Chatterjee described them as a vulnerable group:

They have little control on the resources and on important decisions related to their lives. In India, early marriage and childbearing affects women’s health adversely. About 28 per cent of girls in India get married below the legal age and experience pregnancy (Reproductive And Child Health - District level Household Survey 2002-04, August 2006). These have serious repercussions on the health of women. Maternal mortality is very high in India. The average maternal mortality ratio at the national level is 540 deaths per 100,000 live births (National Family Health Survey-2, 2000).... Women face violence and it has an impact on their health. During infancy and growing years a girl child faces different forms of violence like infanticide, neglect of nutritional needs, education and healthcare. As adults they

\(^{48}\) Macklin (n 15) 480

\(^{49}\) Chatterjee (n 25) 87
Visibilising this ground reality, sex is a factor that even the Constitution of India recognizes as a variable that attracts discrimination. As discussed above, the Constitution specifically makes provision for positive legislation in favor of women to counter structural discrimination.

A surrogate is intrinsically vulnerable due to her sex in a patriarchal system. A reasonable assumption from this is that she may be prone to subordination, whether imposed by her own family members or medical practitioners, making her more susceptible to exploitation in deferential or institutional relationships. She may be conditioned to serve and exhibit social vulnerability. She may be unable to articulate herself sufficiently or make herself heard, leading to communicative impairment. Her requests for information may be denied on account of them being not worthy of consideration. Later in Section D, we shall see how sex as an intrinsic vulnerability links in with other forms of vulnerability identified in the Belmont categorization and therefore mandates legislative responses that are gender-sensitive and empowering.

(ii) The average age of a surrogate

In the studies conducted by the CSR in three high-prevalence areas – Anand, Surat & Jamnagar – amongst a sample of 100 surrogate mothers (CSR ASJ Study), it was found that the majority of the women who act as surrogates are between the ages of 26 and 35. In the other study conducted by CSR in Delhi and Mumbai (CSR DM Study), 66% of the 100 surrogates covered fell in the age group of 26-30 years. In the Sama Study, all the surrogates at the time of the

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50 Chatterjee (n 25) 87  
51 Sama (n 41) 62  
52 CSR ASJ Study (n 40)  
53 ibid.  
54 CSR DM Study (n 39)  
55 ibid.
interview were in the age group of 21–38 years, with all except one below 35 years at the time they acted as surrogates.

Although the minimum age for marriage for a woman or even the age of majority is 18 years, none of the women in the respondent groups was below 21 years. This might be explained by the provisions of the ART Bill 2010. In Section 34, the draft bill provides that a surrogate shall not be less than 21 years of age. This may have had an impact on actual practice even though the bill is only a draft and not the law.

In 2005, the ICMR published guidelines for the accreditation, supervision and regulation of ART clinics in India. The guidelines did not give a minimum age, but stated that a surrogate mother should not be over 45 years of age. Curiously, while allowing 45 years as the upper limit for a woman to act as a surrogate, the ICM’s 2005 Guidelines describe in Section 3.5.12 that no more than three eggs or embryos shall be placed in a woman during one treatment cycle excepting under exceptional circumstances such as “elderly women” (described as those above 37 years of age). Since a surrogate would also be required to have eggs/embryos placed in her, the rationale was unclear for expanding that age group to 45 years of age when otherwise a woman is termed as elderly at 37 years.

From the studies it can be seen that none of the respondents was above 34 and that the preferred age for surrogate mothers was even lower - below 30 years of age. This appears to be a preference driven by the clinics that select surrogates, possibly because the success rate of surrogate pregnancy is assumed to be higher at a lower age. In the Sama Study, age-related responses from doctors pointed to a preference for involving younger women in surrogacy. According to one of the interviewed doctors,

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56 Sama (n 41) 33
57 ICMR’s 2005 Guidelines (n 43)
58 Ibid. Cl. 3.10.5
59 CSR DM Study (n 39) 44. “Hence, there is a preference for surrogate mothers below 30 years of age as the success rate of surrogate pregnancy is considered higher within lower age group.”
60 Ibid.
If a surrogate goes in for her first arrangement at 25 years, then she can go for two or three arrangements till she is 30 years. The chances of getting pregnant are reduced after 30, and delivery is also perceived to be more complicated in older women, given higher incidences of high blood pressure, diabetes, thyroid, etc.\(^\text{61}\)

With this logic underlying the selection process, there would be a drive for younger surrogates. Here it can be seen that there appears to be a fine and ever blurring boundary between capital interests (possible costs incurred if the surrogate pregnancy fails) and concern for the health of the surrogate mother. Such a conflation reveals an ethically troubling alliance between medical practitioners who isolate the woman’s body from the socio-cultural/phenomenological realities and the socio-legal domain, which seeks to regulate social subjects on a presupposition of an equally troubling moral code. Though the interviewed doctor posed the younger age preference for the surrogate herself – suggesting that she would be interested in going in for multiple arrangements before the age of 30 years, the actual considerations appear to be different. The same doctor went on to elucidate that exceptions to this general preference did exist if the surrogates were “34-35 years old but looked younger and were healthy.”\(^\text{62}\) Here, looks appear to matter more even in terms of health.

The 2016 Surrogacy Bill specifies that a surrogate should be between the age of 25 to 35 years on the day of implantation.\(^\text{63}\) The rationale for changes in age parameters, of the minimum age from the ART Bill 2010 (21 years) and of the maximum age from the ICMR’s 2005 Guidelines (45 years) is unclear in the absence of explanatory literature.

On its own, age is not a characteristic that makes a surrogate vulnerable. In fact, old age (above 60 years) or young age (adolescence and childhood) are more likely to be vulnerable times. The age framework of 21 years to 45 years (consolidated from all proposed legislation) does not immediately suggest an opportunity for exploitation on account of age. However, as the

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\(^{61}\) Sama (n 41) 34

\(^{62}\) ibid.

\(^{63}\) Surrogacy Bill (n 45) s 4(3)(b)(I)
discussion that has taken place shows us, younger surrogates are preferable. The ICMR has
gone so far as to describe women aged 37 years as elderly. Age, here, seems to render women
particularly prone to vulnerability and exploitation, especially if their reproductive value is the
main determinant. The emphasis on younger age coupled with her sex increases intrinsic
vulnerability, as a younger woman would be more likely to be dominated in a patriarchal
society, she may still be economically dependent and may be under the control of her
household. Moreover, early childbearing or bearing multiple pregnancies in quick succession
has been found to affect women's health adversely.64

Hence, age and sex are both recognized as twin vulnerabilities and may require particular
cconsideration especially when they are linked to other forms of vulnerability identified in the
Belmont categorization (discussed in Section D). A potential surrogate of a younger age may
well require specific counselling, taking into account her reproductive history as well as her
aspirations for her reproductive future.

C.2 Extrinsic Characteristics

(i) Education

Almost half of the surrogates in both CSR studies were educated to primary school level. In
Mumbai, more than half had also completed the senior secondary level of education. In the
Sama study, there was a wide range of formal education – 2 of the 12 women in the sample
were graduates, 3 had studied until class 10 (the UK equivalent of GCSE's – or 'O' Levels), 3 had
completed class 5, 3 had no formal education, and information was not available for 1.

Notably, none of the respondent groups in Mumbai, Delhi, Jalandhar, Surat or Jamnagar (5 of
the 6 cities covered by the three studies) was illiterate. This flies in the face of the usual

64 Zulufkar Ahmad Khanday, Mohammad Akram, ‘Health Status of Marginalized Groups in India’ (2012) 2(6) Int’l
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descriptor for a surrogate mother hailing from India. In 2013, the media in Australia reported a case of a couple who had hired an “illiterate Indian woman” to be the surrogate mother of their twins and was ordered by a judge to return to India to prove she had not been exploited. In that case, the surrogate was a Hindi-speaker. The judge noted that she had used a thumbprint to sign a contract written in English. The concern expressed was that the document did not establish whether the surrogate mother had signed it after it had been read and translated to her.

In India, literacy is not linked to knowledge of English (the usual language of drafted surrogacy contracts and medical paraphernalia). The Census of India describes the concept of literates and illiterates as “a person aged seven and above who can read and write with understanding in any language as a literate.” There are 22 official languages in India, Hindi being the official language of the union and the regional languages being the official languages of the individual states. The Official Languages Act passed in 1963 gave English the status of a secondary official language, meaning that it could also be used for official use along with Hindi. However, a person is considered literate if they have an understanding of any language. Moreover, Census parameters state that a person need not receive any formal education or acquire any minimum qualification to be treated as literate.

Clearly, while literacy or the lack of it is a vulnerability that is ripe for exploitation, the prime concern is of functional literacy, i.e., were the respondents functionally literate enough to be able to understand the paperwork and documentation of their contract?

In the CSR DM Study,

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[a] majority of surrogate mothers (80% of the respondents in Delhi and 96% in Mumbai) stated that surrogacy agreement between all the involved parties took place in the form of a written contract. The nature of contract for most of the surrogate mothers is a bond paper on which the agreement would take place (70% of the respondents in Delhi and 72% in Mumbai). 14% of the respondents in Delhi and 10% in Mumbai said that the contract was signed on the paper prepared by the agents. 68

The researchers recorded their concerns that “Since the surrogate mothers are unable to read or write, she and her husband are told about the contract by the hospital/clinic authorities in a suitable language and easy terms, which the surrogate mother cannot verify by any means.” 69

The study noted that out of the total number of respondents, 88% in Delhi and 76% in Mumbai stated that they were not aware of the clauses of the contract. 70 On this being cross-referenced, the report records that

[t]he agencies/hospital/clinic authorities responsible for giving the information to the surrogate mothers stated that the expecting surrogate mothers might not have remembered the clauses which were orally explained to them during counseling procedure as they are semi-literate and might have forgotten what had been told to them during the process of signing the agreement. 71

A similar story emerged in the CSR ASJ Study. In the Sama Study, it was reported that gaining access to information and maintaining communication was a challenge even among surrogates with higher levels of education, as the transaction documentation was usually in English. This has serious implications for the giving and obtaining of informed consent. The ICMR’s 2005 Guidelines are silent on the educational qualifications or literacy of a qualifying surrogate. The

68 CSR DM Report (n 39) 60
69 CSR DM Report (n 39) 61
70 CSR DM Report (n 39) 63.
71 CSR DM Report (n 39) 61.
proposed legislation of 2016 is also silent in this regard. This may be a considerable oversight that could compound the vulnerability of a potential surrogate.

As the Supreme Court of India has noted in *Samira Kohli v. Dr. Prabha Manchanda & Anr.*,\(^72\) In India, majority of citizens requiring medical care and treatment fall below the poverty line. Most of them are illiterate or semi-literate. They cannot comprehend medical terms, concepts, and treatment procedures......They are a passive, ignorant and uninvolved in treatment procedures. The poor and needy face a hostile medical environment - inadequacy in the number of hospitals and beds, non-availability of adequate treatment facilities, utter lack of qualitative treatment, corruption, callousness and apathy......What choice do these poor patients have? Any treatment of whatever degree, is a boon or a favour, for them. The stark reality is that for a vast majority in the country, the concepts of informed consent or any form of consent, and choice in treatment, have no meaning or relevance.

Can this narrative form the rationale for arriving at the conclusion that informed consent is a mythical construct which cannot be achieved in Indian circumstances? Realistically, the nature and circumstances of surrogacy are far removed from that of patients as described by the Supreme Court. Surrogacy is a treatment entailing choice. It is not a necessity derived from the surrogate’s disease but rather is an act on her part that benefits others. To participate in the surrogacy arrangement, a woman needs to undergo multiple medical procedures. Hence, it is crucial not to overlook informed consent as being irrelevant to cases of surrogacy.

In medicine, the principles of patient autonomy, informed consent, beneficence, non-maleficence and confidentiality guide clinical practice.\(^73\) The surrogacy arrangement, to the extent expressed as clinical procedures, must necessarily conform to and uphold such

\(^72\) *Samira Kohli v. Dr. Prabha Manchanda & Anr* 1 (2008) CPJ 56 (SC)

principles. The ICMR Research Guidelines, 2000 describe the principle of informed consent as a cardinal principal in which the subject is kept continually informed of any and all developments that affect them and others. This ties in with the recognition of cognitive or communicative vulnerability in the Belmont classification discussed in Section D.

(ii) Previous Employment

In both of the CSR Studies, a large majority was employed previously (61.7% in Anand, 91.4% in Surat, 100% in Jamnagar, 68% in Delhi and 80% in Mumbai). They were generally employed as housemaids or domestic help, factory workers, construction workers, in hotels and restaurants or beauty parlours, and even as nurses, midwives or casual workers assisting clinics and hospitals, with a range of earnings between 1000 to 3000 INR. While 3 of the surrogates in the Sama Study described themselves as housewives, of the remainder, 5 were involved in garment work, one was a peer educator with an NGO, one was a cook, and one worked in a government office serving tea and doing other such chores.

In both the CSR Studies, the surrogates usually had working husbands, though in some cases the woman was the sole bread earner as the husband was without employment or an alcoholic. The spouses of the surrogates in the Sama study included a mason, drivers, cooks, supervisors in factories, workers in an export firm and in a garment factory, and a hotel manager. The kind of work was largely casual, irregular and seasonal, with no formal benefits or safety net. Only one of the surrogates was separated from her husband. One surrogate (for whom this was her second surrogate pregnancy) was engaged in garment stitching (piece work from home) and had earlier been engaged in papad rolling from home. Her husband, who used to do garment embroidery in a factory, had been unable to find work in Delhi due to the relocation required for the surrogacy.

Prior employment seemed to be the norm rather than the exception amongst the surrogates interviewed in the three studies. How prior employment of the surrogate (or rather the lack of
it or the nature of it) suggests vulnerability is discussed below after taking into consideration another characteristic, household income.

(iii) *Household income*

In the Sama study, the range of monthly household income of the surrogates interviewed in Punjab was 3000 to 15,000 INR, with most falling around the average of 6000. The range of household income of the surrogates from Delhi was 4500 – 12,000, with most averaging around the 7500 mark. Only one surrogate had the current surrogacy arrangement as her only source of income.

In India “below poverty line” (BPL) is an economic benchmark used by the Government of India to indicate economic disadvantage and to identify individuals and households in need of government assistance and aid. While an income-based poverty line pegs BPL families as those with a household income that is less than 27,000 INR annually, there are other parameters that may also classify a family as being BPL.

On the whole, the respondents in the three studies under discussion fell in a range of INR 12,000 to 180,000 as an annual household income. Of these in the CSR DM Study, 50% of the respondents in Delhi and 68% in Mumbai earned more than 3000 per month and hence could not be classified as BPL or even at the edge.

However, as close to half the respondents could be at the edge of poverty or even BPL, prior employment and household income are characteristics that offer a deeper view on vulnerability that may be potentially exploited. The choices a potential surrogate is making for the

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74 Ministry of Electronics & Information Technology, Government of India, [http://digitalindia.gov.in/content/below-poverty-line-certificate.] accessed 07 August 2019

75 In India Below Poverty Line is an economic benchmark used by the Government of India to indicate economic disadvantage and to identify individuals and households in need of government assistance and aid. While an income-based poverty line pegs BPL families as those who qualify as beneficiaries as they have household income that is less than 27,000 INR annually, there are other parameters that may also classify a family as being below poverty line such as no land or minimal land holding, no house or dilapidated house, no sanitation latrine, family with an illiterate family member, no regular employed person in the family, no access to safe drinking water, a women headed household or presence of widows or divorcees, scheduled castes or scheduled tribes and mentally retarded or disabled members in the family.
aspirations she holds dear have to be understood in the Indian context as a structural reality with real actors and real consequences.\footnote{Amrita Pande, \textit{Not an "Angel", not a "Whore": Surrogates as "Dirty" workers in India}, 16 (2) Indian Journal Of Gender Studies 141-173 (2009) <https://intersektionalitet.files.wordpress.com/2011/03/notanangel2.pdf> accessed 07 August 2019}

A life below the poverty line would suggest that the potential surrogate has already been exposed to possible malnutrition, disease and various other rigors that may require specific evaluation and treatment to bring her to a healthy and safe level that would support a healthy pregnancy. Living below the poverty line or at the edge of it suggests that the option of surrogacy may not be a free choice but a compulsion. Put in context and read in relation to other circumstances, however, monetary needs could be interpreted differently, and ideally lawmakers must be less prone to depriving women of a potential source of income. Consider the case of bar dancers in India, for whom, after a ban was put on the practice, the Supreme Court of India retorted in support of their work and against the ban, “It is better to dance than beg on the streets.”\footnote{Surabhi Malik, ‘Better to Dance than to Beg,’ says Supreme Court on Plea on Dance Bars’ (\textit{NDTV}, 25 April, 2016) <https://www.ndtv.com/india-news/better-to-dance-than-to-beg-says-supreme-court-on-plea-against-dance-bars-1399142> accessed 07 August 2019} Consider also, that while the studies do indicate that affluent women were not acting as surrogates, this is not a viable or sufficient argument. Affluent women do not seek employment as domestic workers or construction workers either, and yet the argument does not extend to these lines of employment to suggest compulsion and hence prohibition of employment in such sectors.

In the Sama Study, the remuneration for surrogacy – the amount, the nature of payment (lump sum) and the time span over which the amount is received – emerged as the central reason for becoming a surrogate. The surrogates spoke of their everyday hardships and difficulties in making ends meet. One surrogate spoke of the tension of impoverishment and the moral qualms of bearing a child and giving it away,
“It is money that gets you to do everything. One has compulsions at home. Everyone is sitting with a lot of tension at home. No one does it because they enjoy (shauk nahi hota) bearing someone else’s child. When there are compulsions, this is what god gets you to do. No woman bears a child and gives it away out of interest.”

A few of the surrogates in the Sama Study also spoke of surrogacy as a familial expectation to salvage the family out of debt,

“In our home, Munna’s father [her husband] doesn’t have that much work on his hands. And, as you know, if there is a death in the family, then there are expenses. So there was debt. We had to take loans for doing all the work [performing the last rites for the deceased] . . . The family was saying if it happens (it would be good), since there was no money.”

From these anecdotes, the dearth of money certainly forms a narrative of compulsion. Compulsion suggests vulnerability. But does vulnerability translate into exploitation? Surrogates point out that those who are privileged will never face this choice. On the other hand, they are well aware that the money earned from surrogacy cannot easily be matched by the earnings from any other available avenue of income generation. According to one surrogate attending a courtroom proceeding concerning the prohibition of commercial surrogacy, “Meri sab takleef surrogacy ne khatam kar di (surrogacy put an end to all my troubles). Ek naukrani kitna kama legi (how much will a maid earn).”

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78 In February 2015, a writ petition – 95 of 2015 – was filed and linked with civil appeal no. 8714 of 2010 (the ‘Jan Balaz’ case) which was being heard by the Supreme Court of India. This was a public interest litigation (PIL) by Advocate Jayshree Wad seeking a ban on commercial surrogacy (the Jayshree Wad PIL). In November 2015, a group of surrogate mothers moved the Supreme Court. Notice was issued on this writ petition (Pavan Agrawal v. Union of India W.O. (C) No. 841/2015). on 16 December 2015, which with its stay application was tagged to the Jayshree Wad PIL, which in turn was tagged to the main Jan Balaz case. One of the authors interviewed some of the surrogates who attended the courtroom proceedings.
Here income closely ties with employability. Prior employment of a surrogate or proof of prior employability of a surrogate suggests prospects and possibilities, i.e., the presence of choice. Someone who has never been employed or has no perceptible employment opportunity may be vulnerable to compulsion. But a person who is employable may choose to participate in a surrogate arrangement as a matter of choice. It is evident that the majority of the surrogates were already engaged in work, which was menial and poorly paid. Surrogates themselves speak of their current work negatively and in belittling terms. Surrogacy is actually the way out of impoverishment for them.

Consider the trajectory of one surrogate interviewed in the Sama Study. She went to school until Class 8, her husband owned a shop, and then due to medical debt, they had to sell the shop and migrate. She started working as a domestic worker and was told by the placement agency that she would work in a 2-room house. However, the house was much larger with 4 floors and 15 rooms where she was expected to clean bathrooms, wash clothes, clean utensils, and also take care of a child and attend to an older woman, all with no increase in salary. When she found herself unable to keep up physically, she discontinued the work after a fortnight. Her employers or the placement agency did not pay her.

How are such situations any less unjust or without choice? The Supreme Court of India has cautioned about Hobson’s choice\(^79\) - acts which are involuntary in the sense that they are compelled by inevitable circumstances and not choice. But making a different choice may not be the same as a Hobson’s choice.

The tension between impoverishment and economic exploitation is a very real one. At present, not one of the proposed regulations has identified or addressed the vulnerability created by the nature or lack of previous employment or limited household income. Both these characteristics

\(^79\) *People’s Union for Democratic Rights v. Union of India* AIR 1982 SC 1473 “A contract of service may appear on its face voluntary but it may, in reality, be involuntary, because while entering into the contract the employee by reason of his economically helpless condition, may have been faced with Hobson’s choice, either to starve or to submit to the exploitative terms dictated by the powerful employer.”
influence the category of economic vulnerability in the Belmont classification, which is discussed in Section D.

C.3 Relational characteristics

(i) The surrogates’ marital status

In the CSR DM Study, none of the surrogates was single. Of the married majority, some of them were divorced, separated or abandoned. In both cities, 12% were divorced. In Mumbai, 14% had been previously abandoned by their husband, and 6% were separated, whereas in Delhi the percentages were 4% abandoned and 2% separated. In the Sama study, all 12 of the surrogates were married, though 2 were separated but not divorced. One reconciled with her husband for the duration of the surrogacy (despite having walked out of a violent relationship) as the clinic required his consent for the surrogacy arrangement. In the CSR ASJ Study, most of the surrogate mothers were married, and only 3.3% in Anand and 2.9% in Surat were single. Respondents included widows, persons abandoned by their husbands with children to look after, and some who were undergoing midwife training while working as nurses in the same hospitals where the surrogacy procedures are carried out. Overall, more than 95% of the respondents were married and living with their husbands.

The ICMR’s 2005 Guidelines do not specify that a surrogate needs to be married to act as a surrogate. Yet it appears from the respondent groups of the studies and particularly from the case documented in the Sama Study that married status of the surrogate and consent of the spouse are important requirements for clinics selecting surrogates. The Sama Study recorded the particular emphasis laid by doctors and agents (that seek surrogates for clinics) on marital status as a primary criterion for inclusion in surrogacy arrangements. Doctors also justified marital status as a necessary condition as per the draft ART Bill 2010. Interestingly, the 2010

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80 The CSR DM Study (n 39) 44-45
81 The Sama Study (n 41)
82 The CSR DM Study (n 39) 30
83 The Sama Study (n 41) 34
84 The Sama Study (n 41) 35
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Bill does not make marriage a pre-qualification for a woman acting as a surrogate. It does provide that if a potential surrogate is married, her spouse’s consent will be required. The 2016 Surrogacy Bill makes marriage a pre-qualification for a woman to act as a surrogate. The rationale for this added pre-qualification is not immediately evident from the bill itself or any relevant explanatory literature.

The preference for married women is apparent in surrogacy arrangements, in which despite being described as deviants of the natural order, the selection of married surrogates actually seeks to conform to patriarchal norms of marriage and reproduction. As the Sama Study documented, “surrogacy arrangements were undoubtedly directed by a hetero-patriarchal construct of marriage and child bearing that permits the latter only within the former.” Whether this is advantageous to the woman is a point that needs to be considered.

In the Sama study, when faced with the concern of her baby bump showing in a few months, one of the surrogates dismissed it saying, “No worries. My man is with me.” This is an example of a surrogate drawing power and security from being in a heterosexual marital relationship. So is marriage as a pre-requisite for potential surrogates an important shield against societal stigma that often hounds the unwed mother? It is possible.

There is, however, also evidence to the contrary. In the CSR DM study, the researchers noted that

[during] field investigation it was found that the fear of abandonment among married surrogate mothers also acts as a driving force to enter into surrogacy arrangements since their husbands found this arrangement as the easiest way to earn quick money beyond their earning capability either to set up a business,

85 Elly Teman, *Birthiing a Mother: The Surrogate Body And the Pregnant Self* (1st edn, University of California Press, March 2010) “Surrogacy threatens to stigmatise the surrogate as deviant of her natural, national, maternal duties.”
86 *The Sama Study* (n 41) 35
87 *id.*
repayment of a loan amount or simply to enjoy life at the cost of the health risk that their wives are subjected to unnecessarily.\(^{88}\)

In the Sama Study, one surrogate spoke of a proactive role of her husband: she said that when approached by an agent, she had refused the offer of surrogacy, but then the agent approached her husband,

“I said I won’t do it. She (agent) said do it, someone will have a child in the house. They will be happy. I refused. Then my husband talked to her. She explained it to him. He talked to the madam [doctor], about a lakh or two. Then he said do it, someone will have a baby in their house.”

On another note, some of the surrogates in both CSR studies reported resistance from their husbands, and to a much lesser extent from parents and in-laws. Most of them were from nuclear families where the family elders would not even be informed. In the Sama Study some of the husbands expressed strong reservations, stemming from the assumption that the surrogate would have to engage in sexual relations, leading to comparison with sex work. The absence of sexual intercourse was a key factor in persuading the surrogates and their husbands. One surrogate recounted that she impressed upon her husband that she viewed surrogacy as a means for a better future for her children,

“I explained to my husband as well that whatever is in (our) fate will happen, so just give your signature and don’t tell me so many things. He still said he can’t give it. He was being so difficult. I said, “you will have to give it, for my sake (tumhe meri kasama)....The agent is saying that if the signature is not there, then it will not happen. You have an I-card, I don’t.” So he agreed.

\(^{88}\)The CSR DM Study (n 39) 45
Although marriage is not a stated requirement in the ART Bill 2010, if a surrogate is married, spousal consent is necessary before she can act as a surrogate under both the ART Bill 2010 and the ICMR’s 2005 Guidelines. This raises the question of whether a woman is truly autonomous in the decisions she needs to make, first to enter into the surrogacy arrangement and second to continue to participate in it and take decisions concerning her body. This also comes up against the notion of patient autonomy and sheds light on the fundamental legislative incongruity because the surrogates are not entitled to the same rights as patients.

Patient autonomy means that a mentally competent adult accessing a health service does not need the authorization of a third party. In the context of a surrogate, autonomy would have two meanings – 1) patient autonomy, i.e., the surrogate’s right to take autonomous decisions with regard to the medical treatments she shall undergo for the surrogate arrangement; and 2) reproductive autonomy, i.e., the surrogate’s right to take free and informed decisions about her own fertility and sexuality. The right to make free and informed decisions about health care and medical treatment, including decisions about one’s own fertility and sexuality, is enshrined in Articles 12 and 16 of the Convention on the Elimination of All Forms of Discrimination Against Women (1978).

India, as a signatory to the International Conference on Population and Development, 1994, has committed itself to ethical and professional standards in family planning services, including the right to personal reproductive autonomy and collective gender equality. This understanding is reflected in the Medical Termination of Pregnancy Act, 1971 and the National Population Policy 2000, which provides that in matters related to

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92 The Medical Termination of Pregnancy Act, 1971, as amended by Act No. 64 of 2002; and The Medical Termination of Pregnancy Rules, 2003 <http://mohfw.nic.in/MTP.htm.> accessed 07 August 2019; Also see Ministry of Health and Family Welfare, Government of India, Guidelines for Medical Officers for Medical Termination of Pregnancy up to eight weeks using manual vacuum aspiration technique, New Delhi, Government of
contraception, abortion and sterilization, third party consent or prior consent of the spouse is not necessary. It follows that if spousal consent or third party consent is unnecessary for preventing pregnancy or terminating pregnancy, then it should also be unnecessary for becoming pregnant.

There is however a contrasting position taken by the Supreme Court of India in Samar Ghosh v. Jaya Ghosh which held on reproductive autonomy that:

> If a husband submits himself for an operation of sterilisation without medical reasons and without the consent or knowledge of his wife and similarly if the wife undergoes vasectomy (read tubectomy) or abortion without medical reason or without the consent or knowledge of her husband, such an act of the spouse may lead to mental cruelty.

Mental cruelty is a ground for divorce under Hindu law in India. So while the decision itself does not require spousal consent to be carried out, the consequences of exercising autonomy may affect the status of marriage.

Would this possible threat to marriage raise enough grounds for rationalising spousal consent in cases of surrogacy where the conceptus has no genetic link with the spouse of the surrogate? Maybe not. At best, such a situation may be addressed by requiring that the act of acting as a surrogate be brought to the knowledge of the spouse beforehand by the surrogate if she is...
married, and the surrogate could give an undertaking in this regard. It would also mean that she has suitably assessed any risk to her marriage.

Reality is in stark contrast to this ideal. In the Sama Study, the field investigators noted that being married or more importantly receiving the surrogate’s husband’s consent along with the surrogate’s consent was a condition adhered to quite strictly by doctors and agents. The rationale for this requirement was described as important to pre-empt the possibility of any trouble (or liability) claimed by the surrogate, or to avoid future monetary contestations by the husband as well as ensure cooperation towards a positive outcome of the pregnancy and towards “easy” relinquishment. The husband’s affirmation was also identified as critical to avoid challenges to the practice of abstinence particularly in the early months of the pregnancy.

From a progression through the draft legislation on the issues which arrive at making it mandatory for a potential surrogate to be married and also to seek spousal consent, it appears that the notion of patient autonomy does not apply to surrogates. These provisions evidently exist not to protect the surrogate, but rather to ensure her compliance. They further highlight perceptions in society about the nature of the ownership a husband wields over his wife’s body. Counselling is considered insufficient to the extent that contractual liability is required on the husband’s part to cede his control. What paradigm shift might be necessary in such a case to turn the legal framework towards protecting the surrogate mother’s rights, and regulating surrogacy as work, rather than merely working within patriarchal norms to secure the woman’s body for financial gains? What kind of vulnerability does such an alliance bring to bear on women?

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97 Medical Council of India, *The Code of Medical Ethics* (approved by the Central Government under s 33 of Indian Medical Council Act, 1956) Cl. 13, Chapter - Disciplinary Action. The Chapter enumerates a list of responsibilities, violation of which will be professional misconduct. Clause 13 of the said chapter places the following responsibility on a doctor: “In an operation which may result in sterility the consent of both husband and wife is needed.” This would cover every procedure in which the reproductive system is manipulated of either spouse. In effect, as doctors in India are trained, marriage carries with it the assumption of ceding of personal autonomy and loss of control over one’s body, particularly of one’s reproductive abilities. This is a troubling construct.
The presence or a negative state of marriage creates tension regarding the autonomy of a surrogate. In one example in the Sama Study, the requirement of spousal consent caused a woman to reconcile with a violent spouse. While the ICMR’s 2005 Guidelines did not make marriage a qualifier to act as a surrogate, the proposed 2016 Surrogacy bill does. The threat is that making marriage and, by the same coin, spousal consent a precedent condition for a potential surrogate, this would invisibilise the stress that it may cause to her personal autonomy. A spouse needs to be seen as an influence on the woman to act as a surrogate. From the studies conducted by CSR, the other influencing factors, which can be identified in order of influence, are agencies or representatives of clinics, the suggestions of family and friends, the experiences of other surrogate mothers, and also media coverage. The CSR data shows that the majority of the surrogates from Anand, Surat and Jamnagar reported having taken the surrogacy decision jointly with their husbands. In contrast, the researchers reported findings that the husband emotionally pressurized the wife to undergo surrogacy in order to buy a house or to set up a garage or to start a business. A possible interpretation is that while the surrogate and her husband have similar motivations, as wife and husband they have different aspirations on how the money would be utilised. In Mumbai, fewer surrogates were dependent on their husband and termed it their own decision. In Delhi, the “self decision” and “husband’s role” were almost equal influences on the decision for surrogacy.

The anecdotal evidence from the studies and the experiences noted above do appear to indicate that the mandatory qualification may bring with it a high degree of deferential vulnerability, which is another category of vulnerability identified in the Belmont Classification, elaborated upon in Section D below.

(ii) The surrogates’ children

The researchers in the CSR DM Study and also the CSR ASJ Study found that all the surrogates had children of their own, and the majority had two children. They noted that this was a prerequisite for infertility physicians/clinics/hospitals engaged in the surrogacy business as it

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98 The CSR DM Study (n 39) 50
acted as a proof of fertility of the potential surrogate mothers. In the Sama study, all the surrogates interviewed had children, and 5 of the surrogates had previously had children for surrogate arrangements.

Notably, the ICMR’s 2005 Guidelines had no requirement that a surrogate have children of her own. As per the draft ART Bill 2010, while no requirement of prior progeny was prescribed, it laid down that a surrogate could have a total number of five (5) children (successful live births), which includes her own children. The rationale for this specified number was unclear as no commentary on the development of the bill is publicly available. The proposed 2016 Surrogacy Bill mandates that a potential surrogate mother needs to have a child of her own to qualify for surrogacy. Again, there is no available literature on the rationale for this additional requirement from previous guidelines and drafts.

According to one of the agents introduced in the study, completion of the surrogate’s family and having the desired number of children prior to entering the surrogacy arrangement was something that agents took into account. One of them was quoted assaying, “Because, God forbid, a problem should arise in conceiving later, they would say that I got this done and that is why I can’t have children now.” Evidently, the surrogate’s identity as a mother is primary. First, as mother to her own progeny and then, as mother for the commissioning parents. However, the surrogate’s identity as a mother clashes with her identity as a worker. Amrita Pande in her seminal work “Not and angel Not a whore” identifies, based on the findings of her interviews with surrogates in Anand, that the same narratives that serve to reinforce the surrogate’s image as a dutiful and selfless woman in the service of her family also undermine her role and image as an independent wage worker. Pande illustrates with examples that recruitment tactics for surrogates often target women who are desperate for money to provide for their children, to get their daughters married on time, and so on. She identifies that “being a mother is not

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99 The CSR DM Study (n 39) 50
100 Surrogacy Bill (n 45) s 4(3)(b)(I).
101 Amrita Pande (n 76) 169
just a medical requirement for a woman to be recruited as a surrogate but also an insidious mechanism to control her” during the surrogacy arrangement.

The CSR DM study noted that amongst the surrogates, families with more than two children were more prevalent. It concluded, “That’s why family maintenance and education of children became a compelling factor in the absence of other employment avenues for mothers to enter surrogacy arrangements.” It further noted the concern that, “Respondents, who had one-child family through C-section, were ignorant that after a delivery through surrogacy arrangement (in which most of the time the child is delivered through C-section) they will not be in a condition to have another child of their own if they wished to.”

There is a tension of sorts created here. The history of birthing a child would make a surrogate evidently able to birth a child in the future as assessed by the clinics. But having a child or children would also make a woman more vulnerable to coercion for acting as a surrogate for the future welfare of her own child. Having only one child of her own may create concerns about whether she can have further children of her own after the surrogacy process, which usually involves extensive hormonal treatment and surgical deliveries. But a requirement of having completed her family first before acting as a surrogate would add to the potential compulsion to act as a surrogate due to enhanced family needs and increased economic responsibility on her.

It is unclear if any requirement imposed on a surrogate to already have her own child/children would be empowering to her or would make her more vulnerable. In a published example, Anita acted as a surrogate because her son had a heart condition and needed an expensive operation. Another case in point is one that the CSR DM Research team came across in Mumbai in which the surrogate mother had filed a case to fight for the custody of her child with

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102 The CSR DM Study (n 39) 49.
103 The CSR DM Study (n 39) 50.
104 Sarmishta Subramanian, ‘Wombs for rent: Is paying the poor to have children wrong when both sides reap such benefits?’, (Maclean’s, 2 July 2007)<https://archive.macleans.ca/issue/20070702.> accessed 07 August 2019
the money she would get out of the surrogacy arrangement she had entered into. Another surrogate highlighted education for her children as a strong motivation:

> “Who will help us out? We have put our children in an English-medium school. The most important thing that came to my mind is that we have to educate our children. So it is just that. I have this dream, since I couldn’t study and we are so miserable. My children should be able to go forward, with blessings from you too. With English, one can meet [good, decent people]. Whatever I couldn’t get, my children should. That’s why I came here. I have no troubles over my sustenance (khana-peena). I can work anywhere and get my food.”

Take another example, of X, who has a seven-year-old biological son whom she hopes to send to a good school and away from the rigours of city life,

> “After this delivery and sending my child to hostel, I will work full-time. If my husband and I work, we will be able to ensure that my child becomes a doctor and escapes this life of struggle. After all, we have no pension or government security in our old age. Who knows if our children will take care of us?”

The presence of dependents can thus also be a motivator for a woman to become a surrogate, as much as it is an area of stress that also contributes to the narrative of desperation. It appears that a surrogate’s own children can be an insidious influence. Legislation that mandates that to qualify as a surrogate she should have her own children is not necessarily reducing her vulnerability. It may only be expounding on patriarchal thought that a woman should first have served the reproductive interests of her own family before serving another’s.

It is a matter of concern that the proposed 2016 Surrogacy Bill makes both marriage and children into requirements that a woman should have met before she can act as a surrogate.

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105 Perappadan(n 10)
This does not demonstrate inadequate understanding of the nature of the stress such factors can cause to autonomous choice and how it exacerbates vulnerability. While it is not necessary for the law to make not being married or not having children as qualifications, the requirement of being married and having children certainly fails to see the huge compulsions these may pose on the surrogate.

D. THE VULNERABILITY MATRIX

D.1 Intrinsic, Extrinsic and Relational Vulnerabilities: A taxonomy for vulnerability in surrogacy

From the above analyses, a taxonomy comprised of intrinsic, extrinsic and relational vulnerabilities can be effectively derived. It is defined as follows:

i) Intrinsic Vulnerability: For a nuanced understanding of intrinsic vulnerability, the primary determinants of a surrogate’s susceptibility to vulnerability are her biological (intrinsic) characteristics, namely her sex and her age. In a surrogacy arrangement, being a woman renders the surrogate prone to certain gender-specific discriminations and exploitations, while her age places definitive restrictions on her economic autonomy.

ii) Extrinsic vulnerability: Social factors such as income and education level potentially render a surrogate vulnerable in terms of the contract. A consideration of extrinsic vulnerability necessitates questioning on a normative ethical level the extent to which the contract (legal and written) ought to correspond to the surrogate’s literacy level and whether her economic needs ought to be given primacy in the arrangement.

iii) Relational vulnerability: Relational vulnerability addresses questions regarding the surrogate's decision-making autonomy when entering into the arrangement by asking to what extent her relational attributes such as marital status and family structure shape or delimit her own choices. In understanding the surrogate’s position as a relationally shaped embodiment,
the notion of relational vulnerability necessitates a consideration of her continued well-being through the process.

The issue of surrogacy is interesting in that it destabilises the idea that the causes of danger, potential exploitation, discrimination or exclusion lie outside of yourself. It is certainly in the nexus of commercial interests and patriarchal mores that qualities like age and sex become determinants of vulnerability among surrogates, but we would like to note that intrinsic does not mean non-relational. This criterion has heuristic value in that it helps identify fixed and mobile, culturally defined and physically defined points of relation. Also, the mere existence of extrinsic vulnerabilities does not presume the existence of exploitation – only the possibility of it. While relational characteristics are identified as possible sources of vulnerability, it is recognised that the relational characteristics of marriage and children may at the same time be stressors and motivators – their identification as a possible source of vulnerability does not immediately cast either a positive or negative light on them. The idea of visualizing the vulnerability construct is to enable any legislation to take these various connotations and characteristics into account with all their separate complexities without lumping them all together.

A significant point of interest of such a differentiated identification is the relationship between vulnerabilities and the law, as specifically seen in the case of surrogacy. Legal frameworks can be seen as having their basis in a certain ethical responsibility of balancing out vulnerabilities, providing frameworks to empower the vulnerable. In our analysis and drawing from Mackenzie et al., the taxonomy of vulnerability that develops as a
construct for surrogacy, broadly divided into intrinsic, extrinsic and relational vulnerabilities, is pictorially represented here at Figure. 1.

The ICMR recognized and addressed surrogacy as a practice prevalent in India in the year 2000. Not many resources or information is available on whether surrogacy (as an Assisted Reproductive Technology) was being utilized by infertile couples to beget children before 2000 but such an assumption can be drawn, and it can be surmised that the ICMR’s act of recognition was a consequence of the practice already being in existence. Yet its treatment of surrogacy and the surrogate at the time was very different. The ICMR recognized the surrogate to be in a position of vulnerability in 2000 by treating her on par with a subject of bio-medical research. This treatment, though potentially problematic as being a form of extreme protection for a subject fully competent to consent, had the advantage of allowing a visibilisation of various types of vulnerabilities that need to be addressed in the case of a surrogate also.

Returning now to the vulnerabilities delineated by the Belmont Report, we proceed to reinterpret our classification of intrinsic, extrinsic and relational vulnerabilities, and legitimise/valorise them contextually. As can be seen from our analysis of characteristics in Section C above, certain categories of vulnerability in the Belmont Classification such as communicative vulnerability, deferential vulnerability, economic vulnerability and social vulnerability directly correspond with our analysis. Medical vulnerability and study vulnerability do not appear to have any relevance. Institutional vulnerability may have some overlap but not of great magnitude. Having identified the major corresponding categories, we will now proceed to place them in the vulnerability construct and elaborate on the legislative opportunities that become available by this identification.

106Centre For Social Research (n 7)
107ICMR Research Guidelines 2000 (n 28)
108From the research studies conducted by CSR, (n 39) & (n 40), we see in the study conducted in Jamnagar that almost 40 percent of the respondent group of surrogates were working as nurses or had assisted in the clinic/hospital work as midwives or casual workers. The study does not reveal whether the surrogates were previously employed with the same clinic where they were acting as surrogates or not. In the study conducted in Delhi and Mumbai this was only the case for 6% and 2% of the respondent group respectively. In the Sama Study (n 41) none of the respondents from Punjab or Delhi were working with the clinics. Hence this may not be a large concern but may require safeguards.
D.2 Communicative Vulnerability

This type of vulnerability is directly identifiable with the surrogacy arrangement in which a surrogate by virtue of inadequate education, illiteracy, or lack of understanding of the language in which the contract documentation is drawn up is unable to communicate her concerns effectively or even satisfy the requirements of informed consent. Similarly, resources and counselling which are not available at the level of her understanding fail her. It is also evident that any counselling is being provided by the ART Clinic/doctor/agent itself, which creates a conflict of interest. Also, such counselling is a one-off event, although the arrangement demands the availability of continuous counselling throughout.

Addressing communicative vulnerability is a key element that lawmakers need to cover in potential regulation. To be able to ensure informed consent, either minimum parameters of functional literacy need to be established by engaging with the surrogate or requirements for forms, contracts and counselling to be in a language of her choice may be necessary aspects along with the provision of neutral, unbiased legal assistance or other aids for supported decision-making.

D.3 Deferential Vulnerability

In the studies conducted by CSR and Sama, deferential vulnerability was present in various ways. The CSR data shows that the majority of the surrogates from Anand, Surat and Jamnagar reported having taken the surrogacy decision jointly with their husbands. The researchers, however, report findings that the husband emotionally pressurized the wife.

The researchers expressed the concern that “while the surrogate mothers are in the shelter home, the payment made to them in instalments or entire amount, is coaxed by their husbands who spend it on alcohol or use it for setting up business which in most cases does not take up.” The husband’s role was quite dominant as one surrogate shared,
I don’t know anything. The doctor did not speak to me. [The] monetary issue was discussed with my bhabhi [agent]. I think my husband knows, but I have no idea about the money . . . I asked my husband to tell me about the money. He said you don’t worry, everything will be fine.

A surrogate in the Sama Study shared that instead of speaking to her, the commissioning parents spoke to her husband,

They did not tell me about this, but the parents had talked to my husband. They told him that they had kept two eggs (embryos). He said that was not an issue. So they had spoken to my husband and he had said that was fine. They talked with my husband while I was sitting inside. I did not know about this.

In practice, doctors prefer surrogates who are married and also make spousal consent a requirement. This certainly increases the deferential vulnerability of a potential surrogate.

Agents and doctors were also influential factors in the Sama Study. Their actions were more to resolve the surrogate’s initial dilemmas or confusions. For example, one surrogate described herself as, “I was confused and faced some dilemmas. How will it be possible [how will she conceive]? Will I have to sleep with anyone? The doctor explained that it is for someone’s happiness, and the bhabhi [agent] had earlier explained the procedure to me. One surrogate related that the doctor told her, “Doctor sahib had told [me] this that if you eat well and take care of yourself and give a child like this, you are helping people and the nation. It will be a good thing. God will also bless you. Doctor sahib persuaded me. So I said okay.”

In the Sama Study one surrogate revealed that, “Doctor had told me one thing, they say that we [the surrogate and her husband] shouldn’t have sex. But she said if I am unable to conceive with the procedure, you can have your own child, I will not tell them [commissioning parents].”
Clearly, these situations suggest an enhanced need for a sensitive recruitment and consent plan where the surrogates have an opportunity to consent voluntarily and not feel obligated to follow the advice of another. Deferential vulnerability also becomes a profound concern if the law lays down requirements that the surrogate be related to the intending parents. The draft 2016 Surrogacy Bill, for example, requires that the surrogate mother be a close relative of the intending parents.

D.4 Economic Vulnerability

The category of economic vulnerability applies squarely to surrogacy. No matter what the narrative, it is clear that the driving force for a surrogate mother is money. Amrita Pande’s interactions with surrogates reflect that most of the surrogate’s narratives worked towards downplaying the choice aspect in their decision to become surrogates by highlighting their economic desperation or the needs of their husbands or children as if they are saying, “It is not in my hands, so I cannot be held responsible and should not be stigmatized.”

However, there have been examples that reveal different positions on the matter. One woman in the Sama Study who was acting as a surrogate for the second time, drew on her experiences and said that women need to communicate openly about their monetary interests. “But communication needs to be open, like I did. I am confessing that in my case, I was quite afraid and I did not communicate. Women should communicate. They should talk openly, the way I have talked about money, one should talk openly.” She clearly articulated herself and exhibited greater confidence in negotiating the money involved. She pointed out that self-stigmatization and fear inhibited women from asking for their fair share. Yet another surrogate revealed a different perspective about feeling inhibited about receiving any payment at all, as the commissioning parents were distant relatives of her husband. “It is in my relations and she [the commissioning mother] is known. It feels strange to talk about money. It is like it is going to our family only.” She was certain that expenses would be taken care of, though.

109 Amrita Pande (n 76)
Chapter 4

In the Vulnerability Construct, economic vulnerability overlaps with extrinsic vulnerability due to the state of the income, prior employment and education of a surrogate. Economic vulnerability in surrogacy requires specific caution in the recruitment of surrogates. It is important that the payment offered does not encourage an individual to put herself at greater risk than they would otherwise. Does this mean that if payment were to be done away with altogether, this nature of vulnerability would be done away with?

At present, the proposed regulation of surrogacy by way of the 2016 Surrogacy bill has suggested that surrogacy should be altruistic. A strict definition of altruism has been taken to cover only the medical expenses incurred by the surrogate mother and insurance coverage.¹¹⁰ There is no room for reimbursement of any other expenses of the surrogate or remuneration for their involvement, time and effort.

The statement of general principles issued in the ICMR Research Guidelines 2000 includes the principle of non-exploitation, whereby “as a general rule, research subjects are remunerated for their involvement in the research or experiment.” The principle of non-exploitation insists that research subjects should be remunerated for their involvement in a research or experiment, at least to compensate for the “physical and psychological risks” and “foreseeable and unforeseeable risks”. Regarding the general ethical issues elaborated in the ICMR Research Guidelines 2000 under seven headings, one of them is “Compensation for Participation”, which specifically calls for reasonable payments that do not amount to inducement and are approved by an appropriately constituted committee and allow for the withdrawal of a subject from the study with the benefit of full participation (if she does so due to medical reasons) or payments proportionate to her participation (if she withdraws for any other reasons).¹¹¹ As already

¹¹⁰ *Surrogacy Bill (n 45) s 2(b) - “Altruistic Surrogacy” means the surrogacy in which no charges, expenses, fees, remuneration or monetary incentive of whatever nature, except the medical expenses incurred on surrogate mother and the insurance coverage for the surrogate mother, are given to the surrogate mother or her dependents or her representative.

¹¹¹ *ICMR Research Guidelines 2000 (n 28) “Subjects may be paid for the inconvenience and time spent and should be reimbursed for expenses incurred due to their participation. They may also receive free medical services. However, it is stipulated that such payments should not be so large or the medical services so extensive as to induce prospective subjects to consent to participate in research against their better judgment (inducement). Moreover, all payments rendered need to be approved by an appropriately constituted Institutional Ethics Committee. In case the
introduced above, the ICMR Research Guidelines 2000 addressed surrogacy for the very first time and likened surrogates to subjects of bio-medical research. It follows that those principles would also guide the manner of conduct of a doctor or clinic with a surrogate.

In contrast, the proposed regulation suggests payment only of medical expenses, and here too, upon withdrawal of participation by the surrogate at her request, she would need to refund all certified and documented expenses incurred for the pregnancy by the biological parents or their representative.\(^{112}\) This in itself amounts to a compulsion, particularly where economic vulnerability is high.

Therefore, the safeguard for economic vulnerability is not doing away with payments altogether but rather making the payments more visible, reasonable and non-contingent to full participation. This may require monitoring by an outside body and thorough counselling of a surrogate, keeping in mind her state of income and employability. Safeguards such as pre-approved payments, payments that are compensatory in nature and reasonable (not so high that they serve as inducements), insurance cover for foreseeable and unforeseeable risk, free medical treatment and medical treatment that extends to after the delivery may be considered protection against such vulnerability.

D.5 Social Vulnerability

Social vulnerability recognizes the vulnerability of participants who are at risk of discrimination on account of race, gender, ethnicity and age. This type of vulnerability, particularly when present with communicative vulnerability, may often result in discriminatory stances towards surrogates. Social vulnerability needs to be kept in mind when considering the nature and training of support required for a surrogate to exercise informed decision-making. While age

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and gender\textsuperscript{113} have been recognized as factors in the intrinsic vulnerability of a surrogate, the role played by factors of race and ethnicity or even religion require much more wide-scale research studies than the ones presently relied on.

On the whole, as we visibilise each category of vulnerability and develop the vulnerability construct further, the following pictorial representation arises (See Figure 2).

The intersection of each layer of vulnerability is also of import as its helps us understand the relationship each has with the other. It can be extrapolated from our analysis that intrinsic vulnerability —factors like sex and age — may deepen deferential vulnerability. Similarly, social vulnerability may become enhanced on account of intrinsic vulnerability (especially sex)

\textsuperscript{113}For a general and critical understanding of women’s status in India see Pamela S. Johnson, Jennifer A. Johnson, ‘The Oppression on Women in India’ (Sep. 2001) 7(9) Violence Against Women 1051-1068 <http://www.bbc.com/news/world-asia-india-17398004> accessed 07 August 2019
when combined with more marginalizing factors like religion, caste or ethnicity, especially where extrinsic vulnerability exists – lack of education, low income or limited employability. Economic vulnerability bears a direct correlation with communicative vulnerability as an economically unsound position may lead to compulsive situations in which a surrogate is unable to vocalize her own concerns. This may be exacerbated if relational vulnerability is high. Hence, each layer bears on the other, influences the other, and may even become lighter or stronger in relation to the other (See Figure 3). This suggests a complex interplay, which marks the need for a variety of regulatory nuances and emphasises that there is no single solution to the various vulnerabilities surrounding the surrogate.

D.6 Legal Vulnerability

A critical category of vulnerability in the Belmont Classification is that of legal vulnerability. It is acknowledged that legal vulnerability is not immediately visible in the socio-economic and demographic characteristics of the surrogates, which were analysed to develop the surrogacy construct. However, an interplay of all the vulnerabilities – intrinsic, social, extrinsic, communicative, economic, relational, deferential – highlights several quagmires that are ripe for exploitation if the law is unsupportive or unable to attend to each opportunity created by the various vulnerabilities.

This particularly concerns surrogacy if it or its commercial aspects are outlawed and surrogates are compelled to continue their participation, having at the outset agreed to an illegal act. It may also concern surrogates who may not qualify as a surrogate but may be acting as one contrary to the law. It would also be a concern if the surrogate herself is a foreign national who has been brought to India for the purpose of surrogacy.

In 2012, when the Government of India took the position that surrogacy would not be available to homosexual couples, various news reports stated that some infertility clinics in Delhi continued to sign on gay clients from all over the world. According to one report,
Clients shipped their frozen sperm to Delhi, which was used to fertilize eggs from Indian donors. The resulting embryos, legally belonging to the gay men, were implanted into Indian surrogate mothers. To avoid the ban, infertility clinics then moved surrogate mothers across international borders into Nepal. There, they gave birth, and clients arrived to pick up their children.\(^\text{114}\)

It is a matter of concern that post prohibitory stances on surrogacy, surrogates are far more vulnerable than before. Sharmila Rudrappa writes:

> They [surrogates] are wholly dependent on agencies that have brought them into countries where they are strangers and unfamiliar with the language, culture and social norms. Surrogacy agencies provide them with housing and food in these foreign countries. And they control the money. As a result, the women are powerless to terminate their contracts, or go back home if they choose to do so. They are isolated from friends and family and have no legal recourse to address financial abuses or medical malpractice.\(^\text{115}\)

It is evident that the surrogate mothers are often mute spectators. Rather than building on autonomy, freedom and choice, surrogacy reinforces the image of women as selfless, dutiful mothers whose primary role is to serve the family, their husbands and in-laws,\(^\text{116}\) and their need is borne of economic desperation.\(^\text{117}\) In the CSR Studies, the researchers identified that the surrogates were at times made to feel like money banks. A surrogate in the Sama Study shared,

> Here the thing is that you can neither talk to the doctors nor to the couple [commissioning parents]. You have to keep your thoughts to your own self. Whatever they say, you have to do it. Madam said, ‘Do this, do that.’ And you have


\(^\text{115}\) *ibid.*

\(^\text{116}\) Amrita Pande (n 76)

\(^\text{117}\) Amrita Pande (n 76)
Chapter 4

to do it. You can’t talk freely. She [doctor] just asks, everything is fine, is there any problem, eat this, eat that. They will ask about all the things that they are concerned with as part of their work. The rest comes in the report. The doctors look at the report in front of them. They won’t share an experience with a human, but they will do it with a file and that is it. They won’t look at you. They will look at your file. ‘How are you? Do you feel fine? Are you eating? Is the movement okay?’ . . . That is all they say. Even if you try to talk to them, they will say, ‘I don’t just have one patient to see, I have many.’ They are all meethi chhuri [sweet knife]. . . Madam doesn’t have any time. It is a fixed timetable. Right now, in this hospital, then that. Here, if there is a new patient, there is no one who can explain anything to you. They only talk to the family [commissioning parents], as if it is them and not us who are pregnant.

The surrogates spoke of being excluded from the process - the only concern being the health of the foetus and the identifiable patients being the commissioning parents. Surrogates reported experiencing a general atmosphere of intimidation to open communication and access to doctors being mediated by the presence of the agent. There was concern expressed about rubbing the agent the wrong way, as a surrogate shared when questioned if she had asked details of her medication. “No. I have not asked them. They will wonder why I am so curious or what my motive is. If I ask him that, he will say I do all your work, what medicines, etc., [are required], everything I take care of. So why are you asking this?” One surrogate in the Sama Study also described the secrecy that surrounded the practice and the invisibilisation of the surrogate. In the CSR studies, some surrogates shared that if they spoke too much or asked too many questions, they could be replaced by other women.

All these factors may cause surrogates to place themselves in a legally vulnerable situation, which they may feel they need to continue with as they had agreed to it to begin with. The nature of the arrangement, i.e., a pregnancy, also entails a compulsion in itself beyond, say the 24-week mark, after which a medical termination may not be legally possible. Disquietingly, it
has been observed in the two studies done by CSR that “clinics/doctors normally prefer to prepare and sign the agreement when the pregnancy is confirmed by the end of the first trimester till the middle of the 4th–5th months of pregnancy.” It was noted that,

More than 85% of the contracts were found to be signed around the second trimester of the pregnancy as it takes one to two months more for the commissioning parents to arrange their visit to India after being informed about the confirmation of pregnancy of the surrogate mother by the clinic/infertility physician.

In the statement of general principles issued in the ICMR Research Guidelines 2000, one heading of identified principles is the “principles of voluntariness, informed consent and community agreement”, which assumes research subjects are fully apprised of the research and the impact and risk of such research on themselves and others; and the research subjects retain the right to abstain from further participation in the research irrespective of any legal or other obligation that may have been entered into by them or someone on their behalf, subject to only minimal restitutive obligations of any advance consideration received and outstanding.

According to the ICMR Research Guidelines 2000, the principles of informed consent and voluntariness are cardinal principles to be observed throughout the research and experiment, including its aftermath and applied use so that research subjects are continually kept informed of any and all developments that affect them and others. However, without in any way undermining the cardinal importance of obtaining informed consent from any human subject involved in research, the nature and form of the consent and the evidentiary requirements to prove that such consent was taken depend upon the degree and seriousness of the invasiveness into the concerned human subject’s person and privacy, health and life generally, and the overall purpose and importance of the research.

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118 CSR DM Report (n 39) 60
119 CSR DM Report (n 39) 60
As a proposed law moves to more restrictive positions or is unable to address the interplay of vulnerabilities we have identified above, the scope of legal vulnerability deepens. Hence, legal vulnerability should be understood as an all-encompassing risk that would need to be assessed not only when a woman agrees to act as a surrogate but also at various stages of the surrogacy arrangement and even after it ends. Minimizing the risk of legal vulnerability would require that the surrogate be more visible to third-party assessment. Its specific risk requires an all-encompassing visibilisation in the Vulnerability Construct (See Figure 4) as it affects all layers of vulnerability identified and has the potential of exacerbating or ameliorating each layer, in effect increasing or decreasing the possibility of exploitation of the surrogate.

It is ironic that the Surrogacy (Regulation) Bill 2016 is taking steps in the opposite direction. Commentators have noted their concern on this stating,

*Today, when surrogate mothers have legal rights, there are accusations of exploitation. If commercial surrogacy is banned, the intended parents and surrogates would be forced to operate underground with a very high risk exposure.*
Then these poor women would have no legal rights and the chances for exploitation would be even more.\textsuperscript{120}

E. LIMITATIONS OF THIS STUDY AND SCOPE FOR FUTURE RESEARCH

One of the main limitations of this research is the lack of exploration of the corporeality of vulnerability. The surrogate mother has a specifically corporeal embodiment in the exchange, a body at stake with its needs and requirements. Pregnancy carries a great emotional and physical strain, and brings with it a specific kind of situational vulnerability that is at once intrinsic and extrinsic. Further research could pick up on this matter.

Another point of concern arises from the studies reviewed. When analysing the trio of factors (education, previous employment and household income) together, it can be seen that the majority of surrogates in the respondent groups were neither jobless nor illiterate nor even below the poverty line. Then where has the narrative of the poor, illiterate surrogate come from?

From Amrita Pandey’s work in Anand,\textsuperscript{121} the chief motive for surrogacy was economic: 34 out of 42 surrogates she had interacted with had family incomes below the poverty line. Saravanan,\textsuperscript{122} in her 2010 study of gestational surrogacy in Anand, described the women she interviewed to be ‘on the edge of poverty’ because of indebtedness or homelessness, and that they were not educated beyond the higher secondary level. In the CSR Study conducted in Anand, the incidence of unemployment amongst surrogate mothers was much higher compared to the other locations. It was noted that while almost half of the respondents in Anand, Surat and


\textsuperscript{121}Gina Maranto, ‘They are just Wombs’ Centre For Genetics And Society (12 June 2010) quoting Sociologist Amrita Pande of the University of Cape Town <https://www.geneticsandsociety.org/article/they-are-just-wombs>

\textsuperscript{122}Sheela Saravanan, ‘Transnational Surrogacy and Objectification of Gestational Mothers’ Economic and Political Weekly (2010) 45 (16)
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Jamnagar were educated to the primary level, illiteracy was much more prevalent in Anand. This in turn impacted their ability to be in gainful employment in the public or private sector.

Could it be that it was through studies based in Anand, an area that appears intrinsically to have lower literacy levels and lower employment amongst women, that the narrative of the poor, illiterate surrogate came about? Could times have moved on from this narrative as surrogacy became more and more prevalent in Tier 1 cities in India? Anand was never a tier 1 city or even an identifiable Tier 2 city to begin with. It merely rose to fame due to the work of Dr. Nayna Patel, who pioneered the practice of surrogacy in India. This is also what led the first wave of researchers to Anand. It is a question worth asking, and only wider studies amongst surrogates in India from multiple locations can give us that answer.

F. CONCLUSION

Through a close reading of the findings of three studies, two conducted by CSR and one by Sama - Research Group on Health, we have identified that a surrogate mother is enveloped by various layers of vulnerability. These layers may be intrinsic to her on account of her age or sex or may be extrinsic to her on account of her income or literacy levels or state of previous employment. We further identified that a surrogate’s capacity to act autonomously may at times be hampered on account of relational vulnerabilities, which involve factors like marriage or children.

By likening the practice of surrogacy to biomedical research being conducted on the human subject (i.e., the surrogate mother) as was done by the ICMR 2000 Guidelines, several further and differentiated layers of vulnerability become visible. By comparatively analysing the vulnerability construct with these categories, it can be seen that various categories such as cognitive or communicative vulnerability, deferential vulnerability, economic vulnerability and social vulnerability do in fact exist as separate layers or even overlap with the vulnerabilities identified in surrogates. As the ultimate element, we have identified the category of legal
vulnerability that makes an impact on every layer of vulnerability and is capable of exacerbating or ameliorating them.

The mere existence of vulnerability does not automatically suggest the existence of exploitation. Indeed, some situations may be unjust without being exploitative, and some may involve harm inflicted on vulnerable people without having exploited them.¹²³ Potential laws need to visibilise vulnerability and address it through recognition, for the ultimate goal of a constitutionally sound legislation is to prevent exploitation.

The majority of the surrogates who participated in the research studies appear to be making very active choices among the limited options they have. They also appear to be exerting their agency, sometimes even against their spouses and family members, to achieve their aspirations. As they learn from their experiences, they find themselves in better positions of negotiation. This is the roadmap of empowerment.

An empowering legislation’s best hope is to put safeguards and protections in place that reduce the various layers of vulnerability and equip a person with coping strategies that help her to make a choice of whether to act as a surrogate or not and make decisions later during the surrogate arrangement. Our analysis emphasises that given the complex interplay of each layer of vulnerability, no one solution is a good fit.

It appears from the direction that the Surrogacy (Regulation) Bill of 2016 is taking that regulators are heavily invested in singular solutions. Our analysis suggests that they may fail to protect the surrogate and would disempower her and –more worryingly – create further opportunity for exploitation as her vulnerabilities grow.

Historically, Indian lawmakers have a penchant for short-changing Indian women’s labour prospects in the guise of protection. Take for example the Factories Act, 1948 and the Shops

¹²³Macklin (n 15) 473
and Commercial Establishments Act, 1961, through which restrictions were imposed on women engaged in night-time work. These provisions, which were to ensure the safety of women at night, were used instead to blame them, as whenever a crime against women was reported at night, it became a fashion for law enforcement officials to question why the women had to be working at night and even asking that women only work from 8 am to 8 pm.\(^{124}\) Or consider the 2005 ban on dance bars in Maharashtra by the state government, which effectively put more than 75,000 women out of work. Even when the Supreme Court ordered that the ban be lifted, the Maharashtra Chief Minister imposed an obscenity ban through the Maharashtra Prohibition of Obscene Dance in Bars and Hotels and Protection of Dignity of Women Act, 2016\(^{125}\). It seems that what women can and can’t do with their body is a constant battle for regulators in the guise of protecting the dignity of woman. This may well be what is guiding the present regulation on surrogacy, rather than an understanding of an Indian surrogate’s realities or a real concern to address her vulnerability. This construct of human dignity is not empowering. In a patriarchal society, everything viewed through a moral prism could act as a constraint on how women are able to exercise control over their bodies.

It is necessary that debates on dignity and morality are not carried out in a vacuum and without thought to the circumstances in which women exist. We cannot afford to sermonize, pity or sympathize. Lawmakers should instead empathize – for this is just the way things are for the women they are attempting to regulate. In order to address the concerns arising from surrogacy arrangements, regulation is necessary. Such regulation cannot be indifferent to her vulnerability. The draft 2016 Surrogacy Bill, in which the Government has opted to make surrogacy altruistic, suggests that lawmakers are of the opinion that removing the financial aspects of a surrogacy arrangement, in effect the surrogate’s own reimbursement, would be the most effective tool against vulnerability. However, this may be a misguided approach. As shown above, restrictive positions of law actually exacerbate legal vulnerability. Also, by


retaining payment of medical expenses, the Government has in effect retained the gains of the entire medical machinery driven by the doctors and the ART Clinics, which were the primary stimulus for the burgeoning industry. It is ironic that the measures to end the exploitation of surrogates may actually become more exploitative themselves. Merely banning the “commercial” aspect of surrogacy may have an opposite effect and lead to invisible transactions in which a surrogate would find herself even more vulnerable and easily exploited - for it is easy to hide a money trail but difficult to hide a pregnancy.

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REFERENCES


Baby Manji Yamada v Union of India and Anr. AIR 2009 SC 84


Brenden Hills, ‘A couple who hired an illiterate Indian woman to be surrogate of their twins ordered to prove she wasn’t exploited’, The Sunday Telegraph (30 June 2013) 


Chandrima Chatterjee & Gunjan Sheoran, Vulnerable Groups in India, The Centre for Enquiry into Health and Allied Themes (CEHAT) 1998


Centre for Social Research, ‘Surrogate Motherhood: Ethical or Commercial (Anand, Surat & Jamnagar) (2012) <https://drive.google.com/file/d/0B-f1XIdg1JC_Ui04RmlYUkNsTFE/edit>


Dr. Ranjana Kumari, ‘Surrogate Motherhood: Ethical or Commercial’ Centre for Social Research 39 https://wcd.nic.in/sites/default/files/final report.pdf accessed 07 August 2019

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Ethical Guidelines For Biomedical Research On Human Participants (Indian Council of Medical Research, 2000)

Gina Maranto, ‘They are just Wombs’ Centre For Genetics And Society (12 June 2010)
https://www.geneticsandsociety.org/article/they-are-just-wombs


Hari G Ramasubramaniam, ‘Banning Commercial Surrogacy will expose Women to Exploitation’ *The Economic Times* (28 August 2016)

Imrana Qadeer, ‘Social and Ethical Basis of Legislation on Surrogacy: Need for Debate’ (2009) 6(1) Indian Journal Of Medical Ethics


http://nrs.harvard.edu/urn-3:HUL.InstRepos:10611784 accessed 07 August 2019


Margaret Atwood, *The Handmaid’s Tale* (McClelland and Stewart 1985)


Medical Council of India, *The Code of Medical Ethics* (approved by the Central Government under s 33 of Indian Medical Council Act, 1956)


National Guidelines For Accreditation, Supervision And Regulation Of Art Clinics In India, ICMR and the National Academy of Medical Sciences, India (2005)  http://icmr.nic.in/art/art_clinics.htm accessed 07 August 2019


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People’s Union for Democratic Rights v. Union of India AIR 1982 SC 1473


Samira Kohli v. Dr. Prabha Manchanda & Anr 1 (2008) CPJ 56 (SC)

Sarmishta Subramanian, ‘Wombs for rent: Is paying the poor to have children wrong when both sides reap such benefits?’, (Maclean’s, 2 July 2007) https://archive.macleans.ca/issue/20070702 accessed 07 August 2019


The Constitution of India, 1950

The Medical Termination of Pregnancy Act, 1971 (Act No. 64 of 2002)  
http://mohfw.nic.in/MTP.html accessed 07 August 2019


The Surrogacy (Regulation) Bill, 2016  

United Nations Division for The Advancement of Women, Convention on The Elimination of All Forms of Discrimination Against Women (United Nations, 18 December 1979)  

http://www.un.org/popin/icpd2.html accessed 07 August 2019

UNESCO, Universal Declaration on Bioethics and Human Rights (United Nations, Oct. 1992005)  


NOTES

In February 2015, a writ petition – 95 of 2015 – was filed and linked with civil appeal no. 8714 of 2010 (the ‘Jan Balaz’ case) which was being heard by the Supreme Court of India. This was a public interest litigation (PIL) by Advocate Jayshree Wad seeking a ban on commercial surrogacy (the Jayshree Wad PIL). In November 2015, a group of surrogate mothers moved the Supreme Court. Notice was issued on this writ petition (Pavan Agrawal v. Union of India W.O. (C) No. 841/2015). on 16 December 2015, which with its stay application was tagged to the Jayshree Wad PIL, which in turn was tagged to the main Jan Balaz case. One of the authors interviewed some of the surrogates who attended the courtroom proceedings.
CHAPTER 5 - THE PREFERABLY UNHEARD SURROGATE:
THE SUPREME COURT OF INDIA’S VOLTE FACE ON SURROGACY
AND ITS CONSEQUENCES

There's really no such thing as the ‘voiceless’. There are only the deliberately silenced, or the preferably unheard.

– Arundhati Roy

I. INTRODUCTION

The popular use of the term surrogacy describes a woman bearing and giving birth to a baby for another person. It is currently a legal grey area in India, and the topic is widely contested. It is a complex issue and the debates centre around issues such as morality and ethics, exploitation and commodification, the definition and rights of the child and parenthood. Social views are not settled and are changing continuously. There is as yet no universal position on surrogacy as some countries have banned it outright while others have developed different approaches. Legislation is also subject to change. In most debates, however, the voice of the surrogate is seldom heard while all proposed and realized legislative changes have a strong potential effect on her.

1 The 2004 Sydney Peace Prize lecture delivered by Arundhati Roy, 3 November 2004 at the Seymour Theatre Centre, University of Sydney
2 Margaret Atwood, The Handmaid’s Tale (McClelland and Stewart, 1985)
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In India, the legal position on surrogacy has been in a state of flux since 2015 when the government took a highly conservative stand before the Supreme Court of India to allow altruistic surrogacy only for married Indian heterosexual couples. This position was meant to be swiftly followed by a law to fill the legal vacuum, but despite a 2014 and a 2016 draft on the subject, there is no law in place as yet. The Supreme Court has ceased its scrutiny in anticipation of a law, which is already much delayed. This has left a legal vacuum in which surrogacy is loosely regulated under the Indian Council of Medical Research’s (ICMR) National Guidelines for Accreditation, Supervision and Regulation of Assisted Reproductive Technologies (ARTs) clinics, 2005.6 This is not surrogacy-specific legislation, which suggests that surrogacy has been grouped with ARTs. The surrogate mother is not, however, a technology but a person. Hence, being grouped with ARTs appears problematic at the outset.

The ICMR7 has, over the years, shifted in its treatment of surrogacy and in doing so supported the swift expansion of the surrogacy industry.8 There is no documentary evidence that the ICMR has initiated research among surrogate mothers or that its policies have been informed by the their experiences. This has led to a lopsided development and concerns have been brought before the Supreme Court of India on two occasions. As India’s highest judicial forum, the Supreme Court is duty-bound to uphold the ideals of the constitution, which include the right to life,9 personal liberty10 and dignity,11 the right to equal treatment before the law,12 non-discrimination and equal opportunity.13

6National Guidelines for Accreditation, Supervision and Regulation of ART Clinics In India (Indian Council of Medical Research and the National Academy of Medical Sciences, India, 2005) (2005 ICMR Guidelines)<http://icmr.nic.in/art/art_clinics.htm> accessed 18 May 2018
7The Indian Council of Medical Research was set up as the Indian Research Fund Association in 1911, has evolved over the years in line with changing health research needs. Today, it is the apex body in India for the formulation, coordination and promotion of biomedical research. It is one of the oldest medical research bodies in the world (ICMR)
9The Constitution of India, Art. 21
10ibid.
11Maneka Gandhi v Union of India 1978 SCR (2) 621
In this paper we aim to understand how the position and rights of the surrogate are changed by the two proceedings before the Supreme Court of India, which took place in 2008-2009 and 2014-15. This analysis takes the vulnerability of the surrogate as starting point and aims to understand the consequences and implications of the rulings of the Supreme Court in the context of a highly controversial procedure. The two events as documented in Supreme Court records and media accounts shed light on the Indian legal system’s difficult relationship with the very notion of surrogacy, and in analysing them, we ask what can be done to ensure a more democratic process inspired by the ideals formulated in the Constitution in the future.

II. The Case of Baby Manji (2008-2009)

In August 2008, a challenge to certain directions given by a Division Bench of the Rajasthan High Court travelled to the Supreme Court in the case of Baby Manji Yamada v Union of India (the Baby Manji case).

The brief background lay in a writ petition, which had been filed by a non-government organization (NGO) called Satya before the Rajasthan High Court. Its concern was for a child named Manji (Baby Manji) who had been born to a surrogate mother from Anand, Gujarat, on 25 July 2008 after a surrogacy agreement had been entered into in 2007 by the biological parents Dr Yuki Yamada and Dr Ikufumi Yamada and the surrogate mother. The controversy began when during the surrogate’s pregnancy, the biological parents separated. The municipality at Anand issued a birth certificate indicating the genetic father as the parent. Since surrogacy had not been declared legal in India and the law did not allow a single man to adopt a girl, this practice was by definition illegal, prompting Satya’s intervention. Meanwhile, baby

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12 The Constitution of India, Art. 21
13 The Constitution of India, Art. 15
14 Baby Manji Yamada v Union of India and Anr AIR 2009 SC 84
Manji’s genetic father’s visa expired and he was unable to take custody of her due to the controversy over his parentage. His mother, Baby Manji’s grandmother, approached the Supreme Court of India for custody of the baby.

Satya’s stand before the Supreme Court was that there is no law governing surrogacy in India and in its name a money-making racket was being perpetrated, and asked that the Union of India enforce stringent laws relating to surrogacy.

Until then, the practice of surrogacy was being treated as legal by the ICMR, which had, between 2000 and 2005, already substantially changed its own position. For instance, an arrangement that had required a valid adoption in 2000 was changed by the ICMR in 2005 to put the names of the intending parents on the child’s birth certificate, with no mention of the surrogate as the birth mother and without any requirement of adoption or post-birth maternal consent. Satya seized the opportunity to polemicize these and other issues before a forum that could ethically settle surrogacy’s legal status.  

The Supreme Court, however, did not pass any orders on the status of Baby Manji and directed that any aggrieved person may approach the Commission constituted under the Protection of Child Rights Act 2005. Instead, it legally recognized the practice of surrogacy. In its judgment, the Supreme Court stated that ‘surrogacy is a well-known method of reproduction whereby a woman agrees to become pregnant for the purpose of gestating and giving birth to a child she will not raise but hand over to a contracted party’.  

In effect, this acceptance was sufficient to establish a legal recognition of surrogacy in India. The Supreme Court then commented on the legality of commercial surrogacy,

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16 The health of the surrogate mother also featured prominently among the issues that Satya took up - Surrogates were being put at risk through multiple embryo transfers and multiple IVF attempts and also the danger of HIV

17 Baby Manji Case (n 14)

18 Director of Settlements AP v M R Apparao AIR 2002 SC 1598. The statements of the Court on matters other than law like facts may have no binding force as the facts of two cases may not be similar. But what is binding is the ratio
stating, ‘This medical procedure is legal in several countries including in India where due to excellent medical infrastructure, high international demand and ready availability of poor surrogates it is reaching industry proportions’.

For the Supreme Court, the legality of commercial surrogacy in India was a foregone conclusion. Such a conclusion, passed in the absence of enabling legislation or a reasoned exercise to fill legislative gaps, could be deemed factually incorrect, since commercial surrogacy was not ‘legal in several countries including in India’ as the Court misguidedly believed.

The Supreme Court went on to comment,

10. Intended parents may arrange a surrogate pregnancy because a woman who intends to parent is infertile in such a way that she cannot carry a pregnancy to term. Examples include a woman who has had a hysterectomy, has a uterine malformation, has had recurrent pregnancy loss or has a health condition that makes it dangerous for her to be pregnant. A female intending parent may also be fertile and healthy, but unwilling to undergo pregnancy. 11. Alternatively, the intended parent may be a single male or a male homosexual couple. 12. Surrogates may be relatives, friends, or previous strangers. Many surrogate
arrangements are made through agencies that help match up intended parents with women who want to be surrogates for a fee.  

However, while the Supreme Court recognized surrogacy and even commercial surrogacy, it made no attempt to review the 2005 ICMR Guidelines for surrogacy in India or even the draft ART Bill of 2008 that had already been proposed to regulate it. If it had, it may have shown how surrogates were being short-changed in the entire surrogacy arrangement. Overall, the 2008 Bill had already been criticized as being weak on operational realities, self-contradictory, and unclear. Meanwhile, concerns about the commodification of surrogates and even egg donors abounded among social workers at the time and Satya had raised these very issues before the Supreme Court.

A. Consequences

The Supreme Court’s actions legalizing surrogacy without adequate scrutiny of an industry that legitimates and endorses the practice, emboldened the view that the sole interest was financial gain. It would not be out of place to mention that in 2005-2006, the ICMR had anticipated that profits from the surrogacy industry would reach USD 6 billion in the coming years. Furthermore the Supreme Court’s reference to the ‘ready availability of poor surrogates’in India created a demand for economically marginalized women who might be willing to consider surrogacy as a source of income. The following

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22 Baby Manji Case (n 14) 10-12
23 On 13 September 2008, during a national consultation on “Assisted Reproductive Technologies (ARTs): Emerging Concerns and Future Strategies” in New Delhi, the ICMR presented the draft Assisted Reproductive Technology (Regulation) Bill & Rules- 2008 (hereinafter the ‘2008 ART Bill’). This was based on its broader National Guidelines for Accreditation, Supervision and Regulation of Assisted Reproductive Technology (ART) Clinics in India as published in 2005.
24 Sarojini NB and Aastha Sharma, ‘The Draft ART (Regulation) Bill: In Whose Interest?’ (January-March 2009) VI Indian Journal of Medical Ethics 1
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section deals with various aspects of the surrogate mother’s vulnerability and the effect of the Supreme Court decision in this regard.

1. The ‘Poor Surrogate’

Research among surrogates conducted by the Centre of Social Research (CSR) in five Indian cities in two separate studies and by Sama – Resource Group for Women and Health in two cities covered in one study found that surrogates are usually between 21 and 34 years of age. Most are married with children, though some are widowed, divorced or abandoned with children to look after. The majority of the surrogates are unskilled workers engaged in domestic work or are home-makers. Surrogates are almost always from poor or lower middle-class backgrounds. The annual household income of the surrogates who participated in the two studies by CSR and the one by Sama fell from INR 12,000 to 1,80,000. Most of the surrogates’ husbands were engaged in casual labour.

According to Manasi Mishra, who heads the Research Division at the CSR in New Delhi and conducted its studies, Indian surrogates typically have no more than a fifth grade education. They often cannot read contracts drafted in English. Researchers report that some surrogates said their husbands had persuaded or coerced them into

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26 The Centre for Social Research (CSR) conducted a study in a few cities of Gujarat to examine the conditions of the surrogate mother and child. The study carried out in 2011-12 looked at a sample of 100 surrogate mothers in the cities of Anand, Surat and Jamnagar. A separate study was conducted in Mumbai and Delhi. Another study carried out by Sama-Resource Group for Women and Health (2012) interviewed 12 surrogate mothers, five doctors and a commissioning couple.


undertaking pregnancy for pay. Most women decide to keep their surrogacy a secret from their villages and parents to protect their reputation.\(^{31}\)

L., aged 30, said she became a surrogate after her alcoholic husband left her to care for their two children. She was recruited by a neighbour who had been a surrogate herself, a common practice; clinics often pay referral fees of several hundred dollars. ‘If I can buy a small apartment and take care of my children’s education, it will be worth it’, L. said.\(^{32}\)

It can be seen from such anecdotal evidence, that a potential surrogate experiences various types of vulnerability in relation to her age and sex. She tends to come from a poor or lower-middle-class background, has low levels of literacy and education, is or has been married, has dependants, is unskilled and is either unemployed or employed in occupational areas that are hazardous or casual, informal and insecure. It appears from anecdotal evidence that such a woman may be subjected to various forms of psychosocial stress, such as a life crisis, interpersonal or marital difficulties or occupational worries. These might include the breakdown of her marriage, loss of job, child’s illness, accident of her husband etc. These are all factors that make her more vulnerable in the surrogacy arrangement, in an industry where the model surrogate worker–mother is compliant to the needs of doctors and ART clinics.\(^{33}\)

2. Not A Patient – Only A Womb

The 2009 decision of the Supreme Court of India was the direct precursor of the then drafted Assisted Reproductive Technologies (Regulation) Bill, 2010 (ART Bill 2010) which

\(^{31}\)Amrita Pande, ‘Not an “Angel”, Not a “Whore”: Surrogates as “Dirty” Workers in India’ (2009) 2 Indian Journal of Gender Studies 16


\(^{33}\)Julie McCarthy (n 30). Embryologist Anoop Gupta who runs one of the largest fertility clinics in New Delhi, while dismissing the criticism that India’s poorest women are being taken advantage of said in an interview, ‘Pregnancy is not a big deal for them’, and added that he looks for ‘simple’ women and once selected an educated engineer who gave him nothing but ‘headaches’. 

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followed the 2008 Draft Bill. The exercise of drafting the 2008 and 2010 Bills had been entrusted to a 12-member specialist committee, besides establishing a National Advisory Committee on ART under the chairmanship of the Director General, ICMR.\textsuperscript{34} The attitudes of clinicians are reflected in the preamble of the 2010 ART Bill which states,

... 85 percent of the cases of infertility can be taken care of through medicines, surgery, and/or the new medical technologies such as in vitro fertilization (IVF) or intracytoplasmic sperm injection (ICSI)...[T]hese technologies not only require expertise but also open up many avenues for unethical practices which can affect adversely the recipient of the treatment; medically, socially and legally.\textsuperscript{35}

With this statement, the ART Bill identified its primary target for protection – the recipient of the treatment, that is those who opt for the use of medical technologies as a treatment for infertility. The surrogate was only treated as part of an ART treatment available to the patients of an infertility clinic and her ‘use’ was described as, ‘Most of the new technologies aimed at taking care of infertility, involve handling of the gamete – spermatozoa or the oocyte outside the body, or the use of the surrogate mother who would be carrying a child with whom she has no biological relationship’.\textsuperscript{36}

Having thus defined the surrogate primarily in terms of technology, the Preamble established that the ART Bill 2010 seeks to provide maximum benefit to the couples/individuals who go to fertility clinics and who are the only recognized ‘patients’\textsuperscript{37}. Since medical practitioners’ duty of care is towards patients, the rights of the surrogate in this regard are not only completely neglected in the 2010 ART Bill but

\textsuperscript{34}Anil Malhotra, ‘Rewriting Surrogacy Laws’ \textit{(Lawyers Update, June 2014)}<http://lawyersupdate.co.in/LU/1/1629.asp> accessed 2 May 2015
\textsuperscript{36}ibid.
\textsuperscript{37}ART Bill 2010, s 2 (x)
treated as being opposed to the interests of the patient(s) and in fact someone from whom both the patients and even the growing foetus need protection.

This interpretation is also evident from the Form R2,\textsuperscript{38} which a surrogate is required to sign with ART banks, and states, ‘The surrogate shall be under the observation of the ART Clinic chosen by the patient(s) during the period of surrogacy. However, if any complications arise during the period, the ART Clinic/Bank shall not be responsible for them under any circumstances.’ (emphasis added)

The medical situation for the surrogate following delivery seems even more troubling. The Sama study found that the delivery process is timed around the convenience of the commissioning parents. Sometimes the baby is delivered by C-section before the due date and at others, the birth is delayed. One surrogate felt that her health problems were attributable to such delay,

\hspace{2cm} The thing is that all the other children were born on time, and I had no problems.

\hspace{2cm} They used to give me injections to delay the birth of this child. But the child could not be held in. Now I have headaches often, even fever. I had double pneumonia.

\hspace{2cm} Never before had I gone through any problems.\textsuperscript{39} Surrogates perceived that the quality of care they received during the pregnancy was much better than after delivery. Also, as the patient (read: intending parent) chooses the ART clinic, this could lead to the surrogate not having the freedom to seek treatment or a second opinion elsewhere (except at her own cost), thus affecting her ability to make decisions based on independent and impartial information. One surrogate interviewed in the Sama study had a very negative experience and was forced to go to another hospital at her own expense, ‘No, they didn’t even give any medicines. We had to buy from our own money. I went to the hospital once; they didn’t give any


\textsuperscript{39} Sama Study (n 28) 82
medicine. They said once they [commissioning parents] say, then we will give it. I said but I am in pain, after the delivery’.

It is debatable whether a surrogate could rely on the Consumer Protection Act, 1986 for any remedy against the ART bank or clinic, because she would be seen not as its client but as technology to be used by its patients.\(^{40}\) The irony lies in the fact that the surrogate herself agrees to this by signing Form R2.

Throughout the 2010 ART Bill, the surrogate is treated in the same way as a gamete donor – someone who donates sperm or oocyte, without taking into account the immense physical and emotional investment that pregnancy bears. During the surrogacy arrangement, a surrogate may have to undergo multiple cycles of IVF before implantation is achieved. This involves medically suppressing and controlling her natural menstrual cycle with gonadotropin-releasing analogue therapy and oestrogen replacement, creating an artificial proliferative phase in order to increase the chance of implantation. To achieve this, she undergoes several ultrasounds and is given intramuscular injectables daily along with oral medication until the embryos are implanted into her uterus and fertilization is achieved.

The potential complications of the pregnancy might confine the surrogate to periods of prolonged bed rest or absence from work. Of course, she experiences all the usual difficulties associated with pregnancy – nausea, swelling, back pain, gestational diabetes, hypertension and so on, along with the increased risk of an ectopic pregnancy, premature labour and uterus rupture, which can have lasting and even fatal implications. Following this, if the pregnancy goes well, is the management of the delivery, which is usually by C-section, and the possibility of post-natal depression and

\(^{40}\)ART Rules under ART Bill 2010 (n 38) Form S - Contract between ART bank and the Patient [1] The Bank agrees to supply the semen / oocyte donor / surrogate selected by the patient to the ART clinic (registration no.________________) selected by the patient as per the rules laid down in the ART (Regulation) Act
the effects of suppression of lactation. It should not be forgotten that India has a high maternal mortality rate.\textsuperscript{41}

In no way can a sperm donor be equated with a surrogate mother – and yet, this is what the draft law attempted to do. Was this a consequence of conflict between the interests of intending parents, surrogates or ART clinics, or was it due to ignorance or even indifference? It is unlikely that the policy-makers, who were also doctors, failed to see the differences between the two situations – the most obvious being the few minutes it takes to provide a sperm sample and the time invested before, during and after a nine-month pregnancy.

In the CSR study, the researchers saw that the surrogates were at times made to feel like money banks and were completely excluded from the medical process – the only concern was the health of the foetus and the identifiable patients being the commissioning parents. Surrogates reported experiencing a general atmosphere of intimidation to open communication and access to doctors mediated by the presence of the agent. A surrogate in the Sama study said,

\textit{Here the thing is that you can neither talk to the doctors nor to the couple [commissioning parents]. You have to keep your thoughts to your own self. Whatever they say, you have to do it. Madam said, ‘Do this, do that’. And you have to do it. You can’t talk freely. She [the doctor] just asks, everything is fine, is there any problem, eat this, eat that. They will ask about all the things that they are concerned with as part of their work. The rest comes in the report. The doctors look at the report in front of them. They won’t share an experience with a human, but they will do it with a file and that is it… [T]hey only talk to the family [commissioning parents], as if it is them and not us who are pregnant.\textsuperscript{42}}

\textsuperscript{41}Debalina Datta and Pratyay Pratim Datta, ‘Maternal Mortality in India: Problems and Strategies’. (Jan-March 2013) 2 Asian Journal of Medical Research 1
\textsuperscript{42}Sama Study (n 28) 76
One surrogate in the Sama study also described the secrecy that surrounded the practice in general and the invisibility of the surrogate in particular. Some surrogates said that if they spoke too much or asked too many questions, they may be replaced by other women.

In clinical practice, this commoditizing approach taken by the 2010 ART Bill seems to reduce a natural mother to a womb donor in order to emphasize her disposability in the surrogacy arrangement. By rendering the surrogate invisible, the ART clinic becomes the most dominant in the surrogacy arrangement. Given the already vulnerable position of the surrogate, she then has no agency to negotiate or bargain.

In a vicious cycle, the increased irrelevancy and disposability of the surrogate to the surrogacy arrangement has translated into clinical practices and policies that discriminate against her and compared to other pregnant women, further fuelling the thought that she is irrelevant.

3. Discriminatory Practices

The ICMR guides ART clinics on several forms and contracts that are to be signed by the surrogate. One of these is Form J, which is the agreement for surrogacy, which was also reproduced under the rules of the 2010 ART Bill. A particular provision is that of the surrogate’s right to abort. The provision reads:

I understand that I would have the right to terminate the pregnancy at my will, under the provisions of the MTP Act; I will then refund all certified and documented expenses incurred on the pregnancy by the biological parents or their representative. If, however, the pregnancy has to be terminated on expert medical advice, these expenses will not be refunded.

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43 Sama Study (n 28) 79
44 Sama Study (n 28) 77
45 ART Rules 2010 under ART Bill 2010 (n 38) Form J – Agreement for Surrogacy

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It is important to understand that this entire statement required of the surrogate is based on a basic fallacy, since no provision of the Medical Termination of Pregnancy Act, 1971 (MTP Act) allows a woman to seek abortion at will. It allows medical practitioners to perform an abortion only when they deem it advisable in certain circumstances.\textsuperscript{46} Hence, this provision in Form J is misleading and restrictive. If a medical practitioner performs an abortion for a surrogate then it would be on the basis of her or his own opinion formed in accordance with the MTP Act. The question of refunding the expenses incurred should not arise.

The CSR research team came across a case in Delhi in which the surrogate’s 10-week pregnancy had been forcibly aborted as the foetus was found to be abnormal. When she objected, the doctor gave her INR 12,000 and scared her away from the surrogacy centre. When fellow surrogates at the same centre who were more than four months pregnant criticized this decision, they were threatened by the doctor and the centre to keep their mouths shut.\textsuperscript{47} The CSR research team in Delhi and Mumbai also raised concerns about abortifacient pills being given to surrogates early on in the pregnancy without their knowledge, leading them to believe they had miscarried spontaneously. This was being done in cases of ‘twiblings’,\textsuperscript{48} which refers to the practice of two or three surrogates being impregnated simultaneously so that a commissioning parent can ensure a high success rate.

Another troubling provision of Form J is the requirement of unequivocal acceptance of the surrogate to submit to foetal reduction – ‘I will, however, agree to foetal reduction if

\textsuperscript{46}The Medical Termination of Pregnancy Act, 1971, as amended by Act No. 64 of 2002 (MTP Act). According to s 3(2) of the MTP Act, a pregnancy may be terminated by a registered medical practitioner where the length of the pregnancy does not exceed twelve weeks if such medical practitioner is, or where the length of the pregnancy exceeds twelve weeks but does not exceed twenty weeks, if not less than two registered medical practitioner are, of opinion, formed in good faith, that - (i) the continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury to her physical or mental health; or (ii) there is a substantial risk that if the child were born, it would suffer from such physical or mental abnormalities to be seriously handicapped. In determining whether the continuance of a pregnancy would involve such risk of injury to the health as is mentioned above, the medical practitioners may also take account of the pregnant women’s actual or reasonable foreseeable environment

\textsuperscript{47}CSR DM Study (n 27) 61

\textsuperscript{48}Ibid.
asked by the party seeking surrogacy, in case I happen to be carrying more than one foetus’. 49

Under the rules of the 2010 ART Bill, if a patient were to be found to have of a multiple pregnancy, she has to necessarily be told of the risks this entails to her and the foetus, and be suitably counselled. The rules specifically state that selective embryo reduction would be advised only when there are more than two foetus present. 50 Hence, for patients, there were three stated preconditions to any attempted foetal reduction – (1) more than two foetus are present; (2) the patients are suitably counselled on the advantages and disadvantages of the procedure; (3) they give their informed consent.

In the case of surrogates, none of the preconditions were met. A surrogate could be required to undergo foetal reduction even if there are only two foetus. She would receive no counselling before this procedure, nor was her informed consent necessary in light of the blanket consent taken from her at the very outset.

In the Sama study, concerns were expressed about foetal reduction. Some of the surrogates expressed their displeasure at neither being informed about the transfer of multiple embryos, nor of the reduction. According to one surrogate, ‘They will not say how many transfers they are doing. Then the result will come and they will tell how many children are there’. 51 Another surrogate said,

They had transferred four eggs [embryos] inside me and I was not told about it. One day, I got a call asking me to visit the hospital. They told me that one of the children did not have a heartbeat and that one has to be taken out by surgery. I was very scared. I didn’t understand how you could take one out. What if something happens to me? I called my

49 ART Rules 2010 under ART Bill 2010 (n 38)
50 ART Rules 2010 under ART Bill 2010 (n 38) r 6.13.3 - It is essential that the advantages of foetal reduction (better chances of the survival of the other fetuses and the fact that they are likely to be born nearer term and with better birth weight) and disadvantages (the possibility that there might be an increased risk of abortion following the procedure) must be explained to the couple, and their informed consent taken before embryo reduction is attempted.
51 Sama Study (n 28) 61
husband, but before he could reach, they had taken me inside for the surgery. That night there was too much pain in my stomach.\textsuperscript{52}

Another surrogate in the Sama study reported that instead of speaking to her, the commissioning parents spoke to her husband,

\textit{They did not tell me about this, but the parents had talked to my husband. They told him that they had kept two eggs [embryos]. He said that was not an issue. So they had spoken to my husband and he had said that was fine. They talked with my husband while I was sitting inside. I did not know about this.}\textsuperscript{53}

Asking a woman to submit to foetal reduction when it is medically unnecessary and providing her no real choice in the matter is an infringement of her right to bodily integrity. This right is at the very core of personal freedom and naturally flows from the right to life under Article 21 of the Constitution of India, which includes the right to live with human dignity.\textsuperscript{54} Such provisions are also discriminatory as they apply different standards to surrogates than to otherwise pregnant women and do not provide them equal reproductive rights and freedoms.

With the surrogate not being treated as a patient, and with neither the ART clinic nor the ART bank willing to take any responsibility towards her, it is highly debatable if she is enabled to make an informed choice and give her informed consent,\textsuperscript{55} which is integral to medical procedures.\textsuperscript{56} This requirement imposes another layer of safeguards upon the conventional

\textsuperscript{52}\textit{Ibid.}
\textsuperscript{53}\textit{Sama Study (n 51)}
\textsuperscript{54}\textit{Gautam v Chakraborty} (1996) 1 SCC 490. These rights can be drawn from a number of human rights instruments such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the Convention of Elimination of Discrimination Against Women
\textsuperscript{55}Taber’s Cyclopedic Medical Dictionary (23\textsuperscript{rd} edn., FA Davis Company) Informed consent - Consent that is given by a person after receipt of the following information: the nature and purpose of the proposed procedure or treatment; the expected outcome and the likelihood of success; the risks; the alternatives to the procedure and supporting information regarding those alternatives; and the effect of no treatment or procedure, including the effect on the prognosis and the material risks associated with no treatment. Also included are instructions concerning what should be done if the procedure turns out to be harmful or unsuccessful
\textsuperscript{56}M D Kirby, ‘Informed Consent: What Does It Mean?’ (1983) 9 Journal of Medical Ethics 69. The ethical need for informed consent in medical practice was a salutary reminder to doctors that their patients were people and not cases
device of ‘consent’ in contract law. The legal arrangement for surrogacy is like a pack of cards, resting on the foundation of the surrogate’s consent. However, the Supreme Court’s statements, the ICMR guidelines, the various versions of draft laws and clinical practice do not provide an environment conducive to the surrogate’s informed choice or consent. Hidden in paperwork is an ugly bargain for the surrogate with an unhealthy dependence on her consent in an attempt to justify ignoring her fundamental rights and dignity. Furthermore, this surrogacy agreement is stated to be legally enforceable.

As the Supreme Court had resolved the Baby Manji case with a presumption of legality, not only of surrogacy, but also of surrogacy agreements, and of commercial gains in surrogacy, the ICMR’s later steps catered accordingly. The 2010 ART Bill broadened the patient group that could access surrogacy. With the assurance of legality from the Supreme Court of India and a market environment that clearly favoured business and clients to the detriment of the surrogate mother,57 in less than a decade, surrogacy in India, with the availability of the ‘poor surrogate’ became a multi-million-dollar industry. In 2011, infertility assistance was estimated to be a USD two billion industry.58

The government helped to make it easier for business, as in 2013 it issued a notification allowing import of human embryos for artificial reproduction, paving the way for foreign couples to bring frozen human embryos into India and rent a surrogate womb in India. Specific visas for surrogacy could be granted to foreign nationals. In this environment, it was not surprising that surrogacy cases peaked in India, which became the world’s literal ‘mother destination’.59

and that the patient/doctor relationship needed to be open and honest in recognition of and respect for each patient’s autonomy.

60Sharmila Rudrappa, ‘Making India the “Mother Destination”: Outsourcing labor to Indian surrogates’ in C Williams and K Dellinger (eds.), Gender and Sexuality in the Workplace: Research in the Sociology of WorkVol20 (Emerald 2010) 253-285
III. THE JAYSHREE WAD PIL (2014-15)

In 2014, while the ICMR was playing a significant role in shaping India’s peaking surrogacy industry, a case progressing in the Supreme Court of India was taking an interesting turn. Filed as civil appeal no. 8714 of 2010 (the ‘Jan Balaz’ case), the appeal was the consequence of the Gujarat High Court granting Indian citizenship to twins born of a surrogate from Anand – a town in Gujarat. On 4 September 2014, the Supreme Court, after having addressed the immediate issue before it, which was to ensure that Nikola and Leonard were reunited with their parents Jan Balaz and Susan Anna Lohlad in Germany, turned its attention to the 2010 ART Bill to understand its status from the Union of India. In February 2015, a writ petition – 95 of 2015 – was filed and linked with the Jan Balaz case. This was a public interest litigation (PIL) by Advocate Jayshree Wad seeking a ban on commercial surrogacy and also asking that the 2013 notification of the commerce ministry, which allowed import of embryos as ‘goods’ subject to a no-objection certificate from the ICMR, be declared illegal and quashed.\(^{61}\) According to Advocate Wad the sale of motherhood was an abhorrent idea – ‘In India we believe that motherhood is sacred, not something that can be traded with anyone for money’.\(^{62}\) The PIL lead to the Supreme Court asking the Union Government to take a stand on commercial surrogacy\(^ {63}\) as notices were issued to the ministries of home affairs, law and justice, health and family welfare, commerce and external affairs as well as the Medical Council of India and the ICMR. The prime question was whether commercial surrogacy should be prohibited.


\(^{62}\) Shashank Bengali (n 32)

\(^{63}\) Rajni Pandey (n 61)
the intending parents and the ART clinics, such as surrogacy agencies, surrogacy hostels, and surrogacy law firms. After six years of an exponential growth of the industry, was a total ban possible without a larger discussion? Had this even taken place? Apart from the three studies conducted by CSR and Sama, there had been no other large-scale research conducted among surrogates. The ICMR had monopolized all policy development and was not inclusive in its processes, as reflected in its one-sided its policies. What nature of representative dialogue was educating the Supreme Court at this stage?

Even Advocate Wad’s credentials of being representative of surrogates were very limited. How she came about it was that she had a friend whose relative had a surrogate child. But she was unaware that surrogacy is a huge trade in the country until she read an article in a weekly magazine in 2014. As reported in the media, ‘the report made Wad go back to her books on biology, a subject she graduated in before becoming a lawyer. She dug out details on the “flourishing business” in India. After a year’s research, she approached the Supreme Court in 2015 to highlight the pitfalls of the unregulated industry. In her own words, ‘I read about how women were exploited by a handful of medical experts who controlled it [surrogacy business], which I thought should be stopped. Surrogate moms are not told about the risks’. What affronted her was that surrogacy ‘amounts to sale of motherhood’. But when asked by one of the authors, who contacted her office with a request to share research, if any surrogate mothers had been interviewed, the answer was no.

By now the Union Government of 2013, which had been so willing to promote India as a surrogacy destination, had been replaced. A new central government had been sworn in and it did not share the same views on surrogacy as its predecessor. In an affidavit it filed on 27 October 2015, it claimed that ‘altruistic surrogacy to needy, infertile married Indian couples’

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will be allowed after thorough checks on the couples.\textsuperscript{65} The Supreme Court recorded these developments in its order dated 2 December 2015 and observed, ‘Insofar as the banning of commercial surrogacy is concerned the stand of the Government of India is that it is opposed to commercial surrogacy’.

What was the basis of this paradigm shift? On 14 October 2015, the Supreme Court had recorded in its order that the proposed Surrogacy (Regulation) Bill of 2014 would be undergoing a ‘consultative process’. In this regard the Solicitor General anticipated a period of three months for the process to be completed, during which the matter would be placed before the cabinet and finally before parliament. However, the matter was resolved merely some 10 days later, on 27 October 2015.\textsuperscript{66} Why did the government cut short the process and take a decisive stand so quickly?

In all this confusion, one thing was certain. No past, present or potential surrogates were consulted in any manner in this entire process. They were not even identified as stakeholders and the aftermath sufficiently proves this.

In November 2015, a group of surrogate mothers moved the Supreme Court.\textsuperscript{67} They said the changes by the Government of India were discriminatory and projected surrogacy in a very negative light.\textsuperscript{68} Notice was issued on this writ petition\textsuperscript{69} on 16 December 2015, which with its stay application was tagged to the Jayshree Wad PIL, which in turn was tagged to the main Jan Balaz case. Of the six women who approached the Supreme Court, four were quite vocal in


\textsuperscript{66}Civil Appeal No. 8714 of 2010. Order dated 28 October 2015 of the Supreme Court proceedings records the Solicitor General’s submission that ‘certain decisions have been taken by the Union of India pursuant to the last order of this Court dated 14th October, 2015.’


\textsuperscript{69}Pavan Agrawal v. Union of India W.O. (C) No. 841/2015
saying that ‘they were happy with the services they provided, the returns they got, yet no one would hear them out’. They claimed that they had come together and approached SCI healthcare (a leading IVF/surrogacy provider) to do something about it.

One of the authors had an opportunity to interact with some of the women in the court premises. In a conversation with Geeta (name changed at her request), who was accompanying her sister who had previously acted as a surrogate to an American couple, she told me that her sister had everything planned. She had called her from her village in Bihar to stay with her and have the baby of another American couple. *Phir sab bigad gaya*, meaning the plans came undone due to the notification of the government. She said that her sister’s husband was a driver. With the money from her surrogate pregnancy, the couple had been able to buy a *pukka* (cement) house and also put her own two children in school. She said that the doctor in SCI is very good. She makes all the women do fixed deposits in their name so that the money is safe and they can use it when they need it. Geeta had similar aspirations for herself. She wanted to go back to her village where her husband was a farm hand and buy the land he tilled. *Sabko khushi mil jaati*, meaning all would have been happy. *Hum koi paap thodi na karrahehain, yeh toh punya ka kaam hai*, meaning I wasn’t going to commit a crime or a sin, this was a noble cause. Her sister said they hadn’t been forced or tricked – why are false stories being written? The author told them that in smaller towns there have been several anecdotes about women being exploited. They said, *yeh sahi nahin hai – hum awaa zuthayenge, lekin Sarkaar koh yeh rokna nahin chahiye*, meaning being forced is not correct and they will raise their voices about this, but this [surrogacy] should not be stopped.

If the Supreme Court was deciding on whether commercial surrogacy should be banned, the views of the surrogates were perhaps most pertinent. Here was an opportunity to have a direct dialogue with them. If Advocate Wad was offended that surrogacy meant selling motherhood, in the courtroom were women who had sold theirs and yet spoke of it as *punya ka kaam* – a noble cause.

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70 *Aradhna Wal* (n 68)
Unexpectedly, in its counter affidavit dated 29 January 2016, the Union of India rejected the surrogates’ contention that they have been rendered jobless by the government’s changed stance by claiming at the outset that the surrogate mothers should not be heard, as they are not directly affected by the ban.\(^71\) It went on to state that women do not have the legal right to become surrogate mothers for commercial gain. It rejected the surrogate mothers’ submission that the fundamental right to life and liberty incorporates within itself the right to autonomous reproduction and each individual of legal age has rights to take her own decision to choose whether to become a surrogate.

According to the Union of India, women do not acquire any separate right to become surrogate mothers. As citizens, they are governed by the instructions of the Union of India. A woman has every right to start a family within a marriage but her reproductive rights are protected and should be within the set legal framework. There is no bar on right to marry and to found a family within the marriage, with the right of reproductive autonomy and the right to privacy. Reproductive rights are protected by the law. It said that women needed to be protected from illegal commercial surrogacy used by many for monetary benefits. ‘There has been widespread concern over exploitation of surrogates and surrogacy’, the affidavit said. Going further, it clarified that an altruistic surrogacy for ‘needy infertile married couples’ was still legal. However, it was up to the State Health Authority to decide the genuineness of this need.\(^72\)

This one document exposed the government’s the lack of regard for a key stakeholder group, which was germane to surrogacy. The Supreme Court of India looked the other way. The pleas of the surrogates were rejected. The court decided that all matters would be heard once the Bill is enacted as an Act of Parliament, with or without modification, as may be. No further listing dates were given for the matter.

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The burning question remained – if the surrogates did not have a right to be heard then who did? Who were the other stakeholders that had been identified in the ‘consultative process’ that had allegedly been underway? There is still no publicly available and verifiable source providing the participants of the consultative process or its details.

A. Consequences

The nature of headlines generated in the wake of the news of the assumed ban on commercial surrogacy in India were ‘Despair over ban in India’s surrogacy hub’, India’s Surrogacy Tourism Takes a Hit, ‘A setback for surrogacy in India’. Headlines such as ‘India Surrogacy ban dismays British couples’, were only to be expected as the customers in question being foreign nationals who could no longer use Indian surrogates. Similarly, the negative reaction of medical practitioners for whom surrogacy was a source of income, such as members of the Indian Society of Assisted Reproduction, who were reported to be ‘particularly upset’, was expected. However, it is headlines like ‘Surrogates feel hurt by India’s ban on foreign customers’ and reactions of surrogates claiming that ‘It’s foul play’ that contradict what should have been a happy ending to their alleged exploitation.

76 Nirmala George, ‘Surrogates Feel Hurt by India’s Ban on Foreign Customers’ The Associated Press (18 November 2015)<http://www.ctvnews.ca/health/surrogates-feel-hurt-by-india-s-ban-on-foreign-customers-1.2663609> accessed 26 December 2015
77 Bindu Shajan Perappadan (n 67)
The Supreme Court’s volte-face cost the surrogates much more as they were left to their own devices, possibly worse off than when they had approached the judiciary. By declining to contradict the stance of the Union of India, the Supreme Court rendered the surrogate invisible. From here on, if she participated in a surrogacy arrangement, the onus was on her to show how she was exercising her reproductive rights within the confines of marriage and in accordance with the instructions of the Union of India.

Even women’s activists were unhappy about this turn of events. CSR director, Ranjana Kumari, stated that banning foreign couples from hiring Indian surrogates will not solve the problem of poor regulation but rather will help to create a flourishing black market. Over two years later, this has been proven true.

1. The Shifting Black Market

In June 2017, the Hyderabad Police Task Force raided an infertility centre that allegedly conducted illegal surrogacy operations and found at least 45 surrogate mothers, who were confined for nine months to a small space above the centre, ‘….Authorities found that the organisation had very little documentation on the mothers and the new-borns’. ‘The women were all huddled in one large room and had access to just one bathroom’, investigating officers are reported to have told the media. They were mostly migrants from north-eastern states who had been brought here through agents.

Such incidents reported in the media show the present plight of the surrogate. Surrogacy continues, but now under wraps. The surrogate is now even more invisible, more vulnerable, and more difficult to access. It is in such circumstances that she is most vulnerable to

80 Raksha Kumar (n 74)
83 ibid.
exploitation and has the least agency to speak out. According to media reports, ‘it is now not uncommon for a couple in one country to pay a surrogate in a second, via an agency in a third, for a child that will be born in a fourth, all in an effort to comply with the letter of the law in the various jurisdictions.’ 84 With so many players now involved, issues of cheating on payment issues and discriminatory treatment appear small with the looming fear of human trafficking.

As Indian laws tightened, clinics in India started sending Indian mothers to Nepal to give birth and some even shifted their operations. Nepal’s underground surrogacy operation was exposed in the earthquake in 2015 when several Israeli gay parents and their babies born to surrogates were taken back to Israel.85 These events led to the Nepal Supreme Court imposing a temporary ban, which was followed by the Government of Nepal outlawing surrogacy in September 2015.

It had been reported that agencies that were in Nepal moved to Cambodia. According to Preeti Bista, owner of the Nepalese surrogacy agency My Fertility Angel, ‘Since surrogacy has been put on hold in Nepal, I have both desperate surrogates and parents calling me non-stop, asking me if I can help them. I am now trying to do just that in Cambodia’. 86

Cambodia has already reported practices of intending parents leaving the country with the surrogate and baby, splitting up in a third country and then flying home. Who knows what happens to the surrogate after this? In August 2016, it was reported that Australia had urged Cambodia to crack down on surrogacy services and that ‘Cambodia's Ministry of Foreign Affairs and International Cooperation has formally reported to the Australian Government that

commercial surrogacy had been prohibited in Cambodia’. It has been reported that the trade swiftly found a new base in neighbouring Laos, which has yet to criminalize commercial surrogacy.

Meanwhile, doctors in India are also finding loopholes. Julie Bindel, an undercover journalist from the UK, found that clinics in Gujarat were willing to provide her surrogacy services if her friend of Indian origin was willing to be the official commissioning parent and then hand over the baby to her. Doctors are now recruiting women from Kenya to come to India, be implanted and then fly back to Nairobi where they give birth to babies who are picked up by the intending parents.

While illegality becomes the norm, the surrogate continues to remain without voice, and without rights. In a market of this nature, she is wholly dependent on agencies that may shift her from country to country while controlling the money. With no support, she may lack the agency to terminate the arrangement or to return home if she wishes to. She may be isolated from her familiar surroundings, with no legal remedy if she were to face financial or medical exploitation. With no law in sight, her plight continues in the legal vacuum.

2. The Legal Vacuum

The women who had approached the Supreme Court were autonomous beings who were exercising their right to be heard in a law-making process that directly affected them. They had come forward to protect their interests in a process overseen by the highest court of the

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country, but instead found themselves gravely disenfranchised, and falling through legal provisions. Moreover, their right to profit from their own bodies’ efforts was obstructed in a conservative stance that undermined women’s rights over their own body and restricted the exercise of reproductive rights to the realm of marriage.

We see here that neither of the positions – one legalizing surrogacy, and the other declaring it illegal on the grounds of a woman’s right to profit from a willingly entered surrogate arrangement – seek to empower women. Instead, they appear to be mechanisms of control over a woman’s rights to her own body operating under a deeply patriarchal moral regime.

Karuna Nandy, an advocate who practises in the Supreme Court, has stated:

*If you have a bunch of commercial surrogates who are saying we need a ban, you have a ban. If you have a bunch of commercial surrogates who say, ‘No, I want to do this, but it’s not fair, I need more money, then that points to a regulated industry. If we ask disempowered women what they want, we start to think of them as whole people, we start to ask them what they want as citizens.*

The Supreme Court’s denial of a judicious examination of surrogacy, and its refusal to deal the issue in a legally objective way, have resulted in a legal vacuum. At present there is no law to regulate surrogacy. The draft laws of 2014 and 2016 have failed to come through. In the absence of any legislation on the subject, the ICMR ART clinic Guidelines, 2005 form the only policy applicable to the matter. As has already been discussed, the ICMR ART Clinic Guidelines, 2005 do not even mention the surrogate as a stakeholder and identify the ART clinic as the prime stakeholder. They appear to have been brought about with the singular objective of making surrogacy convenient for the ART clinic. The forms detailed above, which usurp the surrogate’s basic rights and treat her in a discriminate manner, are in practice under these guidelines.

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91Julie McCarthy (n 30)
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The plight of the surrogate now is the collective failure of all law-making bodies, in particular the highest judiciary.

IV. CONCLUSION

In 2008, the Supreme Court of India had an opportunity, which it decided not to seize. It recognized surrogacy and all its commercial elements while pragmatically acknowledging the ready availability of the poor surrogate and did not question the ethics involved. By 2014 – when it picked up this matter again, commercial surrogacy had become an industry in the country, growing in leaps and bounds and flourishing in an under-regulated and highly permissive environment.

The Supreme Court of India and the Government of India’s collective steps to ban commercial surrogacy in India in 2015 show the legislative body’s unwillingness to look at the situation through a prism of the constitutional ideals of personal liberty, equality and dignity with safeguards against discrimination. The consequent legal vacuum has exacerbated the surrogate mother’s exploitation in a legal regime that treats her only as a womb, not a patient. She is actively discriminated against, and systematically excluded from being recognized as a stakeholder by the Government of India and by the Supreme Court of India.

The entire surrogacy industry is unlikely to give up and disappear. It will simply go underground and take the surrogate with it and this is what anecdotal evidence is showing us and what we may want to learn from.

While legal spaces are shrinking for surrogacy, the red market\(^9\) for it is expanding. This situation is analogous to the sex-work industry, where bans have only eroded the rights of sex workers. Even researchers who have done seminal work among surrogates are concerned that

\(^9\) Carney Scott, ‘Every Body has a Price’ (Red Markets, 2009)<http://redmarkets.com/what-is-a-red-market> accessed 10 May 2018. The red market is described as any economic system or economy that trades primarily in human flesh or human beings
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the imposition of a formal ban pushes the entire industry underground and further reduces the rights of surrogates.\textsuperscript{93} It is possible that the present form of lawlessness is preferred by certain vested interests as the industry still survives in it. This may also be the reason for delayed regulation.

Amrita Pande, in her article in ‘Wombs in Labor: Transnational Commercial Surrogacy in India’, suspects that the camps on both sides of the divide – one that hails the government’s actions as a pioneering attempt by a state to protect its citizens, and the other that terms the denial of parenthood as a move that is draconian and archaic. Neither camp chooses to prioritize a vital part of the story: the rights of the surrogates.\textsuperscript{94}

The above analysis points in the same direction. The Supreme Court has every reason to review its inaction. With no law forthcoming, it could choose to re-open the matters pending before it. This seems to be the only hope of holding a democratic conversation with the surrogate and helping her reclaim her position lost in the surrogacy arrangement.

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\textsuperscript{94}ibid.
Chapter 5

REFERENCES


Arundhati Roy, The 2004 Sydney Peace Prize Lecture, 3 November 2004, Seymour Theatre Centre, University of Sydney


Audrey Wilson, ‘How Asia’s Surrogate Mothers Became a Cross Border Business’ *This Week in Asia* (4 June 2017)
Chapter 5


Baby Manji Yamada v Union of India and Anr AIR 2009 SC 84


Jan Balaz Civil Appeal No. 8714 of 2010

Debalina Datta and Pratyay Pratim Datta, ‘Maternal Mortality in India: Problems and Strategies’. (Jan-March 2013) 2 Asian Journal of Medical Research 1

Director of Settlements AP v M R Apparao AIR 2002 SC 1598


Chapter 5

15 October 2017

Emily Harris, ‘Israel Dads Welcome Surrogate Born Baby in Nepal on Earthquake Day’ (National Public Radio: All Things Considered, 29 April 2015)

Gautam v Chakraborty (1996) 1 SCC 490


Import Policy Norms, Directorate General of Foreign Trade for 'Human Embryos' vide notification No. 52(RE-2013)/2009-2014 dated 2 December 2013

Julie Bindel, ‘Outsourcing Pregnancy: A Visit to India’s Surrogacy Clinics’ The Guardian (Ahmedabad, 1 April 2016)


Julie McCarthy, ‘Why Some of India’s Surrogate Moms Are Full of Regret’ National Public Radio (Weekend Edition Sunday, 18 September 2016)

Maneka Gandhi v Union of India 1978 SCR (2) 621


Margaret Atwood, The Handmaid’s Tale (McClelland and Stewart, 1985)


National Guidelines for Accreditation, Supervision and Regulation of ART Clinics In India (Indian Council of Medical Research and the National Academy of Medical Sciences, India, 2005) (2005 ICMR Guidelines) http://icmr.nic.in/art/art_clinics.html accessed 18 May 2018


Nita Bhalla, ‘India’s Surrogacy Tourism: Exploitation or Empowerment?’ Thomson Reuters Foundation (4 October 2013) http://www.trust.org/item/20131004162151-r5i0w/ %5Bhttp://perma.cc/HV2K-YBFJ%5D accessed 27 September 2015


Pavan Agrawal v. Union of India W.O. (C) No. 841/2015


Sarojini NB and Aastha Sharma, ‘The Draft ART (Regulation) Bill: In Whose Interest?’ (January-March 2009) VI Indian Journal of Medical Ethics 1


Taber’s Enyclopedic Medical Dictionary (23rd edn., FA Davis Company)


The Medical Termination of Pregnancy Act, 1971, as amended by Act No. 64 of 2002
Chapter 5

The Constitution of India, 1950

_Vishaka v State of Rajasthan_ 1997 (6) SCC 241
CHAPTER 6 - THE FORCED GIFT: BIRTH OF AN INDIAN POSITION AT ODDS WITH THE SURROGATE MOTHER

“The machine does not isolate man from the great problems of nature but plunges him more deeply into them.”

- Antoine de Saint-Exupery, The Little Prince

The year 2015 in India marked a turnaround in the governmental position on the legal status of surrogacy, with a move to prohibit commercial surrogacy altogether. It would, henceforth, be only altruistic and available to Indian married couples only and not to foreigners. It must be noted that not only had commercial surrogacy been legal in India since the 2008-2009 case of Baby Manji Yamada v. Union of India, it had since burgeoned into a multimillion-dollar industry, lending India that now infamous title: “the cradle of the world”. However, in the years that the commercial surrogacy industry flourished, it remained largely unregulated: there were few ethics regulations in place, and almost no laws protecting the surrogate mothers, the babies and the commissioning parents from exploitation under the control of “a handful of medical experts”. The Government’s response to these concerns came in the form of a total ban on commercial surrogacy in 2015, amidst concerted opposition from the

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2 Baby Manji Yamada v Union of India AIR 2009 SC 84
4 Aditya Ghosh, ‘Cradle of the World’ Hindustan Times (23 December 2006) 18
6 B Sinha, ‘It amounts to sale of motherhood: Surrogacy warrior who moved SC speaks up’ Hindustan Times (26 August 2016)
7 Editorial, “The New Surrogacy Bill will Stop Exploitation of Women” Hindustan Times (25 August 2016)
surrogates themselves. Their objections were, however, dismissed on the basis of a problematic claim that “surrogate mothers are not directly affected by the ban”.

In the past decade, India has seen at least five revisions to the draft legislation for the regulation of Assisted Reproductive Technologies (ART): the 2008, 2010, 2013, 2014 and the 2016 Bills. The drafts have volleyed on surrogacy to great extremes – from expanding the patient group to severely limiting it; not allowing relatives to act as surrogates to limiting surrogates only to close relatives; allowing commerce in surrogacy to allowing only altruistic surrogacy. In this article, we examine the diametrically opposed positions from allowing commerce in surrogacy to prohibiting it completely and only allowing altruistic surrogacy through a close relative as a solution to avert exploitation of surrogates in India. Through the conceptual framework of vulnerability, this article critically examines the provisions of the draft Surrogacy (Regulation) Bill, 2016 and asks whether these two solutions lessen or contribute to the vulnerability of a surrogate mother to exploitation or serve as a constitutionally sound approach. First, we construct a backdrop of vulnerability in the context of surrogacy. Second, we examine the 2016 Bill’s requisites of a surrogate being a close relative. We then examine the commercial elements of the environment and the shift to altruism in the 2016 Bill. Finally, we analyze the consequences of these approaches and their impact on vulnerability specifically.

A. UNDERSTANDING VULNERABILITY IN SURROGACY

In an influential 2013 collection of essays, Mackenzie et al. defined vulnerability as “an ontological human condition” and a key element of our day-to-day existence. One of the

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8 B S Perappadan, ‘A Setback for Surrogacy in India’ The Hindu (29 November 2015)
9 A Wal, ‘Surrogate Mothers say Regulate Practice, Don’t Ban it; Moves SC Opposing Restriction’ DNA (30 November 2015)
10 D Singh (n 1) 124; B Sinha, ‘Women are not Legally Empowered to Become Surrogates: Centre to SC’ Hindustan Times (4 February 2016)
11 D Singh (n 1)
central premises of their study is that, as human beings, we depend on others for the totality of our welfare and wellbeing.

Vulnerability as a pervasive social phenomenon thus generates fundamental moral, political and legislative obligations insofar as it is interwoven with exclusionary and hierarchical social structures that inevitably impact the rational agency of individuals. Another significant definition of vulnerability is offered by Chandrima B. Chatterjee in her 1998 study titled, *Vulnerable Groups in India* (CEHAT). As opposed to a dependency-based model, as Mackenzie and others propose, Chatterjee proposes what one might call a susceptibility based model of vulnerability defines vulnerability as the state of being exposed or susceptible to danger or abuse. She writes that vulnerability “comprises of weakness of physical or mental strength, defenselessness, unprotectedness, fragility and exposure to undesirable conditions/factors.”

In an earlier publication, we suggested drawing a strategic analytic distinction between vulnerability and exploitation; one does not automatically imply, necessitate or co-opt the other. Certainly, an exposure to detrimental circumstances in one’s life enables a link between vulnerability and exploitation.

However, in the context of surrogacy, as we argue, it is precisely a careful delineation of such circumstances that could constructively inform regulatory interventions to prevent exploitation. Through a close reading of three studies, two by CSR and one by Sama - Research Group on Health, we argued that “a surrogate mother is enveloped by various layers

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14 *D Singh* (n 1) 127
15 A.C MacIntyre, ‘Dependent rational animals: Why human beings need the virtues’ (1999) 20 *Open Court Publishing*
16 C Chatterjee and G Sheoran, *Vulnerable Groups In India*, The Centre for Enquiry into Health and Allied Themes (CEHAT) 1998
17 *ibid; D Singh* (n 1) 128
18 *D Singh* (n 1)
19 *ibid.
of vulnerability”: these layers may be intrinsic to her on account of her age or sex; extrinsic in terms of her income, literacy level or state of previous employment; or relational, involving factors like marriage or children.\textsuperscript{22}

We then suggested that several further and differentiated layers of vulnerability become visible when one reads the practice of surrogacy against the referential framework of biomedical research (i.e., the surrogate mother) as the ICMR 2000 Guidelines\textsuperscript{23} proposed: vulnerabilities such as cognitive or communicative, deferential, economic, and social emerge thus as separate and overlapping layers. Finally, subsuming all these layers is the category of “legal vulnerability” can be seen to have an impact on every layer of vulnerability with the capacity to exacerbate or ameliorate each layer\textsuperscript{24}(See Figure 1).

Furthermore, as the term suggests, “legal vulnerability” is necessarily contingent upon the legal framework that frames an issue; surrogacy in this case: “As a proposed law increases restrictive positions or is unable to address the interplay of the above vulnerabilities, the scope of legal vulnerability deepens. Hence, legal vulnerability should be understood as an all-encompassing risk that needs to be assessed not only when a woman agrees to act as a surrogate but throughout the surrogacy arrangement and even after it ends.”\textsuperscript{25}

Thinking towards an ethics of vulnerability for surrogacy, we begin to understand that it is incumbent upon legislative bodies

\textsuperscript{22}D Singh (n 1)151-153
\textsuperscript{23}Ethical Guidelines For Biomedical Research On Human Participants (Indian Council of Medical Research, 2000) <http://whoindia.org/linkfiles/hsd_resources_ethical_guidelines_for_biomedical_research_on_human_subjects.pdf> accessed 07 August 2019
\textsuperscript{24}D Singh (n 1) 167
\textsuperscript{25}D Singh (n 1) 168
to keep the risk of legal vulnerability to a minimum. This, as we have argued earlier, “requires an all-encompassing visibilisation in the Vulnerability Construct as it affects all layers of vulnerability identified, effectively increasing or decreasing the possibility of exploitation of the surrogate.”

B. THE 2016 BILL ON SURROGACY – SOLUTION OR OTHERWISE?

The 2016 Bill which was approved by the Union Cabinet on 24.8.2016, purports to “control the unethical practices in surrogacy, prevent commercialization of surrogacy and...prohibit potential exploitation of surrogate mothers and children born through surrogacy”.

The Bill seeks to avert the exploitation of surrogates by, primarily banning the commercial aspect of surrogacy, i.e., only allowing altruistic surrogacy, and, thereafter, only allowing a close relative to act as a surrogate. A contract however has been deemed necessary in the event that the surrogate refuses to hand over the child. This suggests that while a surrogacy arrangement will have no commercial elements, it is still to be enforced legally by way of contract; meaning, a close relative acting as a surrogate would need to be bound by contractual obligations.

This approach highlights a key concern: what consequences does a binding contract on a familial relationship have on the vulnerability of a surrogate? In the following section, we examine the two solutions offered by the 2016 Bill – firstly that the surrogate be a close relative and secondly that the arrangement be an altruistic one.

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26ibid.
27 IANS, ‘Cabinet Approves Surrogacy Regulation Bill’ Business Standard (24 August 2016)
28 Press Information Bureau, Government of India Cabinet, ‘Cabinet approves Introduction of the Surrogacy (Regulation) Bill, 2016’
29 Cabinet Briefing by Union Ministers, Cabinet briefing by Union Ministers Sushma Swaraj & J P Nadda in New Delhi: Cabinet gives its approval for introduction of Surrogacy (Regulation) Bill, 2016DD NEWS, Oct. 24, 2018.,
B.1 Keeping it in the family

The 2016 Bill envisions an idealized social set-up wherein a child grows up with the knowledge that there is a woman he/she grew up calling mother, but his/her aunt — or another relative — is also a mother. Arguments in favor of this position often cite Indian culture and the long existing “cultural practice” of gifting one’s babies to infertile relatives. The Bill, however, does not provide a definition for the term ‘close relative’. Yet, it provides that “no person, other than a close relative of the intending couple, shall act as a surrogate mother and be permitted to undergo surrogacy procedures as per the provisions of this Act.” These potential surrogates were described in the cabinet briefing on the 2016 Bill as the husband’s sister-in-law or the wife’s sister but it was said that the definition would be provided in the rules under the Bill.

The question one might ask here is whether policy makers are in sync with the dynamics of the surrogate arrangement and regulatory pitch. As R Danzig observes, efficacy of a regulation depends greatly on acceptability by stakeholders. Where regulation runs with the grain, or a predisposition to comply, law will enjoy a measure of success but where it runs against the grain, encountering economic or cultural resistance, it will do much less well.

B.1.1 Historical versus Contemporary Context

Historically, traditional surrogacy finds social and moral acceptance in India as a positive altruistic action on the woman’s part for an infertile couple. However, such historic renditions conform to religious and moral ideologies in their narratives by treating the actual act of impregnation as an act of godly power or spiritual force and not a physical act, as the same would require sexual congress with a male other than her husband, which is morally

30 T Thacker, ‘Poor women are exploited in the name of surrogacy…It must end’ Asian Age (28 August 2016) quoting Dr. Soumya Swaminathan, Director-General of the Indian Council of Medical Research
31 Surrogacy Bill (n 12) s 4(iii)(b) II.
32 Media Briefing (n 29)
34 ibid.
Moreover, as the product of the surrogate arrangement, i.e., the child, is biologically related to the surrogate mother, the act of giving the child up is treated as the supreme sacrifice on the part of the birth mother, to be treated as a gift beyond measure and respected accordingly.

Today, thanks to ART, surrogacy refers mostly to gestational surrogacy. As the surrogate has no contribution to the genetic material of the product, her status is merely of a womb donor and her relinquishment of the child is not her sacrifice, but its rightful restoration to the biological or intended parents who hired her services. This nature of surrogacy is underlined with secrecy on two levels. On one hand, the commissioning parents are unable to tell their in-laws and relatives about having employed a surrogate due to the stigma of barrenness and reproductive inability. In many families, when a child is born out of surrogacy, not even immediate blood-relatives of the couple know, for fear of social ostracization. On the other hand, surrogates themselves appear unable to share their surrogacy with their own families and friends. In the CSR study it was found that post surrogacy, a majority of surrogates did not disclose any information to family and friends. The 2016 Bill may have overlooked these important aspects of the ‘Indian’ mindset.

As journalist Priyanka Dasgupta has observed, cases of surrogacy among close relatives are significantly in the minority, and harbor fears of exploitation and emotional turmoil, owing to the cultural merit that child-bearing has in an Indian context. Despite the concerns that commercial surrogacy brings, the most consoling aspect for prospective parents was the anonymity provided. With this element gone, what we have is a regulatory position that goes against the very grain of widely held cultural norms.

37 A Ghosh, ‘In fact: How focus on altruism, ‘close relatives’ overlooks realities’ Indian Express (26 August 2016)
38 P Dasgupta, ‘Do close relatives lend their wombs to childless couples’ Times of India (28 August 2016)
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This doesn’t mean that the regulatory position should not attempt to challenge cultural norms merely because they are widely held. The CSR study documented responses to the worst part of being a surrogate mother and the majority of surrogates from Anand, Surat and Jamnagar (above 80% in all 3 cities) answered that it is the secrecy involved in the entire process. Imreena Qadeer, in her essay ‘Social and Ethical Basis of Legislation on Surrogacy: Need for Debate’ argues that secrecy and anonymity are rooted in social primacy and in the perceived superiority and exclusivity of blood relations. She argues in favor of more transparent processes with the commissioning mother and the surrogate mother being involved in the birthing and breastfeeding processes. However, this approach, designed for recognition of the surrogate, suggests co-parenting to an extent and greater rights for the surrogate. The 2016 Bill contrarily requires mandatory and contractually bound relinquishment and seeks to establish even pre-birth that the surrogate mother has no rights of the pregnancy or the baby born of it. Hence, it does not appear that the provision of close relative is included with an objective of providing greater transparency to the surrogacy arrangement, more rights to the surrogate mother, or to dismantle the exclusivity of blood relations.

B.2 Prohibition of commerce

The second solution of the 2016 Bill to the issue of surrogacy being exploitative is to make it altruistic. The bill demands an arrangement “in which no charges, expenses, fees, remuneration or monetary incentive of whatever nature, except the medical expenses incurred on surrogate mother and the insurance coverage for the surrogate mother, are given to the surrogate mother or her dependents or her representative.” Even while the concept of altruism fundamentally speaks against any legal contract whatsoever, the promise of reimbursing the surrogate mother’s medical expenses and insurance coverage rightly demands a contractual element. However, such a contract is both limiting and inequitable, as it does not take into

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40 Surrogacy Bill (n 12) s 2(b)
consideration the labor of pregnancy and the surrogate mother’s time and effort as a cost incurred by her.

B.2.1 Retention of commerce for the industry but not the surrogate

The ICMR 2000 Guidelines provide, amongst other principles, the principle of non-exploitation for the protection of human subjects of bio-medical research. This principle requires that research subjects be remunerated or at the very least compensated for risks, which may be physical, psychological, foreseeable or unforeseeable. Furthermore, the guidelines qualify that such remuneration/compensation should be reasonable and overseen by a committee so as to not act as any form of inducement. The Guidelines further provide that a subject can withdraw from any study at any time and for any reason and if the reason were to be a medical one she would get the same benefits as she would have gotten if her participation were complete. In case the reasons are non-medical then she still needs to be paid proportionate to her involvement. As the ICMR 2000 Guidelines addressed surrogacy for the very first time and likened surrogates to subjects of bio-medical research, it follows that those principles would also guide the conduct of a doctor or clinic with a surrogate.

In this regard, the 2016 Bill reflects an acute lack of consideration for the efforts of the surrogate and fails to recognize her contribution in the arrangement. Moreover, use of the words “incurred on her” rather than “incurred by her” suggests that control over the manner in which medical expenses are incurred does not lie with her.

Furthermore, if one of the central objectives of the bill is to curtail trafficking in surrogates, it remains incumbent upon law enforcers to underscore the role that ART clinics and surrogate hostels have had in trafficking cases in recent years. However, Ms. Swaraj (who headed the Group of Ministers (GoM), Union Cabinet that cleared the 2016 Bill) stated in her interaction with the media that the clinics and hostels will continue to remain in operation. She said that

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41 Ethical Guidelines (n 23)
42 D Singh (n 1)162
43 P Singh, ‘Cops Call it Forced Surrogacy’ Outlook (11 May 2017)
the surrogate would necessarily stay in the hostel during the course of the pregnancy and not be permitted to leave.\textsuperscript{44} Swaraj further emphasized that the hostel and all medical expenses will be borne by the intending parents. Far from altruistic, such an arrangement seems rife with profiteering intentions that deliberately exclude and marginalize the surrogate.

\textbf{B.3 \quad No immunity for the surrogate}

As per Section 4(ii) and Section 35 of the 2016 Bill, “no person, organization, surrogacy clinic, laboratory or clinical establishment of any kind shall undertake or provide commercial surrogacy or its related component procedures\textsuperscript{45} and services in any form. Contravention of this is treated as an offence under the Bill, punishable with a minimum imprisonment term of “ten years and with fines, which may extend to ten lakh rupees”.\textsuperscript{46} While the thrust of these Sections appears to be against organized profiteering from surrogacy and the exploitation of the surrogate, the mention of the word person brings it down to the individual and may very well mean the surrogate herself who becomes an identified offender. While the thrust of these Sections appears to be against organized profiteering from surrogacy and the exploitation of the surrogate, the mention of the word person brings it down to the individual and may very well mean the surrogate herself who becomes an identified offender.

The 2016 Bill sees the introduction of a presumption in Section 39 which states, “Notwithstanding anything contained in the Indian Evidence Act, 1872, the court shall presume, unless the contrary is proved, that the woman or surrogate mother was compelled by her husband, the intending couple or any other relative, as the case may be, to render surrogacy services, procedures or to donate gametes for the purpose other than those specified in clause (ii) of section 4 and such person shall be liable for abetment of such offence under section 37 and shall be punishable for the offence specified under that section.” Every offence under this Bill has been made “cognizable, non-bailable and non-compoundable”.\textsuperscript{47} However, there is no

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{44}Media Briefing (n 29)
\item\textsuperscript{45}Surrogacy Bill (n 12) s 4(ii)
\item\textsuperscript{46}Surrogacy Bill (n 12) s 35
\item\textsuperscript{47}Surrogacy Bill (n 12) s 40
\end{itemize}
\end{footnotesize}
provision in the Bill that provides immunity from punishment to a presumably ‘compelled’ woman or surrogate mother.

Another legislation in India – the Prenatal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994\(^48\) has a similar clause from which Section 34 of the 2016 Bill appears to have borrowed heavily. However, it has failed to borrow also from the preceding section of the PCPNDT Act i.e., the immunity provided to a pregnant woman who is presumed to have been ‘compelled’.\(^49\) This is a serious oversight and particularly susceptible to creating conditions where a surrogate (who may have accepted aid beyond the strict contours of an altruistic arrangement) is thereafter manipulated on account of this legal vulnerability.

**B.4 Commercial contracting within the family**

In the cabinet briefing by Sushma Swaraj, she states, “if the surrogate who is a close relative was to refuse to hand over the child, a contract will be signed and her refusal will not be allowed.”\(^50\) A plain reading of the 2016 Bill, however, reveals no provision for a written/signed contract except under Section 6 which states that the “written informed consent”\(^51\) of the surrogate mother must be acquired on a prescribed form “in a language she understands”.\(^52\) As per Section 47, the Central Government may, make rules for “the form in which consent of a surrogate mother has to be obtained under the aforesaid section”.\(^53\)

Written contracts have formed the backbone of surrogacy arrangements in India. The ICMR ART Clinic Guidelines, 2005, provide the necessity of having documentary evidence of the financial arrangement for surrogacy (Clause 3.10 - Surrogacy: General Considerations). The later drafted ART (Regulation) Bill, 2010 provided in its rules several forms and contracts.\(^54\) According to the

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\(^{48}\)Hereinafter referred to as the PCPNDT Act.

\(^{49}\)PCPNDT Act, s 23

\(^{50}\)Media Briefing (n 29)

\(^{51}\)Surrogacy Bill (n 12) s 6

\(^{52}\)Ibid.

\(^{53}\)Surrogacy Bill (n 12) s 47

\(^{54}\)ART Bill 2010, ART Rules, Form R2, Clause 6 – Contract between ART bank and Surrogate.
CSR study, the nature of the surrogacy contract is a bonded paper on which the agreement is typed. In a commercial environment, these contracts have come to become the standard language of an industry guided by the ICMR. Surrogacy contracts have gained legal validity and enforceability due to the support of the Supreme Court of India. We have examined in an independent article the exploitative nature\(^5\) of standard conditions that presuppose that a woman has acquired the consent of her husband, before choosing to act as a surrogate, in effect reducing her own agency as an adult individual. Also, as part of these standard conditions, she assumes the risk of contracting HIV if either of the donors were to become positive during the window period; she agrees to fetal reduction at the outset and she even undertakes to refund all certified and documented expenses incurred on the pregnancy if she decides to terminate the pregnancy even though such medical termination is allowed to her under law.

C. **Fallout on Vulnerability**

Recent studies on vulnerability in the context of human rights and the body have suggested a close link between vulnerability and certain fundamental human rights\(^6\), emphasizing the need for rights based legislations to work towards mitigating corporeal, situational and relational vulnerabilities.\(^7\) Our analysis of the 2016 Bill, however, reveals that without a robust account of the vulnerabilities of the surrogate, and a sole focus on material outcomes of the surrogacy arrangement, legislative practices fail to foster patterns of care and fair compensation for the surrogate mother, and fail to place her at the center of legislative consideration.

C.1 **Vulnerability and exploitation in familial relationships**

From the vulnerability construct, we can observe that a surrogate is “intrinsically vulnerable due to her sex in a patriarchal system... she may be prone to subordination, whether imposed

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56 B.S Turner, *Vulnerability and Human Rights* 1 (Penn State Press, 2006)
57 A.C MacIntyre(n 15)
by her own family members or medical practitioners, making her more susceptible to exploitation in deferential or institutional relationships. She may be conditioned to serve and be unable to articulate herself sufficiently or make herself heard [social vulnerability]. Her requests for information may be denied on account of not being worthy of consideration.”

This raises concerns that a specific kind of exploitation may occur if the close relative clause is implemented. “A man can force his wife to lend her womb to her sister-in-law. Though there will be no monetary transaction, one can’t disregard the exploitation here.” In the CSR study, “the researchers noted during field investigation that the fear of abandonment among married surrogate mothers also acts as a driving force to enter into surrogacy arrangements”.

Here, the issue of relational vulnerability (See Figure 2) is brought up: is the woman’s decision to enter the surrogacy arrangement truly an autonomous one? To what extent do her “relational attributes such as marital status and family structure shape or delimit her own choices”?

The visibilisation of relational vulnerability vis-à-vis a surrogate helps one understand her position at the intersections of her social and familial relations to illuminate her state of well being. This can also then be used to ascertain if she is further at risk of coercion or influence on account of deferential vulnerability. It is seen in our previous work on the vulnerability construct that surrogates empirically have exhibited enhanced deferential vulnerability i.e., a feeling of insubordination whether imposed by her

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58D Singh (n 1) 135 quoting the Sama study at 62
59Danzig (n 33) quoting Dr Shiuli Mukherjee
60D Singh (n 1) 147 quoting the CSR study at 45
61D Singh (n 1) 156
own family members or medical practitioners.\(^{62}\) This may mean that she has a sense of servitude and an inability to articulate herself as her own agent. This suggests a need that regulatory policies extend towards sensitive recruitment and consent plans where the surrogates have the space to consent voluntarily without feeling obligated or coerced into doing so.

As seen in the preceding section, the very concept of a close relative acting as a surrogate has very little acceptance, and is unlikely to get recognition for fear of being further invisibilised to maintain the status quo. The notion that merely because the surrogate is required to be a close relative would bring about a better treatment for her is an assumption that seems removed from ground reality in a country in which recent surveys have found that every third women, “since the age of 15, has faced domestic violence of various forms in India”\(^{63}\). Moreover, the almost compulsory nature of her stay in a surrogacy hostel, as suggested in the press briefing, is troubling. As the Sama study documents, in a surrogacy hostel, every aspect of the surrogate’s life is controlled. The signed agreement is a way to ensure that she is unable to object to the constant oversight, restrictions on her movement and clinical supervision.\(^{64}\)

Moreover, the vagueness of the category of “close relative” may have attendant risks. In India, marriage does not need compulsory registration under law\(^{65}\) and marriages concluded in traditional ceremonies or as per custom are recognized even when not registered.\(^{66}\) This possibility raises concerns that the mandatory nature of the “close relative” provision in the 2016 Bill may result in quick unregistered marriages. Examples of bride trafficking already exist in India and some have been documented as the ‘Paro’ culture or molki which are the terms used for women who have been purchased in other states and brought to regions\(^{67}\) such as

\(^{62}\)D Singh \(^{n 1}\) \(^{135}\)


\(^{64}\) Sama \(^{n 21}\) \(^{93}\)

\(^{65}\) HT Correspondent, ‘Law panel recommends compulsory registration of marriage’ \(\text{Hindustan Times}\) (4 July 2017)

\(^{66}\) Seemav Ashwani Kumar \((2006) 2 SCC 578\)

\(^{67}\) M. Shafiqur, “Bride Trafficking within India” in V Mishra (ed.) \(\text{Human Trafficking: The Stakeholders’ Perspective 47}\) (SAGE, India 2013) 55
C.2 Vulnerability in the Commerce of Reproduction

In the Vulnerability Construct, “economic vulnerability overlaps with extrinsic vulnerability due to the state of the income, prior employment and education of a surrogate. Economic vulnerability in surrogacy requires specific caution in the recruitment of surrogates”.\textsuperscript{70} We find it important that the payment offered does not become an inducement that encourages an individual to assume more risk than they would in the absence of the payment.\textsuperscript{71} In this regard, the basis of the 2016 Bill is the conviction that the driving force for a surrogate mother to enter into a surrogate arrangement is money. It is this vulnerability, precipitated by economic need that the 2016 bill purports to eliminate, by making payable only those expenses that are incurred in the procedure.

This regulatory position, however, is at odds with itself. The proposed 2016 Bill allows payments to doctors, concerning medical expenses incurred on the surrogate, and hostel expenses for nine months, but no payments to the surrogate for her own expenses or contribution. It has been seen in the past that with the assurance of legality from the Supreme Court of India in less than a decade, the surrogacy industry in India became a multimillion-dollar industry. In 2011, infertility assistance was estimated to be a $2 billion industry. This is due to the huge medical and pharmacological dependence of a surrogacy arrangement in achieving successful births. By retaining payment of medical expenses, the Government of India privileges

\textsuperscript{68}ibid.
\textsuperscript{69}Shafiqur (n 58)
\textsuperscript{70}D Singh (n 1) 160
\textsuperscript{71}D Singh (n 1) 128
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the medical machinery driven by the doctors and the ART Clinics over the wellbeing of the surrogate.

C.3. The rigors of legal enforceability

The right to bodily integrity is at the very core of personal freedom and naturally flows from the right to life under Article 21 of the Constitution of India, which includes the right to live with dignity.\textsuperscript{72} A woman’s rights of bodily integrity also encompasses her right to make decisions regarding her own body and reproductive capacity\textsuperscript{73} without external coercion whilst respecting her right to privacy and self-determination.\textsuperscript{74} In India, the Apex court has observed that that a woman’s right to privacy, dignity and bodily integrity should be respected.\textsuperscript{75}

The 2000 ICMR Guidelines state some general principles. Amongst those identified are the “principles of voluntariness, informed consent and community agreement”\textsuperscript{76} i.e., that research subjects be “fully apprised of the research, its impacts and its risks; and that they retain the right to abstain from further participation”\textsuperscript{77} in the research should they change their minds and are subjected to only minimal restitutive obligations.

A surrogacy arrangement depends, primarily, on the consent of the surrogate. While the 2016 Bill provides for the requirement of consent, it does not equally make provisions to protect certain inalienable rights such as the right to privacy, bodily integrity or reproductive freedom; nor does it include within it the scope of withdrawing consent. The freedom of giving of consent must also include within it the scope for withdrawing of consent. Surrogacy arrangements today lack the ingredient of voluntariness or a right to abstain from further

\textsuperscript{72}Gautam v Chakraborty (1996) 1 SCC 490
\textsuperscript{74}R.J Cook and M.F. Fathalla, Advancing Reproductive Rights Beyond Cairo and Beijing - International Family Planning Perspectives (Guttmacher Institute, Sep. 1996)
\textsuperscript{75}Suchita Srivastava& Anr. vChandigarh Administration (2009) 9 SCC 1
\textsuperscript{76}Sanmukhani, J., & Tripathi, C. B., ‘Ethics in Clinical Research: The Indian Perspective’ Indian Journal of Pharmaceutical Sciences (2011) 73(2) 125–130
\textsuperscript{77}D Singh (n 1) 167
participation. For instance, taking away the surrogate mother’s unilateral right to terminate the pregnancy within the legal term, the commissioning parents are instead given the legal right to restrain the surrogate.\textsuperscript{78} This observation, made by the Delhi High Court on the rationale that the commissioning mother remains the legal mother of the child both during and after the pregnancy, is one instance of many where the rights of the surrogate are annulled by practices that assume that the genetic material within the body of a surrogate mother is the property of the intending parents. The 2016 Bill does nothing to change this and may in fact have dire consequences for the surrogate mother. In the Sama study, researchers have documented that in virtually all cases, the surrogate is not informed about multiple implantations, possibility of multiple births, fetal reduction, abortion, organ strain, and risk of premature birth.\textsuperscript{79} The choice regarding abortion, whether for health or convenience purposes, belongs to the contracting parents.\textsuperscript{80}

In such situations, the surrogate may not only be deprived of a right to her own bodily integrity but also to rights all other medical patients have, such as the rights to consider an alternative medical opinion, to undertake or refuse surgery, or to seek medical termination of pregnancy in accordance with Indian law. She may also be subjected to punitive action for exercising her lawful rights. Such provisions may prove to be the gateway for not only allowing another’s will to be imposed upon the surrogate but also provide the perfect justification for such imposition.

The constitutional backing to such enforceability, particularly upon the surrogate, is unclear. In a landmark judgment in 1982 by the Supreme Court of India on bonded labor\textsuperscript{81} in the People’s Union for Democratic Rights v Union of India,\textsuperscript{82} it was held that, “[a]ny factor which deprives a person of a choice of alternative and compels him to adopt one particular course of action may properly be regarded as ‘force’ and if labor or service is compelled as a result of such ‘force’, it would be ‘forced labor’.” The Supreme Court of India consequently held that the performance of a contract of service cannot be enforced against an employee, and that no one can be

\begin{flushright}
\textsuperscript{78}Rama Pandey v. Union of India 2015 (221) DLT 756
\textsuperscript{79}D Singh (n 1) 65
\textsuperscript{81}The Constitution of India, 1949, Art. 23
\textsuperscript{82}People’s Union for Democratic Rights and Ors v Union Of India AIR 1982 SC 1473
\end{flushright}
“forced to provide labor or service against his will, even though it be under a contractor of service”\(^83\)

In normal cases of breach of contract, courts offer one of two remedies. One is specific performance, which means compelling the defaulting party to perform her contractual undertakings. The other is to award damages, which involves a monetary payment by the defaulting party. Were legally enforceable surrogacy contracts permitted, the courts would have to impose one of the above remedies in the event that a breach of the contract had taken place on account of the surrogate’s withdrawal. Until August 2018,\(^84\) specific performance of a contract was a remedy that courts had the discretion to grant, only as an exception when monetary compensation would not be adequate relief for the non-performance of contract. The Specific Relief (Amendment) Act, 2018, however, now makes it mandatory for a court to grant specific performance of a contract. Of course, the Amendment Act has no intention of legalizing bonded labor. However this may well be the unintended consequence in a surrogacy arrangement that is based on a legally enforceable contract as the 2016 Bill is seeking to do.

The surrogacy contract is not an ordinary contract for services to begin with since its fulfillment involves physical intrusion of the contractor’s body, which if unconsented to may amount to a breach of her bodily integrity. Still, upon withdrawal of consent during the contract, the surrogate cannot, like any other contractor, walk out of the workplace since she is the workplace. In the case of pregnant women and unborn children, it has been recognized that there is a “compelling state interest” in protecting the life of the prospective child.\(^85\) It is for this reason that termination of pregnancy is only permitted when the conditions specified in the applicable statute i.e., the Medical Termination of Pregnancy (MTP) Act, 1980 have been fulfilled. This state interest coupled with the fact that the commissioning mother is the legal mother of the unborn child even during the pregnancy of the surrogate,\(^86\) suggests that a person may have ownership over his/her genetic material housed in another’s body.

\(^{83}\textit{ibid.}\)
\(^{84}\text{The Specific Relief (Amendment) Act, 2018 as published in the Official Gazette on 1 August 2018}\)
\(^{85}\textit{D Singh (n 1)135 quoting the Sama study at 62}\)
\(^{86}\textit{Danzig (n 33) quoting Dr Shiuli Mukherjee}\)
creates a moral and proprietorial interest that may rationalize compelling the surrogate’s pregnancy to be continued even when the MTP Act allows her to abort. Contractual provisions that are more restrictive than the MTP Act may back these rights. Read together, this may mean that the surrogate, even where she may desire an abortion, will, on account of the overriding interests of the intending parents, be compelled to produce the baby – in effect, a forced gift.

This possibility may raise the risk of the contract of surrogacy becoming “forced labor”. Article 23 of the Constitution of India prohibits forced labor. This may raise doubts about the very constitutionality of such a contract particularly when the surrogate herself is not benefiting from it in any manner. However, it is unclear in the circumstances if the prohibition of Article 23\(^\text{87}\) can apply to a surrogacy arrangement, which a statute has declared as legally enforceable (as would be the case if the 2016 Bill were to become the law on the subject). The 2016 Bill provisions for “an order concerning the parentage and custody of the child to be born through surrogacy” (emphasis supplied) and requires that such an order should have been passed by a court of the Magistrate of the first class or above, on an application made by the intending couple and surrogate mother.\(^\text{88}\) It appears that this order may be passed even before conception making the surrogacy arrangement enforceable in law at a nascent stage and one from which the surrogate is unable to resile.

The familial bonds emphasized by the altruistic arrangement are at odds with a legally enforceable mandatory contractual arrangement. The morality of a legally enforceable contract in surrogacy is questionable, particularly one that cannot be withdrawn from given the nature of the transaction. The added fact that the surrogate cannot legally be remunerated for her role makes it akin to bonded labor. That the same is to take place within the four walls of family or that of a surrogacy hostel, renders invisible an arrangement that could well be the breeding ground for domestic violence and exploitation. This suggests that the 2016 Bill may bring about a position of even greater vulnerability for a surrogate mother.

\(^{87}\) Medical Termination of Pregnancy Act, 1971

\(^{88}\) Surrogacy Bill (n 12) s 4(iii) (II)
D. CONCLUSION

The Indian position is at odds not only with itself but also, most importantly with the surrogate mother. India’s current regulatory environment and the various positions it may possibly take under the ART Bill 2010, ART Bill 2014 and the path Indian Government has proposed to adopt with the Surrogacy (Regulation) 2016 Bill are in the tabular representation below.

<table>
<thead>
<tr>
<th>India’s position</th>
<th>Surrogate restricted to close relative?</th>
<th>Only Altruistic Surrogacy</th>
<th>Is the Surrogacy arrangement treated as a contract</th>
<th>Is withdrawing from the arrangement provided for?</th>
<th>Is the Surrogacy contract enforceable?</th>
</tr>
</thead>
<tbody>
<tr>
<td>2005 Guidelines of the ICMR</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
<td>Uncertain</td>
<td>Uncertain</td>
</tr>
<tr>
<td>ART Bill of 2010</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
<td>Uncertain</td>
<td>Yes</td>
</tr>
<tr>
<td>ART Bill of 2014</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
<td>Uncertain</td>
<td>Yes</td>
</tr>
<tr>
<td>2016 Surrogacy Regulation Bill</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
</tr>
</tbody>
</table>

It can be seen that surrogacy restricted to a close relative is a new qualification introduced by the 2016 Bill. It is also seen that in contrast to the previous regimes that allowed commercial surrogacy, the 2016 Bill now prohibits it. However it continues to treat the surrogacy arrangement as a contract, while making no provision for withdrawal, treating the same as legally enforceable against the surrogate mother.

Where regulation is in its first phase, its purpose is to control, confine and channel ex ante the particular aspect of practice that is its target. Prohibition of any practice, which has already been taking place, suggests that first-phase regulation is being incorrectly applied and is the

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equivalent of pushing the proverbial genie back into the bottle – an impossible task. Second-phase regulation on the other hand operates ex post, endeavoring to compensate for, or adjust to the consequences of a practice that cannot be controlled by first-phase regulation. Merely because there may be some instances of exploitation, does not justify a regulatory reaction that amounts to throwing the baby out with the bathwater. As Francis Fukuyama conceded, “No regulatory regime is ever fully leak proof.... Every country makes murder a crime and attaches severe penalties to it, yet it occurs nonetheless. The fact that it does has never been a reason for giving up on the law or any attempts to enforce it.”

It is already seen that the ART industry has attempted to subvert tightening regulations by moving beyond national borders and reducing visibility of arrangements. The regulatory position being imposed is obviously not synced to ground realities and thus has a much greater chance of failure. The fallout would be on all stakeholders with particular impact on the most vulnerable – the surrogate mother. Commentators have shared their concern on this stating,

Today, when surrogate mothers have legal rights, there are accusations of exploitation. If commercial surrogacy is banned, the intended parents and surrogates would be forced to operate underground with a very high risk exposure.

Then these poor women would have no legal rights and the chances for exploitation would be even more.

With a high risk of surrogacy trafficking for even small sums of money, the surrogate mother may come to be hidden in plain sight in an arrangement in which her lack of agency is palpable. As she has no immunity under the proposed 2016 Bill and may herself be treated as an offender, there is little encouragement for her to come forward even if she were to face exploitation, for fear of criminal prosecution. Once placed in a commercial context in which she has no right to consideration, her vulnerability is exacerbated even further in a legally

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92 D Singh (n 1)168 quoting H.G Ramasubramaniam, ‘Banning Commercial Surrogacy will expose Women to Exploitation’ *The Economic Times* (28 August 2016)
enforceable mandatory arrangement that she cannot resile from and may need to specifically perform.

To move beyond this legal impasse, we need an ethics of vulnerability that might open the possibility to understand the position of the surrogate better and proceed to respond to her needs in law and policy in ethically defensible ways. Taking vulnerability seriously, by attempting to understand just what it is that we identify when we perceive the surrogate mother to be vulnerable, there is potential to provide a major reorientation within the legal discourse on surrogacy in India with greater respect for autonomy and informed consent, and a way to make sure that we don't cause harm to the surrogate in the surrogacy arrangement. We have sought, in this article, to offer a deeper understanding of the surrogate's vulnerabilities in order to grasp the precariousness of her position within the proposed law on surrogacy, hoping to open up a direction for future research on the subject, and to provide a theoretically and ethically sound starting point for future policy and law on the subject.

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Chapter 6

REFERENCES

Aditya Ghosh, ‘Cradle of the World’ Hindustan Times (23 December 2006) 18

A Ghosh, ‘In fact: How focus on altruism, ‘close relatives’ overlooks realities’ Indian Express (26 August 2016)


A.C MacIntyre, ‘Dependent rational animals: Why human beings need the virtues’ (1999) 20 Open Court Publishing

A Wal, ‘Surrogate Mothers say Regulate Practice, Don’t Ban it; Moves SC Opposing Restriction’ DNA (30 November 2015)

B.S Turner, Vulnerability and Human Rights 1 (Penn State Press, 2006)

Baby Manji Yamada v Union of India AIR 2009 SC 84

B Sinha, ‘Women are not Legally Empowered to Become Surrogates: Centre to SC’ Hindustan Times (4 February 2016)

B Sinha, ‘It amounts to sale of motherhood: Surrogacy warrior who moved SC speaks up’ Hindustan Times (26 August 2016)

B S Perappadan, ‘A Setback for Surrogacy in India’ The Hindu (29 November 2015)


C Chatterjee and G Sheoran, Vulnerable Groups In India, The Centre for Enquiry into Health and Allied Themes (CEHAT) 1998

Chapter 6


Editorial, “The New Surrogacy Bill will Stop Exploitation of Women” Hindustan Times (25 August 2016)

Ethical Guidelines For Biomedical Research On Human Participants (Indian Council of Medical Research, 2000)


Gautam v Chakraborty (1996) 1 SCC 490


Press Information Bureau, Government of India Cabinet, ‘Cabinet approves Introduction of the Surrogacy (Regulation) Bill, 2016’

M. Shafiqur, “Bride Trafficking within India” in V Mishra (ed.) Human Trafficking: The Stakeholders’ Perspective 47 (SAGE, India 2013) 55

Media Briefing on Cabinet Decisions’,
https://www.youtube.com/watch?v=wtI4Mskjpnaaccessed 24 October 2018


People’s Union for Democratic Rights and OrsvUnion Of India AIR 1982 SC 1473

The Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition Of Sex Selection) Act 1994

Rama Pandey v. Union of India 2015 (221) DLT 756


R.J Cook and M.F. Fathalla, Advancing Reproductive Rights Beyond Cairo and Beijing - International Family Planning Perspectives (Guttmacher Institute, Sep. 1996)


Chapter 6


S Saaliq, ‘Every third women in India suffers sexual, physical violence at home” News18 (8 February 2018)

Suchita Srivastava & Anr. vChandigarh Administration (2009) 9 SCC 1

Seemav Ashwani Kumar (2006) 2 SCC 578

T Thacker, ‘Poor women are exploited in the name of surrogacy...It must end’ Asian Age (28 August 2016)

The Constitution of India, 1949

The Medical Termination of Pregnancy Act, 1980

https://icmr.nic.in/guide/ART REGULATION Draft Bill1.pdf accessed 12 June 2018

The Specific Relief (Amendment) Act, 2018 as published in the Official Gazette on 1 August 2018

The Surrogacy (Regulation) Bill 2016, Bill No. 257 of 2016
http://www.egazette.nic.in/WriteReadData/2016/172731.pdf accessed 07 August 2019
CHAPTER 7 - STILL VULNERABLE AND PRECARIOUS?

INTERNATIONAL LEGAL INSIGHTS FOR THE SURROGACY (REGULATION) BILL (2019)

‘These women who are involved in surrogacy are by and large in a very precarious and vulnerable situation...’

- Surekha Nelavala

At the time of writing this paper, the legality of commercial surrogacy in India remains a grey area. Although a complete ban was declared in 2015, no law came about to impose it. The Surrogacy (Regulation) Bill, 2016 now renamed the Surrogacy (Regulation) Bill, 2019 (2019 Bill) that stipulates the ban still awaits its passage through the Rajya Sabha (upper house) and Presidential assent to become a law. The prohibition, albeit declared, remains in limbo.

India’s current move to prohibit commercial surrogacy is by no means an isolated one; rather, it is part of a global outlook towards regulating surrogacy in various ways that is taking shape across the world. While some countries like France and Germany ban all forms of surrogacy, others such as Australia, New Zealand, Greece, the United Kingdom and South Africa have legislations that ban commercial surrogacy while allowing altruistic surrogacy. With India’s current stance, it has joined Cambodia, Nepal, Thailand and the Mexican State of Tabasco in the shift from permitting commercial surrogacy for both its nationals and foreign nationals towards prohibiting or limiting such arrangements. Georgia, the Russian Federation, Ukraine

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and some states of the USA such as California remain in the minority as they continue to provide commercial surrogacy not only for their own citizens, but also for foreign nationals. Israel allows commercial surrogacy only for its own nationals in a tightly regulated structure. Vietnam is possibly the only country in the world that reversed its complete prohibition on surrogacy and now allows altruistic surrogacy through close relatives – a position very similar to what India is hoping to achieve with the 2019 Bill.

One of the key concerns that forms the basis of this paper is that in following this mindset about surrogacy, the Indian government might be undermining the socio-cultural, economic and political conditions peculiar to the Indian legal subject, namely, the intersections between individual freedoms guaranteed under the constitution of India and the socio-economic inequalities and discrepancies that obstruct this access on account of gender, class and caste norms. What may be being overlooked in India’s current stance is that the 10-year run of commercial surrogacy rested on the concept of consent and an individual freedom of contract. From this, we have moved to a state-imposed restriction. We are open to the suggestion that the prohibition of commercial surrogacy may be the most feasible regulatory approach, but feel that it needs cautious implementation. We need to ask whether the 2019 Bill is constitutionally sound; whether it correctly identifies the reasons for this prohibition; and whether the alternatives it suggests are appropriate.

The questions with which this paper experiments can thus be stated as follows: How have the vulnerabilities of a surrogate or potential surrogate mother in India changed along the spectrum of movement that has taken place as law/policy from 2000 to 2019? Can insights from surrogacy regulations in other international jurisdictions help shape the 2019 Bill towards reducing the vulnerability of the surrogates? In the first part, we examine how the practice of surrogacy in India moved from being legally protected in 2000, under which surrogates were regarded in similar terms to human volunteers in bio-medical research; to a commercial practice in 2005, where it proliferated as an industry hand-in-hand with medical tourism;\textsuperscript{5} to,
finally, its commercial aspects being completely prohibited in 2015. We aim to understand how this changing legislative position has impacted surrogate mothers, and how their vulnerability has been affected by each successive change. In the second part of the paper, we delve into a comparative analysis of how surrogacy has been treated in some other jurisdictions which take a legal position to allow altruistic surrogacy and / or intra-familial altruistic surrogacy – a position similar to the one held by the 2019 Bill. Finally, in the concluding section, we summarize the strategies adopted and ask whether the stipulations of the 2019 Bill are appropriate to its objectives and how insights from other jurisdictions can help shape the Bill towards reducing the vulnerability of the surrogates.

A. SURROGACY: AN INDIAN PERSPECTIVE - WHY VULNERABILITY?

One of our central argumentative grounds in this paper is the concept of vulnerability. Why is vulnerability relevant to surrogacy? As a theory, we see its heuristic potential in being able to help us frame legal subjects not as autonomous individuals with unhindered access to constitutional rights, but as subjects who are framed and delimited by their ontological condition – their class, caste, gender, religion, etc. As Martha Fineman observes:

“Our vulnerability and the need for connection and care it generates are what make us reach out and form society. It is the recognition and experience of human vulnerability that brings individuals into families, families into communities, and communities into societies, nation states, and international organizations.”

This social formation based on vulnerability and dependency speaks thus to a mutual obligation, a social responsibility that forms the basis of law. As Kohn notes, ‘the state must

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provide equal access to the “societal institutions” that distribute social goods such as healthcare, employment, and security.\textsuperscript{7}

The concept of vulnerable groups and protection of such groups is well understood in the Indian context, and many steps have been taken to protect the rights of vulnerable groups.\textsuperscript{8} However, addressing vulnerability has on many occasions led to controversial law and policy-making. For example, to offset the vulnerability of women in night work, labour laws were drafted that prohibited them working at night.\textsuperscript{9} This later came to be understood as actually limiting the equality and opportunity of women.\textsuperscript{10} In a similar vein, women bar dancers were legally barred from bar dancing, a position that was later reversed after much protest, by the Supreme Court, for its unconstitutionality.\textsuperscript{11} As such, laws that are enacted to protect the vulnerable have been widely critiqued for failing to achieve their objectives. As examples, the Dowry Prohibition Act, 1961 failed to impact the increasing cases of dowry-related violence,\textsuperscript{12} and scholars believe this is because of disproportionate legal responses\textsuperscript{13} that may not have considered the larger socio-economic picture\textsuperscript{14}; similarly, research suggests that the Prenatal Diagnostic Technique (Regulation and Prevention of Misuse) Act, 1994 has been unable to curb female feticide as it was suggested that it oversimplified the complex problem of structural

\textsuperscript{7} Nina A. Kohn, \textit{Vulnerability theory and the role of government}, \textsc{Yale Journal of Law \\& Feminism} 26 (2014).
\textsuperscript{9} Factories Act 1948 § 66(1)(b).
\textsuperscript{10} Vasantha R. v. Union of India (UoI) And Others, (2001) IILLJ 843 Mad.
\textsuperscript{13} Madhu Purnima Kishwar, \textit{Strategies for Combating the Culture of Dowry and Domestic Violence in India’ Expert Group Meeting Violence Against Women: Good practices in combating and eliminating violence against women UN Office on Drugs and Crime} (UN Division for the Advancement of Women, 2005).
\textsuperscript{14} Anuradha Mukherjee and Ranjan Basu, \textit{A Spacio-Temporal Study on the Vulnerability of Women to Domestic Atrocities in the Social Environment of Kolkata City}, 22 \textit{IOSR Journal of Humanities and Social Sciences} Issue 2 34-41 (2017).
violence against women in India;\textsuperscript{15} the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 has been similarly critiqued for having failed to understand the massive suppression of crime that impacts marginalised groups even more.\textsuperscript{16} Similarly, there is no dearth of research exploring the intersections of vulnerability and gender in India in multiple contexts like domestic violence,\textsuperscript{17} poverty,\textsuperscript{18} sex work,\textsuperscript{19} suicide\textsuperscript{20} and even climate change.\textsuperscript{21} Yet, law making remains strangely bereft of more nuanced responses to vulnerability.

There is a need for scholarly work that develops the practicable aspects of the concept as a tool that would help regulators offset risks, while being careful not to jump to the conclusion of exploitation. This is the slippery slope in vulnerability studies: to clarify that the mere presence of vulnerability does not mean the sure presence of exploitation. It is in this gap that regulators need to find measures that can ameliorate vulnerability, and discard measures that exacerbate it.

\textsuperscript{15}Sheida Tabaie, Stopping female feticide in India: the failure and unintended consequence of ultrasound restriction, JOURNAL OF GLOBAL HEALTH, 7(1), 010304. doi:10.7189/jogh.07.010304
\textsuperscript{17}Debarchana Ghosh, PredictingVulnerability of Indian Women to Domestic Violence Incidents 48 RESEARCH AND PRACTICE IN SOCIAL SCIENCES Vol. 3, No.1 72 (Aug. 2007).
\textsuperscript{18}Holmes, Rebecca & Sabharwal, Nidhi & Rath, Saswatee,Gendered Risks, Poverty and Vulnerability in India: Case Study of the Indian Mahatma Gandhi National Rural Employment Guarantee Act (Madhya Pradesh) (Overseas Development Institute, Oct. 2010)
\textsuperscript{21}Seema Arora-Jonsson, Virtue and Vulnerability: Discourses on Women, Gender and Climate Change, 21 GLOBAL ENVIRONMENTAL CHANGE 744-751 (2011).
In an earlier analysis on the vulnerability of surrogates,\textsuperscript{22} we observed that a surrogate (including a woman intending to be one) is enveloped by various layers of vulnerability\textsuperscript{23} (See figure 1). We have also argued\textsuperscript{24} that although vulnerability may be an ever-present condition of human life, being vulnerable doesn’t automatically imply being exploitable or exploited. The link between vulnerability and exploitation lies in the exposure to harmful circumstances. In the case of surrogacy, it could be argued that a careful identification of the circumstances that render a surrogate negatively vulnerable could constructively inform regulatory interventions to prevent exploitation.

The Constitution of India does not make explicit mention of vulnerability. However, with its emphasis on and separate treatment of equality (or inequality), non-discrimination (or discrimination) and exploitation, we argue that it displays an innate understanding of vulnerability, which warrants further exploration. Surrogacy is also a biomedical and bioethical concern, and the theory of vulnerability plays a strong guiding role for the protection of human subjects of research, which was how surrogacy was first treated under Indian policy.

\textsuperscript{22}Three research studies are available on women acting as surrogates – the first is an exploratory study done by the Centre of Social Research titled ‘Surrogate Motherhood – Ethical or Commercial’, published in 2012, in which 100 surrogates were interviewed from Anand, Surat and Jamnagar (hereinafter referred to as the “CSR ASJ Study”). The second is a study conducted by Sama – Resource Group for Women and Health titled, ‘Birthing A Market – A study on Commercial Surrogacy’ published in 2012 which interviewed 12 surrogates in total, amongst which 4 surrogates were interviewed in depth (hereinafter referred to as the “Sama Study”), and the third is a study done by the Centre of Social Research titled “Surrogate Motherhood – Ethical or Commercial, published in 2014, in which 100 surrogates were interviewed from Delhi and Mumbai (hereinafter referred to as the “CSR DM Study”).


\textsuperscript{24}Fineman, supra note 6.
Chapter 7

The legal spectrum: Protection-Proliferation-Prohibition

From the inception of the surrogacy industry in India, legal regulations have oscillated widely. While the earliest bills focused on establishing frameworks of legal protection for the involved actors, these frameworks had to be radically rethought as the commercial aspects of the industry became stronger and began to necessitate fundamental changes in the law to accommodate economic concerns. Among the consequences of commercialization was the shift in the surrogate’s position from being a central one in the arrangement to that of a mere womb donor. Moreover, as surrogacy entered the nation’s cultural imaginary as a lucrative financial option for surrogate mothers, we began to see a conservative turn towards accommodating traditional ideas about prescribed gender norms. With this, a widespread moralism about what women can and cannot do with their bodies began entering the legal and structural imaginary. This section conceptualizes and theoretically elaborates on these shifting perspectives by positioning them on a spectrum from Protection to Proliferation to Prohibition.

Protection

India’s first surrogate baby was delivered on June 23, 1994. Six years later, in the year 2000, the Indian Council for Medical Research (ICMR) recognized and addressed surrogacy as a practice prevalent in India. ICMR’s first reference to surrogacy was in its Ethical Guidelines for Biomedical Research on Human Participants, 2000, where the practice of surrogacy was likened to biomedical research, and the surrogate mother to the subject of research. As a subject of research, measurement of the surrogate’s vulnerability was guided by ethical

26Trevor Allis, The Moral Implications of Motherhood By Hire, 5 ISSUES IN MEDICAL ETHICS 121 (1997).
principles and guidelines formulated by the National Commission for the Protection of Human Subjects of Biomedical and Behavioural Research published in the ‘Belmont Report’ in 1978.\(^\text{28}\)

The ICMR’s first reference to surrogacy was addressed under ‘The Statement of Specific Principles for Assisted Reproductive Technologies’\(^\text{29}\) as womb leasing. The guidelines rebuttable presumption that the one who carries the baby is also the mother of the child instituted the requirement of post-birth consent after an adequate cooling off period, and the provision for adoption. As such, it placed the surrogate mother at the heart of the surrogacy arrangement. The other identified stakeholders were the intending mother (who needed a medical certificate stating that surrogacy is the only option to redress infertility), the intending parents who have a preferential right to adopt the child born out of the arrangement and who would be responsible for all expenses related to the medical management from pregnancy till adoption, and a qualified consultant for the purposes of enforcing adequate genetic screening. No distinction was created between traditional surrogacy and gestational surrogacy.\(^\text{30}\) These guidelines further ensured that surrogate mothers (or potential ones) were also offered the protections available to other human subjects of biomedical research as enumerated in the general principles\(^\text{31}\) issued in the ICMR Research Guidelines 2000\(^\text{32}\) and the general ethical issues\(^\text{33}\) recognised for guidance. They provided the reasonable interpretation that some semblance of economic and social parity must exist in the surrogacy arrangement in order to avoid exploitation.


\(^{29}\)Ethical Guidelines, supra note 27.


\(^{32}\)Principles of essentiality, voluntariness, informed consent, community agreement, non-exploitation, privacy and confidentiality, precaution and risk minimization, professional competence, accountability and transparency, maximisation of the public interest and of distributive justice, institutional arrangements, public domain, totality of responsibility and principles of compliance.

\(^{33}\)Informed Consent process, Compensation for participation, selection of special groups as research subjects, Essential information on confidentiality for prospective research subjects, Compensation for accidental injury, International collaboration/assistance in bio-medical health research, and the seventh and last heading concerns the researcher’s relations with the media and publication practices
Chapter 7

The ICMR guidelines, by making the surrogate mother the legal mother, were amenable to the interpretation that if a surrogate mother were to refuse to part with the child born of a surrogacy arrangement, the only action available to the genetically related parent would be to contest the custody of the surrogate mother and assert his or her custody on the grounds of best interests of the child. This position was akin to the law concerning custodial issues within the framework of Indian family law rather than the treatment of surrogacy arrangements under the law of contracts.

While there were no documented studies on surrogacy or amongst surrogates in India that the ICMR referred to or relied on before the publication of the ICMR Research Guidelines 2000, the treatment of likening the surrogate mother to the subject of medical research ensured her all the ethical and clinical safeguards available at the time for subjects of bio-medical research, at least on paper. This regulatory treatment envisioned various kinds of vulnerability surrounding her and required a setting off of the factors that caused her to be vulnerable to provide a position of optimum equitability. At least in this sense, the ICMR Research Guidelines 2000 may have been a better starting point to protect potential surrogates while also empowering them to act as surrogates.

Proliferation

By 2005, however, the landscape had begun to change; with an increasing demand for surrogacy in India, and a growing international market, came the enactment of the National Guidelines for Accreditation, Supervision and Regulation of ART clinics in India framed by the ICMR and the National Academy of Medical Sciences (ICMR Guidelines for ART Clinics, 2005). As we shall see in the following sections, a key strategy of the 2005 guidelines, backed by the burgeoning commercial potential of surrogacy, was to move the focus away from the surrogate towards regulating the ART clinics and primarily protecting the interests and rights of the intending parents, and making room for commerciality to flourish. Fundamental changes

occurred in the areas of compensation, the right to abort and access to qualified care, and the requirement of an authorised adoption.

Beyond Reasonable Compensation

The ICMR Research Guidelines of 2000 stipulated that the surrogate mother must be compensated reasonably for her time and effort, as one would reimburse a subject of biomedical research or an experiment. It limited this compensation so as not to grant it any inducing or coercive power over a surrogate to be. In stark contrast, the ICMR ART Clinic Guidelines, 2005 lifted these requirements. First, no bar was put on compensation over and above the genuine expenses that had to be covered, thus allowing surrogate arrangements to exceed altruistic limits and enter commercial zones. Monetary compensation was recognized as an entitlement of the surrogate mother, and the exact value of this compensation was to be decided by discussion between the couple and the proposed surrogate mother. Second, the guidelines provided for the first time the necessity of having documentary evidence of the financial arrangement for surrogacy (cl. 3.10 - Surrogacy: General Considerations), akin to a job (freelance assignment) contract with emphasis on the delivery of the final product. Finally, there was no requirement for payments to be approved by an ethics committee.

Right to abort and Qualified care not mentioned

While it was stated in the 2005 Guidelines that ‘A surrogate mother carrying a child biologically unrelated to her must register as a patient in her own name’, there was no explicit mention of her right to abort or her right to qualified supervision. Under the ICMR Guidelines 2000, these were explicitly mentioned as ‘Abortion under the Abortion Law on the medical ground should be the inviolate right of the surrogate, and the adopting parents have no claim over the amounts already paid’ and ‘A qualified consultant should supervise’ the screening for surrogacy. The safeguards of the ICMR 2000 Guidelines were thus explicitly diluted.
Removal of motherhood of surrogate mother

In the ICMR Research Guidelines 2000, the contract for surrogacy recognised the surrogate’s right to retain the baby if she so desired. This was in spite of the contract recognizing that the surrogacy may be a compensated one. The ICMR Guidelines for ART Clinics, 2005 marked a major departure with respect to the surrogate mothers; the birth certificate would henceforth automatically mention the names of the genetic parents (in Cl. 3.5.4).

By taking away the requirement of an authorized adoption and also the requirement of maternal consent with 6 weeks post-partum delay, the 2005 Guidelines emphasised the contractual nature of the surrogacy arrangement and its validity in favour of the genetic/intending parents as opposed to the surrogate mother. With this, the main actors or stakeholders became the ART Clinics, reducing the surrogate mothers to mere wombs, paving the way for the multimillion dollar industry that surrogacy was to become in subsequent years.

Prohibition

By October 2015, the profits from India’s surrogacy industry were over INR 1300 crores, nearly 200 million USD. Cities such as Anand, in Gujarat, had come to be known as the world’s surrogacy hub, and foreigners for surrogacy accounted for 90 percent of the occupancy in the town’s hotels. The foreign market for surrogacy was much larger than the domestic market, and the previous government had catered for it with proactive policies.

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38 *id.*
Then three events occurred simultaneously: surrogacy cases peaked in India, leading to the filing of a public interest litigation (PIL) by Advocate Jayashree Wad in the Supreme Court in 2015 seeking a ban on commercial surrogacy, and also asking that the import of embryo as “goods” subject to a no-objection certificate from the ICMR be declared illegal and quashed.\(^{39}\)

At the same time, a new government was sworn in at the centre. Internationally, India’s neighbours, Cambodia and Nepal, also imposed a ban on surrogacy. On account of this, when the Supreme Court asked the new government to take a stand on the position, it restricted the import of human embryos to research purposes, and further stated that only “altruistic surrogacy to needy, infertile, married Indian couples” would be allowed after thorough checks of the couples.\(^{40}\)

This stand of prohibition eventually resulted in the 2016 Bill,\(^{41}\) which purported to “control the unethical practices in surrogacy, prevent commercialization of surrogacy and...prohibit potential exploitation of surrogate mothers and children born through surrogacy”.\(^{42}\)

Today, this same Bill has been re-titled for 2019 despite strong opposition.

The Bill has been opposed on several grounds, not least of which is that it does not allow surrogacy for same-sex couples or single parents, and only allows close relatives to act as surrogates, which may result in the exploitation of women within domestic relationships.\(^{43}\)

Not only doctors, but surrogate mothers themselves have been vocal in their criticism,\(^{44}\) albeit without success. Moreover, it is known that no surrogate mothers were in fact consulted during


\(^{41}\)The 2016 Bill was approved by the Union Cabinet on 24 August 2016.


\(^{43}\)Online Bureau, *Lok Sabha Passes Surrogate Bill*, HINDU BUSINESS LINE, Oct. 19, 2018: Duru Shah, a senior Mumbai-based gynaecologist said that banning commercial surrogacy and promoting altruistic surrogacy may create an undue pressure on women who may not be in a position to negotiate becoming surrogates. “If a daughter-in-law is forced to become a surrogate for the daughter in the family, and she may not be able to say no, this leads to exploitation,” said Shah. https://www.thehindubusinessline.com/news/national/lok-sabha-passes-surrogate-bill/article25781949.ece

\(^{44}\)B S Perappadan, *A Setback for Surrogacy in India*, THE HINDU Nov. 29, 2015; A Wal, *Surrogate Mothers say Regulate Practice, Don’t Ban it; Moves SC Opposing Restriction*, DNA Nov. 30, 2015.
the framing of the Bill.\textsuperscript{45} This has led to a lopsided development of policies on surrogacy, which is not immanently derived from the experiences of the mothers themselves.

The 2019 Bill seeks to avert the exploitation of surrogates primarily by banning the commercial aspect of surrogacy, i.e., only allowing altruistic surrogacy, and only allowing a close relative to act as a surrogate. A contract has been deemed necessary, however, in the event that the surrogate refuses to hand over the child.\textsuperscript{46} This suggests that while a surrogacy arrangement ought to have no commercial elements, it is still to be enforced legally by way of contract, meaning that a close relative acting as a surrogate would need to be bound by contractual obligations, exacerbating the risk of intra-familial exploitation of women.

This position also stands, as some fear, to push the industry underground.\textsuperscript{47} Moreover, by instituting preconditions of altruism and being a close relative, the 2019 Bill moves surrogacy from a largely medical domain to the domain of cultural norms, but without taking into account the role of these norms in the daily life of women across the country. All of these factors interwoven make up the combined vulnerabilities of the surrogates.

As the table below (Table 1) sums up the protection-proliferation-prohibition spectrum, we see that although the 2019 position sets out to criminalize any type of commercial surrogacy, it also continues a treatment of the surrogate arrangement as a legally enforceable one, bound by contract, and without the rights that were available to a surrogate as a vulnerable subject in 2000.

\textsuperscript{45}\textit{Online Buerau, supra} note 43; Shivani Sachdev Gour, Director of SCI Healthcare said that no surrogate mothers were consulted before the Bill was passed.; D Singh and J.G.F. Bunders, 5 \textit{The Preferably Unheard Surrogate: The Supreme Court of India’s Volte Face on Surrogacy and its Consequence} NLUO (2018).

\textsuperscript{46}\textit{Cabinet Briefing by Union Ministers, Cabinet briefing by Union Ministers Sushma Swaraj & J P Nadda in New Delhi: Cabinet gives its approval for introduction of Surrogacy (Regulation) Bill, 2016DD NEWS, Oct. 24, 2018. <https://www.youtube.com/watch?v=wtI4Mskpnlk>: External Affairs Minister, Sushma Swaraj, who headed the panel that finalized the 2016 Bill, made known in her interaction with the media in response to concerns about if the surrogate who is a close relative were to refuse to hand over the child that a formal contract will be signed and her refusal will not be allowed.}

\textsuperscript{47}\textit{Sayantan Bera, Nikita Doval, India Govt Moves to Ban Commercial Surrogacy, LIVEMINT,(Aug. 25,2016, 05:01 PM) https://www.livemint.com/Politics/iJaMagwI57XmKANE1juUnO/Cabinet-clears-bill-on-surrogate-motherhood.html}
### Table 1 – The Protection-Proliferation-Prohibition Spectrum

<table>
<thead>
<tr>
<th>Broad Element</th>
<th>Key Features</th>
<th>Protection</th>
<th>Proliferation</th>
<th>Prohibition</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Legal positions</strong></td>
<td>Altruistic arrangements allowed</td>
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<tr>
<td></td>
<td>Commercial arrangements allowed</td>
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<td></td>
<td>Traditional surrogacy allowed</td>
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<td></td>
<td>Gestational surrogacy allowed</td>
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<tr>
<td></td>
<td>Commercial surrogacy criminalised</td>
<td></td>
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<tr>
<td></td>
<td>Traditional surrogacy criminalised</td>
<td></td>
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</tr>
<tr>
<td><strong>Who can act as a surrogate</strong></td>
<td>Relatives can act as surrogates</td>
<td></td>
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<tr>
<td></td>
<td>Non-relatives can act as surrogates</td>
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<tr>
<td><strong>Legal status of parents</strong></td>
<td>Surrogate Mother = Legal Mother</td>
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<tr>
<td></td>
<td>Authorized adoption / process for transfer of parentage post birth</td>
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<td></td>
<td>Automatic parentage of intending parents on birth</td>
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<tr>
<td><strong>Surrogate’s rights</strong></td>
<td>Surrogate’s unqualified right to medical termination as per country law</td>
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<tr>
<td></td>
<td>Post-birth consent from surrogate mother</td>
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<tr>
<td></td>
<td>Post-birth cooling off</td>
<td></td>
<td></td>
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<tr>
<td></td>
<td>Qualified consultant for screening / counselling for surrogate</td>
<td></td>
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<tr>
<td><strong>Essentiality</strong></td>
<td>Medical certificate for intending mother demonstrating infertility, etc.</td>
<td></td>
<td></td>
<td></td>
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<tr>
<td><strong>Money transfers to surrogate</strong></td>
<td>Reimbursement of medical expenses</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Reimbursement of actual expenses in addition to medical expenses</td>
<td></td>
<td></td>
<td></td>
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<tr>
<td></td>
<td>Additional compensation / remuneration to surrogate mother over and above reasonable expenses</td>
<td></td>
<td></td>
<td></td>
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<tr>
<td><strong>Legal position of arrangement as a contract</strong></td>
<td>Written contract</td>
<td></td>
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<tr>
<td><strong>Oversight mechanisms</strong></td>
<td>Payments to surrogate to be approved by Ethics Committee, etc.</td>
<td></td>
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<tr>
<td></td>
<td>Surrogacy agreement to be approved pre-birth by specified board / ministry / court, etc.</td>
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<td></td>
</tr>
<tr>
<td></td>
<td>Post-birth parentage orders required</td>
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</tbody>
</table>

How could the problems of this move be addressed and ameliorated? What comparative models do we have at hand, and what can we learn from them?
Chapter 7

B. INTERNATIONAL COMPARISONS

In this section, we examine all the countries whose jurisdictions have an expressly documented legal position on surrogacy, which takes a clear stand on allowing some form of surrogacy and explicates the nature of such an arrangement, whether altruistic or commercial, i.e., its position on a legally enforceable contract, compensation, and the issue of parentage. Within this selection, we further examine in detail the jurisdictions that focus on the requirement for close relatives to act as surrogates and / or altruistic surrogacy, as India intends to.

Based on this selection criteria, the following countries were excluded from this analysis: France and Germany for having completely prohibited surrogacy; Russia for its fragmentary and inconsistent legal regulations; Georgia where regulations are vague; New Zealand, where guidelines exist only in draft form; South Africa, where guidance on surrogacy is dependent on changing case laws, resulting in unclear requirements; Canada, which, after a constitutional check, has prohibitions and provisions that are only partially in force; and Portugal, where some elements of the surrogacy law have been recently declared unconstitutional, causing legal uncertainty. Those countries that permit commercial surrogacy have also been omitted. This is because our focus centers on an analysis of altruism. In the course of our inquiry, we also checked whether any of these laws require the surrogate to be a close relative or provide a

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49Ia Khurtsidze, Legal Regulation of Surrogacy, 165 GEORGIA EUROPEAN SCIENTIFIC JOURNAL (2016).
51M Nöthling Slabbert, Legal Issues relating to the use of surrogate mothers in assisted reproduction, 5.1 THE SOUTH AFRICAN JOURNAL OF BIOETHICS AND LAW (2012)
54Eleni Zervogianni, Lessons Drawn from the Regulation of Surrogacy in Greece, Cyprus, and Portugal, or a Plea for the Regulation of Commercial Gestational Surrogacy, 33.2 160INTERNATIONAL JOURNAL OF LAW, POLICY AND THE FAMILY (2019).
definition of altruism as strict as the Indian law (limited to reimbursement of medical expenses).

In the table below (Table 2), we identify eleven countries from across the globe with clearly stated legislations on surrogacy. It is interesting to note that where jurisdictions allow commercial surrogacy (such as Armenia, New Hampshire, New Jersey and California (USA), Israel and Ukraine), the surrogate mother is not treated as the legal mother of the child born of the surrogacy arrangement, and the surrogacy agreement is usually enforceable in law. Ukraine, however, is silent on this position.

### Table 2 – International Comparisons

<table>
<thead>
<tr>
<th>Country (USA)</th>
<th>Altruistic surrogacy allowed</th>
<th>Reimbursement of medical expenses</th>
<th>+ Reimbursement of costs actually incurred</th>
<th>Commercial surrogacy allowed (compensation/remuneration)</th>
<th>Traditional surrogacy allowed</th>
<th>Surrogate = Legal Mother</th>
<th>Enforceable surrogacy contract</th>
<th>Surrogate = close relative</th>
</tr>
</thead>
<tbody>
<tr>
<td>Armenia</td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
<td>N</td>
<td>Y</td>
<td>Y</td>
<td>N</td>
</tr>
<tr>
<td>California</td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
<td>N</td>
<td>N**</td>
<td>Y**</td>
</tr>
<tr>
<td>Greece</td>
<td>Y</td>
<td>Y</td>
<td>N*</td>
<td>N</td>
<td>N</td>
<td>N**</td>
<td><strong>N</strong></td>
<td>N**</td>
</tr>
<tr>
<td>Israel</td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
<td>N</td>
<td>Y</td>
<td>N</td>
<td>N**</td>
</tr>
<tr>
<td>New Jersey</td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
<td>Y*</td>
<td>N**</td>
<td>Y**</td>
<td>N</td>
</tr>
<tr>
<td>New Hampshire</td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
<td>N**</td>
<td>Y**</td>
<td>N**</td>
<td>N**</td>
</tr>
</tbody>
</table>

57 The contract is enforceable only where a parentage order has been obtained.
59 The birth mother is the legal mother only where a pre-conception/birth judicial approval order has not been obtained by the intending mother with the consent of the birth mother.
60 The birth mother has 6 months to challenge the transfer if she has a genetic connection, and the surrogacy arrangement is enforceable only where a pre-conception/birth judicial approval order has been obtained by the intending mother.
61 Embryo Carrying Agreements Law, 1996.
62 New Jersey Gestational Carrier Act Senate Bill, at 482.
63 In cases of traditional surrogacy, the New Jersey Gestational Carrier Act does not apply and the surrogate is the legal mother.
64 Enforceable only where a pre-birth order has been applied for and granted.
Chapter 7

<table>
<thead>
<tr>
<th>Country</th>
<th>Y</th>
<th>Y</th>
<th>Y</th>
<th>N</th>
<th>N</th>
<th>N**</th>
<th>N**</th>
<th>N</th>
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<tbody>
<tr>
<td>Thailand</td>
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<tr>
<td>United Kingdom</td>
<td></td>
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<td></td>
<td></td>
<td>Y</td>
<td>Y</td>
<td>N</td>
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<tr>
<td>Ukraine</td>
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<td></td>
<td></td>
<td>N</td>
<td>N</td>
<td></td>
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<tr>
<td>Australia</td>
<td></td>
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<td></td>
<td></td>
<td></td>
<td>Y</td>
<td>Y</td>
<td>N</td>
</tr>
<tr>
<td>Vietnam</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Y</td>
<td>Y</td>
<td>N</td>
</tr>
<tr>
<td>India (as Proposed by the 2019 Bill)</td>
<td>Y</td>
<td>Y</td>
<td>N</td>
<td>N</td>
<td>N</td>
<td>N</td>
<td>Y</td>
<td>Y</td>
</tr>
</tbody>
</table>

*The amount of expenses covered is regulated by the National Independent Authority for Medically Assisted Reproduction.

We will now take a closer look at the countries that relate most closely to the soon to be adopted Indian stance under the 2019 Bill: Vietnam for its close relative requirement, and Greece, Thailand, the UK and Australia for their formulation of altruism, which though not as strict as India’s, may still serve a valuable lesson.

C. THE QUESTION OF KINSHIP: CLOSE RELATIVES AS SURROGATES?

Lessons from Vietnam

In Vietnam, surrogacy of any kind was banned in 2003. However, in response to the concerns of “underground surrogacy”, the National Assembly of Vietnam relaxed the ban in 2014 by amending the law on Family and Marriage and legalizing non-commercial surrogacy among

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66In cases of traditional surrogacy, New Hampshire law does not apply, and the surrogate is the legal mother.
67Enforceable only where the agreement meets the minimum requirements of RSA 168 B:11.
69All surrogacy arrangements are state monitored.
72Family Code of Ukraine, cl. 123.
73Assisted Reproductive Treatment Act 2008, all jurisdictions except the Northern Territory allow only altruistic surrogacy and criminalize commercial surrogacy in Australia. Detailed legislation concerning surrogacy has been passed by Victoria.
74Law on Vietnam Marriage and the Family 2015.
76Interview with Mr Nguyen Viet Tien, Deputy Health Minister, Vietnam, Law reform on Surrogacy Viet Ba, Surrogacy: Through the lens of altruism (2013).
relatives. Surrogacy has since become available to legally married heterosexual couples through surrogates who must be relatives of the couple.

The amendment restricting the surrogate pool to the ‘next of kin’, \(^{77}\) namely sisters, sisters-in-law and female cousins of the wife or the husband, originated from the understanding that family ties are very strong in Vietnamese society, and people believe relatives would help one another when difficulty arises.\(^{28}\) Traditional Vietnamese attitudes towards mother-child kinship have made womb-centrism\(^ {79}\) a dominant notion in Vietnam. Under Vietnamese law, the legal mandate in the 2003 law on in-vitro fertilization and reproduction-supporting techniques (Decree No. 12/2003/ND-CP)\(^ {80}\) stipulates that a woman who carries a pregnancy to term, even when the gametes (ova and sperm) are from other persons genetically unrelated to her, is the rightful and legal mother.\(^ {81}\)

The amended law requires the couple utilising surrogacy to register with a government agency. Hospitals which can offer surrogacy have to be approved by the Ministry of Health. The amendment bars surrogate mothers from being reimbursed for expenses, and they can receive no other financial benefits for carrying the baby. The voluntary status of the involved parties has to be established in writing with a notarized written agreement.\(^ {82}\) There is extensive counseling and a legal assessment of all the parties concerned.\(^ {83}\) For surrogacy to take place, the

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\(^{77}\) 2015 Vietnam Law *supra* note 74, Art. 95.3.


\(^{81}\) Hibino, *supra* note 78.


The amended law that came into effect on January 01, 2016\footnote{Constance Johnson, Vietnam: New Family Law Adopted, LAW LIBRARY OF CONGRESS, (Sept. 15, 2015), https://www.loc.gov/law/foreign-news/article/vietnam-new-family-law-adopted/} permits disputes over surrogacy relationships to be adjudicated in court. If both spouses in the couple requesting the surrogacy die or lose their capacity to take legal action before they receive the baby, the surrogate mother has the right to raise the child herself, but is not required to do so.\footnote{New Law on Marriage and Family, supra note 82.} Should the surrogate mother decide not to keep the child in such a situation, guardianship would be determined under other provisions of the law.\footnote{id.}

However, fears persist that the black market of surrogacy may continue to exist because the scope of altruistic surrogacy is too narrow.\footnote{Tung Le Xuan, Ethical and Legal Aspects of Surrogacy- Recommendations for the Regulation of Surrogacy in Vietnam, 55 UNIVERSITY OF SOUTHAMPTON SCHOOL OF LAW (2016).} Even after the birth of the first surrogate baby, doctors expressed fears of the procedure becoming commercialised.\footnote{Xavier Xymons, Surrogacy comes to Vietnam, BIOETHICS (2016)} Indeed, anecdotal evidence continues to suggest that the amendment has still failed to take away the risk of illegal surrogacy,\footnote{Quoc Thang, Saigon Cops Bust Commercial Surrogacy Ring Led by Chinese National, BUSINESS BREAKING NEWS (Jan. 02, 2019), https://www.businessbreakingnews.net/2019/01/saigon-cops-bust-commercial-surrogacy-ring-led-by-chinese-national/; Asia Times Staff, Vietnamese Child Surrogacy Ring Investigated, ASIA TIMES, Apr 15, 2019, https://www.asiatimes.com/2019/04/article/vietnamese-child-surrogacy-ring-investigated/} despite the amended law having made surrogacy illegal and punishable by five years’ imprisonment.\footnote{Thai Xuon, Vietnam Police Arrest Four for Alleged Commercial Surrogacy, TUOI TRE NEWS, Jan. 01 2019, https://tuoitrenews.vn/news/society/20190101/vietnam-police-arrest-four-for-alleged-commercial-surrogacy-48361.html} The only governmental measure that does exist to deter the illegal practice is to sanction only a few hospitals to carry out surrogacy on humanitarian grounds,\footnote{VNS, Ministry Allows HCM City Public Hospital to offer Surrogacy Procedure, VIET NAM NEWS, Jun. 17, 2019, https://vietnamnews.vn/society/521397/ministry-allows-hcm-city-public-hospital-to-offer-surrogacy-procedure.html#Sx4Z34OZzQMPVwyJ.97} and to monitor these approved facilities closely. At the time of writing this paper, only four approved facilities exist in Vietnam: three public hospitals, and one private.
The Vietnamese experience suggests that while the risk of illegal surrogacy remains, the offer of intra-familial, non-commercial surrogacy has many takers. The law and policy thoroughly center around the surrogate in the surrogacy arrangement. While she is required to enter into a notarized agreement in writing, its purpose is to establish voluntariness on her part. Along with the agreement, multiple requirements of medical, legal and psychological counseling have to be provided to her before approval is granted by the government board. She does not need to be married, but she should have had one child; if she is married, the consent of her husband needs to be obtained so that she is recognized as the legal mother of the child. It is expected that the child will know of her as its birth mother and that she may also participate in post-birth activities such as breast feeding. This suggests that she is highly visible in the surrogacy arrangement.

One concern expressed over altruistic surrogacy within the family is the potential for oppression in the family setting.\(^{93}\) According to Anita Stuhmcke, intra-familial altruistic surrogacy gains acceptability on the premise that all the parties to the surrogate arrangement are equal and that the surrogate mother has the capacity to provide her consent without any coercion.\(^{94}\) However, Stuhmcke suggests that family dynamics may not only cause financial, emotional and physical power inequities but also, once pregnant, the surrogate would have a serious loss of agency. For example, if she wished to keep the child – her loss in terms of family, support structure and relationships would be disproportionately high. As Stainsby has commented, ‘... In a commercial surrogacy situation a surrogate can still have her family support. In an altruistic surrogacy one’s kith and kin can become one’s accusers.’\(^{95}\) India’s position under the 2005 ICMR Guidelines was to prohibit close friends or close relatives from acting as surrogates as the widely held view was that they are more likely to be coerced into

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\(^{94}\) Anita Stuhmcke, *For Love or Money: the Legal Regulation of Surrogate Motherhood*, 3.1 MURDOCH UNIVERSITY ELECTRONIC JOURNAL OF LAW (1996).

serving as surrogate mothers against their wishes.\textsuperscript{96}

It appears that Vietnam has resolved these tensions by making the birth mother the legal mother irrespective of the genetic contribution of the intending parents. This is an important lesson to be learnt. The Indian position makes the surrogate mother invisible to the extent that she has no legal right to the child born, and parentage is automatically assigned to the intending parents at birth.

Another lesson to be learnt from the Vietnam experience is the strong stress on counselling with the understanding even by medical doctors of the mental stresses of surrogacy. The doctors involved in these procedures stress that success of the process depends not only on proper medical care but also on mental support and close communication between the two mothers to help the babies become attached to the genetic mother without hurting the feelings of the surrogate. The underlying assumption in the arrangement was that the children would know the woman who bore them.\textsuperscript{97}

It is damaging that the 2019 Bill in India does not mention any requirement of counselling. Notably, the 2000 guidelines provided for prior counseling with the explanation of various risk factors associated with the procedures presented in simple language. Moreover, consent needed to be elicited in all possible stages of such treatment or procedures, which is no longer the case.

Another overarching lesson from the Vietnamese experience is that despite the deterrent of criminal punishment, including imprisonment, women continue to act as surrogates out of economic compulsion. Since the amended Vietnamese law does not address the concerns about the exploitative nature of surrogacy itself, it fails to protect surrogates from exploitation in illegal arrangements. Given the size and population of India, which is much larger than


Vietnam, ensuring that the law allowing surrogacy only through close relatives or the law disallowing commercial surrogacy will be followed is a task of herculean magnitude.

D. **CONDITION THAT THERE BE NO COMPENSATION TO SURROGATE BEYOND MEDICAL EXPENSES**

A solution offered by the 2019 Bill to address the concern of surrogacy being exploitative is to make it altruistic. The bill demands an arrangement ‘in which no charges, expenses, fees, remuneration or monetary incentive of whatever nature, except the medical expenses incurred on surrogate mother and the insurance coverage for the surrogate mother, are given to the surrogate mother or her dependents or her representative.’ In its Statement of Objects and Reasons, the Bill refers to the Law Commission of India, which in its 228th report also recommended the prohibition of commercial surrogacy by enacting a suitable legislation: The report did, however, specify that the surrogacy arrangement will contain reimbursement to the surrogate of all reasonable expenses for carrying a child to full term. This again is a much broader approach to altruism than what the 2019 Bill is restricting itself to. The Parliamentary Standing Committee has in fact disagreed with the model of altruism recommended in the 2019 Bill and has suggested compensated surrogacy.

**Lessons from Greece**

Since 2002, Greece has recognized altruistic gestational surrogacy as the only legal form of surrogacy. The arrangement is only possible after special permission has been obtained from

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98 The Surrogacy Regulation Bill 2016, § 2(b)  
99 Law Commission Of India Report No. 228, Need For Legislation To Regulate Assisted Reproductive Technology Clinics As Well As Rights And Obligations Of Parties To A Surrogacy, Report No. 228 (August 2009)  
the appointed Greek court in which a judge must pre-approve the surrogacy agreement before the surrogate mother is impregnated.\textsuperscript{101}

Traditional, commercial and social surrogacy (i.e., where the reasons for hiring a surrogate are not medical, but rather cosmetic or career related) are expressly prohibited. The availability of surrogacy for same-sex couples is implicitly prohibited, as in Greece civil unions between people of the same sex are not recognized by law.\textsuperscript{102} The provisions of articles 1458 of the Greek Civil code, along with article 8 of the Law 3089/2002, stipulate that court authorization needs to be granted before transfer of a fertilized ovum into the body of the surrogate. For such a grant, there needs to be a written agreement without any financial transaction between the intending parents, the surrogate and, if the latter is married, her spouse as well. Court action is initiated on application of the woman who wants to have the child, who is expected to provide evidence that she is medically unable to carry a pregnancy to term and that the surrogate is in good health and able to conceive. To determine the health of the surrogate, she needs to be medically examined; there is also a strict requirement for psychological assessment of the surrogate.\textsuperscript{103} There is no right to terminate the agreement after fertilization.\textsuperscript{104} However, the surrogate does have a right to terminate the pregnancy, which is equivalent to the abortion rights available to all women.\textsuperscript{105} Another important feature of the law is that any clause that imposes extreme safety measures to be taken by the surrogate during her pregnancy is invalid, because it violates her right to self-determination and her private freedom.\textsuperscript{106}

Greek law provides that the agreement for surrogacy should be made without financial compensation. However, the following are not considered financial compensation);(i) the

\textsuperscript{101} Comparative Study, \textit{supra} note 48.
\textsuperscript{102} Aristides N Haztis, ‘The Regulation of Surrogate Motherhood in Greece’ \textsc{Social Science Research Network} (Sept 01, 2010), \url{https://ssrn.com/abstract=1689774}
\textsuperscript{103} Greek Law 3305/2005, Art.13, ¶2.
\textsuperscript{104} Greek Criminal Code (hereinafter “GCC”), Art.1456, ¶2.
\textsuperscript{105} GCC, Art. 179 and 181 (legal principle of fairness) &Art.304 (right to legal abortion).
\textsuperscript{106} Comparative Study, \textit{supra} note 48, at 290;The legal basis for this rule is the general legal principle of fairness guaranteed by Art. 179 of the GCC. Also invalid as immoral and illegal is any clause that prohibits the surrogate’s right to a lawful abortion. Such a clause would be unacceptable due to the fact that it infringes the surrogate’s right to her bodily integrity. Whether the illegality of these clauses will influence the illegality of the surrogacy contract as a whole will be deemed on the basis of the Art. 181 of the GCC.
payment for any expenses necessary for the artificial insemination procedure, pregnancy, delivery and childbirth; and (ii) the restitution of any damages incurred and lost wages by the surrogate because she left her work or she took an unpaid leave of absence during the period (and because) of insemination, pregnancy, delivery and childbirth. The amount of expenses covered is regulated by the National Independent Authority for Medically Assisted Reproduction. In reality, this authority is not yet operational.\textsuperscript{107}

The commissioning parents are recognized as the legal parents of the child right after birth, but this is subject to the surrogacy agreement having received pre-approval. The mother of the child is presumed to be the commissioning mother who obtained the court’s authorization for the procedure. This presumption is subject to all the requirements having been complied with. However, within six months after the birth, the surrogate mother can challenge the establishment of legal kinship if she can prove that the surrogacy was traditional, i.e., with the surrogate mother’s genetic material.

Article 26 provides for criminal sanctions on whoever participates in a surrogacy procedure where the requirements stated above are not met, amounting to imprisonment for a term of 2 years and a fine. The same sanction also applies to whoever advertises about surrogacy, provides professional services as a middleman, or offers his or her services or the services of another for the attainment of any kind of financial consideration. In such a manner, any aspect of commerce in surrogacy has been prohibited and penalized.

In hindsight, it seems that the Greek law has erred by creating no distinction regarding punishment amongst the parties – the surrogate, the middlemen and the commissioning parents; what has happened in effect is the development of a veil of silence in which commercial transactions are taking place. According to Aristides N. Hatzis, most surrogacies in Greece are indeed commercial. This is more than obvious from the published judicial decisions granting surrogacy permission where in most cases the surrogate mother and the

\textsuperscript{107}Comparative Study, supra note 48, at 292.
commissioning parents were total strangers before the agreement. Hatzis’ research found that out of 92 decisions authorizing the surrogacy procedure, the surrogate was a close relative in only 13 cases. In the remainder, the surrogate was the “best friend” of the mother, often an immigrant from Eastern Europe with an age difference of 10-20 years. In his view, it is obvious that the prohibition of commercial surrogacy and the criminal sanctions are purely declaratory and the only legal consequence is that the commercial surrogacy contracts are not to be enforced by the Greek courts. This for Hatzis is a paradoxical situation in which most surrogacies are commercial and the parties do not have the incentive to draw up a real contract for delimiting and securing their rights for such an important and complex arrangement.

Hatzis’ research is not the only study that suggests this. In a comparative study done on the legal regimes on surrogacy in EU member states in 2013, it was documented that in reality, many of the cases of surrogate motherhood were the result of an agreement with surrogate mothers of foreign origin from countries which were in chronic financial decline, who had a low social standing (considerably lower than that of the intending parents), and low wages. The judges providing pre-approval of such agreements only have powers that are procedural in nature, with no powers to investigate or call for evidence. Further query by the court is not a usual practice when the need for protection of the right to procreate is paramount.

Here, an important context to the Greek position is that the facilitative view taken by Greece on surrogacy is based on the constitutional recognition of the right to have a child or the right to procreate. On account of this, the ‘best interests of the child’ are a fundamental consideration in the decision relating to the approval of the surrogacy agreement and in dealing with any issues arising from the arrangement.

The experience of Greece shows that altruism is not that easy to attain. Despite the court-monitored authorization process, cases of surrogacy with commercial elements are taking place.

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108 Comparative Study, supra note 48.
109 Greek Constitution, Art. 5, ¶1.
110 Law 3305/2005, Art. 1, ¶2; Greek Constitution, Art.21, ¶1 (protection of family).
within it and without it. The penalties, by applying to all the parties equally, have led to there being no whistle blowers as all the stakeholders have been tarred by the same brush.

India may learn a lot from Greece’s experience as it appears to be walking a very similar path with the 2019 Bill while keeping the definition of altruism even stricter than Greece (which allows payment of all expenses and even restitution of lost wages and damages incurred). One certain lesson is the understanding that merely making an arrangement altruistic will not necessarily end illegal surrogacy. More possibilities need to be considered.

Another important lesson is that of giving the courts (first-class magistrates’ courts to provide parentage orders) a lot more responsibility and overview. The 2019 Bill should expressly provide for and reiterate that their powers of investigation, summoning of evidence and taking statements on oath would apply to all cases of surrogacy coming to them for parentage orders. This becomes particularly critical as it seems that the Boards and authorities which are going to be set up under the 2019 Bill are not being provided with any manner of additional budget for their functioning.111 This issue of non-allocation of funds will surely result in inefficient functioning of the authorities and regulatory and monitoring bodies appointed under the law.112

Lessons from Thailand

Thailand’s restrictive stance on surrogacy is as recent as India’s. On February 19, 2015, the National Legislative Assembly of Thailand enacted Protection of a Child Born by Medically Assisted Reproductive Technology Act, B.E. 2558 (2015)(ART Act), declaring surrogate

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111 Neetu Chandra Sharma, Cabinet approves introduction of surrogacy regulation bill’ LIVEMINT, (Jul. 03, 2019) https://www.livemint.com/politics/policy/cabinet-approves-introduction-of-surrogacy-regulation-bill-156216553833.html"No permanent structure is proposed to be created in the draft Bill. Accordingly, there will not be any financial implications, except for the meetings of the National at Surrogacy Boards and appropriate authorities, which will be met out of the administrative budgets of respective departments."

agreements void because they are against public policy and banning fees to surrogate mothers and surrogate clinics beyond reasonable expenses.\textsuperscript{113}

The law was in response to two widely publicised incidents that rocked Thailand – the first incident concerned a baby born of a Thai surrogate who was abandoned by its Australian intending parents as it had Down’s syndrome, while they left with its twin;\textsuperscript{114} the second was the discovery of a Japanese businessman who, using a Thai surrogate, had fathered 9 children who were found to be residing with their nannies in a condominium in Bangkok.\textsuperscript{115}

The law states as its purpose the protection of a child born by medically assisted reproductive technology. It makes surrogacy only available to a lawful husband and wife, and requires a written arrangement between them and the surrogate mother.\textsuperscript{116} It sets up a committee (Committee for the Protection of a Child Born by Medically Assisted Reproductive Technology) that will consider permission relating to surrogacy on a case by case basis.\textsuperscript{117} Under Chapter II, the law places several responsibilities on the service provider, i.e., the medical practitioner/ART. These include the responsibility to provide the Committee with an examination and an assessment of readiness of physique, mind, and environment of the applying couple, the surrogate mother and any donor of sperm or oocyte. This includes presentation of screenings against disease which may affect the baby.\textsuperscript{118} The penalties under the Act for failure to comply with the law apply to the medical practitioner. Violations are liable to attract imprisonment and a fine.\textsuperscript{119} Any persons operating surrogacy for commercial benefits are liable for imprisonment for 10 years with a fine.\textsuperscript{120}

\begin{thebibliography}{9}
\bibitem{Stasi} Stasi, supra note 113.
\bibitem{Protection} Protection of a Child Born by Medically Assisted Reproductive Technology Act, B.E. 2558 (2015), § 1.
\bibitem{TechagaisiyavanitW} Techagaisiyavanit W., Reproductive justice dilemma under the new Thai law: Children Born out of Assisted Reproductive Technology Protection Act BE 2558' 45201LAW J FAC LAW (2016).
\bibitem{Assisted} Assisted Reproductive Technologies Act, B.E. 2558 (“ART Act”), §16.
\bibitem{ARTAct} ART Act, §§ 46 and 47.
\bibitem{ARTAct} ART Act,§48.
\end{thebibliography}
The law also requires the surrogacy arrangement to be a written arrangement entered into prior to the pregnancy\textsuperscript{121} (it is not referred to as a contract) and makes it voidable at the instance of the surrogate.\textsuperscript{122} She has the right to abort (or also not consent to an abortion requested by the intending parents), in which case the surrogacy arrangement will be terminated, but she shall not have to pay back any expenses she may have already receive under the arrangement.\textsuperscript{123} The allowed expenses are described as “expense for keeping surrogate mother’s health in good condition during pregnancy, an abortion instead of childbearing and after giving birth including expense for postnatal care of a child born by the surrogacy for a term not less than thirty days (translated).”\textsuperscript{124}

The law specifies that the surrogate should not be an ascendant or a descendant of the lawful husband and wife. She shall be their blood relative, but in case they have no blood relative, then the surrogate can be an unrelated woman subject to approval by the Committee.\textsuperscript{125} Commentators have said that “in this way, ART law tries to avoid any influence on relatives to act as gestational carriers and further difficulties within the family.”\textsuperscript{126} When the surrogate starts receiving antenatal care or is ready to give birth, the written arrangement will be presented to the doctor in charge at the hospital as evidence for issuing the child’s certificate of birth and notification of birth accordingly.\textsuperscript{127}

An important context in which this law is set is that under Section 150 of the Thai Civil and Commercial Code, ‘an act is void if its object is expressly prohibited by law or is impossible, or is contrary to public order or good morals,’ and therefore the default position on surrogacy agreements is that they are deemed void as against public policy and without legal affect.\textsuperscript{128}

\textsuperscript{121}ART Act, § 2.
\textsuperscript{122}ART Act, § 26.
\textsuperscript{123}ART Act, § 26.
\textsuperscript{124}ART Act, § 25.
\textsuperscript{125}ART Act, § 21.
\textsuperscript{126}Stasi, supra note 113.
\textsuperscript{127}ART Act, § 31.
\textsuperscript{128}Stasi, supra note 113.
Chapter 7

The position the National Council for Peace and Order (NCPO) has taken when declaring the law is to eliminate the growing phenomenon of procreative tourism in Thailand. 129

Commentators on the law take both pessimistic and optimistic positions on the practical impact of the law. One view argues that this will push the industry underground, 130 while the other argues that the weight of evidence so far indicates the opposite, as only one person has been punished under the law, and the surrogacy business is now seen to be shifting to Laos. 131

Some important lessons that India can learn from Thailand are:

1) That the onus of responsibility and therefore penalty for ensuring that every case placed before the committee for approval abides with the requirements of the law is being placed on the service providers, i.e., the medical practitioners. The penalties are not just criminal but also civil in nature. This strongly deters doctors from engaging in unscrupulous acts. Moreover, the Thai law has a single window for clearance, which is the application by the service provider to the Committee for the Protection of a Child Born by Medically Assisted Reproductive Technology. This allows better record keeping, tracking, monitoring and documentation.

In India, under the proposed 2019 Bill, the parties responsible for obtaining the permission for surrogacy are the intending couple and/or the surrogate mother. 132 The ART clinics are subject to few if any legal limitations, while the intending parents need to get a certificate of essentiality and a certificate of eligibility from the appropriate authority, and the surrogate applies for an eligibility certificate from the appropriate authority and also furnishes a certificate of her medical and psychological fitness from a registered medical practitioner. In addition, the intending parents and the surrogate need to apply jointly for an order concerning

129 Stasi, supra note 113.
130 Zimmerman AL, Thailand’s ban on Commercial Surrogacy: Why Thailand should regulate, not attempt to eradicate, 41 917 BROOK J INT LAW (2015).
131 Stasi, supra note 113.
parentage and custody of the child even before certificates are obtained from the appropriate authority. There is no guidance on the basis on which such a parentage order will be given.

A gap in the 2019 Bill is that no person has been made responsible for furnishing accurate information to either the court that will provide a parentage order or the appropriate authority that will provide permission for the surrogacy, and no penalties have been provided on this. Therefore, there is a high possibility of misuse.

2) Under Thai Law, the surrogate has been given rights for abortion (conducting it or refusing it) and determining the surrogacy arrangement as voidable while still continuing to be eligible to claim for expenses. This is a very positive step to provide more power to the surrogate in the arrangement. It counterbalances the establishment of the intended parents’ legal parentage.\textsuperscript{133} This is an important takeaway for India, which is presently moving towards making the surrogacy agreement legally enforceable and taking away the surrogate’s right of abortion as per the law of the land by placing conditions on it that are more burdensome as those on other pregnant women.\textsuperscript{134}

**Lessons from Australia**

In Australia, all states except the Northern Territory have taken a legal stand on surrogacy. Mostly, such legislation allows altruistic surrogacy arrangements and, in some states,\textsuperscript{135} even goes to the extent of criminalising commercial surrogacy arrangements. In Australian Capital Territory, altruistic surrogacy is legal under the Parentage Act 2004. In both Western Australia & South Australia, laws have been passed under the Surrogacy Act 2008 and the Family Relationships Act, 1975 that allow altruistic surrogacy for opposite-sex couples but not for single people and same-sex couples. Queensland has made only altruistic surrogacy legal under the Surrogacy Act 2010 No 2. Similarly, New South Wales has done so under the Surrogacy Act

\textsuperscript{133}Stasi, *supra* note 113.  
\textsuperscript{134}2019 Bill, § 3 (iv).  
\textsuperscript{135}New South Wales, Queensland and Australian Capital Territory.
Chapter 7

2010 No 102 and Tasmania under the Surrogacy Act No 34 and the Surrogacy (Consequential Amendments) Act No 31. Victoria has passed the Assisted Reproductive Treatment Act 2008. Throughout Australia, the legislation is now relatively uniform.\textsuperscript{136} For the purpose of our analysis, we will be looking at the Assisted Reproductive Treatment Act 2008 passed in Victoria, which was the first to adopt a law on surrogacy.

The legislation of Victoria specifically mentions that a “surrogate mother must not receive any material benefit or advantage as a result of a surrogacy arrangement.”\textsuperscript{137} There is a prescribed penalty, and it is stated that where a surrogacy arrangement provides for a matter other than the reimbursement for cost actually incurred by the surrogate mother, the surrogacy arrangement is null and void.

It is telling that Victoria’s legislation not once refers to the surrogacy arrangement as an “agreement”. The rule of medical necessity exists. Before entering into the arrangement, criminal checks of all parties involved are necessary, along with counseling and legal advice. The intending mother and her partner must also undergo child protection checks. The law provides for a Parent Review Panel\textsuperscript{138} before which the parties must present their case for approval.\textsuperscript{139} They need to provide evidence of their altruistic motives, their need for surrogacy in order to procreate, and their suitability to become parents. This approval has to be sought before conception. The legislation also envisages traditional surrogacy, but only to be treated as a non-complying surrogacy arrangement, which may be approved in exceptional circumstances where reasonable.

The legislation further defines in great detail the status of children in surrogacy arrangements. It recognises the surrogate mother as the birth mother and stipulates that the commissioning parents make an application for a substitute parentage order not less than 28 days and not more than 6 months after the birth of the child, only after which the commissioning parents

\textsuperscript{136} Bronwyn Devine, \textit{An Overview of Surrogacy in Australia}, 29O&G MAGAZINE Vol. 12 No 3 Spring (2010).
\textsuperscript{137} Assisted Reproductive Treatment Act 2008, § 44.
\textsuperscript{138} Assisted Reproductive Treatment Act 2008, § 39.
\textsuperscript{139} Assisted Reproductive Treatment Act 2008, § 40.
would be named as the child’s legal parents. In order to make the order, the court must be satisfied that it is in the best interest of the child, that the surrogacy arrangement has been approved by the Patient Review Panel, that the surrogate mother freely consents to the making of the order, and that the surrogate mother or her partner have not received any material benefit or advantage from the surrogacy arrangement. The law expressly makes such an arrangement non-enforceable, leaving it to the courts to decide any conflicts on the basis of the best interests of the child.

Two major lessons from Australia are the unenforceability of surrogate arrangements and the requirement of a post-birth parentage order. As the first lesson is also a conclusion drawn from the UK, it will be elaborated on in the concluding section below.

With respect to the requirement of a post-birth parentage order, India’s 2019 Bill proposes a pre-conception parentage order. The basis behind this is unclear, and it can be argued that this stage is too nascent for the surrogate and parties involved to completely understand the rigors of the arrangement. There may also be a concern that when parentage is automatically assigned in favour of the commissioning parents at the hospital at the time of birth, there are no checks available to ensure the surrogate has been provided with all safeguards - such as reimbursement of medical expenses and provision of insurance, as is provided for in the 2019 Bill. Such automatic parentage without the kind of oversight mechanism provided for in Victoria’s legislation gives rise to larger and more troubling issues, such as the possibility of fraudulent certificates to cover trafficking in babies. The better and more lasting solution may be that in the case of surrogacy, the surrogate as well as the commissioning parents are mentioned on the birth certificate of the child.140

140Mrs. B.S Deepa v. Regional Passport Officer Madras, Writ Petition No. 29105 of 2014 and M.P. No. 1 of 2014 (High Court of Madras); In this case, the Madras High Court had issued directions to the Ministry of External Affairs, Union of India to “incorporate suitable provisions in the Passport Manual and incorporate suitable columns in the applications for the issue of passports, to enable the parties to indicate either the names of the biological parents or the names of the adoptive parents or the names of the step parents or all of them, according as the situation demands. It can be left to the will of the parties either to indicate the names of one or more of the biological parents along with the name/ names of the adoptive or step parent/parents or to indicate the names of all.” Hence, there exists prior basis to such extension.
Lessons from the United Kingdom

In the UK, surrogacy was regulated conjointly under the Surrogacy Arrangements Act, 1985, and the Human Fertilisation and Embryology Act, 1990, which were then amended by the provisions of the Human Fertilisation and Embryology Act, 2008. The regulated position criminalises commercial surrogacy and, while allowing altruistic surrogacy, restricts payment to reasonable expenses only.

The Surrogacy Arrangements Act, 1985 was also amended to declare expressly that no surrogacy arrangement is enforceable by or against any of the parties making it.\footnote{Surrogacy Act 1985, §1A inserted HFE Act 1990, §36.}

The law recognises the surrogate as the legal mother and requires the parties to obtain a post-birth parental order which will extinguish the surrogate’s claim of motherhood. A 6-week cooling-off period is provided, during which the surrogate can change her mind and refuse to relinquish the baby born of the arrangement. This refusal is available even when she has no genetic connection with the child. The law itself provides that a parental order is to be given to an applying couple (this couple may be heterosexual or same-sex\footnote{On the 2008 statute, see M Fox, The Human Fertilisation and Embryology Act 2008: Tinkering at the margins’ 17 FEMINIST LEGAL STUDIES 333(2009); J McCandless and S Sheldon, The Human Fertilisation and Embryology Act (2008) and the Tenacity of the Sexual Family Form 73 MODERN LAW REVIEW (2010) 175.}). However, this provision, which in effect bars a parental order from being granted to a single person, has been declared to be incompatible with the Human Rights Act, 1998.\footnote{Re Z (A Child) (No 2) [2016] EWHC 1191 (Fam).}

Today, the law is being reviewed to undertake substantial reform.\footnote{Campaigners Call for Reforms to Surrogacy Laws, THE GUARDIAN, Jun. 6, 2019. https://www.theguardian.com/lifeandstyle/2019/jun/06/campaigners-call-reforms-surrogacy-laws} Some of the reforms suggested are a pre-conception regulatory framework, permitting moderate payment as a compensation for labour, and widening access and moving away from the two-parent model.\footnote{145}
A lesson to consider for the 2019 Bill is the UK’s movement away from the two-parent model. The 2019 Bill is highly restrictive. Surrogacy is only available for a heterosexual, married couple; same-sex couples or single people cannot commission a surrogacy arrangement. At the time when the surrogacy Bill was announced, i.e., 2015, Indian law did not in fact recognize same-sex unions and continues not to even after the decriminalization of homosexuality in 2018. The watering down of Section 377\textsuperscript{146} of the Indian Penal Code which criminalised homosexuality allowed fresh interpretations of gender roles, sex-based discrimination, gender stereotypes, inequality of the sexes, and even sexual harassment. An important element of the judgment is that it recognizes that all individuals have an inherent right to marriage, regardless of their sexual orientation; the choice of whom to partner, the ability to find fulfilment in sexual intimacies, and the right not to be subjected to discriminatory behaviour are intrinsic to the constitutional protection of sexual orientation.

Against this articulation, the 2019 Bill’s restriction of surrogacy to a heterosexual, married normative may already be outdated and, if challenged in the Supreme Court, may also be found to be constitutionally deaf.

E. BRINGING TOGETHER THE COMPARATIVE ANALYSIS ON THE PROTECTION-PROLIFERATION-PROHIBITION SPECTRUM

The final table (Table 3) showing our comparative analysis with all countries examined together is presented below. The proposed Indian position under the 2019 bill along-with the previous positions taken in India on the Protection-Proliferation-Prohibition spectrum are also stated.


\textsuperscript{146}Navtej Johar v. Union of India, (2018) 10 SCC 1.
Table 3 – International Comparison with the Protection-Proliferation-Prohibition Spectrum

<table>
<thead>
<tr>
<th>Broad Element</th>
<th>Key Features</th>
<th>India as Protection</th>
<th>India as Proliferation</th>
<th>2019 Bill</th>
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<th>Gree ce</th>
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<td>Legal positions</td>
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<td>Who can act as a surrogate</td>
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<td>Legal status of parents</td>
<td>Surrogate Mother = Legal Mother</td>
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<td>Surrogate’s rights</td>
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<td>Post-birth consent from surrogate mother</td>
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<td>Essentiality</td>
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<td>Money transfers to surrogate</td>
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<td>Oversight</td>
<td>Payments to surrogate to</td>
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It is evident from the visual representation that the 2019 Bill, while suggesting a position that appears to conform to the global status quo, deviates from several elements that the analysis suggests are key to the framing of such an approach. One example of this is not allowing traditional surrogacy and in fact criminalising it. All other altruistic regimes allow traditional surrogacy with the exception of Greece, but even in Greece it is not criminalised. While India and Vietnam both restrict surrogates to close relatives, in all other altruistic regimes a wider view is taken. For example in Thailand, while a preference is shown for blood relatives, other persons are also allowed to act as surrogates to avoid the possibility of coercion within the family. We have already expressed concerns in the preceding sections on this type of exploitation that may occur within families.

A position taken by three out of the five altruistic regimes examined in comparison to India’s 2019 Bill is that the surrogate is treated as the legal mother. It is only in Greece and Thailand that such a position is not adopted. However, in Greece there is a post-birth requirement of a parentage order. In Thailand, though no post-birth parentage order is required, the law provides that when the surrogate is ready to give birth, the written arrangement will be presented to the doctor in charge at the hospital as evidence for issuing the child’s certificate of birth and notification of birth accordingly. Therefore, some manner of post-birth oversight is provided for.

In a significant departure, the 2019 Bill mandates pre-birth consent, and the surrogate in effect surrenders all her rights before she has even undergone the rigours of the surrogacy process. Such pre-birth orders are common in jurisdictions that allow commercial surrogacy through a gestational carrier such as New Jersey (USA), New Hampshire (USA), Israel and California (USA). These laws provide that a gestational surrogacy agreement executed in accordance with these provisions is presumptively valid. It permits intended parents to establish parentage prior to the child’s birth. It requires that a copy of the gestational surrogacy agreement be filed with the court or surrogacy board (in the case of Israel) as part of the parentage action. Any failure to comply with the requirements of the law rebuts the presumption of the validity of the assisted reproduction agreement for gestational carriers.

We also see that the 2019 Bill does not provide for the rights of the surrogate, as is usually done in all altruistic regimes; these include her right to medical termination of the pregnancy under the law of the country (without discrimination) and her right to counselling before and during the arrangement. All altruistic regimes, with the exception of Greece (in compensation,
it has a post-birth parentage order requirement), require the surrogate’s post-birth consent. The 2019 Bill does not provide for this or any post-birth confirmations. There is also no provision for her actual expenses incurred during the arrangement, which is provided in all other altruistic regimes with the exception of Vietnam.

Another critical point of departure in the 2019 Bill is that it fails to declare the surrogacy arrangement as unenforceable. This position has been adopted by all five altruistic regimes in comparison. There is also no provision for withdrawal from the contract – something that India can learn from Thailand.

Enforceability of the surrogate contract is a familiar element of countries that allow commercial gestation surrogacy, as can be seen from the tabular representation of all the countries. In fact, the Ukraine, even while being a surrogacy-friendly country with legal commercial surrogacy, avoids taking a position about whether the various agreements signed between the surrogate, the intending parents and the institution conducting the medical procedure under its law are enforceable or not.

F. SUMMARY AND CONCLUSION

It appears 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. As the above analysis of the 2000 Guidelines in contrast with the 2019 Bill demonstrates, the surrogate mother started from a protected position. This position revealed the various layers of vulnerability that surrounded her. By 2005, the picture had completely changed, and her legal treatment moved from a familial construct in which she was protected in a framework of principles that safeguarded subjects of bio-medical research to a contractual construct in which she was expected to bear most of the risks.

The 2019 Bill attempts to reinstate the familial construct to the extent of introducing a close relative requirement and mandatorily moving to altruistic surrogacy. However, it fails to bring back her legal treatment as the birth mother. The juxtaposition of conditions more in sync with commercial arrangements onto an altruistic arrangement through close relatives results in discord, which becomes apparent in comparison with the legislations of Vietnam, Australia, Thailand, the UK and Greece.

The Vietnamese experience suggests that while the risk of illegal surrogacy still remains, on the whole, the offer of intra-familial, non-commercial surrogacy can be operationalized, but to do

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148 Surrogacy is officially regulated by cl. 123 of the Family Code of Ukraine, the Ukrainian Ministry of Justice act on “alterations to civil registration regulations in Ukraine” No. 1154/5 from 22.11.2007 and Ukrainian Ministry of Health order “on approval of reproductive technologies appliance” No. 771 from 23 December 2008.
this, the law and policy need to center around the surrogate in the surrogacy arrangement. The surrogate needs recognizable rights as the legal mother irrespective of the genetic contribution of the intending parents. This position may also balance out the potential for oppression in the family setting. Another lesson to be learnt from the Vietnam experience is the strong stress on counselling of the surrogate.

Greece shows that despite checks and balances, altruistic surrogacy is not easy to attain, even in its widest definition, and under the table transactions continue to occur. This also demonstrates the need to consider compensated surrogacy, with sufficient safeguards, as has been suggested by the Parliamentary Committee, or as is now being considered as a reform in the United Kingdom. Another key requirement that the 2019 Bill needs to provision for is giving the courts to have a lot more responsibility and overview of the arrangements of surrogacy coming before them.

The Thai experience shows us that by placing the onus of responsibility on the service providers, i.e., the medical practitioners, for ensuring that every case placed before the committee for approval abides within the requirements of the law (and consequent penalty for failure), we can create a strong deterrent against misuse. Moreover, the Thai law has a single window of clearance, which allows better record keeping, tracking, monitoring, and documentation. The 2019 Bill needs to learn from this. Additionally, the power of the surrogate under Thai Law, i.e., her right to an abortion (conducting it or refusing it) and determining the surrogacy arrangement as voidable while still continuing to be eligible to claim for expenses, is a very positive step and a lesson worthy of being emulated.

From Australia, we learn the importance of a post-birth parentage framework in addition to pre-conception safeguards. Oversight is necessary at every stage to ensure the surrogacy arrangement is not exploitative of the surrogate. It is further noted that in all the countries that only allow altruistic arrangements, the surrogacy arrangement is not treated as a contract. In the majority of those jurisdictions, there is no automatic transfer of parenthood, and the birth mother is considered the legal mother. Clearly, altruistic surrogacy has not been treated as an arrangement incurring a mandatory obligation, which is legally enforceable. The comparative analysis reveals that even in jurisdictions that allow commercial surrogacy – Israel, California and the Ukraine– while the requirement of a surrogacy contract may be there, it is not treated as a legally enforceable contract.

The United Kingdom’s law on surrogacy has been operational for the longest period of time. Its tests with time and changing concepts serve as a lesson reminding us that we need to be forward thinking in our approach. On account of the 377 judgment, the 2019 Bill’s restriction of surrogacy to a heterosexual, married normative may already be out-dated. Here, the recent experiences of Portugal come to mind, where a 10-year prohibition on surrogacy was reversed.

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148Navtej Johar, supra note 146.
as it was not constitutionally valid. This suggests that we need to check every aspect of the proposed law for its constitutional soundness.

It is imperative that the 2019 Bill as has been passed by the Lok Sabha be revisited in its entirety. As the Vulnerability Construct demonstrates, restrictive positions of law actually exacerbate legal vulnerability. Hence, lawmakers need to look beyond the rhetoric of morality and go back to the heart of surrogacy, i.e., the surrogate herself, and re-approach the law through the lens of her vulnerability. It is incumbent that India create a more evolved regulation that resonates with its most vulnerable stakeholder.

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REFERENCES


Anindita Majumdar, Surrogacy, Oxford India Short Introductions (Oxford University Press 2019) 9

Anita Stuhmcke, ‘For Love or Money: the Legal Regulation of Surrogate Motherhood’ (1996) Murdoch University Electronic Journal of Law 3.1


B S Perappadan, ‘A Setback for Surrogacy in India’ The Hindu (29 November 2015); A Wal, ‘Surrogate Mothers say Regulate Practice, Don’t Ban it; Moves SC Opposing Restriction’ DNA, (30 November 2015)


California Code, Family Code: FAM s 7962
https://codes.findlaw.com/ca/family-code/fam-sect-7962.html accessed on 07 August 2019

Cl. 123 of the Family Code of Ukraine, the Ukrainian Ministry of Justice act on “alterations to civil registration regulations in Ukraine” No. 1154/5 from 22.11.2007


‘Campaigners Call for Reforms to Surrogacy Laws’ The Guardian (6 June 2019)

Debarchana Ghosh, ‘Predicting Vulnerability of Indian Women to Domestic Violence Incidents’ Research and Practice in Social Sciences’ (Aug. 2007) Vol. 3, No.1 48-72


‘Media Briefing on Cabinet Decisions’,
https://www.youtube.com/watch?v=wtI4Mskjpnk last accessed 24 October 2018

Dipanjan Roy Chaudhary, ‘Seeking to ensure protection of rights of vulnerable groups, India to UNHRC’ Economic Times (New Delhi, 06 May 2017)

Directorate General for Internal Policies, A Comparative Study of the regimes on surrogacy in the EU states. (May 2013) 333


Embryo Carrying Agreements Law, 1996.


Factories Act, 1948, s 66(1)(b)

Family Code of Ukraine, Cl. 123.

Government Of India, Law Commission Of India, *Need For Legislation To Regulate Assisted Reproductive Technology Clinics As Well As Rights And Obligations Of Parties To A Surrogacy*, (Report No. 228, August 2009)


Greek Law 3305/2005

Greek Criminal Code

Greek Constitution

Chapter 7

Ia Khurtsidze, ‘Legal Regulation of Surrogacy’ (2016) Georgia European Scientific Journal 165-9


Jayashree Wad v Union of India, Writ Petition (Civil) 95 of 2015


Law on Vietnam Marriage and the Family 2015

Madhu Purnima Kishwar, ‘Strategies for Combating the Culture of Dowry and Domestic Violence in India’ Expert Group Meeting Violence Against Women: Good practices in combating and eliminating violence against women UN Office on Drugs and Crime (2005) Manushi, article for UN Division for the Advancement of Women


Mr Nguyen Viet Tien, ‘Vietnam’s deputy health minister, Interview on the law reform on surrogacy Viet Ba, Surrogacy: Through the lens of altruism’
Mrs. B.S Deepa v Regional Passport Officer Madras, Writ Petition No. 29105 of 2014 and M.P. No. 1 of 2014 (High Court of Madras)

National Human Rights Commission, Report of a Study to Understand the Legal Rights and Challenges of Surrogates from Mumbai and Delhi (Centre for Social Development, New Delhi) 17


Navtej Johar v Union of India, (2018) 10 SCC 1

Neetu Chandra Sharma, ‘Cabinet approves introduction of surrogacy regulation bill’ (LiveMint, 03 July 2019)

http://www.nzlii.org/nz/other/nzlc/pp/PP54/PP54-4_.html#Heading1159 accessed on 07 August 2019

‘New Law on Marriage and Family’ (Vietnam Law And Legal Forum, 5 August 2015)

New Jersey Gestational Carrier Act Senate Bill 482


Rajni Pandey, ‘Restriction on Surrogacy may have far reaching impact’ *Indian Medical Times* (20 October 2015) [http://www.indiamedicaltimes.com/2015/10/20/restriction-on-surrogacy-may-have-far-reaching-impact/](http://www.indiamedicaltimes.com/2015/10/20/restriction-on-surrogacy-may-have-far-reaching-impact/)


*Re Z(A Child) (No 2) [2016]* EWHC 1191 (Fam)

Sankar Sen, ‘SC/ST (POA) Act more unused than misused’ *The Tribune* (18 April 2018)
Sayantan Bera, Nikita Doval, ‘India Govt Moves to Ban Commercial Surrogacy’ (LiveMint, 25 August 2016)
https://www.livemint.com/Politics/iJaMugwI57XmKANE1juUnO/Cabinet-clears-bill-on-surrogate-motherhood.html accessed 25 August 2016

Seema Arora-Jonsson, ‘Virtue and Vulnerability: Discourses on Women, Gender and Climate Change’ (2011) Global Environmental Change 21 744-751

Senate Bill 353 Re-codifying RSA 168-B relative to surrogacy
http://www.gencourt.state.nh.us/legislation/2014/SB0353.pdf accessed on 07 August 2019

Scroll Staff, ‘Reading List: Six Article on Maharashtra’s dance bar ban and its impact on dancers, business owners’ (Scroll, 17 January 2019) accessed 14 August 2019


Shreeja Sen, ‘Against Commercial Surrogacy: Govt Tells Supreme Court’ (LiveMint, 28 October 2015)
http://www.livemint.com/Politics/vItqt0Dp5TyNzKKXyGpsqN/Govt-plans-to-ban-booming-surrogacy-service-to-foreigners.html accessed 07 August 2019


Surrogacy Arrangements Act, 1985

Chapter 7


The Surrogacy Regulation Bill 2016, s. 2(b)

The Human Fertilisation and Embryology Act 1990


Tung Le Xuan, ‘Ethical and Legal Aspects of Surrogacy- Recommendations for the Regulation of Surrogacy in Vietnam’ (2016) University of Southampton School of Law 55

Ukrainian Ministry of Health order “on approval of reproductive technologies appliance” No. 771 from 23 December 2008


Vasantha R. v Union of India (UoI) And Ors., (2001) IILLJ 843 Mad


VNS, ‘Ministry allows HCM City public hospital to offer surrogacy procedure’ (Vietnam Net Global, 17 June 2019)

‘Vietnam welcomes first baby born through surrogacy’ (Nhan Dan OnLine, 22 January 2016)

Victoria Assisted Reproductive Treatment Act 2008
Chapter 7

Xavier Xymons, ‘Surrogacy comes to Vietnam’ (2016) BioEthics


CHAPTER 8 - FROM VULNERABILITY TO STRENGTH? SURROGACY
THROUGH THE CONSTITUTION’S LOOKING GLASS

A.1 INTRODUCTION

India’s vast and incredible diversity can be seen in the multitude of legal issues that challenge its lawmakers every day. By present count, there are 47 bills pending in the Parliament on issues as varied as the use and regulation of DNA technology\(^1\), the establishment of authorities for the better protection of human rights\(^2\), stricter punishments to protect children from sexual offences,\(^3\) the welfare of persons with autism, cerebral palsy and such other disabilities,\(^4\) better laws for the prevention of atrocities against the scheduled castes and tribes in India,\(^5\) laws to curb indecent representation of women on the internet\(^6\), and laws to prevent immoral traffic.\(^7\)

While these commitments of the Government to welfare and social justice appear laudable, it is vital to observe the reception of these laws by the community they seek to protect. Last year, for example, the Lok Sabha passed a bill to protect the rights of transgender persons.\(^8\) In the aftermath of its passage, the law which sought to set up a mechanism for social, economic and

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educational empowerment of transgender people was described as violative and criticised (even within the transgender community) for possibly leaving those it hoped to protect more vulnerable to abuse. The law has been called out for engendering social oppression, doing more harm than good, and perpetuating stigma. In another example, the law for the prevention of begging was severely curtailed by the Delhi High Court on account of it being unconstitutional. A law banning dance bars ostensibly to prevent immoral activities and trafficking of women, and to ensure the safety of women in general, had the intended consequence of 75,000 women losing their livelihood and the unintended consequence of pushing them into further impoverishment and towards prostitution. Women working as dancers and waitresses in these dance bars filed petitions in the Supreme Court of India, which eventually struck down the ban.

Pragmatism or utility has often dictated law and policy making in India. Lawmakers rely entirely on the Supreme Court of India to act as the conscience keeper and apply the touchstones of the Constitution of India. This sometimes allows bad law to be made that creates inequities that can never be undone.

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13 Annie Banerji, Supra note 10
16 Harsh Mander v. Union of India AIR 2018 Del 188
17 Utkarsh Srivastava, “Maharashtra’s Ban on Dance Bars Has Done More Harm Than Good” The Wire, March 28, 2016, https://thewire.in/gender/maharashtras-ban-on-dance-bars-has-done-more-harm-than-good
The question is, should we wait for the courts to weed out bad law or should we look at the Constitution of India as a starting point during the development of the law itself? In the case on begging, the Delhi High Court commented that “before criminalizing any act, the State has to first think out a clear factual basis and impact thereof to pass a well thought legislation after due application of mind and being mindful of the constitutional rights provided under the Constitution of India.”

This paper utilises surrogacy in India as a case study to explore methods through which the Constitution of India can be operationalized in the process of making law on social issues. Our endeavour and focus serve one of the two presently stated objectives of lawmakers for enacting the Surrogacy (Regulation) Bill, 2019. The objectives of this most recent legislation are “to regulate surrogacy services in the country to prohibit the potential exploitation of surrogate mothers and to protect the rights of children born through surrogacy”. Our focus is to see how the proposed law can successfully prohibit the potential exploitation of surrogate mothers in a manner that strengthens them and is constitutionally sound.

This paper is divided into four parts. In I) we give a brief background of surrogacy in India. We confirm that little is known about the surrogate mother or the potential surrogate mother (addressed as surrogate in this paper), and we identify her structural realities. In II), we briefly describe the theoretical approaches to surrogacy and suggest that the same are subsumed in the Constitution of India. Here, we develop a Constitutional lens through which the various vulnerabilities of a surrogate can be visibilised and conceptualized as a Vulnerability Construct, and we bring up the importance of legal vulnerability and the role it plays in ameliorating or exacerbating vulnerability. In III) we analyze the trajectory of policy development on surrogacy and conclude that the considerations of lawmakers have not satisfactorily created the regulatory legitimacy on surrogacy for the objective they have stated in the 2019 Bill. Finally, in IV), we identify the gaps and suggest how the law and the regulators can, through coping, bridge the divide between the surrogate and the law and strengthen her.

\footnote{supra note 16.}
At relevant places, this paper poses some important questions and answers them during its narrative – What do we know about the surrogate? Has the surrogate’s voice been adequately heard? Does the surrogate think that she has been exploited? What does the surrogate say she needs? The purpose of these questions is to keep the context real and ensure that this paper makes the voice of the surrogate central to our work at all times.

A.2 SURROGACY IN INDIA

India has seen multiple attempts to formulate regulation on surrogacy. Starting from the ICMR’s efforts in 2000, 2002, 2005, through its guidelines and attempts to draft legislation for Assisted Reproductive Technologies in 2008, 2010 and 2014, to the specific surrogacy regulation bill of 2016 to 2019 – the journey has been long with many shifts in approach. It has not ended with any firm or satisfactory results, however.20

Between 2002 and 2014, the surrogacy industry flourished and was said to be worth over INR 2000 crores21 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.22 Along with reproductive tourism, surrogacy had been described as a “pot of gold”.23 It is said that this industry was built on the backs of poor impoverished women marked by their lack of choice. Yet, in 2015, when Indian regulators banned the availability of surrogacy to foreign nationals and also started taking steps towards banning commercial surrogacy outright and only allowing altruistic surrogacy arrangements (which involve a close relative of the intending couple acting as a surrogate), comingled amongst the voices of those decrying the prohibitionary stance were those of women who had acted as surrogates. This shows the clash

23Government Of India, Law Commission Of India, Need For Legislation To Regulate Assisted Reproductive Technology Clinics As Well As Rights And Obligations Of Parties To A Surrogacy, (Report No. 228, August 2009).
or disconnect between the women who identify themselves as past or potential surrogates and the regulators. In order to truly understand this disconnect and to listen to the surrogates’ views we must begin by asking, who is the surrogate? What are her needs, opinions, and expectations? What options does she have?

A.3 WHAT DO WE KNOW ABOUT THE SURROGATE?

In an earlier work we analysed three available research studies on surrogates in India to learn more about them and their structural realities. The first was an exploratory study by the Centre of Social Research (CSR) titled Surrogate Motherhood – Ethical or Commercial, CSR (2012), in which 100 surrogates from Anand, Surat and Jamnagar were interviewed (hereinafter referred to as the CSR ASJ Study). The second was a study conducted by Sama – Resource Group for Women and Health titled Birthing A Market – A study on Commercial Surrogacy (2012), which interviewed 12 surrogates in total, of whom 4 were interviewed in depth (hereinafter referred to as the Sama Study). The third was also by the CSR, Surrogate Motherhood – Ethical or Commercial (2014), in which 100 surrogates from Delhi and Mumbai were interviewed (hereinafter referred to as the CSR DM Study).

For this paper, we reviewed a recent study conducted by the Council for Social Development and submitted to the National Human Rights Commission (CSD Study). In this study, 36 surrogates were interviewed (28 from Delhi and 8 from Mumbai) over an 8-month period. The study is important because it was conducted in a time period when the Government had already announced its ban on commercial surrogacy.

The key structural realities of surrogates that we identified through our analysis are summarized below.

25Dr. PM Arathi, Report of a Study to Understand the Legal Rights and Challenges of Surrogates from Mumbai and Delhi, National Human Rights Commission, Centre for Social Development (2018)23
26See for detailed analysis D Singh, D Nadkarni and J.G.F Bunders Supra note 24
B.a. Structural subordination

In Indian society, women have a subordinate status compared to men. They often have little control over the resources and important decisions related to their lives. They routinely face violence due to unwanted pregnancies, domestic violence, sexual abuse at the workplace and sexual violence, including marital rape and honour killings. Against this structural background, the surrogate is doubly vulnerable. She may be conditioned to be servile and unable to articulate herself sufficiently. Her requests may be denied or not deemed worthy of consideration.

Largely, surrogates do not represent themselves in surrogacy transactions. The arrangements in India involve agents who recruit surrogates from different rural areas of India. These agents act on behalf of either ART Clinics (whose patients are the intending parents, and where the medical procedures will take place) or ART Banks (which source gametes and eggs). Interpersonal interactions between the intending parents and the surrogate are usually not allowed and definitely stop after the surrogate delivers the baby. Researchers have found that the intending parents often change their phone numbers after the surrogate delivers. The surrogates therefore depend on the agents for help.

It has been noted that doctors prefer married women who already have at least one child to act as surrogates and strictly require the surrogate’s husband’s consent along with the surrogate’s own consent. While these requirements seem reasonable on the one hand, since previous progeny suggests that the surrogate is able to reproduce and pregnancy (whether by surrogacy or not) affects both spouses (where a marital relationship exists), on the other hand

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27 C Chatterjee and G Sheoran, “Vulnerable Groups In India,” The Centre for Enquiry into Health and Allied Themes (CEHAT) 1998
28 Id.
29 Dr. P M Arathi, Supra note 25, 33
31 Medical Council of India, The Code of Medical Ethics (approved by the Central Government under section 33 of Indian Medical Council Act, 1956) Clause 13, Chapter - Disciplinary Action.
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one could ask whether, in adhering to patriarchal norms of marriage and reproduction, such requirements may serve other purposes also. In the study conducted by Sama, we documented that some doctors express a preference for these requirements to a) pre-empt the possibility of any trouble (or liability) claimed by the surrogate, b) to avoid future monetary contestations by the husband as well as ensure cooperation towards a positive outcome of the pregnancy and c) towards “easy” relinquishment on account of the surrogate already having a child.\(^{32}\) Such preferences may then lead to unintended consequences. In one example in the Sama Study, the requirement of spousal consent forced a woman to reconcile with a violent spouse. The researchers also reported findings that the husband emotionally pressurized the wife to undergo surrogacy in order to buy a house or set up a garage or start a business. It also appears that for some women, acting as a surrogate becomes a solution to avoid divorce.\(^{33}\)

The surrogate’s own children are also used in recruitment tactics targeting women who are desperate for money to provide for their children, to get their daughters married on time, and so on. The presence of dependents can thus also be a motivation for a woman to become a surrogate, as much as it is an area of stress that also contributes to the narrative of desperation.

It is usual practice in India that during the surrogate’s pregnancy, she stays in a surrogacy hostel or surrogate house.\(^{34,35}\) The owners of the surrogacy hostels constantly monitor not only their medical check-ups, but also their movements, diet, and the people they interact with.\(^{36}\) In the CSD Study, during the interaction with one surrogate, it was noted, “When I asked her for how long she had been living in the hostel. She looked at Mr. Yugal and then answered my question. She was very conscious of Mr. Yugal’s presence.”\(^{37}\) Doctors writing about practices in surrogacy

\(^{32}\) D Singh, Supra note 24,122
\(^{33}\) Dr. P M Arathi, Supra note 25, 65
\(^{34}\) Patel, Supra note 30
\(^{36}\) P M Arathi, Supra note 25, 75.
\(^{37}\) P M Arathi, Supra note 25, 65.
have described staying at a surrogate hostel as akin to a compulsion and also a preference of the doctor and the intending parents due to the preciousness of the pregnancy.\textsuperscript{38}

\textbf{B.b. Limited Functional Literacy resulting in Defective Consent}

The law and also the surrogacy arrangement documentation is usually in English. The studies indicate that since many of the surrogate mothers are unable to read or write, she and her husband are told about the contract by the hospital/clinic authorities in a suitable language and easy terms, which the surrogate mother cannot verify by any means.\textsuperscript{39} The majority of them were using fingerprints for their signature on the surrogacy contract.\textsuperscript{40} When asked if anyone had explained the surrogacy agreement to them, a surrogate responded, “Sir and Madam (owners of the surrogacy hostel) explained things to our husbands and they made us to put our fingerprints in the document.”\textsuperscript{41}

This has serious implications for the giving and obtaining of informed consent. To participate in the surrogacy arrangement, a woman needs to undergo multiple medical procedures. Hence, it is crucial not to overlook informed consent as being irrelevant to cases of surrogacy.\textsuperscript{42}

\textbf{B.c. Primary Motivation is Commercial Gain}

In all of the studies reviewed, the remuneration for surrogacy – the amount, the nature of payment (lump sum) and the time span over which it is received – emerged as the central reason for becoming a surrogate. However, notably, none of the surrogates had been previously unemployed, and they are not among the poorest women in the area studied.\textsuperscript{43}

\textsuperscript{38} Patel, Supra note 30
\textsuperscript{39} Dr. Ranjana Kumari, “Surrogate Motherhood: Ethical or commercial” Centre for Social Research 39, \texttt{<https://wcd.nic.in/sites/default/files/final\%20report.pdf>} accessed 07 August 2019.
\textsuperscript{40} P M Arathi, Supra note 25, 71.
\textsuperscript{41} P M Arathi, Supra note 25, 72.
\textsuperscript{42} D Singh Supra note 24
More than half of them were not “below the poverty line”. However, the majority of the surrogates were already engaged in work, which was menial and poorly paid when they chose to act as surrogates. The variety of work they had been doing included tailoring, working in the garment industry, cooks, and domestic help. The commonality between their past livelihoods or their spouse’s livelihoods was that most of them were from the unorganised sector, casual or contracted labour. With the money they got from surrogacy work, they intended to buy land, construct a house, educate their children, save for their daughter’s marriages, get medical treatment for a family member, repay old debts or even start a business. Payment for surrogacy varies by contract; estimates range from “that equivalent to” three times what the head of house could make in a month. Most of the surrogates described surrogacy as a better option than the work they did before.

Based on these factors and others revealed during the analysis of the surrogate studies, we describe a taxonomy of vulnerability that develops as a construct for surrogacy, broadly divided into intrinsic, extrinsic and relational vulnerabilities, given in the pictorial representation here (See Figure 1 – Intrinsic, Extrinsic and Relational Vulnerabilities).

Figure 1 – Intrinsic, Extrinsic and Relational Vulnerabilities

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45 P M Arathi, Supra note 25, 66.
46 P M Arathi, Supra note 25, 71.
47 Patel, Supra note, 30
48 Rozée Gomez, Supra note 43
49 D Singh, Supra note 24
A.4 Theoretical Approaches to Surrogacy

Traditionally, surrogacy has been approached from very conflicting viewpoints. Drawing from Bentham’s doctrine of utilitarianism, Peter H. Schuck\textsuperscript{50} reviewed surrogacy on the scale of utility and argued that surrogacy creates ardently wanted life. He described that the residual risks of surrogacy are likely to be very low, especially when compared with the benefits.\textsuperscript{51} Diametrically opposed to this were the views of E.S. Anderson, who argued, drawing on Kantian philosophy, that commercial surrogacy is a degrading practice that turned women’s labour into a commodity.\textsuperscript{52} In contrast, the talk of commodification\textsuperscript{53} is erroneous market rhetoric according to Radin, i.e., the rhetoric of alienability of all ‘goods’ especially in the context of personhood\textsuperscript{54} and bodily integrity. In Radin’s view, the choices of regulatory approaches to surrogacy involved universal market inalienability which would lead to outright prohibition of surrogacy, or non-commodified market alienability which would allow payment of the surrogate’s reasonable out-of-pocket expenses, or incomplete commodification under which performance of surrogacy agreements by willing parties should be permitted, but women who change their minds should not be forced to perform. J.D. Ingram, on the other hand, felt no need for such hesitant positions on surrogacy, exhorting instead that the arrangement has benefits for all, and we should allow gestational surrogacy to become an accepted and honoured profession.\textsuperscript{55} He suggested very detailed contracts to hold the arrangement together in which the parties had the freedom to contract all possible details. Arneson also argued in favour of the commercial surrogacy arrangement as a natural outcome of Mill’s views on liberty and freedom\textsuperscript{56} but suggested it be monitored by the State with the goal of welfarism\textsuperscript{57} and egalitarianism.\textsuperscript{58} He agreed that such arrangements should not be required to be specifically

\textsuperscript{51}\textit{id.}
\textsuperscript{54}\textit{id.}
\textsuperscript{56}John Stuart Mill, \textit{On Liberty} (Boston: Ticknor and Fields, 1863)
\textsuperscript{58}\textit{id.}
performed and should completely respect the wishes of the surrogate even when they entailed abortion or refusing tests.

In India, the subject of surrogacy has been subject to a lot of public discourse but limited academic study from a legal or constitutional viewpoint. Some ethnographic studies have been conducted, key among which is Amrita Pande’s research on the lives and circumstances of Indian surrogates. Pande’s research shows us that surrogacy in India needs to be analyzed beyond the Euro-centred and ethics-oriented framework. When seeking a regulatory position on surrogacy in India, the philosophical approaches of Bentham, Kant and Mills and their influence may appear too distant and disconnected. It is the search for something closer to home that leads our enquiry to the Constitution of India.

A.5 The Constitution as a Theoretical Lens

The immediate question that leaps to mind is, “Why the Constitution of India?” We argue that the Constitution of India forms an integrated framework that subsumes within it most of the other theoretical approaches on bioethics and surrogacy. The Constitution, in its overarching position as supreme law in India, is not only practically applicable to problems arising in India, but also evinces a strong legitimacy of argument. Any law in Indian needs to be in line with the Constitution of India, and therefore it must be taken into account when criticizing or preparing new law. But what aspect of the Constitution should be taken into account? What are its fundamentals from which we can derive our lens for this paper?

In Golaknath v State of Punjab and Keshavananda Bharathi v State of Kerala, the Supreme Court of India described Parts III (Fundamental Rights) and IV (Directive Principles of State Policy) of the Constitution as constituting an integrated scheme forming a self-contained code.

59Rudrappa, Sharmila, Discounted Life: The Price of Global Surrogacy in India (New York University Press, 2015);
Fundamental rights stated in Part III are described as the primordial rights necessary for the development of human personality while the Directive Principles in Part IV are described as the mandate to build a welfare State.  

In the following sections, we outline what these fundamental rights stated in Part III are that are relevant to our use of the Constitution as a theoretical lens to approach law making on surrogacy.

A.6 INDIVIDUAL RIGHTS / FREEDOMS POSTULATED IN PART III OF THE CONSTITUTION OF INDIA

B.a. RIGHT TO EQUALITY AND RIGHTS AGAINST DISCRIMINATION

Articles 14, 15, 16, 17 and 18 of the Constitution of India form a class of rights that build on Article 14, which reads, “The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.”

These conceptualizations of formal equality have been reconciled with the realities of Indian society. The Constitution thus, while fundamentalising equality, also provides for safeguarding the interests of vulnerable sections of society (women, children, and socially and educationally backward classes of citizens) in several respects. In this way, the Constitution of India reflects the assumption that Indian society contains inequality, and the provisions regarding compensatory discrimination programs propose reforms toward that goal, with an ultimate aim of ameliorating unequal effects.

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63"id.
65Srimathi Champakam Dorairajan v. State of Madras AIR 1951 Mad 120
With this understanding of systemic discrimination, it can be argued that to achieve substantive equality, an intimate understanding of the life conditions of the individuals or group in question is integral to policy making. It is only then that the policy can arrive at curated measures that can hope to achieve an equal playing field for the group or individuals in question. Individual conditions find mention in the Constitution itself in Article 38 (2) which states that, “The State shall, in particular, strive to minimise the inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations.”

This requisite of intimate understanding requires as a condition precedent to law or policy making that the subject group/individuals be heard and closely assessed for structural inequalities that may not be as apparent in an interplay of rights.

**B.b. THE OPPORTUNITY TO BE HEARD**

The opportunity to be heard is an unwritten tenet of Article 21 of the Constitution. Reiterated by the Supreme Court in the case of Olga Tellis, it is stated as “The ordinary rule which regulates all procedure is that persons who are likely to be affected by the proposed action must be afforded an opportunity of being heard as to why that action should not be taken. The hearing may be given individually or collectively, depending upon the facts of each situation.”

**Has the surrogate’s voice been adequately heard?**

Surrogacy has been on the agenda of the Indian Council for Medical Research (ICMR) since 2000. However, in all those years, through its shifting perceptions, there is no documentary evidence that the ICMR has initiated research among surrogate mothers or that its policies have been informed by their experiences.

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Surrogacy has appeared as a legal concern twice before the Supreme Court of India. The first time was in August 2008, in the case of Baby Manji Yamada v Union of India (the Baby Manji case), where a separation of the intending parents threw India’s adoption policies into sharp crisis. The Supreme Court did not pass any orders on the status of Baby Manji and directed that any aggrieved person may approach the Commission constituted under the Protection of Child Rights Act 2005. Yet, in that judgment, it recognized the practice of surrogacy to be legal and described it as ‘a well-known method of reproduction whereby a woman agrees to become pregnant for the purpose of gestating and giving birth to a child she will not raise but hand over to a contracted party’.

In February 2015, as the number of surrogacy cases peaked in India, a public interest litigation was filed by Advocate Jayshree Wad seeking a ban on commercial surrogacy. According to Advocate Wad the sale of motherhood was an abhorrent idea – ‘In India we believe that motherhood is sacred, not something that can be traded with anyone for money’. Despite filing the PIL after a year of research, Advocate Wad’s petition did not mention having interviewed any surrogates and also did not mention the three studies conducted by CSR and Sama, which at the time were the only large-scale studies conducted amongst surrogates.

In October 2015, the proposed Surrogacy (Regulation) Bill of 2014 was supposed to be undergoing a ‘consultative process’. However, the government cut short the process and adopted a starkly disparate position on 27 October 2015 when, in an affidavit to the Supreme

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68 Baby Manji Yamada v. Union of India and Anr AIR 2009 SC 84 (‘Baby Manji Case’)
69 Id.
70 Sharmila Rudrappa ‘Making India the “Mother Destination”: Outsourcing labor to Indian surrogates’. In Williams, C. and Dellinger, K. (eds.) Gender and Sexuality in the Workplace (Research in the Sociology of Work, Volume 20) (Emerald 2010) 253-285
Chapter 8

Court, it claimed that ‘altruistic surrogacy to needy, infertile married Indian couples’ will be allowed after thorough checks of the couples.\(^{73}\)

In November 2015, a group of surrogate mothers approached the Supreme Court.\(^{74}\) They said the changes by the Government of India were discriminatory and projected surrogacy in a very negative light.\(^{75}\) In its counter affidavit dated 29 January 2016, the Union of India rejected the surrogates’ contention that they have been rendered jobless by the government’s changed stance by claiming at the outset that the surrogate mothers should not be heard, as they are not directly affected by the ban.\(^{76}\) It went on to state that women do not have the legal right to become surrogate mothers for commercial gain. Moreover, a woman has every right to start a family within a marriage, but her reproductive rights are protected and should be within the set legal framework. Since the Supreme Court decided that all matters would be heard once the Bill is enacted as an Act of Parliament, the petition of the surrogates was rejected, and the matter has been kept in abeyance.

Consequently, the Surrogacy (Regulation) Bill, 2016 was introduced in the Parliament without any public consultation. Although heavily criticised by a parliamentary committee\(^{77}\) reviewing it as out of sync with ground realities, drafted without adequate stakeholder consultation, patriarchal in approach and moralistic, it was reintroduced in the Lok Sabha and passed with only minor amendments as the Surrogacy Regulation Bill 2018. As it lapsed when the house dissolved for national elections, it was reintroduced in the Lok Sabha as the Surrogacy


\(^{76}\) Bhadra Sinha, “Women are not legally empowered to become surrogates: Centre to SC”, Hindustan Times, February 04, 2016 http://www.hindustantimes.com/india/women-are-not-legally-empowered-to-become-surrogates-centre-to-sc/story-LWItwPR2MOYqkhQ0vzsvDN.html

(Regulation) Bill 2019 and passed. The law claims that it stops the exploitation of surrogates but has not once engaged with surrogates to understand who they are and what they have to say. In effect, they were condemned as a class without any opportunity to be heard.

B.c. FUNDAMENTAL FREEDOMS

Article 19 of the Constitution states the freedoms available to citizens: of speech and expression, to assemble peaceably and without arms, to form associations or unions, to move freely throughout the territory of India, to reside or settle in any part of the territory of India and to practise any profession or to carry on any occupation, trade or business.

While it is understood the fundamental freedoms are not absolute, and reasonable restrictions may be imposed by the State, it is necessary that the restrictions should a) not trample on any other fundamental right guaranteed by the Constitution of India, b) should be reasonable, i.e., not arbitrary, and c) should not be discriminatory, i.e., must be based on valid relevant principles applicable equally to all similarly situations, and it must not be guided by any extraneous or irrelevant considerations.

B.d. THE RIGHT TO LIFE OR PERSONAL LIBERTY

Article 21 is possibly one of the shortest clauses of the Constitution which has received the widest possible interpretation. In Francis Coralie Mullin v. Administrator, Union Territory of Delhi, the Supreme Court held that the right to dignity forms an essential part of our

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79 The Constitution of India, Supra note 64, Art 19(1)(a)
80 The Constitution of India, Supra note 64, Art 19(1)(b)
81 The Constitution of India, Supra note 64, Art 19(1)(c)
82 The Constitution of India, Supra note 64, Art 19(1)(d)
83 The Constitution of India, Supra note 64, Art 19(1)(e)
84 The Constitution of India, Supra note 64, Art 19(1)(g)
86 Id.
87 Francis Coralie v. The Administrator, (1981) 1 SCC 608
constitutional culture, which seeks to ensure the full development and evolution of persons and includes expressing oneself in diverse forms, freely moving about and mixing and comingling with fellow human beings. The Supreme Court went on to hold that the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter, etc.\textsuperscript{88} From the aforesaid interpretations of Article 21 grew a complex jurisprudence. Various judgments have come to interpret that Article 21 protects the dignity of human life,\textsuperscript{89} one’s right to privacy,\textsuperscript{90} one’s right for recognition of gender identity,\textsuperscript{91} the right to die with dignity,\textsuperscript{92} the right to immediate medical aid,\textsuperscript{93} reproductive freedom,\textsuperscript{94} etc.

When the surrogates approached the Supreme Court, they argued that by banning surrogacy, their reproductive freedoms guaranteed by the Constitution of India have been violated. The Government replied that the right to procreate is a legal right available to women within marriage. The Constitution’s views as interpreted by the Supreme Court are very different, however. A woman's right to make reproductive choices has been interpreted as a dimension of 'personal liberty' as understood under Article 21 of the Constitution of India,\textsuperscript{95} making it a crucial consideration that a woman's right to privacy, dignity and bodily integrity should be respected. Taken to their logical conclusion, reproductive rights include a woman's entitlement to carry a pregnancy to its full term, to give birth, and to subsequently raise children irrespective of the institution of marriage.

In the case of pregnant women, the only compelling state interest has been identified as protecting the life of the prospective child, and therefore termination of pregnancy is subject to

\textsuperscript{88}The Right to Life with Human Dignity: Constitutional Jurisprudence\url{https://shodhganga.inflibnet.ac.in/bitstream/10603/89946/10/10_chapter%20ii.pdf}
\textsuperscript{89}Francis Coralie Supra note 87
\textsuperscript{90}R. Rajagopal @ RR Gopal & Anr. v. State of Tamil Nadu & Ors., (1994) 6 SCC 632
\textsuperscript{91}National Legal Services Authority v. Union of India (2014) 5 SCC 438
\textsuperscript{92}Common Cause v. Union of India (2004) 5 SCC 222
\textsuperscript{93}Pt. Parmanand Katara v. Union of India AIR 1989 SC 2039
\textsuperscript{94}Justice K S Puttaswamy v. Union of India (2017) 10 SCC 1; Suchita Srivastava v. Chandigarh Administration (2009) 9 SCC 1; Ramakant Rai (I) & Anr. v Union of India & Ors. (2009) 16 SCC 565
\textsuperscript{95}Suchita Srivastava v. Chandigarh Administration (2009) 9 SCC 1
the provisions of the Medical Termination of Pregnancy Act 1971.

The right of reproduction has also been protected as an element of the right to privacy under Article 21 as spatial control – “Spatial control denotes the creation of private spaces. Decisional autonomy comprehends intimate personal choices such as those governing reproduction as well as choices expressed in public such as faith or modes of dress.”

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The understanding that reproductive choices are exercised within and shaped by the social order creates a more subjective understanding of these rights and freedoms, which is relevant for understanding and addressing historic and contemporary processes of reproductive oppression. This framework is able to visibilise marginalization, stigmatization and oppression on account of poverty, racism, environmental degradation, sexism, homophobia and injustice.

B.e. PROTECTIONS AGAINST EXPLOITATION

Articles 23 and 24 of the Constitution make special mention of rights against exploitation. Under Article 23, traffic in human beings and beggary and other similar forms of forced labour are prohibited, and any contravention of this provision is to be a punishable offence. Selling of children / slavery would be struck down outright under Article 23 and so would bonded labour.

However, this article has also been interpreted as protecting the individual not only against the State but also against private citizens. It treats non-payment of lawful salary to employees as

96Justice K S Puttaswamy v. Union of India (2017) 10 SCC 1
97Smith, A., “Beyond pro-choice versus Pro-life: Women of color and reproductive justice” NWSA Journal, 17(1), 119-140
100In Re Baby M, 537 A.2d 1227 (February 3, 1988); In Re Adoption of Paul, 550 N.Y.S.2d 815 (December 21, 1989); Doe v. Attorney General, 487 N.W.2d 484 (June 01, 1992)
101Kapila Hingorani v. State of Bihar, 2003 Supp(1) SCR 175
falling within the definition of forced labour.\textsuperscript{102} Exaction of labour and services against payment of less than the minimum wage also amounts to forced labour.\textsuperscript{103} Even where remuneration is paid, labour supplied by a person would be hit by Article 23 if it is forced labour, that is, labour supplied unwillingly as a result of force or compulsion, and both these words have been given a wide interpretation.\textsuperscript{104}

Article 23 captures the vulnerabilities of India. To quote the Supreme Court,

“In a country like India where there is so much poverty and unemployment and there is no equality of bargaining power, a contract of service may appear on its face voluntary but it may, in reality, be involuntary, because while entering into the contract the employee by reason of his economically helpless condition, may have been faced with Hobson's choice, either to starve or to submit to the exploitative terms dictated by the powerful employer. It would be a travesty of justice to hold the employee in such a case to the terms of the contract and to compel him to serve the employer even though he may not wish to do so. That would aggravate the inequality and injustice from which the employee even otherwise suffers on account of his economically disadvantaged position and lend the authority of law to the exploitation of the poor helpless employee by the economically powerful employer. Article 23 therefore, provides that no one shall be forced to provide labour or service against his will, even though it be under a contractor of service.”\textsuperscript{105}

**Does the surrogate think that she has been exploited?**

This question now becomes very pertinent to our enquiry as its positive answer suggests outright prohibition of every aspect of surrogacy.

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\textsuperscript{102}State of Gujarat v. Hon'ble High Court of Gujarat, (1998) 7 SCC 392

\textsuperscript{103}S.K. Maslan Bee v. General Manager South Central Railway, (2003) 1 SCC 184

\textsuperscript{104}People’s Union for Democratic Rights and Ors v. Union Of India, AIR 1982 SC 1473.

\textsuperscript{105}Id.
The CSD Study admitted that most of the surrogacy research interprets the voices of surrogates with a pre-conceived notion about the surrogacy practices. They found a huge gap between the researchers’ understanding of concepts like exploitation and well-being and that of the respondents. It was identified that surrogates are already living a tough life, and in most cases they considered surrogacy as a less risky and relatively better option for survival. While the researchers tended to dismiss this as an inability to recognize inequality, oppression, and exploitation in a capitalist society, empirical evidence in some of the studies was contrary, reminding them of the need to refrain from interpreting the voices of surrogates in their own social terms, and instead to capture social realities as they are.106

Surrogates have expressed that financial well-being is only one reason to be a surrogate. They also feel worthy because they give children to the childless. They speak about sexual harassment and discrimination in their previous employments and think of surrogacy as a better option. Sunita, a surrogate interviewed in the CSD study, worked as a security guard for Rs. 9500 per month, but she would not get paid on time nor would she get her overtime, which would go to middlemen.107

Hence, it is not the act of surrogacy itself that these women identify as exploitative. Many of the surrogates had previously acted as egg donors, and some of them who were interviewed in the studies were acting as surrogates for the second time. Surrogates who participated in the research studies appeared to be exerting their agency, sometimes even against their spouses and family members, to achieve their aspirations. As they learned from their experiences, they find themselves in better positions of negotiation. Furthermore, they don’t see themselves as selling babies. Rather they interpret their lack of genetic connection with the child to mean that they are rightfully restoring the child to its genetic parents post-birth.108

The surrogate women who were interviewed in the studies don’t see themselves as victims but

106 P M Arathi, Supra note 25, 76
107 P M Arathi, Supra note 25, 81
108 P M Arathi, Supra note 25, 94-96
as actors exercising free will. They describe surrogacy as a more meaningful and creative option than factory work: “Garments? You wear your shirt a few months and you throw it away. But I make you a baby? You keep that for life. I have made something so much bigger than anything that I could ever make in the factory.”

Where they do feel exploited is their loss of all control over their bodies upon entering into a surrogacy agreement with a clinic; violation of their reproductive rights; ignoring their relinquishment rights; the involvement of middlemen which results in the bulk of money paid by commissioning parents never reaching the surrogate mother. They contend that in case of an unfavourable outcome of pregnancy, they are unlikely to be paid, and there is no provision of insurance or post-pregnancy medical and psychiatric support for them. They feel that minimal remuneration to be paid to the surrogate mother should be fixed by law.

All of the aforesaid are identifiable conditions of work. In 2010, after conducting its studies amongst surrogates, which had been commissioned by the Ministry of Women and Child Development (MWCD) and the National Commission for Women (NCW), the Centre for Social Research (CSR) held a concluding two-day national conference entitled ‘A Policy Dialogue on Issues around Surrogacy in India’ in September 2014. The inaugural panel had representatives from the Ministry of Women and Child Development, Ministry of Health and Family Welfare, and the National Commission for Women.

The recommendations that arose from this initiative were largely the expressed need for a rights-based legal framework to safeguard the human rights of each party involved in the

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109 Rozée Gomez, Supra note 43
110 Id.
111 Sharmila Rudrappa, “India outlawed Commercial Surrogacy – Clinics are finding Loopholes”, (The Conversation, 24 October 2017)
113 Id.
114 Centre for Social Research, Supra note 112
115 Centre for Social Research, supra note 112
116 Saxena, Supra note 35
117 Id.
agreement. This larger framework covered the creation of a central database or registration system for surrogacy arrangements (largely as a monitoring role); videographic consent to ensure consent is informed and not forced upon the surrogate; access to intensive care and medical check-ups for surrogates even after delivery; elimination of agents; contracts in the local language of the surrogate; the prerogative for termination of pregnancy resting with the surrogate, which are all recommendations that put the surrogate mother purposively in the center of the arrangement. None of these recommendations made their way into the 2014 draft of the law or the 2016 or 2019 bill,\textsuperscript{118} and it is not clear why. It has been suggested that the present law was more concerned with addressing the reputation of India as a surrogacy destination, which was internationally embarrassing; especially alongside the criticism it faced for human rights violations.\textsuperscript{119}

What the surrogates find exploitative is the Government’s stance of prohibition. The trauma associated with surrogacy lies in the stigma, secrecy and ignorance that surrounds it. The Government’s prohibitory stance has quelled any positive conversation around surrogacy and further stigmatized them. One surrogate in the CSD study said, “\textit{Thoda izzat milna chahiye hum logon ko, band karne se kuch nahin hone wala, doctors ko samjho ke sahi se kaam kare, thoda paise badhayen, band karne se kuch nahin hoga, gareeb aadmi marega, gareeb aurat ko dhanda karna padega}.” (We should get some dignity. Tell the doctors to do things correctly. Let them increase the payment also. There is no point in stopping it fully. The poor men will die, and their poor wives will have to be prostitutes.) She is echoing the voice of most of the surrogates in the study.

The surrogates want the Government to listen to them before passing a law about them.\textsuperscript{120}

Those who were interviewed in the CSD study were even more eager to participate because they wanted their voice to be heard by the Government to rethink the ban.


\textsuperscript{120}P M Arathi, Supra note 25, 113.
Vulnerability is the breeding ground for inequality, discrimination and exploitation, and by separately and distinctly dealing with these three concerns in its rights-based approach, the Constitution of India demonstrates what may be an innate understanding of vulnerability.

Regulators first need to identify the stakeholders in the social policy they intend to promulgate. Then each stakeholder needs to be interviewed about the vulnerability construct, and all vulnerability layers of the stakeholder need to be visibilised.

In this paper and building on previous works, we have visibilised the vulnerabilities of the surrogate. We identified that the surrogate’s capacity to act autonomously may at times be hampered on account of several vulnerabilities. Various categories of vulnerabilities, such as cognitive or communicative, deferential, economic and social, do in fact exist as separate layers or even overlap with the vulnerabilities identified in surrogates (see Figure 2 – Visibilised Vulnerabilities of a Surrogate).
As the ultimate element, the category of legal vulnerability can be seen to have an impact on every layer of vulnerability, with the capacity to exacerbate or ameliorate each layer (see Figure 3 – Vulnerability Construct). Here is where applying our constitutional lens is most crucial.

The Supreme Court of India has already laid the groundwork for the constitutional lens in the case of Minerva Mills v Union of India, in which it said “three Articles of the Indian Constitution and only three stand between the heaven of freedom into which Tagore wanted his country to awake and the abyss of unrestrained power.” These three articles were identified as Articles 14, 19 and 21.121 To this golden triangle of sorts we add another vertex – that of Article 23, which deals with the rights against exploitation. It is notable that the Constitution treats exploitation separately. It appears that in separating the treatment of exploitation, the Constitution acknowledges implicitly that there are not only inequalities but also limits to anti-discrimination treatment in treating such inequalities, and that some people are much more vulnerable.

Using the quadrilateral form created between Articles 14, 19, 21 and 23 (our Constitutional Lens), we assert that once the vulnerabilities are identified for the subject, some questions need to be asked by regulators.

1. Which identified vulnerability creates inequality in law for the subject?
2. Which identified vulnerability results in discrimination against the subject?
3. Which identified vulnerability impedes the subject’s freedom?
4. If it impedes freedom, is the restriction reasonable, and has the subject been adequately consulted about this restriction?
5. Which identified vulnerability threatens the right to life and liberty of the subject?
6. Which identified vulnerability may result in an absolute possibility of exploitation of the subject under Article 23?
7. Is there a way in which the absolute possibility of exploitation can be reduced for the subject?

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121 Minerva Mills v. Union of India AIR 1980 SC 1789
8. If the answer to 7 is no or if prohibition is preferred by regulators, then would such prohibition of the act which creates an absolute possibility of exploitation impinge on the fundamental rights of the subject under Articles 14, 19, 21 and 23?

The aforesaid questions, or the constitutional lens, are a necessary exercise because the positive / negative influence of law on vulnerability is a vulnerability in itself – which we identify as legal vulnerability.

It is acknowledged that legal vulnerability is not immediately visible in the socio-economic and demographic characteristics of the surrogates, which were analysed to develop the surrogacy construct. However, an interplay of all the vulnerabilities – intrinsic, social, extrinsic, communicative, economic, relational, deferential – highlight several quagmires that are ripe for exploitation if the law is unsupportive or unable to attend to each opportunity created by the various vulnerabilities. Hence, legal vulnerability should be understood as an all-encompassing risk (pictorially represented in Figure 3 above) that would need to be assessed not only when a woman agrees to act as a surrogate but also at various stages of the surrogacy arrangement and even after it ends. Minimizing the risk of legal vulnerability would require that the surrogate be more visible to third-party assessment.

A.7 TRAJECTORY OF POLICY DEVELOPMENT ON SURROGACY AND ITS REGULATORY LEGITIMACY

B.g. THE PREVENTION-PROLIFERATION-PREVENTION SPECTRUM

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122D Singh, Supra note 24
In a previous work, we identified that the regulatory position on surrogacy has oscillated greatly since the inception of the surrogacy industry in India. We have traced these oscillations along a spectrum – Prevention (at the outset of the practice, preventing exploitation and misuse of technology and the body),\textsuperscript{123} Proliferation (the growth of surrogacy into an industry, largely unregulated)\textsuperscript{124} and Prohibition (a complete ban in response).\textsuperscript{125} We then pictorially interpreted this spectrum. This was to understand, in a side-by-side comparison, the various changes that have occurred over the spectrum in key features of each of the shifts in legal position. This allowed us to substantiate the disconnects with the legal stance that regulators wish to adopt that have happened during the development of the law on surrogacy as each shift has occurred on the spectrum. The spectrum is pictorially expressed in Figure 4 (Figure 4 – Prevention-Prohibition-Proliferation Spectrum). It shows all of the elements of each part of the spectrum considered with regard to surrogacy.

\begin{table}
\centering
\begin{tabular}{|c|c|c|c|c|}
\hline
Broad Element & Key Features & Prevention & Proliferation & Prohibition \\
\hline
Legal Positions & Altruistic arrangements allowed & & & \\
& Commercial arrangements allowed & & & \\
& Traditional surrogacy allowed & & & \\
& Gestational surrogacy allowed & & & \\
& Commercial surrogacy criminalised & & & \\
& Traditional Surrogacy criminalised & & & \\
\hline
Who can act as a surrogate & Relatives can act as surrogates & & & \\
& Non-relatives can act as surrogates & & & \\
\hline
Legal status of parents & Surrogate Mother = Legal Mother & & & \\
& Authorized adoption/ process for transfer of parentage post birth & & & \\
& Automatic parentage of intending parents on birth & & & \\
\hline
Surrogate’s rights & Surrogate’s unqualified right of medical termination as per country law & & & \\
& Post birth consent from surrogate mother & & & \\
& Post birth cooling off & & & \\
& Qualified consultant for screening/counselling for surrogate & & & \\
\hline
Essentiality & Medical certificate for intending mother demonstrating infertility etc & & & \\
\hline
Money transfers to surrogate & Reimbursement of medical expenses & & & \\
& Reimbursement of actual expenses in addition to medical expenses & & & \\
& Additional compensation/ remuneration to surrogate mother over and above reasonable expenses & & & \\
\hline
Legal position of arrangement as a contract & Written contract & & & \\
& Non enforceable arrangement & & & \\
\hline
Overight mechanisms & Payments to surrogate to be approved by Ethics Committee etc & & & \\
& Surrogacy agreement to be approved pre birth by specified board/ ministry/ court etc & & & \\
& Post birth parentage orders required & & & \\
\hline
\end{tabular}
\caption{Figure 7 – Prevention-Proliferation-Prohibition Spectrum}
\end{table}

\textsuperscript{123}Ethical Guidelines for Biomedical Research on Human Participants, 2000, http://whoindia.org/LinkFiles/HSD_Resources_Ethical_Guidelines_for_Biomedical_Research_on_Human_Subjects.pdf
\textsuperscript{124}National Guidelines for Accreditation, Supervision and regulation of ART clinics in India framed by the ICMR and the National Academy of Medical Sciences, India, 2005, http://icmr.nic.in/art/art_clinics.htm
\textsuperscript{125}Surrogacy (Regulation) Bill, 2016
Once the proposed Indian position under the 2019 bill is positioned along the Protection-Proliferation-Prohibition spectrum along with the previous positions taken in India, it becomes clear that the 2019 Bill suggests a position that deviates from several elements that our analysis suggests are key to the framing of such an approach. Examples include not treating the surrogate as a legal mother although insisting on a close relative acting as one; requiring pre-birth consent and surrendering of all rights pre-conception, which is an approach usually taken only by jurisdictions allowing commercial surrogacy; not providing for the inviolable rights of the surrogate, as is usually done in all altruistic regimes; insisting that she take on the burden of altruism while the doctors get paid but also be subjected to a legally enforceable contract which has no provision for withdrawal. Enforceability of the surrogate contract is actually a familiar element of countries that allow commercial gestational surrogacy.

In this manner, the 2019 Bill strikes discordant notes between its objectives, strategy and elements. This is turn impacts its regulatory legitimacy.

B.h. Regulatory Legitimacy

Roger Brownsword wrote of the importance of maintaining legitimacy while legislating in the face of scientific and technological change. He argued in his seminal work on the subject that regulators must be able to support a legitimate regulatory purpose for their regulatory strategies, that they are achieved through legitimate means, and that they are effective. This includes the concepts of regulatory pitch, i.e., the way regulators seek to engage with their regulatees (a moral pitch or a practical pitch); regulatory phasing, i.e., whether the regulation is in its first phase or second phase; and regulatory range, which decides on the channelling (negative, neutral or positive) that a proposed law will adopt to bring about the particular consequences that are pre-decided by regulators as being of social worth or for the public good.


127 *id.*
When applied systematically, the vulnerability construct helps the regulator to decide the
direction of a proposed policy by visibilising all the risks of each stakeholder. In case of the
surrogate mother or a potential surrogate mother (the identified subject for our analysis), we
find the particular need to safeguard her from communicative vulnerability, deferential
vulnerability, economic vulnerability and social vulnerability. We then apply the constitutional
lens, and in answer to each question we get:

<table>
<thead>
<tr>
<th>1. Which identified vulnerability creates inequality in law for the subject?</th>
</tr>
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<tbody>
<tr>
<td>Communicative Vulnerability - This type of vulnerability is directly identifiable with the surrogacy arrangement in which a surrogate is unable to communicate her concerns effectively or even satisfy the requirements of informed consent by virtue of inadequate education, illiteracy, or lack of understanding of the language in which the contract documentation is drawn up.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>2. Which identified vulnerability results in discrimination against the subject?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Social Vulnerability - Social vulnerability recognizes the vulnerability of participants who are at risk of discrimination on account of race, gender, ethnicity and age. This type of vulnerability, particularly when present with communicative vulnerability, may often result in discriminatory stances towards surrogates. For example, doctors may treat surrogates as technology rather than patients and therefore not give them the same degree of care as a patient would get. She may not get the same rights as otherwise pregnant women.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>3. Which identified vulnerability impedes the subject’s freedom?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Deferential Vulnerability – Surrogates are unable to act autonomously as they rely on their spouses, doctors, agents, and surrogacy hostel owners to make decisions for them. In practice, doctors prefer surrogates who are married and also make spousal consent a requirement.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>4. If it impedes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Spousal consent has been made mandatory in surrogacy</td>
</tr>
</tbody>
</table>
freedom, then is the restriction reasonable and has the subject been adequately consulted about this restriction?

arrangements. However, it is not mandatory in abortion, and the Supreme Court has frowned on a high court that had implored the husband and father of a woman seeking permission for abortion, stating that the required consent is only from the woman herself.\textsuperscript{128} Arguably, if spousal consent or third-party consent is unnecessary for preventing pregnancy or terminating pregnancy,\textsuperscript{129} then they should also be unnecessary for becoming pregnant. The question the regulator poses then is the reasonableness of this, and has the surrogate been adequately consulted?

Also, surrogate hostels are used as sites of surveillance. However, they also serve as a place of comfort for the surrogate. Is making them a mandate of doctors and intending parents for their convenience reasonable for the surrogate? The regulator also asks if the surrogate has been adequately consulted.

<table>
<thead>
<tr>
<th>5. Which identified vulnerability threatens the right to life and liberty of the subject?</th>
<th>Economic Vulnerability - Economic vulnerability in surrogacy requires specific caution in the recruitment of surrogates. It is important that the payment offered does not encourage an individual to put herself at greater risk than they would otherwise. She therefore enters enforceable contracts with increased risks on her such as the risk of HIV, foetal reduction, takes on stricter standards of care and restrictions during the pregnancy, etc.</th>
</tr>
</thead>
<tbody>
<tr>
<td>6. Which identified vulnerability may result in an absolute</td>
<td>Economic Vulnerability or deferential vulnerability, in which the surrogate is forced to provide her labour or is put under compulsion to her detriment.</td>
</tr>
</tbody>
</table>

\textsuperscript{128}Indu Devi v. State Of Bihar,(2017) Petition(s) for Special Leave to Appeal (C) No. 14327/2017, Judgment of May 9, 2017 (Supreme Court of India)

\textsuperscript{129}Samar Ghosh v. Jaya Ghosh (2007) 4 SCC 511
7. **Is there a way in which the absolute possibility of exploitation can be reduced for the subject?**

Close monitoring of the economic element of the transaction and the deferential relationships the surrogate may be bound by and also making sure the transaction cannot be forced upon the surrogate, may be ways to reduce the possibility of exploitation.

8. **If the answer to 7 is no or if prohibition is preferred by regulators, then would such prohibition of the act which creates an absolute possibility of exploitation impinge on the fundamental rights of the subject under Articles 14, 19, 21 and 23?**

Here, for example, if the regulator were to prefer prohibition of commerce in the surrogacy arrangement, the next step would be to assess if such prohibition would be affected by other fundamental rights. For example, if it were confirmed that making a surrogate perform her part in a surrogacy arrangement without remuneration would amount to constrained labour that would be constitutionally unsound under Article 23, the regulator would need to reconsider using a negative channelling.

With these answers, the regulator can now adopt the most preferable regulatory pitch and range, which avoids being constitutionally unsound and also ameliorates the various kinds of vulnerabilities identified for the subject. The regulator can also consider different strategies if the industry to be regulated is already in operation, with due consideration to what phase it is
in. Based on this, the ideal mix of elements that would take forward the objective of the proposed law can be effectively identified.

With surrogacy as our case study, we reconsider the objective of the Surrogacy Bill 2019 “to prohibit the potential exploitation of surrogate mothers” and reassess the elements (underlined here for easy reference) the Surrogacy Bill 2019 proposes.

Going through the elements one by one against the Vulnerability Construct and the Constitutional Lens, the following is found:

1. Recognizably, the surrogate is structurally subordinate in the surrogacy arrangement. In order to enhance her position to one of strength, she has to be allowed to be as autonomous as possible. Here, the elements of only allowing altruistic surrogacy (where she does not get any compensation for her effort in the surrogacy arrangement) as well as only allowing close relatives (possibly putting her under the compulsion of family dynamics to render her services) increase her sense of servility and compound her communicative and deferential vulnerability. The practice of not recognizing her as the legal mother, automatic transfer of parentage on birth and pre-conception consent make her even more subordinate in the surrogacy arrangement.

2. Criminalizing commercial vulnerability when the surrogate’s primary motivation is commercial gain is in effect criminalizing her.

3. Making the surrogacy arrangement a written contract, which is enforceable against her compounds her communicative, social and deferential vulnerability. It has been confirmed that she often has limited functional literacy, resulting in defective consent. Moreover, she is not acting autonomously and may be being coerced.

4. Only allowing reimbursement of medical expenses and not allowing her reasonable expenses to be offset in effect exploits her while allowing everyone else in the arrangement to benefit. She in effect becomes an end to a means, which is not she
herself. This may also be unconstitutional under Article 19, as it impedes on her opportunities, and Article 23.

5. **Not ensuring her basic rights** such as the right to abortion as per the law of the land, right to psychological and legal counseling, establishing informed consent before every procedure performed on her, and also subjecting her to stricter standards than an otherwise pregnant woman would be discriminatory and possibly unconstitutional under Articles 14 and 21.

It follows from the above that the 2019 Bill, as it is, is more likely to augment the legal vulnerability of a surrogate and render her even more exploited. Its regulatory legitimacy is questionable even more so as it has not consulted the surrogate at all.

It does appear from the above analysis that while looking outwards at the world’s positions on surrogacy, Indian regulators may have failed to look inwards at surrogacy itself and what it means for the surrogate in India and the industry here. However, this is not to say that the law cannot cope.

**A.8 HOW CAN THE LAW STRENGTHEN THE SURROGATE?**

First, the law can only strengthen the surrogate and ensure her non-exploitation if it is listening to the surrogate.

**What does the surrogate say she needs?**

"*If I can buy a small apartment and take care of my children’s education, it will be worth it,“* L said.\(^{130}\)

“*The couple of the child I am carrying have been trying to have kids for 15 years,”* says ‘Y’... “*because it also pays well.*” “*I want to go back to my village, buy land and settle*

\(^{130}\)Shashank Bengali, *supra* note 71
down,” she says. “This money is the only way out. My husband will never be able to earn enough for us to return home. But if I become a surrogate mother, we will have enough money. ...”

X has a seven-year-old biological son whom she hopes to send to a good school and away from the rigours of city life. “After this delivery and sending my child to hostel, I will work full-time. If my husband and I work, we will be able to ensure that my child becomes a doctor and escapes this life of struggle,” she explains. “After all, we have no pension or government security in our old age. Who knows if our children will take care of us? It’s only prudent to save for the future. Motherhood and the ability to have children is a gift that nature has given to lucky women... I don’t think there is anything wrong in ‘gifting’ and ‘sharing’ this divine power and engaging in something that is mutually beneficially to all the parties involved,” she adds. 

First and foremost, there is no escaping the fact that the surrogate needs financial security. In the limited choices she has available, she chooses surrogacy in order to create more choices for herself. Even if the law pushes ahead to prohibit commercial gain, the same inducement will cause surrogates to enter into illegal arrangements, making them even more vulnerable. According to Preeti Bista, owner of the surrogacy agency My Fertility Angel, “no matter how many bans there are, you can never make people’s wish to start a family disappear.”

It is interesting that the surrogate is not asking for the maximum financial benefit but rather financial security.

Based on the limited studies conducted amongst surrogates by the Centre for Social Research and SAMA, the needs of a surrogate are identifiably: monetary gain for her aspirations, recognition of her contribution balanced with confidentiality to escape stigmatization,

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131Bindu Shahjan Perapaddan, Supra note 74
132id.
transparency in the contractual and in-pregnancy medical process, care during pregnancy extending to post-delivery, establishing a relationship with the intending parents, contact with the baby post-birth and desiring information about the child’s growth and whereabouts.

**Coping Strategies**

Concepts and theories of ‘coping’ and ‘coping strategies’ serve as tools to help us understand how during adverse circumstances or periods of stress, people’s agential mechanisms of adaptation, recuperation, and resilience\(^{134}\) can be stimulated to reinforce capabilities and strengths. Very simply, coping refers “to the things that people do to avoid being harmed by life-strains. At the very heart of this concept is the fundamental assumption that people are actively responsive to forces that impinge upon them”\(^{135}\). The concept has been developed in many situated and applied contexts, particularly social psychology and social work practice, and understandings of what it means to ‘cope’, “whether it be about counter-balancing threat, ‘getting by’ or ‘getting on’”\(^{136}\), and how such coping can be strategic, are widely debated in research.\(^{137}\)

Here we take coping to be a crucial counterpart to vulnerability. If we understand vulnerability as an indication of an individual’s reduced capacity to respond and act, the act of coping with the very circumstances that render them vulnerable is thrown into sharp relief. As Robert Chambers observes, Vulnerability has two sides: “an external side of risks, shocks, and stress to which an individual … is subject; and an internal side which is defencelessness, meaning a lack of means to cope without damaging loss. Loss can take many forms becoming or being physically weaker, economically impoverished, socially dependent, humiliated or


\(^{136}\)id at 6

psychologically harmed”

These perspectives focus primarily on individuals, however, and individualized responses to life problems and stressors. In an influential 1978 essay titled “The Structure of Coping”, Pearlin and Schooler critique this tendency by suggesting that the structural and societal bases of harm-causing phenomena haven’t been adequately explored in the social sciences. Such an approach “tends to overlook the presence of institutionalized solutions to common life-tasks”. Instead, they call for an emphasis on the “enduring and widely experienced life-strains that emerge from social roles and... [on] coping modes that are shared by people who also share key social characteristics.”

Such an understanding of coping is especially relevant to our paper, because our focus lies not merely on how surrogate mothers can cope with the circumstances that render them vulnerable, but on how the underlying systems can facilitate and enrich the surrogates’ coping mechanisms in an inherently difficult situation such as assisted pregnancy. The hope, ultimately, would be that practitioners and policy makers might be encouraged to use this concept.

In the context of surrogacy and having visibilised the vulnerabilities of the surrogate, we can look at the ICMR Ethical Guidelines of 2000, which include the principles of non-commoditization, essentiality, voluntariness, informed consent, non-exploitation, privacy and confidentiality, precaution and risk minimization, professional competence, accountability and transparency, maximization of public interest and of distributive justice as a possible source of coping strategies.

139 Pearlin, L., Supra note 135.
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<th>Identified Vulnerability</th>
<th>Suggested Coping Strategies</th>
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| **Legal Vulnerability**  | • All surrogacy arrangements whether altruistic or compensated ought to be declared as void or voidable at the option of the surrogate. They ought to be enforceable only in the circumstances that they have been registered pre-birth, subjected to scrutiny during the arrangements, and closed post-birth after the period provided with the consent and agreement of the surrogate mother. Any disputes, such as the surrogate mother refusing to part with the child, ought to be dealt with as a custodial matter on the touchstone of “best interests of the child”.
  • The Clinics ought to be made responsible for making applications for surrogacy, incurring penalties for their failure to observe the law. |
| **Communicative Vulnerability** | • The Surrogate mother requires her own independent representative or counsel in the arrangement. The latter may be arranged at the cost of the State, and her functions may include ensuring the surrogate is fully apprised of the process of surrogacy and the impact and risks, physical, psychological and moral, of such a process on her and others, including the unborn child, in a language and manner understood by her.
  • The representative ought to play no role in sourcing the surrogate and may be independently appointed by the appropriate authority on receiving an application for surrogacy from a panel of counsellors. The cost of such representation may be state-borne through a fund that intending parents and clinics providing surrogacy services can contribute towards. |
| **Social Vulnerability** | • The Surrogate mother ought to be dealt with in a manner |
conducive to and consistent with her dignity and well-being, under conditions of professional fair treatment and transparency, and after ensuring that she is placed at no greater risk than such risk commensurate with her well-being in light of the object to the achieved, i.e., providing the infertile couple with progeny. She should not be subjected to any discriminatory treatment in matters of embryo transfers, foetal reduction, etc. compared with women who otherwise take IVF treatment.

• Doctors ought to treat her in a doctor-patient relationship within the requirements of medical ethics and should also be prosecutable by the surrogate as a consumer of their services.

• A surrogate mother’s privacy and confidentiality must be protected except where disclosures are required by law or authority. In case of disclosures, efforts must be made to ensure that the surrogate mother does not suffer from any form of hardship, discrimination or stigmatization as the consequence of having acted as a surrogate.

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<th>Deferential Vulnerability</th>
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<td>• The surrogate mother ought not to be commodified, i.e., become a mere means for the betterment of the infertile couple (anti-commodification principles). Hence, she ought to be recognized as the mother of the child born, and her motherhood ought only to be extinguished after sufficient oversight that she has been fairly treated in the arrangement, preferably after a period not less than 30 days after delivery so that she has sufficiently recovered her health and risks of post-birth complications have been allayed.</td>
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<tr>
<td>• The law must prioritise obtaining the surrogate’s informed and freely given consent, and there must not be any element of unjustified deception, undue influence or intimidation, or</td>
</tr>
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unjustifiable assurances that may influence her decision to act as a surrogate.

- Requirements such as “close relative”, “married” and “prior child” ought not to be made mandatory, but may be stated as preferable.
- The requirement that a surrogate stay in a surrogate home ought to be addressed negatively by the law which seeks to encourage that surrogates stay with their families, and while surrogate hostels can be an available option, any payments to the surrogate hostel would flow from the intending parents to the surrogate mother to the surrogate hostel.
- In keeping with the principles of totality of responsibility, the doctors/clinic attending the surrogate mother at various stages and the intending parents (being the sponsors) along with various persons who are deriving benefit from the surrogacy arrangement should be responsible for the due observance of all the stated principles, guidelines and prescriptions and take remedial action wherever required.
- The requirement for spousal consent ought to be replaced by the need to counsel the spouse if the surrogate requests this.
- It should be confirmed at the start of the surrogacy arrangement that a surrogate has a bank account in her own name in which all compensation for her expenses is transferred.
- The law ought to specify that the surrogate’s interests prevail over the intending parents and over the unborn child to the extent provided by the Indian Penal Code and the Medical Termination of Pregnancy Act.

| Economic Vulnerability | Based on the principles of non-exploitation, it may be formulated as a general rule that surrogate mothers may act altruistically, |
which includes them being compensated for their involvement in the surrogacy process up to a reasonable limit with the assurance of a minimum guarantee as compensation for their inconvenience and time spent, irrespective of the outcome of the pregnancy.

- Furthermore, in accordance with the general ethical principles of the ICMR, they may be reimbursed for expenses incurred by them due to their participation, and they may also receive free medical services.

- However, payments should not be so large or the medical services so extensive as to induce prospective surrogates to consent to act as surrogate mothers against their better judgment.

- An appropriately constituted ethics committee should approve all such payments.

- The surrogate ought to retain the right to abstain from further participation in the surrogacy process irrespective of any legal or other obligation that may have been entered into by her, without penalty and subject only to minimal restitutive obligations of any advance consideration received and outstanding. This is in keeping with the principles of voluntariness, informed consent and community agreement of the ICMR’s ethical guidelines. Moreover, any medical termination of pregnancy under the abortion law is the absolute right of the surrogate mother, and she ought not to be required to return amounts that have already been paid if she chooses to exercise this right. Also, she cannot be subjected to penalty or forced to continue her participation in the surrogacy process.
Breaking down a surrogate’s identified needs, we can see that they concern several parties. For example, the surrogate’s need for recognition for her contribution balanced with confidentiality to escape stigmatization concern the intending parents and the ART Clinic. Concerns of exploitation would largely be of unequal bargaining power between the surrogate and the intending parents due to culture, language and class, the involvement of other parties in the transaction leading to reduced communication and transparency between the primary parties, and a large chunk of the monetary package being usurped by the other parties. To regulate the surrogacy arrangement, we need to find a balance in these competing needs. However, this is only possible after visibilisation of the vulnerabilities of all involved parties in the surrogacy arrangement.

It was made clear that the aforesaid suggestions for coping strategies are only from the perspective of ameliorating the possible exploitation of surrogates in the surrogacy arrangement, as for now our analysis ignores all other stakeholders and their competing interests. Such balancing of other rights can be the subject matter of further research and papers.

A.9 CONCLUSION

We feel that the romanticisation of women’s labour comes from centuries of patriarchal oppression that has refused to value women’s contribution to the household as ‘work’. This by extension is also applied to the labour of pregnancy, child bearing, child rearing and taking care of the elderly as being part of women’s identity. This leads to the moral judgment that if any of this was to be commercialised, it would detract from the womanhood of the woman. In this rhetoric, even when women hire a wet nurse, tutor, cook or nurse, they experience tremendous amounts of guilt of not being able to keep intact or live up to their womanhood.

It is easy to prohibit surrogacy on moral grounds as a sale of motherhood. But then the prohibition should be outright and should cover all forms of surrogacy. Allowing altruistic surrogacy is yet another way of romanticizing the labour of a woman.
Also, while prohibition is easy, it is difficult to deal with the fallout for the women who will still risk life and limb to act as a surrogate. The realities of life are that women’s participation in the workforce has been steadily declining while the feminization of poverty is on the rise. Choices are limited, and sometimes the law needs to strengthen an individual to make the best choice possible when the State is unable to provide more choice. This is the responsibility of a welfare state.

After the ban on dance bars, in 2015, when the Supreme Court of India saw the folly in what it termed absurd, irrational and regressive curbs, it said, “You can regulate but cannot put such conditions ... The state must rise above gender bias and permit women to work.”

What women can and can't do with their body is a constant battle for regulators in the name of protecting the dignity of women. But can anyone other than the woman herself define her dignity? Would not anyone else’s opinion be paternalistic?

The only solution to this is to listen to the vulnerable women who are acting as surrogates and strengthen them in a manner that they can access to exercise better choice. Any law for surrogacy should necessarily be kept within the larger scope of a law for public health. Possibly, the State can also explore self-help groups for women who have acted as surrogates or even create programmes that they can train in and complete during the course of pregnancy. After all, those 9 months to create a baby can certainly create a better subsequent life for the surrogate. We remain hopeful that visibilising vulnerability in turn visibilises the opportunity for strength.

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143 Id.
REFERENCES


Baby Manji Yamada v. Union of India and Anr AIR 2009 SC 84


C Chatterjee and G Sheoran, “Vulnerable Groups In India,” The Centre for Enquiry into Health and Allied Themes (CEHAT) 1998


Common Cause v. Union of India (2004) 5 SCC 222


Dr. PM Arathi, Report of a Study to Understand the Legal Rights and Challenges of Surrogates from Mumbai and Delhi, National Human Rights Commission, Centre for Social Development (2018) 23


Ethical Guidelines for Biomedical Research on Human Participants, 2000, http://whoindia.org/LinkFiles/HSD_Resources_Ethical_Guidelines_for_Biomedical_Research_on_Human_Subjects.pdf

Francis Coralie v. The Administrator, (1981) 1 SCC 608

Government Of India, Law Commission Of India, Need For Legislation To Regulate Assisted Reproductive Technology Clinics As Well As Rights And Obligations Of Parties To A Surrogacy, (Report No. 228, August 2009).

Harsh Mander v. Union of India AIR 2018 Del 188


In Re Baby M, 537 A.2d 1227 (February 3, 1988); In Re Adoption of Paul, 550 N.Y.S.2d 815 (December 21, 1989); Doe v. Attorney General, 487 N.W.2d 484 (June 01, 1992)

Indu Devi v. State Of Bihar,(2017) Petition(s) for Special Leave to Appeal (C) No. 14327/2017, Judgment of May 9, 2017 (Supreme Court of India)


John Stuart Mill, On Liberty (Boston: Ticknor and Fields, 1863)

Justice K S Puttaswamy v. Union of India (2017) 10 SCC 1

Kapila Hingorani v. State of Bihar, 2003 Supp(1) SCR 175

Keshavananda Bharati v. State of Kerala (1973) 4 SCC 225


Medical Council of India, The Code of Medical Ethics (approved by the Central Government under section 33 of Indian Medical Council Act, 1956) Clause 13, Chapter - Disciplinary Action.
Chapter 8

Minerva Mills v. Union of India AIR 1980 SC 1789


National Guidelines for Accreditation, Supervision and regulation of ART clinics in India framed by the ICMR and the National Academy of Medical Sciences, India, 2005, http://icmr.nic.in/art/art_clinics.htm

National Legal Services Authority v. Union of India (2014) 5 SCC 438


People’s Union for Democratic Rights and Ors v. Union Of India, AIR 1982 SC 1473.

Pt. Parmanand Katara v. Union of India AIR 1989 SC 2039


R. Rajagopal @ RR Gopal &Anr. v. State of Tamil Nadu & Ors., (1994) 6 SCC 632


Ramakant Rai (I) &Anr. v Union of India & Ors. (2009) 16 SCC 565


S.K. Maslan Bee v. General Manager South Central Railway, (2003) 1 SCC 184


Sharmila Rudrappa ‘Making India the “Mother Destination”: Outsourcing labor to Indian surrogates’. In Williams, C. and Dellinger, K. (eds.) Gender and Sexuality in the Workplace (Research in the Sociology of Work, Volume 20) (Emerald 2010) 253-285

Sharmila Rudrappa, “India outlawed Commercial Surrogacy – Clinics are finding Loopholes”, (The Conversation, 24 October 2017)

Chapter 8


Smith, A., “Beyond pro-choice versus Pro-life: Women of color and reproductive justice” *NWSA Journal*, 17(1), 119-140


Srimathi Champakam Dorairajan v. State of Madras AIR 1951 Mad 120

State of Gujarat v. Hon’ble High Court of Gujarat,(1998) 7 SCC 392

Suchita Srivastava v. Chandigarh Administration (2009) 9 SCC 1

Surrogacy (Regulation) Bill, 2016


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The Right to Life with Human Dignity: Constitutional Jurisprudence https://shodhganga.inflibnet.ac.in/bitstream/10603/89946/10/10_chapter%20ii.pdf


Utkarsh Srivastava, “Maharashtra’s Ban on Dance Bars Has Done More Harm Than Good” The Wire, March 28, 2016, https://thewire.in/gender/maharashtra-s-ban-on-dance-bars-has-done-more-harm-than-good


CHAPTER 9 - DISCUSSION AND CONCLUSION

In the previous chapters, I have described our efforts to bridge social research amongst surrogate mothers with legal theory in order to provide them a voice in the regulatory stances that are being taken in India which impact them. I formulated the following main research question to guide my thesis:

**How can visibilising the vulnerabilities of surrogate mothers through a constitutional lens impact the trajectory of policy development on surrogacy in India?**

From this I articulated 3 sub questions:

1) What are the structural realities of a surrogate mother or potential surrogate in India that contribute to her vulnerabilities?
2) What is the trajectory of policy development on surrogacy, the role of the surrogate in it and the impact of the policy developments on her?
3) What are the gaps between policy objectives and practice, and are there any ways of dealing with such gaps in order to help the surrogate cope with her vulnerabilities and also result in policies that are constitutionally sound?

This chapter is divided into three sections. In the first section (9.1), the most important findings of this thesis are provided, answering the sub-questions. In the second section (9.2), the main research question is answered. In the third section, I have a discussion of the results. The subsequent sections reflect on the validity of this thesis, the limitations of this study, and provide considerations for future research.

9.1 **Conclusions from the study questions**
Discussion and Conclusion

In each section, the research sub-questions have been examined and addressed. The following section is structured into three parts following the research sub-questions.

9.1.1 Sub-question 1: What are the structural realities of a surrogate mother or potential surrogate in India that contribute to her vulnerabilities?

This question has been dealt with predominantly in Chapter 4 but some elements have also been identified in Chapter 5, Chapter 6 and Chapter 8. The literature review in Chapter 4 showed that surrogate mothers in India are intrinsically vulnerable due to their sex in a patriarchal system. This makes them prone to subordination, whether imposed by their own family members or medical practitioners, making them more susceptible to exploitation in deferential or institutional relationships. As doctors show a preference for younger surrogates, this increases their intrinsic vulnerability, as a younger woman would be more likely to be dominated in a patriarchal society, she may still be economically dependent and may be under the control of her household. Moreover, early childbearing or bearing multiple pregnancies in quick succession has been found to affect women’s health adversely. Particularly worrying was the low levels of functional literacy among surrogates - Since the surrogate mothers were unable to read or write, she and her husband are told about the contract by the hospital/clinic authorities in a suitable language and easy terms, which the surrogate mother cannot verify by any means. A large majority of surrogates were not aware of the clauses of the contract. Gaining access to information and maintaining communication was a challenge even among surrogates with higher levels of education, as the transaction documentation was usually in English. This has serious implications for the giving and obtaining of informed consent. The ICMR Research Guidelines, 2000 describe the principle of informed consent as a cardinal

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1. Chapters 4 to 8 of this thesis are co-authored and any reference to these chapters or the results therein is to collaborative work and efforts. Consequently, I have used ‘we’ or ‘our’ whenever referring to the same in the following sections.
3. Dr. Ranjana Kumari, ‘Surrogate Motherhood: Ethical or Commercial’ Centre for Social Research 39<https://wcd.nic.in/sites/default/files/final%20report.pdf>-accessed 07 August 2019
4. CSR DM Study (n 2) 63
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principal in which the subject is kept continually informed of any and all developments that
affect them and others. This ties in with the recognition of cognitive or communicative
vulnerability.

An interesting finding from the literature review was that prior employment seemed to be the
norm rather than the exception amongst the surrogates interviewed in the three studies. The
majority of the surrogates were already engaged in work, which was menial and poorly paid.
Surrogates themselves speak of their current work negatively and in belittling terms. Surrogacy
was actually the way out of impoverishment for them. The remuneration for surrogacy – the
amount, the nature of payment (lump sum) and the time span over which the amount is
received – emerged as central reasons for becoming a surrogate.

The literature review also showed that the surrogate’s being married or more importantly
receiving the surrogate’s husband’s consent along with the surrogate’s consent was a condition
adhered to quite strictly by doctors and agents.\(^5\) The presence or a negative state of marriage
creates tension regarding the autonomy of a surrogate. The threat is that making marriage and,
by the same coin, spousal consent a precedent condition for a potential surrogate, invisibilizes
the stress that this may cause to a surrogate’s personal autonomy. A spouse needs to be seen
as an influence on the woman to act as a surrogate. Also, having borne children was a
prerequisite for infertility physicians/clinics/hospitals engaged in the surrogacy business as it
acted as a proof of fertility of the potential surrogate mothers.\(^6\) Amrita Pande in her work “Not
and angel Not a whore”\(^7\) identifies, that “being a mother is not just a medical requirement for a

\(^5\) Medical Council of India, *The Code of Medical Ethics* (approved by the Central Government under s 33 of Indian
Medical Council Act, 1956) Cl. 13, Chapter - Disciplinary Action. The Chapter enumerates a list of responsibilities,
violation of which will be professional misconduct. Clause 13 of the said chapter places the following responsibility
on a doctor: “In an operation which may result in sterility the consent of both husband and wife is needed.” This
would cover every procedure in which the reproductive system is manipulated of either spouse. In effect, as doctors
in India are trained, marriage carries with it the assumption of ceding of personal autonomy and loss of control over
one’s body, particularly of one’s reproductive abilities.

\(^6\) Centre for Social Research, ‘Surrogate Motherhood: Ethical or Commercial’ (2012), 50<https://archive.nyu.edu/bitstream/2451/34217/2/Surrogacy-Motherhood-Ethical-or-Commercial-Delhi%26Mumbai.pdf> accessed 16 November 2017

\(^7\) Amrita Pande, *Not an “Angel”, not a “Whore”: Surrogates as “Dirty” workers in India*, 16 (2) Indian Journal Of
Gender Studies 141-173 (2009)
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woman to be recruited as a surrogate but also an insidious mechanism to control her” during the surrogacy arrangement. Legislation that mandates that to qualify as a surrogate she should have her own children is not necessarily reducing her vulnerability. It may only be expounding on patriarchal thought that a woman should first have served the reproductive interests of her own family before serving another’s.⁸

As a consequence of the literature review, in Chapter 4, we effectively derived a taxonomy comprised of intrinsic, extrinsic and relational vulnerabilities of the surrogate, which was pictorially represented (See Fig. 1) and were able to conclude that a surrogate mother is enveloped by various layers of vulnerability.

Using the Belmont Report⁹ and its classificatory categories of vulnerability as a benchmark, we were able to place them in the vulnerability construct. We visibilised each category of vulnerability and the pictorial depiction is placed at Fig. 2.

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By likening the practice of surrogacy to biomedical research being conducted on the human subject (i.e., the surrogate mother) as was done by the ICMR 2000 Guidelines, several further and differentiated layers of vulnerability become visible. We were also able to understand that each layer of vulnerability bears on the other, influences the other, and may even become lighter or stronger in relation to the other. This suggests a complex interplay, which marks the need for a variety of regulatory nuances, and emphasises that there is no single solution to the various vulnerabilities surrounding the surrogate.

We then considered the role legal vulnerability plays on the aforesaid construct. In our review of existing literature, we identified that as a proposed law moves to more restrictive positions or is unable to address the interplay of vulnerabilities we have identified above, the scope of legal vulnerability deepens. Hence, legal vulnerability should be understood as an all-encompassing risk (See Fig. 5 below) that would need to be assessed not only when a woman agrees to act as a surrogate but also at various stages of the surrogacy arrangement and even after it ends. We concluded that the category of legal vulnerability makes an impact on every

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10 Ethical Guidelines For Biomedical Research On Human Participants (Indian Council of Medical Research,2000)<http://whoindia.org/linkfiles/hsd_resources_ethical_guidelines_for_biomedical_research_on_human_subjects.pdf> accessed 07 August 2019

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layer of vulnerability and is capable of exacerbating or ameliorating them, in effect increasing or decreasing the possibility of exploitation of the surrogate. When law fails to address vulnerabilities themselves, it makes the surrogate legally vulnerable which is an all-encompassing risk that increases the possibility of her exploitation.

9.1.2 Sub-question 2: What is the trajectory of policy development on surrogacy, the role of the surrogate in it and the impact of the policy developments on her?

This sub question has been examined in two chapters in our thesis – Chapter 5 and Chapter 6.

From the analysis in Chapter 5, we learnt that there is no documentary evidence of the ICMR having initiated research among surrogate mothers or that its policies have been informed by their experiences. The chapter outlines two instances when concerns about surrogacy were brought before the supreme court: the 2008 Baby Manji Case,12 where the legality of surrogacy as a commercial industry was first established; and a 2014 PIL filed by Advocate Jayshree Wad, seeking a ban on commercial surrogacy. It was observed that no surrogates were consulted during these proceedings or even in the course of the preparation of the public interest litigation. In November 2015, a group of surrogate mothers that moved the Supreme Court13 were also not heard and the Union of India rejected the surrogates’ contention that they have been rendered jobless by the government’s changed stance of prohibiting commercial surrogacy. The Union of India asserted in court that the surrogate mothers should not be heard, as they are not directly affected by the ban.14 It went on to state that women do not have the legal right to become surrogate mothers for commercial gain. In all this, it was observed that the Supreme Court of India did not intervene as the pleas of the surrogates were rejected. The

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12 Baby Manji Yamada v Union of India and Anr AIR 2009 SC 84
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court decided that all matters would be heard once the Bill is enacted as an Act of Parliament, with or without modification, as may be. No further listing dates were given for the matter.

The consequences of the aforesaid shift, after almost a decade of legitimacy, was analysed from media accounts in Chapter 5. It was concluded that the Supreme Court’s volte-face cost the surrogates much more as they were left to their own devices, possibly worse off than when they had approached the judiciary. By declining to contradict the stance of the Union of India, the Supreme Court rendered the surrogate invisible. From here on, if she participated in a surrogacy arrangement, the onus was on her to show how she was exercising her reproductive rights within the confines of marriage and in accordance with the instructions of the Union of India. Anecdotal evidence that was considered also revealed that in reality surrogacy continues but is now under wraps and the surrogate is now even more invisible, more vulnerable, and more difficult to access.

In Chapter 6 we learnt from the extensive legal and critical analysis of draft surrogacy regulations, particularly a critical analysis of the 2016 Bill (which is now the 2019 Bill), that there are two regulatory solutions offered by the 2016 Bill to ameliorate exploitation of the surrogate – firstly that the surrogate only be a close relative of the intending parents and secondly that the arrangement be an altruistic one. These solutions were examined through the vulnerability construct developed in Chapter 4 to understand their impact on the surrogate.

The analysis indicates that the 2016 Bill is self-contradictory. It requires mandatory and contractually bound relinquishment and seeks to establish even pre-birth that the surrogate mother has no rights of the pregnancy or the baby born of it. Hence, it does not appear that the provision of close relative is included with an objective of providing greater transparency to the surrogacy arrangement, more rights to the surrogate mother, or to dismantle the exclusivity of blood relations.
Discussion and Conclusion

The analysis also concludes that the 2016 Bill reflects an acute lack of consideration for the efforts of the surrogate and fails to recognize her contribution in the arrangement. It also fails to dismantle the surrogacy industry (ART clinics, surrogate hostels and agents) and criminalizes the surrogate for her participation without understanding her economic or deferential vulnerability. This legal position compounds her legal vulnerability.

The analysis also argues that the rigors of legal enforceability of a contractual arrangement on surrogacy within a familial context and without compensation may deprive the surrogate of her rights to her own bodily integrity and also rights all other medical patients have, such as the rights to consider an alternative medical opinion, to undertake or refuse surgery, or to seek medical termination of pregnancy in accordance with Indian law. We also problematized that there is risk of the contract of surrogacy becoming “forced labor” and pointed out the constitutional unsoundness of this position as Article 23 of the Constitution of India prohibits forced labor.

We concluded that regulatory positions suggested by the 2016 Bill go against the very grain of widely held cultural norms impacting their regulatory legitimacy and may bring about a position of even greater vulnerability for a surrogate mother as her fundamental rights guaranteed under the Constitution of India are detrimentally impacted.

The main conclusion was that surrogate mothers have been at the receiving end of discriminatory treatment by both the Government of India and the Supreme Court of India and they has been systematically excluded from stakeholder groups. The consequences are that present regulatory positions are deaf to her vulnerabilities and may in fact exacerbate them. This research shows a pressing need for an ethics of vulnerability that might open the possibility to understand the position of the surrogate better and proceed to respond to her needs in law and policy in ethically defensible ways.
9.1.3 Sub-question 3: What are the gaps between policy objectives and practice, and are there any ways of dealing with such gaps in order to help the surrogate cope with her vulnerabilities and also result in policies that are constitutionally sound?

This sub question has been examined in two chapters in this thesis – Chapter 7 and Chapter 8.

In Chapter 7, we conducted two comparative studies. In the first study, we comparatively analysed regulatory positions within the Indian landscape which have been taken since 2000 to 2019 and we conceptualized and theoretically elaborated on these shifting perspectives by positioning them on a spectrum from Protection to Proliferation to Prohibition (Figure 3) identifying their broad elements and key features.

<table>
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<tr>
<th>Broad Element</th>
<th>Key Features</th>
<th>Protection</th>
<th>Proliferation</th>
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We found that while there were no documented studies on surrogacy or amongst surrogates in India that the ICMR referred to or relied on before the publication of the ICMR Research Guidelines 2000, the treatment of likening the surrogate mother to the subject of medical research ensured her the ethical and clinical safeguards available at the time for subjects of biomedical research, at least on paper. This regulatory treatment envisioned various kinds of vulnerability...
surrounding her and required a setting off of the factors that caused her to be vulnerable to provide a position of optimum equitability. At least in this sense, the ICMR Research Guidelines 2000 may have been a better starting point to protect potential surrogates while also empowering them to act as surrogates.

The analysis showed that as the shift to proliferation took place, fundamental changes occurred for the surrogate in the areas of compensation, the right to abort and access to qualified care, and the requirement of an authorised adoption as the safeguards of the ICMR 2000 Guidelines were explicitly diluted.

We examined in the next shift to prohibition that the prohibition proposed is not a composite ban on surrogacy but a ban on certain types of surrogacy as the 2019 Bill seeks to avert the exploitation of surrogates primarily by banning the commercial aspect of surrogacy, i.e., only allowing altruistic surrogacy, and only allowing a close relative to act as a surrogate.

From the spectrum we concluded that although the 2019 position sets out to criminalize any type of commercial surrogacy, it also continues a treatment of the surrogate arrangement as a legally enforceable one, bound by contract, and without the rights that were available to a surrogate as a vulnerable subject in 2000.

In the second comparative study we examined all the countries whose jurisdictions have an expressly documented legal position on surrogacy, which takes a clear stand on allowing some form of surrogacy and explicates the nature of such an arrangement, whether altruistic or commercial, i.e., its position on a legally enforceable contract, compensation, and the issue of parentage. Within this selection, we further examined in detail the jurisdictions that focus on the requirement for close relatives to act as surrogates and / or altruistic surrogacy, as India intends to regulate surrogacy by the 2019 Bill. The jurisdictions for detailed comparison were derived to be Vietnam, Greece, Thailand, Australia (Victoria) and United Kingdom.
Discussion and Conclusion

The comparative elements were the same as the spectrum derived from the first analysis. This could then be visually represented by us as had been done in Figure 4.

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<th>Broad Element</th>
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With this pictorial representation, the gaps became evident. The 2019 Bill, while suggesting a position that appears to conform to the global status quo, deviates from several elements that the analysis suggests are key to the framing of such an approach. We observed that no post-birth oversight is provided for in the 2019 Bill on surrogacy. We also saw that the 2019 Bill does not provide for the rights of the surrogate, as is usually done in all altruistic regimes; these include her right to medical termination of the pregnancy under the law of the country (without discrimination) and her right to counselling before and during the arrangement. There is also no provision for her actual expenses incurred during the arrangement, which is provided in all other altruistic regimes with the exception of Vietnam.

The 2019 Bill mandates pre-birth consent, and the surrogate in effect surrenders all her rights before she has even undergone the rigours of the surrogacy process. Such pre-birth orders are
common in jurisdictions that allow commercial surrogacy through a gestational carrier such as New Jersey (USA), New Hampshire (USA), Israel and California (USA). All altruistic regimes, with the exception of Greece (in compensation, it has a post-birth parentage order requirement), require the surrogate’s post-birth consent. The 2019 Bill does not provide for this or any post-birth confirmations. Another critical point of departure in the 2019 Bill is that it fails to declare the surrogacy arrangement as unenforceable. This position has been adopted by all five altruistic regimes in comparison. Enforceability of the surrogate contract is a familiar element only of countries that allow commercial gestation surrogacy.

Whilst understanding the gaps, we also learnt from the comparative analysis with other jurisdictions that they offer lessons that regulators can learn from, to fill these gaps. The Vietnamese experience suggests that while the risk of illegal surrogacy still remains, on the whole, the offer of intra-familial, non-commercial surrogacy can be operationalized, but to do this, the law and policy need to center around the surrogate in the surrogacy arrangement. The surrogate needs recognizable rights as the legal mother irrespective of the genetic contribution of the intending parents. Greece shows that despite checks and balances, altruistic surrogacy is not easy to attain, even in its widest definition, and under the table transactions continue to occur. This also demonstrates the need to consider compensated surrogacy, with sufficient safeguards, as has been suggested by the Parliamentary Committee, or as is now being considered as a reform in the United Kingdom. The Thai experience shows us that by placing the onus of responsibility on the service providers, i.e., the medical practitioners, for ensuring that every case placed before the committee for approval abides within the requirements of the law (and consequent penalty for failure), we can create a strong deterrent against misuse. Moreover, the Thai law has a single window of clearance, which allows better record keeping, tracking, monitoring, and documentation. Additionally, the power of the surrogate under Thai Law, i.e., her right to an abortion (conducting it or refusing it) and determining the surrogacy

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arrangement as voidable while still continuing to be eligible to claim for expenses, is a very positive step and a lesson worthy of being emulated. From Australia, we learn the importance of a post-birth parentage framework in addition to pre-conception safeguards. Oversight is necessary at every stage to ensure the surrogacy arrangement is not exploitative of the surrogate. It is further noted that in all the countries that only allow altruistic arrangements, the surrogacy arrangement is not treated as a contract. In the majority of those jurisdictions, there is no automatic transfer of parenthood, and the birth mother is considered the legal mother. Clearly, altruistic surrogacy has not been treated as an arrangement incurring a mandatory obligation, which is legally enforceable.

In Chapter 8, we used surrogacy in India as a case study to explore methods through which the Constitution of India can be operationalized in the process of making law on social issues. In the course of the paper we developed a constitutional lens through which the Vulnerability Construct (developed in Chapter 4) could be focused on. The use of the constitutional lens was found to have particular relevance on account of the visibilisation of legal vulnerability as an all-pervasive concern in the vulnerability construct. We summed up that minimizing the risk of legal vulnerability would require that the surrogate be more visible to third-party assessment.

For developing the constitutional lens, we found that the Supreme Court of India has already laid the ground work for the constitutional lens in the case of Minerva Mills v Union of India, in which it said “three Articles of the Indian Constitution and only three stand between the heaven of freedom into which Tagore wanted his country to awake and the abyss of unrestrained power.” These three articles were identified as Articles 14, 19 and 21. 16 To this golden triangle we added another vertex – that of Article 23, which deals with the rights against exploitation as we derived in the literature review that the Constitution treats exploitation separately, thus implicitly acknowledging that there are not only inequalities but also limits to anti-discrimination treatment in treating such inequalities, and that some people are much more vulnerable.

16 Minerva Mills v Union of India AIR 1980 SC 1789
Discussion and Conclusion

We found that when applied systematically, the vulnerability construct helps the regulator to decide the direction of a proposed policy by visibilising all the risks of each stakeholder. We then applied the constitutional lens developed by us and in asking the questions framed were able to find the answers that may help regulators adopt the most preferable regulatory pitch and range, which avoids being constitutionally unsound and also ameliorates the various kinds of vulnerabilities identified for the subject.

We concluded that regulators must be able to support a legitimate regulatory purpose for their regulatory strategies, that they are achieved through legitimate means, and that they are effective. This includes the concepts of regulatory pitch, i.e., the way regulators seek to engage with their regulatees (a moral pitch or a practical pitch); regulatory phasing, i.e., whether the regulation is in its first phase or second phase; and regulatory range,\(^{17}\) which decides on the channelling (negative, neutral or positive) that a proposed law will adopt to bring about the particular consequences that are pre-decided by regulators as being of social worth or for the public good.

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 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. This in turn exacerbates the legal vulnerability of the surrogate. Here we have learnt that these gaps can be addressed by a systematic visibilisation of vulnerability as has been done in the vulnerability construct. We can ameliorate the risk of constitutional unsoundness in this law making process by using the constitutional lens developed. The prevention-proliferation-prohibition spectrum can aid regulators in achieving regulatory legitimacy and coherence to achieve one of the objectives of the proposed law, which is to protect the surrogate mothers from exploitation.

Discussion and Conclusion

9.2 Answering the Main Research Question

The main research question of this thesis was:

How can visibilising the vulnerabilities of surrogate mothers through a constitutional lens impact the trajectory of policy development on surrogacy in India?

Central to answering this question was recognizing the structural realities of a surrogate mother or potential surrogate in India that contribute to her vulnerabilities; the trajectory of policy development on surrogacy, the role of the surrogate in it and the impact of the policy developments on her; and the gaps between policy objectives and practice.

We have seen from the findings summarised in Section 9.1 that the structural realities of a surrogate speak of her vulnerability. Vulnerability concepts and their applicability have been found to have diverse applications in multiple fields. Its application in health care is well documented. Vulnerability and gender has been explored previously, with India as a background in multiple contexts like domestic violence, poverty, sex work, suicide and even climate change.

What we also find in the research is that vulnerability has an implied place in the Constitution of India. In the case of Srimathi Champakam Dorairajan v State of Madras, it was held,

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24 Srimathi Champakam Dorairajan vThe State of Madras AIR 1951 Mad 120
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“One finds running through the Constitution two underlying conceptions which inform the entire scheme of national life envisaged by it. One is the principle of equality not only of status but also of opportunity & the other is the establishment of a social order based on social, economic & political justice.”

The Supreme Court went on to comment, “As necessarily following from such an ideal, there is the exhibition of an anxiety to promote the interests of the backward & weaker sections of the people. With this end in view, the Constitution provides for safeguarding their interests in several respects.” (emphasis supplied)

Here, I draw your attention to the multiple provisos / non obstate clauses that these Articles come with. Article 15(3) which has been there as part of the original Constitution, unlike some provisos that were introduced after as amendments reads – “Nothing in this article shall prevent the State from making any special provision for women and children.” Later, through the Constitution (First Amendment) Act, 1951, this same provision was extended to include provisions for the advancement of socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes also for their admission to educational institutions including private educational institutions.

The rationale for Article 15(3) and similar provisions in this vein in the Constitution lie in an understanding of the unequal playing ground that was India in 1950 and still remains. Established after independence, the Constitution of India reflects the assumption that Indian society represents inequality, and the provisions regarding compensatory discrimination programs propose reforms toward that goal, with an ultimate aim of ameliorating unequal effects.25

We find from the research that the Constitution of India deals with inequality, discrimination and exploitation separately and distinctly in its rights-based approach. Particularly exploitative situations such as forced labour and employment of children are dealt with under Article 23. The Supreme Court has held this specific treatment to mean that Article 23 is not just the responsibility of the State but is a right enforceable against the world at large. The research concludes that the Constitution innately understands that non-discrimination prescriptions are not enough to address certain situations and in doing so it demonstrates an innate understanding of vulnerability and that it is not just specific groups of people that are vulnerable but also certain situations create vulnerability.

An overarching finding of the study is that the mere existence of vulnerability does not automatically suggest the existence of exploitation. The majority of the surrogates who participated in the research studies appear to be making very active choices among the limited options they have. They also appear to be exerting their agency, sometimes even against their spouses and family members, to achieve their aspirations. As they learn from their experiences, they find themselves in better positions of negotiation. This is the roadmap of empowerment.

However, a critical finding is that the surrogates have not been heard and this suggests a trammelling of their fundamental rights.

The opportunity to be heard is an unwritten tenet of Article 21 of the Constitution. The case of *A.K Gopalan v The State of Madras* was possibly the first judgment of the Supreme Court of India interpreting the Constitution of India, particularly Article 21 of the Constitution, which reads, “No person shall be deprived of his life or personal liberty except according to procedure established by law.”

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26 Under Article 23, traffic in human beings and begar and other similar forms of forced labour is prohibited and any contravention of this provision is to be a punishable offence. Under Article 24, no child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment.

27 *People’s Union for Democratic Rights v Union of India* AIR 1982 SC 1473

28 *A.K Gopalan v The State of Madras* AIR 1950 SC 27
Another prime conclusion of this study is that after being excluded, surrogates have been systematically discriminated against in various clinical practices and even the altruistic nature of surrogacy proposed may be a restriction on their fundamental rights of reproduction and against forced labour. Also, there are concerns of their rights of bodily integrity being violated and their agency in abortion (of the limited nature given in the MTP Act) is being subjected to the requirements and consent of others.\(^29\) While restrictions may be imposed on certain fundamental rights, it is necessary that such restrictions do not trample on any of the other fundamental rights.

Another important conclusion of this thesis is that while theoretically speaking there have been a lot of studies on vulnerability, they have been scattered and largely without any reference to the Constitution, which often is perceived as moral absolutism. This is commonly misinterpreted to mean that where a position identifies vulnerability, such a position needs to be banned as the Constitution prohibits exploitation.

Undoubtedly, some situations may be unjust without being exploitative, and some may involve harm inflicted on vulnerable people without having exploited them.\(^30\) We have found from the research that if potential laws were to visibilise vulnerability, this would in turn lead a visibilisation of the sources of vulnerability and the factors that ameliorate and exacerbate each form of vulnerability. With the correct aids, policy makers could see the pause between vulnerability and exploitation as an opportunity for legal intervention.

The significance of this is even more pressing when we consider legal vulnerability and visibilise its impact on the surrogate. Here in the research we are able to uncover constitutional unsoundness in the proposed legislation. This is primarily found in the forced nature of the altruistic transaction for the surrogate.


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According to Chief Justice Kania, \(^{31}\) “Deprivation (total loss) of personal liberty, which inter alia includes the right to eat or sleep when one likes or to work or not to work as and when one-pleases and several such rights sought to be protected by the expression 'personal liberty' in article 21, is quite different from restriction (which is only a partial control) of the right to move freely (which is relatively a minor right of a citizen) as safeguarded by article 19(1) (d).” Whilst interpreting Article 23, the Supreme Court of India in *People's Union for Democratic Rights and others Vs. Union of India and others* said, “We are, consequently, of the view that when a man gives work of administration to another for compensation which is not as much as the lowest pay permitted by law, the work or administration gave by him unmistakably falls inside the extension and ambit of the words “constrained work” under Art 23 of the Indian Constitution.” Constrained work was equated to forced labour in a later judgment of the Supreme Court. \(^{32}\)

With the knowledge that such legislation may be doomed to fail and has failed the surrogates it wishes to protect, \(^{33}\) this thesis hopes to impress on regulators that they need to consider different solutions than the 2019 Bill and address surrogacy through various modes and mixes of regulation for the ultimate goal of a constitutionally sound legislation is to prevent exploitation. The state itself, through the legal positions it takes, can exacerbate or ameliorate vulnerability or what we have identified and specifically verbalised in the vulnerability construct as legal vulnerability that encompasses all other forms of vulnerability. The positive / negative influence of law on vulnerability to cause vulnerability in itself has not previously been discussed and this we believe is key in this analysis.

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\(^{31}\) *A.K Gopalan* (n 28)

\(^{32}\) *Kapila Hingorani v. State of Bihar* (2003) 6 SCC 1

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Hence, visibilising vulnerability can in fact also visibilise the opportunity for strength and suggest a roadmap for how regulators can move from vulnerability to strength which is where the tools we have developed in the course of this research and presented in this thesis would serve their purpose.

9.3 Discussion

9.3.1 Scientific Contribution

When we look at the various perspectives on surrogacy, we see that the approaches form a triangular arrangement between Bentham’s theory of Utilitarianism suggesting greatest happiness for the greatest number and an emphasis on consequences i.e., the costs or benefits that result; Kant’s theorization of the ‘Categorical Imperative’ and the concept of dignity suggesting the absolute unity of a human person and it being morally impermissible to make use of one’s body as a means towards an end that does not rest in that person itself; and the doctrine of Human Rights that aims at identifying the fundamental requisites for each human being leading a minimally good life in which preservation of personal autonomy and freedom is integral.

The practical application of these theories to law making on social issues such as surrogacy, domestic violence, child abuse, sex work, euthanasia, manual scavenging, bar dancing remains limited, especially when seen within Indian realities. These theories however have great worth in India’s regulatory development. We argue that these theories have already influenced and in fact have been subsumed in the Constitution of India itself, which stands as a strong and viable moral, social and ethical theoretical compass to direct law making in India. However, constitutional theory itself or even the provisions of the Constitution are not studied in the usual course. Usually, such study may only be available to law students and that too in general forms that give very little connection between practical realities and the ideals of the Constitution. Lawmakers or regulators (who are not even usually students of law) may have very limited understanding of how to utilise the constitution in every day law making.
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This thesis’s practical or social contribution is in the area of law making, particularly to surrogacy and this is described in the section on social relevance below. It however also makes a unique academic and theoretical contribution to surrogacy and beyond.

The cross-sections between surrogacy and vulnerability are a matter of public discourse where surrogates have often been described in media accounts as vulnerable. The 2019 Bill on surrogacy has been described as a historic step expected to protect vulnerable Indian surrogates from exploitation. Gulzar Barn has described this as an unfair use of vulnerability as it trades on a objectionable and rectifiable injustice and results in further disadvantage to the vulnerable. It bears out that surrogates from India have been described commonly as vulnerable, particularly in transnational surrogacy but there is limited work in the sources of her vulnerability. Sheela Saravanan’s works on surrogacy are India centric, focussing on the dynamics of a transitional economy and its inequalities but does not capture vulnerability. The research done by SAMA does provide bioethical and public health perspective on the ethical and regulatory issues of surrogacy drawn from its on research amongst surrogates in India but stops short from articulating their sources of vulnerability in a manner that can be generalised.

In existing works, we find that Christine Straelhe has examined different sets of harm that are often employed to argue against such a contractual interpretation of the right to

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surrogacy through the analytical lens of vulnerability while disagreeing with a prohibition and seeking careful regulation. She has suggested in her work that there are two sources of vulnerability, being the status of women compared to men and the vulnerability from the clinical procedures themselves. However, this is not drawn from the ethnographic studies done amongst surrogates in India. New studies on socio-demographic characteristics of Indian surrogates suggests that the hypothesis that surrogates are poor choiceless women needs to be confronted by further research. This even more so emphasises the need to bridge such data with a visible assessment of vulnerability.

In this thesis, the vulnerability construct bridges socio-ethnographic data on surrogates in India with theoretical concepts on vulnerability and visibilises the possible sources of vulnerability and possible exploitation. These relationships have not been explored in recent works on the subject and can be generalised beyond the domain of surrogacy.

Literature does exist examining the constitutional validity of regulatory positions on surrogacy in India and even surrogacy itself. The former concentrate on the fundamental rights of parenthood and reproduction and the discrimination innate in excluding certain groups from accessing surrogacy. Authors have also argued that the prohibition of commercial surrogacy is a reasonable restriction of personal liberty under Article 21. However, except for brief mentions of a constitutional tests, current literature does not throw up any deep analysis of the impact of the Constitution of India on the surrogate mother herself. In this thesis, we not only examine the socio-dynamics of the Indian surrogate from the constitutional lens, we also extend current theory from the golden triangle of Article 14, 19 and 21 of the Constitution as suggested in the

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Minerva Mills case\textsuperscript{45} to also consider, as a point of examination, the prohibitions against exploitation captured in Article 23 of the Constitution of India.

There is insufficient analysis or literature available in which the shifts in the regulatory position on surrogacy within India and the tension and dysfunction created as a result thereof have been explored. In this area, the contribution of this thesis is very relevant. The framing of the Protection-Proliferation-Prohibition Spectrum (PPP Spectrum) is analytical work covering regulatory shifts in India from 2000 to 2019 and this nature of detailed analysis has been undertaken for the first time.

We have also suggested that regulators can see a role for themselves in “coping” as we move from individuals coping to institutional / regulatory coping. Concepts and theories of ‘coping’ and ‘coping strategies’ serve as tools to help us understand how during adverse circumstances or periods of stress people’s agential mechanisms of adaptation, recuperation, and resilience\textsuperscript{46} can be stimulated to reinforce capabilities and strengths. Very simply, coping refers “to the things that people do to avoid being harmed by life-strains.

In this thesis, we recast the concept of coping as being sourced in infrastructure and regulation and we make coping not the individual’s responsibility but the State’s.

The theoretical contribution of this thesis is the recasting of ‘coping’ as the bridge between the Vulnerability Construct and the PPP Spectrum. Once the vulnerability construct visibilises all the vulnerabilities of every stakeholder and the regulator classifies through the PPP spectrum the approach that she intends to take, legislative, political and infrastructure strategies can be further visualised to address risk, ameliorate vulnerability and achieve the objectives of the regulation.

\textsuperscript{45}Minerva Mills \textit{v.} Union of India AIR 1980 SC 1789
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These strategies are conceptualized as coping strategies that go beyond the existing field of literature and application. At present, the concept of coping has been developed in many situated and applied contexts, particularly social psychology and social work practice, and understandings of what it means to ‘cope’, “whether it be about counter-balancing threat, ‘getting by’ or ‘getting on’47, and how such coping can be strategic, are widely debated in research.48

Limited to the individual level, the concept of coping strategies has been under-utilised in the area of policy making. As practical example, women walking on an unlit public road at night are expected to individually cope with the situation of potential threat to their safety, by either choosing to avoid the road altogether or taking safeguards as they walk. This impinges on their constitutional freedom of movement. Preservation of such freedoms is the goal of a welfare state and thus the responsibility of the State. Re-articulation of coping strategies as strategic interventions by the State through law, policy and infrastructure to help the vulnerable cope with their vulnerability would lead to the practical provision of street lighting to protect fundamental freedoms.

Overall, this formulation of coping is more in keeping with the ideals of a Welfare State, which is stated in the Constitution of India. This new enlarged of coping makes it the duty of the State to reduce risk and ameliorate vulnerability not just through social policies but also conscious law making where the law provides the policy framework and/or infrastructure to the individual subject being regulated to cope with the risks it may be expecting it to absorb or repel.

The innovation of this thesis is that by using the constitutional lenses consistently with the vulnerability construct we can arrive at constitutionally sound positions in the law making stage itself.

9.3.2 Social Relevance

The Vulnerability Construct

In this thesis we have reconceptualised policy making process. From vulnerability theories we have developed the vulnerability construct (See Fig. 5).

The vulnerability construct serves as a readily available, easy to follow lens. On the one hand, we have a Constitution of India in which most theoretical approaches are already subsumed and which has actually made all these principles available as the supreme law of the country. On the other hand, people need to understand theories behind the Constitution, which is to suggest that the constitution as a theory itself is not easily available or evident not only to law makers, people involved in day to day policy making but even social theorists.

What the vulnerability construct does is that it literally makes available in a graphic pictorial, very easy to access way, the concepts implicit in the Constitution. Law makers can look at every inter-gaging sphere and see its applicability to the subject at hand and from that we can have more informed law making.

The vulnerability construct thus actually expands the theory itself and serves as an intersection between other disciplines which are not just law but also social science, medicine, ethics, clinical research and the like. This makes the Constitution more cogent to every day practices.
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The constitutional lens

From the golden triangle of Article 14, 19 and 21 of the Constitution as suggested in the Minerva Mills case, we have proposed a quadilateral constitutional lens (Fig. 6) that also takes into account vulnerability and exploitation as suggested by Article 23 of the Constitution of India. The constitutional lens captures in it the questions we have suggested regulators ask in the drafting process of law. The lens, used along with the vulnerability construct would help them place identified vulnerabilities in the context of fundamental rights which are guaranteed by the Constitution of India. The lens would then help them arrive at the constitutional soundness of their proposals.

A parallel exercise to the use of the vulnerability construct and the constitutional lens is the application of the Protection-Proliferation-Prohibition spectrum.

There is a concept of legal pitch in regulation. It is to decide on the tenor that a proposed law will adopt to bring it about to particular consequences that are pre-decided by regulators as being of social worth or for public good. The vulnerability construct helps the regulator decide the direction of a proposed policy by visibilising all the risks of
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each stakeholder when applied systematically. The elements of a regulatory position (as deducted and arrived at from the works of Roger Brownsword\textsuperscript{49} on regulating new technologies) are pictorially depicted in Figure 7.

The PPP spectrum (already pictorially depicted at Figure 3) is a co-extensive tool for regulators that helps classification. Every industry/ market / practice has specific elements. The PPP spectrum disciplines regulators to study the subject industry/ market / practice and identify its specific elements. It then helps the regulator distribute the elements of the subject that is to be regulated into the objectives that the regulators wish to achieve – prevention, proliferation or prohibition. This then provides a mix of elements that can serve as a framework that furthers the object intended by regulation.

The examination and articulation of the PPP spectrum therefore suggests a way law can keep up with the trajectory of the practice.

A caveat however is that for regulation, the vulnerability construct and the PPP spectrum necessarily need to be utilised together. This is because the PPP spectrum is largely the utility or pragmatism that often is the predominate interest of the law / policy makers. The vulnerability contrast is in fact a way to take into account the voice of the subject in different ways and to represent this in a visible, pictorial imagery for ease of understanding. This is what we have referred to as visibilisation. If used in isolation of each other they would make the objectives of regulation blind to vulnerability.

While the spectrum in this thesis has been derived from the policies on surrogacy, the objective of the spectrum is to find a regulatory position that is able to move from linear approaches in legislative drafting to interactive legislative drafting which achieves regulatory legitimacy in real life conditions.

\textsuperscript{49}Roger Brownsword (n 22)
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9.4 VALIDITY

9.4.1 Internal Validity

Within this thesis, multiple strategies were used to enhance the validity of the results and conclusions and to minimise the effects of researcher bias. These have already been described in detail in Chapter 3. From time to time, the findings of this thesis have been presented in public discussions and consultations and views have been sought from several representatives of NGO’s, Government, Clinicians, Activists, lawyers and researchers.

9.4.1 External Validity

The conclusions of this thesis can have a wide impact on several social issues that regulators are looking at regulating. The tools that have been developed in this thesis can inform policy making not just in India, but also in other low and middle-income countries that are dabling with the idea of a surrogacy ban. With the vulnerability construct, law and policy makers and researchers can visibilise and assess vulnerability of every stakeholder during the nascent stage of development of law itself. The protection-proliferation-prohibition spectrum helps a particular trajectory of how markets seem to function and can inform policy making at nascent stages and show us a way to be able to keep up with the changes in an ethical response and not a knee-jerk fashion reaction.

While the theme of this thesis is surrogacy, in ultimate practice, its findings are relevant and applicable to any other legal/ethical dilemma requiring legislation such as manual scavenging, occupational health and safety of women workers, domestic work, sex work, abusive partnerships.
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9.5 LIMITATIONS AND SUGGESTIONS FOR FUTURE RESEARCH

One of the main limitations of this research is the lack of exploration of the corporeality of vulnerability. The surrogate mother has a specifically corporeal embodiment in the exchange, a body at stake with its needs and requirements. Pregnancy carries a great emotional and physical strain, and brings with it a specific kind of situational vulnerability that is at once intrinsic and extrinsic. Further research could pick up on this matter.

Another point of concern arises from limitations of the studies reviewed in terms of their respondent size and geographical reach. I feel that wider studies amongst surrogates in India from multiple locations can give us greater clarity in terms of their vulnerabilities.

Also, in order not to fall in the trap of stigmatizing any vulnerable group, I acknowledge that this research has preceded from the perspective of the surrogate only. The time and physical limitations of this thesis have allowed us only the space to look at the position of the surrogate. The endeavour should be that the construct and tools developed should be used to map every stakeholder on the premise that every person is always vulnerable.

I also acknowledge that the PPP spectrum assumes that the practice is already in existence and has seen considerable developments or shifts in approach. This may not be relevant to first phase regulation where a market or an industry does not already exist.

The work done in this thesis on coping is in its nascent stages of transformation and we acknowledge that it is only a starting point. The strategies suggested are specific to surrogacy and are only based on what we know or what we can derive from current research amongst surrogates. Since more research is necessary, the strategies may evolve substantially on the basis of that. I hope however that this work presses upon the fact that much more needs to be done in the present regulatory position on surrogacy to achieve an empowering legislation that meets its objective of non-exploitation of the surrogate.
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9.6 CONCLUSION

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.

It provides a sound theoretical framework through which the Constitution of India can be taken as a starting point during the early stages of law making, and the legitimacy of legislative proposals be examined. This would tremendously streamline the process of law making itself and save resources and time. Eventually it would also serve as a first measure safeguard against bad law making its way to the rule book and will help ensure that the affected populace do not have to suffer unintended consequences while waiting for the intervention of the Supreme Court of India.

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REFERENCES


*A.K Gopalan v The State of Madras* AIR 1950 SC 27


Amrita Pande, *Not an “Angel”, not a “Whore”: Surrogates as “Dirty” workers in India*, 16 (2) Indian Journal Of Gender Studies 141-173 (2009)

*Baby Manji Yamada v Union of India and Anr* AIR 2009 SC 84


Dr. Ranjana Kumari, ‘Surrogate Motherhood: Ethical or Commercial’ Centre for Social Research 39 https://wcd.nic.in/sites/default/files/final%20report.pdf accessed 07 August 2019


Ethical Guidelines For Biomedical Research On Human Participants (Indian Council of Medical Research, 2000) http://whoindia.org/linkfiles/hsd_resources_ethical_guidelines_for_biomedical_research_on_human_subjects.pdf accessed 07 August 2019

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Medical Council of India, *The Code of Medical Ethics* (approved by the Central Government under s 33 of Indian Medical Council Act, 1956)

*Minerva Mills v Union of India* AIR 1980 SC 1789


*People’s Union for Democratic Rights v Union of India* 1982 AIR 1473


Discussion and Conclusion


The Print Team, ‘Commercial Surrogacy: Prone to misuse or should be allowed with regulations’ (The Print, 16 July 2019) https://theprint.in/talk-point/commercial-surrogacy-prone-to-misuse-or-should-be-allowed-with-regulations/263710/ accessed 07 August 2019
Discussion and Conclusion

Legislative Materials, Statutes, Guidelines, Rules & Regulations

Assisted Reproductive Technology Rules under ART Bill 2010 ........................................ 154, 155, 157, 159
Ethical Guidelines For Biomedical Research On Human Participants(Indian Council of Medical Research, 2000) ................................................................................................................................. passim
Factories Act 1948 ................................................................................................................. 211
The Protection Of Human Rights (Amendment) Bill, 2019 ...................................................... 255
Import Policy Norms finalized by Directorate General of Foreign Trade for 'Human Embryos' vide notification No. 52(RE-2013)/2009-2014 dated 2 December 2013 .................................................. 161
Medical Council of India, The Code of Medical Ethics (approved by the Central Government under s 33 of Indian Medical Council Act, 1956) .......................................................... 114, 261, 306
National Guidelines For Accreditation, Supervision And Regulation Of Art Clinics In India, ICMR and the National Academy of Medical Sciences, India (2005) ............................... 95, 98, 146, 280
Protection of a Child Born by Medically Assisted Reproductive Technology Act, B.E. 2558 (2015), .................................................................................................................................................. 234
The Assisted Reproductive Technology (Regulation) Bill, 2010 ............................................ 95, 126, 153, 191
The Bombay Prevention of Begging Act, 1959 ....................................................................... 256
The Constitution of India ........................................................................................................ passim
The DNA Technology (Use and Application) Regulation Bill, 2018 ........................................ 255
The Immoral Traffic (Prevention) Amendment Bill, 2006 ...................................................... 256
The Indecent Representation of Women (Prohibition) Amendment Bill, 2012 ......................... 256
The Medical Termination of Pregnancy Act, 1971 ................................................................. 112, 158, 199
The Medical Termination of Pregnancy Act, 1971, as amended by Act No. 64 of 2002; The Medical Termination of Pregnancy Rules, 2003 ................................................................. 53
The National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities (Amendment) Bill, 2018 .......................................................... 256
The Protection of Children from Sexual Offences (Amendment) Bill, 2019, .......................... 255
The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Amendment Bill, 2013 .......................................................................................................................... 256
The Specific Relief (Amendment) Act, 2018 ........................................................................ 198
The Surrogacy (Regulation) Bill, 2016 ............................................................................ passim
The Surrogacy Regulation Bill 2016, Statement of Objects and Reasons .............................. 30
The Transgender Persons Protection Rights Bill, 2016 ...................................................... 256

Judicial Precedents

Baby Manji Yamada v Union of India and Anr. AIR 2009 SC 84 ........................................ passim
Director of Settlements AP v M R Apparao AIR 2002 SC 1598 .............................................. 148
Doe v. Attorney General, 487 N.W.2d 484 (June 01, 1992) ............................................... 273
Esakkimuthu v The Government Of Tamil Nadu, Writ Petition No.12396 Of 2002 (High Court of Madras, 12 April 2002) ............................................................................................... 57
Francis Coralie Mullin v Administrator, Union Territory of Delhi (1981) 1 SCC 608 7-8 .... 62, 271
Gautam v Chakraborty (1996) 1 SCC 490............................................................................ 160, 196
Golaknath v State of Punjab AIR 1967 SC 1643 ............................................................... 37, 58, 266
Harsh Mander v. Union of India AIR 2018 Del 188.......................................................... 257
In Re Adoption of Paul, 550 N.Y.S.2d 815 ....................................................................... 273
In Re Baby M, 537 A.2d 1227 (February 3, 1988) .............................................................. 273
Indu Devi v. State Of Bihar,(2017) Petition(s) for Special Leave to Appeal (C) No. 14327/2017, Judgment of May 9, 2017 (Supreme Court of India) ......................................................... 283
Jayashree Wad v. Union of India, Writ Petition (Civil) 95 of 2015 ........................................... 218
Bibliography

Justice K S Puttaswamy v Union of India (2017) 10 SCC 1.............................................. 62, 272
Kapila Hingorani v. State of Bihar, 2003 Supp(1) SCR 175 ............................................. 273, 322
Keshavananda Bharati v State of Kerala (1973) 4 SCC 225.............................................. 58, 266
M.S. Anoop v State of Kerala Civil Writ Petition 33709/2015 (High Court of Kerala, 06 August 2016) ...................................................................................................................... 56
Maneka Gandhi v Union of India 1978 AIR 1978 SC 597..................................................... 61, 146
Minerva Mills v. Union of India AIR 1980 SC 1789 ............................................................ 278, 316, 326
Mrs. B.S Deepa v. Regional Passport Officer Madras, Writ Petition No. 29105 of 2014 and M.P. No. 1 of 2014 (High Court of Madras) ............................................................................. 239
National Legal Services Authority v Union of India (2014) 5 SCC 438 .......................... 62, 271
Pavan Agrawal v. Union of India W.O. (C) No. 841/2015 .................................................... 164
People’s Union for Democratic Rights v. Union of India AIR 1982 SC 1473 ........ 108, 197, 273, 320
Pt. Parmanand Katara v Union of India AIR 1989 SC 2039 .................................................. 62, 272
R. Rajagopal @ RR Gopal & Anr. v State of Tamil Nadu & Ors. (1994) 6 SCC 632 ........ 62, 271
Rama Pandey v. Union of India 2015 (221) DLT 756 ............................................................ 197
Ramakant Rai (I) & Anr. v Union of India & Ors. (2009) 16 SCC 565 ............................. 62, 272
Samar Ghosh v Jaya Ghosh (2007) 4 SCC 511 .................................................................... 113, 283
Samira Kohli v. Dr. Prabha Manchanda & Anr 1 (2008) CPJ 56 (SC) ................................. 103
Seema v Ashwani Kumar (2006) 2 SCC 578 ...................................................................... 194
Srimathi Champakam Dorairajan v The State of Madras AIR 1951 Mad 120 ................. 267, 319
State of Gujarat v. Hon’ble High Court of Gujarat,(1998) 7 SCC 392 ............................... 273
Suchita Srivastava & Anr. vChandigarh Administration (2009) 9 SCC 1 ............................. 196
Vasanth R. v. Union of India (UoI) And Others, (2001) IILLJ 843 Mad ....................... 211
Vishaka v State of Rajasthan 1997 (6) SCC 241............................................................... 149

Chapters, Books and Treatises
A Gewirth, Reason and Morality (Chicago, IL: University of Chicago Press, 1978) ........... 45
Bibliography


B.S Turner, Vulnerability and Human Rights 1 (Penn State Press, 2006) ........................................... 192


Catriona Mackenzie, Wendy Rogers & Susan Dodds (eds.) Vulnerability: New Essays in Ethics and Feminist Philosophy 3 (Oxford University Press, 2014) ............................................. 89


Deryck Beyleveld, Human dignity in bioethics and Biolaw (Roger Brownsword, Oxford University Press 2001) ................................................................................................................. 44, 48


Elly Teman, Birthing a Mother: The Surrogate Body Andthe Pregnant Self (1st edn, University of California Press, March 2010) ............................................................................................ 110

Bibliography


Jeremy Bentham, Traité de législation civil et pénale (1802) ........................................................................... 40

John Stuart Mill, On Liberty (Boston: Ticknor and Fields, 1863) ................................................................. 265


Krause F., ‘Caring Relationships: Commercial Surrogacy and the Ethical Relevance of the Other’in Krause F., Boldt J. (eds) Care in Healthcare: Reflections on Theory and Practice (Palgrave Macmillan, Cham, 2018) ......................................................................................................................................... 41


Lawrence Lessig, Code and other laws of Cyberspace (Basic Books, 1999) ............................................. 38

Margaret Atwood, The Handmaid’s Tale (McClelland and Stewart, 1985) ................................................. 86, 145


Martha C. Nussbaum, Frontiers of Justice: Disability, Nationality, Species Membership (Belknap Press 2007)............................................................................................................................................. 89

Peadar Kirby, Vulnerability and Violence (PlutoBooks, 2006)........................................................................ 54


Bibliography


Taber’s Cyclopedic Medical Dictionary (23rd edn., FA Davis Company) 160


**Articles, Essays & Journals**


Bibliography

A.C MacIntyre, ‘Dependent rational animals: Why human beings need the virtues’ (1999) 20 Open Court Publishing .......................................................................................................................... 182, 192
Amrita Pande, ‘Not an Angel, not a Whore: Surrogates as Dirty Workers in India’ Indian Journal of Gender Studies .................................................................................................................... passim
Amrita Pramanick & Swapnendu Banerjee, ‘Gestational Surrogacy Contracts and Social Ignominy with Discrete Efforts’ Department of Economics Jadavpur University Kolkata ...........41
András Bragyova, Kant and the Constitutional Review Kantian Principles of the Neo-constitutionalist Constitutionalism Acta Juridica Hungarica 114 (2011) 52 No. 2 97 .................42
Aristides N Haztis, ‘The Regulation of Surrogate Motherhood in Greece’ SOCIAL SCIENCE RESEARCH NETWORK (Sept 01, 2010) ...........................................................................................................229
Armenian Law on Reproductive Health and Reproductive Rights, 2002 .............................................246
Arneson, R. “Commodification and Commerical Surrogacy”, Philosophy & Public Affairs, 21(2), 132-164 .................................................................................................................................265
Bailey, Alison, Reconceiving Surrogacy: Toward a Reproductive Justice Account of Surrogacy Work in India (November 30, 2009). RECONCEIVING SURROGACY: TOWARD A REPRODUCTIVE
JUSTICE ACCOUNT OF INDIAN SURROGACY, Hypatia. Special FEAST Issue, Diane T. Meyers, ed., Vol. 26, No. 4, Fall 2011 ................................................................. 22
Brittany Cavens, ‘Surrogacy Law? The Unparalleled Social Utility of Surrogacy and the Need for Federal Legislation’ Department of Political Science (Wittenberg University, April 2010)........ 41
C Chatterjee and G Sheoran, Vulnerable Groups in India, The Centre for Enquiry into Health and Allied Themes (CEHAT) 1998 .................................................................................. 182, 260
California Code, Family Code: FAM ........................................................................ 247
Chandrima Chatterjee & Gunjan Sheoran, Vulnerable Groups in India, The Centre for Enquiry into Health and Allied Themes (CEHAT) 1998 ................................................................. 90, 96, 97
Bibliography


Dr. Ranjana Kumari, ‘Surrogate Motherhood: Ethical or Commercial’ Centre for Social Research 39 .............................................................................................................................................. passim


Eggers, Michele, "Embodying Inequality: The Criminalization of Women for Abortion in Chile" Doctoral Dissertations, 1059 (2016) : 2 .............................................................................................................................................. 273


Gendered risks, poverty and vulnerability in India Case study of the Indian Mahatma Gandhi National Rural Employment Guarantee Act (Madhya Pradesh) October 2010 Rebecca Holmes, Nidhi Sadana and Saswatee Rath, Overseas Development Institute and Indian Institute of Dalit Studies ........................................................................................................................................ 318


Hallie Liberto, ‘Ethical Theory and Moral Practice’ Vol. 17 No. 4 (August 2014) 619-629........... 55


Imrana Qadeer, ‘Social and ethical basis of legislation on surrogacy: need for debate’ Indian Journal of Medical Ethics (2009) Vol. 6 No. 1.................................................................................. 52, 103, 188, 290

Imrana Qadeer, ‘The ART of Marketing Babies’ (2010) 7(1) The Indian Journal of Medical Ethics 209 ................................................................. 161
Bibliography


Kaushik, Nikita. Law In Surrogacy. Indian Journal Of Health & Medical Law, [S.L.], V. 2, N. 1, P. 30-43, July 2019

Khurtsidze, Legal Regulation of Surrogacy, 165 GEORGIA EUROPEAN SCIENTIFIC JOURNAL(2016)


M Nöthling Slabbert,Legal Issues relating to the use of surrogate mothers in assisted reproduction, 5.1 THE SOUTH AFRICAN JOURNAL OF BIOETHICS AND LAW(2012)

M. Shafiqur, “Bride Trafficking within India” in V Mishra (ed.) Human Trafficking: The Stakeholders' Perspective 47 (SAGE, India 2013) 55

Macklin R., ‘Dignity is a useless concept’ BMJ 2003 327:14 19-20
Bibliography


Michele Eggers, ‘Embodying Inequality: The Criminalization of Women for Abortion in Chile’ Doctoral Dissertations (2016) 1059 2 ................................................................. 50


Nair, Smitha Sasidharan, and Rajesh Kalarivayil, ‘Has India’s Surrogacy Bill Failed Women Who Become Surrogates?’ Indian Journal of Women and Social Change 3, No. 1 (June 2018) ........ 322


Bibliography


Pearlin, L. ................................................................................................................................. 289


Protection of Children Born from Assisted Reproductive Technologies Act B.E. 2558 (2015)... 251


R.J Cook and M.F. Fathalla, Advancing Reproductive Rights Beyond Cairo and Beijing - International Family Planning Perspectives (Guttmacher Institute, Sep. 1996) ......................... 196


Rothhaar Markus, ‘Human dignity and human rights in bioethics: the Kantian approach’ Medicine, Health Care and Philosophy 13.3 (2010) 251-257................................................................. 44

Saravanan S., ‘An ethnomethodological approach to examine exploitation in the context of capacity, trust and experience of commercial surrogacy in India’ Philosophy, Ethics, and Humanities in Medicine: PEHM (2013) 8,10 ........................................................................................................ 25
Sarojini NB and Aastha Sharma, ‘The Draft ART (Regulation) Bill: In Whose Interest?’ (January-March 2009) VI Indian Journal of Medical Ethics 1 .................................................................................... 150
Senate Bill 353 Re-codifying RSA 168-B relative to surrogacy ......................................................................................... 252
Serene J. Khader, ‘Intersectionality and the Ethics of Transnational Surrogacy’ International Journal of Feminist Approaches to Bioethics Vol. 6 No. 1 (Spring 2013) 68-90......................................................... 20
Sharma R. S. (2014), ‘Social, Ethical, Medical & Legal aspects of Surrogacy: An Indian Scenario’ The Indian Journal of Medical Research, 140 (Suppl 1) S13–S16......................................................... 30
Bibliography

Sheela Saravanan. "Humanitarian' thresholds of the Fundamental Feminist Ideologies: ....... 324
Sheida Tabaie, Stopping female feticide in India: the failure and unintended consequence of ultrasound restriction, JOURNAL OF GLOBAL HEALTH, ................................................................. 211
Spriha Shukla, “Surrogacy Bill: A Much Needed Reform that fails the test” Observer Research Foundation, Dec. 21, 2018 ................................................................................................................. 276
Sunita Reddy and Imrana Qadeer, ‘Medical Tourism in India: Progress or Predicament?’ Economic & Political Weekly XLV, No. 20 (n.d.) 69-75. .............................................................................. 21
Surrogacy Arrangements Act, 1985 and Human Fertilization and Embryology Act, 1990........ 248
Techagaisiyavanit W., Reproductive justice dilemma under the new Thai law: Children Born out of Assisted Reproductive Technology Protection Act BE 2558’ 45201LAW J FAC LAW (2016). .... 234
Timms, O., ‘Ending commercial surrogacy in India: significance of the Surrogacy (Regulation) Bill, 2016’ Indian Journal of Medical Ethics, 3 [2 (NS)] 99 ......................................................... 29, 276
Vera Lúcia Raposo, The new Portuguese law on surrogacy - The story of how a promising law does not really regulate surrogacy arrangements 21(3) 230 JBRA ASSISTED REPRODUCTION (2017222
Xavier Xymons, Surrogacy comes to Vietnam, BIOETHICS (2016) ........................................ 226

Newspaper Articles
A Ghosh, ‘In fact: How focus on altruism, ‘close relatives’ overlooks realities’ Indian Express (26 August 2016)................................................................. 187
Abantika Ghosh, ‘Surrogacy legislation: is woman a child producing factory’ Indian Express (02 September, 2016) ................................................................. 84
Aditya Ghosh, ‘Cradle of the World’ Hindustan Times (23 December 2006) 18 ............... passim
Anindita Majumdar, Surrogacy, Oxford India Short Introductions (Oxford University Press 2019) 9 ............................................................................................... 246
Anuradha Mascarenhas, ‘Surrogacy Ban For Foreign Couples Sends ART Centres in City in a Tizzy’ The Indian Express (25 December 2015) ......................................................... 167
Aradhna Wal, ‘Surrogate Mothers say Regulate Practice, Don’t Ban it; Moves SC Opposing Restriction’, DNA (30 November 2015) ........................................................................ 86, 164, 181
Bhadra Sinha, ‘It amounts to sale of motherhood’: Surrogacy warrior who moved SC speaks up’ Hindustan Times (26 August 2016) ........................................................................ 85
Bhadra Sinha, ‘It Amounts To Sale of Motherhood’: Surrogacy Warrior Who Moved SC Speaks Up’ Hindustan Times (India, 26 August 2016) ........................................................................ 163
Bhadra Sinha, ‘Women are not Legally Empowered to Become Surrogates: Centre to SC’, Hindustan Times (04 February 2016) ........................................................................ 86, 166, 181, 309
Brenden Hills, ‘A couple who hired an illiterate Inda woman to be surrogate of their twins ordered to prove she wasn’t exploited’, The Sunday Telegraph (30 June 2013) ........................................... 101

Campaigners Call for Reforms to Surrogacy Laws, THE GUARDIAN, Jun. 6, 2019 ........................................... 240


Dhananjay Mahapatra, “Don’t put absurd curbs on dance bars: SC” Times of India, February 25, 2016, ................................................................................................................................. 295

Dipanjan Roy Chaudhary, Seeking to ensure protection of rights of vulnerable groups, India to UNHR, ECONOMIC TIMES, May 06, 2017 .................................................................................. 211


Gargi Mishra, ‘Our notions of Motherhood’ Indian Express (09 August 2019) .......................................................... 28

Hari G Ramasubramaniam, ‘Banning Commercial Surrogacy will expose Women to Exploitation’ The Economic Times (28 August 2016) ......................................................................................... 133

HT Correspondent, ‘Law panel recommends compulsory registration of marriage’ Hindustan Times (4 July 2017) .......................................................................................................................... 194

Julie Bindel, ‘Outsourcing Pregnancy: A Visit to India’s Surrogacy Clinics’ The Guardian (Ahmedabad, 1 April 2016) ................................................................. 170


Legal Correspondent, “SC modifies law imposing restrictions on dance bars in Maharashtra”, The Hindu, January 17, 2019 .................................................................................................................. 257


Manas Jena, ‘Good that New Bill to Rein in Commercial Surrogacy’ Daily Pioneer (3 September 2016) ................................................................................................................................. 101

Mohamed Thaver, ‘Mumbai Police go after Dance Bars with Hidden Cameras’ The Indian Express (10 June 2016) ...................................................................................................................... 136


Namita Kohli, ‘Moms on the Market, Sunday Hindustan Times (New Delhi, 13 March 2011) .... 23
Bibliography

Nergish Sunavala, ‘Humans of Anand: “We’re not baby making machines’ The Times Of India (08 September, 2016) .................................................................84

Owen Bowcott, ‘Surrogacy review to tackle laws declared unfit for purpose’ The Guardian, (4 May 2018) .................................................................145

P Dasgupta, ‘Do close relatives lend their wombs to childless couples’ Times of India (28 August 2016) .................................................................187

P Singh, ‘Cops Call it Forced Surrogacy’ Outlook (11 May 2017) ........................................189

Philip Sherwell, ‘India Surrogacy Ban Dismays British Couples’ The Telegraph (India, 18 November 2015) .................................................................167

Reema Gowalla, “Has the Transgender Bill 2019 failed to strike a chord with the community”Times of India, August 13, 2019 .........................................................256

S Saaliq, ‘Every third women in India suffers sexual, physical violence at home” News18 (8 February 2018) ........................................................................194


Sarah Haaji, ‘Cambodia Proves Fertile Ground For Foreign Surrogacy After Thailand ban’ The Guardian (Global Development, 19 August 2017) ........................................169, 287

Scroll Staff, Reading List: Six Article on Maharashtra’s dance bar ban and its impact on dancers, business owner, SCROLL (Jan. 17, 2019, 03:06PM). .........................................................211

Shashank Bengali, ‘India Scales Back “rent-a-womb” Services’ Los Angeles Times (25 January 2016) ..................................................................................152, 162, 287

Shemin Joy, ‘Govt ready to sent Bills to panels, Oppn says too late’ Deccan Herald (New Delhi, 07 August 2019) ..................................................................................27, 259

Teena Thacker, ‘Sunday Interview: Poor woman are exploited in the name of surrogacy-it must end’ Deccan Chronicle (28 August 2016, New Delhi) .................................................................17

Conventions and UN Documents


Madhu Purnima Kishwar, Strategies for Combating the Culture of Dowry and Domestic Violence in India’ Expert Group Meeting Violence Against Women: Good practices in combating and
Bibliography

eliminating violence against women UN Office on Drugs and Crime (UN Division for the Advancement of Women, 2005) ................................................................. 211
United Nations Division for the Advancement of Women, Convention on the Elimination of All Forms of Discrimination Against Women ....................................................................... 52, 112


Internet Materials

Madhavi Menon, ‘Surrogacy Regulation punishes women for being independent, mystifies motherhood as sacred’ (The Scroll, 06 August 2019) ................................................................. 322
‘Motherhood and Morality: India Debates the Surrogacy Bill’ (Sify, 29 August 2019) ............... 17
‘Vietnam welcomes first baby born through surrogacy’ (Nhan Dan Online, 22 January 2016) 253
Aloka A Dutta, ‘Surrogacy Regulation Bill 2018: 8 questions that we should be asking’ (Youth ki Awaaz, January 2019) ................................................................................. 28
Andrew Fagan, ‘Human Rights’ (Internet Encyclopedia of Philosophy) ........................................ 45, 46, 49
Anil Malhotra, ‘Rewriting Surrogacy Laws’ (Lawyers Update, June 2014) ................................... 153
Annie Banerji, “India’s transgender community says new bill violates their rights”, Reuters December 19, 2018 ......................................................................................... 256
Arijeet Ghosh & Nikita Khaitan, ‘A Womb of One’s Own: Privacy and Reproductive Rights’ (Engage, 31 October 2017) ......................................................................................... 51
Audrey Wilson, ‘How Asia’s Surrogate Mothers Became a Cross Border Business’ This Week in Asia (4 June 2017) ......................................................................................... 169
Ben Winslow, ‘Utah Supreme Court says law banning same sex couples from gestational agreements is unconstitutional’ Fox13 (Salt Lake City, 02 August 2019) ............................................. 28
Bibliography

Bhaskar Chawla, ‘Women Do Not Have a Legal Right to Become Surrogates, Says Government’ (Vagabomb, 4 February 2016) ................................................................. 166


Cabinet Briefing by Union Ministers, Cabinet briefing by Union Ministers Sushma Swaraj & J P Nadda in New Delhi: Cabinet gives its approval for introduction of Surrogacy (Regulation) Bill, 2016DD NEWS, Oct. 24, 2018., .......................................................................................... passim

Carney Scott, ‘Every Body has a Price’ (Red Markets, 2009) ......................................................... 172

Centre for Social Research, ‘Surrogate Motherhood: Ethical or Commercial (2012) 151, 183, 306


Despair Over Ban in India’s Surrogacy Hub’ BBC News (22 November 2015) ............................... 167

Emily Harris, ‘Israeli Dads Welcome Surrogate Born Baby in Nepal on Earthquake Day’ (National Public Radio: All Things Considered, 29 April2015 ) ................................................................. 169

Gaurav Mukherjee, ‘Who benefits from India’s move to ban commercial surrogacy’ (Oxford Human Rights Hub, 23 September 2016) ..................................................................... 23

Gina Maranto, ‘They are just Wombs’ Centre For Genetics And Society (12 June 2010) ........... 133

Gita Aravamudan, ‘Surrogacy Bill 2019 disempowers women, supersedes more pressing legislation on Artifical Reproductive Technology’ (Firstpost, 14 August 2019) ......................... 28

Himani Chandna & Apoorva Mandhani, ‘Restricting surrogacy to relative won’t work, doctors say as bill is tabled in Lok Sabha’ (The Print, 16 July 2019) ......................................................... 27

Human Rights Law Network, ‘Bombay High Court Permits Surrogate Mother to Terminate her 24 Week Old Pregnancy’ (HRLN, 12 December 2018) ....................................................... 321

IANS, ‘Cabinet Approves Surrogacy Regulation Bill’ Business Standard (24 August 2016) .......... 185


J Yee, ‘Women strap on bellies to keep surrogacy secret’ BioEdge (5 May 2012) ....................... 187

Julie McCarthy, ‘Why Some of India’s Surrogate Moms Are Full of Regret’ National Public Radio (Weekend Edition Sunday, 18 September 2016) ..................................................... 151, 152, 171
Bibliography

Karitekeya Bahadur, ‘Missing the Point on Surrogacy’ (Pragati, 04 February 2019) .......................... 26
Katie Dangerfield, ‘Rent-a-womb Crackdown: Australian Woman on Trial For Illegal Surrogacy in Cambodia’ Global News (World, 17 July 2017) .......................................................................................................................... 168
Lindsay Murdoch, ‘Cambodia Warns Australia Over Illegal Surrogacy Services’ The Sunday Morning Herald (2 August 2016) .............................................................................................................................................. 170
Lois McLatchie, ‘Surrogacy Contracts: A Blight on the Human Dignity of Surrogate Mothers and the Children they Bear’ (The Centre for Bioethics and Culture Network, 27 June 2018) ........... 44
Mansi Thapliyal, ‘India Outlawed Commercial Surrogacy – Clinics are Finding Loopholes’ (The Conversation, 24 October 2017) .............................................................................................................................................. 170
Martha Albertson Fineman, ‘Fineman on Vulnerability and Law, New Legal Realism Conversations’ (New Legal Realism, 2015) .............................................................................................................................................. 54
Media Report (Surrogacy Bill Regulation) (26 December to January), Indian Council for Medical Research, Department of Health Research, Ministry Health and Family Welfare, Government of India .................................................................................................................................................. 324
N Chaudhari, ‘Regulating Assisted Reproductive Technologies in India’ (Oxford Human Rights Hub, 12 November 2015) .............................................................................................................................................. 201
Neetu Chandra Sharma, ‘Cabinet approves introduction of surrogacy regulation bill’ (LiveMint, 03 July 2019) ............................................................................................................................................... 250
Nirmala George, ‘Surrogates Feel Hurt by India’s Ban on Foreign Customers’ The Associated Press (18 November 2015) .............................................................................................................................................. 167
Nisha Agrawal, ‘Inequality in India: What’s the Real Story?’ (World Economic Forum, 4 October 2016) ............................................................................................................................................... 93
Nita Bhalla, ‘India’s Surrogacy Tourism: Exploitation or Empowerment?’ Thomson Reuters Foundation (4 October 2013) ............................................................................................................................................... 146
Online Bureau, Lok Sabha Passes Surrogate Bill, HINDU BUSINESS LINE, Oct. 19, 2018: ................ 219
Bibliography

Phillip Rich, ‘What Can We Learn from Vulnerability Theory?’ (Honors Projects, 2018) 352 ...... 54


Press Information Bureau, Government of India Cabinet, ‘Cabinet approves Introduction of the Surrogacy (Regulation) Bill, 2016’ .................................................................................................................. 219, 251

Press Information Bureau, Government of India, Cabinet, ‘Cabinet Approves Introduction of the Surrogacy (Regulation) Bill 2016’ (24 August 2016) .................................................................................................. 95, 219


PTI, ‘Lok Sabha passes Bill which will ban commercial Surrogacy’ (News18, 05 August 2019) ... 25

PV Swati, ‘Gurgaon Police: After 8 PM Women would be ‘Inviting’ Rape’ YKA (19 March 2012) ........................................................................................................................................................................ 136

Rajni Pandey, ‘Restriction On Surrogacy May Have Far Reaching Impact’, Medical Times (India, 20 October 2015) ...................................................................................................................................................... 162, 218

Raksha Kumar, ‘India’s Surrogacy Tourism Takes a Hit’ Foreign Affairs (11 December 2015). 167, 168


Sanyukta Dharmadhikari & Sharanya Gopinathan, “Equal to killing us: Why India’s transgender community is rejecting the Trans Bill” The News Minute, December 18, 2018........ 256

Sarmishta Subramanian, ‘Wombs for rent: Is paying the poor to have children wrong when both sides reap such benefits?’, (Maclean’s, 2 July 2007) ................................................................. 117

Saumya Sahni & Aparimita Singh, ‘Surrogacy Bill exploits the people it seeks to protect’(Delhi Post, 26 December 2018) ................................................................................................................................................ 26, 322

Sayantan Bera, Nikita Doval, ‘India Govt Moves to Ban Commercial Surrogacy’ (LiveMint, 25 August 2016) .......................................................................................................................... 17, 220

Sayantan Bera, Nikita Doval, ‘India Govt Moves to Ban Commercial Surrogacy’ (LiveMint, 25 August 2016) .......................................................................................................................... 252
Bibliography

Scroll Staff, ‘Hyderabad: Police Bust Surrogacy Racket, Find That 45 Women Had Been Confined for Nine Months’ (Scroll, 8 June 2017) .................................................................................................................. 168
Sharanya Gopinathan, ‘Explainer: Everything that is wrong with Surrogacy (Regulation) Bill’ (The News Minute, 20 December 2018) .............................................................................................................................................. 24
Shreeja Sen, ‘Against Commercial Surrogacy: Govt Tells Supreme Court’ (LiveMint, 28 October 2015) ........................................................................................................................................................................... 252
Sruthi Sagar Yamunan, ‘The Daily Fix: Surrogacy bill aims to end exploitation of vulnerable women—but has serious flaws’ (Scroll, 20 December 2018) ................................................................. 26, 28, 324
Sruti Bandopadhayay, ‘The Process of Lawmaking in India’ (Accountability Initiative, 10 August 2010) ........................................................................................................................................................................... 27
Surabhi Malik, ‘Better to Dance than to Beg,’ says Supreme Court on Plea on Dance Bars’ (NDTV, 25 April, 2016) ........................................................................................................................................................................... 106
T Thacker, ‘Poor women are exploited in the name of surrogacy...It must end’ Asian Age (28 August 2016) quoting Dr. Soumya Swaminathan, Director-General of the Indian Council of Medical Research ................................................................................................................................. 186
The Print Team, ‘Commercial Surrogacy: Prone to misuse or should be allowed with regulations’ (The Print, 16 July 2019) ........................................................................................................................................................................ 322
The Right to Life with Human Dignity: Constitutional Jurisprudence .................................................................................................................. 271
Utkarsh Srivastava, “Maharashtra’s Ban on Dance Bars Has Done More Harm Than Good” The Wire, March 28, 2016 ................................................................................................................................. 257
Vietnam welcomes first baby born through surrogacy, NHAN DAN ONLINE (Jan. 22, 2016), ........ 225
The popular usage of surrogacy is to describe the act of a woman birthing a child for another. Surrogacy, though often clubbed under the umbrella of ARTs, is actually an arrangement and not a technique as it instrumentalizes several types of ARTs to achieve its goal. It 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 legal position on surrogacy in India is a controversial one, having progressed from an active commercial industry to being prohibited through a state-imposed restriction. The Surrogacy Regulation Bill, 2016 (now the Surrogacy Regulation Bill, 2019) is in its final rites of passage through the Indian Parliament. The objective of legislators is to ensure non-exploitation of the surrogate for it has been seen the world over that surrogacy arrangements create a conflict of rights and interests, and they may often result in exploitation of the surrogate, particularly those from economically disadvantaged backgrounds. Yet, in 2015, when Indian regulators banned the availability of surrogacy to foreign nationals and also started taking steps towards banning commercial surrogacy outright and only allowing altruistic surrogacy arrangements, which involved a close relative of the intending couple acting as a surrogate, comingled amongst the voices of those decrying the prohibitionary stance were those of women who had acted as surrogates and even social workers who had worked amongst surrogates and researched their conditions.

It appears that in the period of about a decade in which surrogacy was allowed to mushroom in India, unhindered by legislation, it created an expectation of being a labour option or opportunity. It also became a matter about the surrogate mother’s sexual and bodily autonomy – which meant allowing her to decide what is best for her.
The steps that the Indian Government has now taken of prohibition appear too simplistic to deal with the innate complexity of an industry that had been up and running for much too long. Also, anecdotally, the policy reversal of the Government of India has not been welcomed or supported by the women whom it had identified as being exploited. This shows the clash or disconnect between the women who would have identified themselves as past or potential surrogates and the regulators.

In most debates the voice of the surrogate is scarcely heard while proposed and realized legislative changes have a major potential impact on her. That surrogates themselves have opposed the proposed legislation suggests that the proposed law is unable to address their real concerns.

The latest attempts at prohibition have also been severely critiqued by factions in the Government itself and also the opposition. It is criticised as out of sync with realities on the ground, drafted without adequate stakeholder consultation, patriarchal in approach and moralistic, refusing to recognize women’s agency and not being in sync with constitutional jurisprudence. The last flaw reflects events that unfolded in Utah, just days before the passage of the 2019 Bill on surrogacy, where a restrictive law on surrogacy was declared unconstitutional. Indeed, it is unclear if the Surrogacy Bill and its development in India have in any way engaged with the Constitution of India or even with its primary stakeholders. Concerns have been raised that a complete moratorium may well push the industry underground, putting the surrogate mother in a worse-off position.

Such criticism, after a period of more than 10 years has been invested in the development of a law on the subject, suggests a strong need for analysis. The fact is that so many changes have taken place in the regulatory position itself that this is a source of tension on its own.

What needs to be seen is whether the surrogate herself has become a victim of these tensions or whether the shifts have given her strength.
In India, the subject of surrogacy has seen a lot of public discourse but been subject to limited academic study from a legal or constitutional viewpoint. Insufficient work has been done that bridges social research amongst surrogates with legal theory, and hence a gap has been created between realities on the ground and regulatory action, leading to the disconnect described above and to the 2019 Bill being described as a casual approach to a serious concern. For the further development of surrogacy regulation, it is imperative that this gap be bridged.

This would allow a more nuanced analysis and the development of a legal position that moves beyond a universalistic moralizing position and develops the concept and arrangement of surrogacy in the more transparent and non-stigmatized context that is highly pertinent to surrogate mothers, who have been identified as key stakeholders that the law should aim to save from exploitation.

The aim of this thesis was, hence, to make an explicit attempt to operationalise the Constitution of India in early law making with the endeavour that the legislation on surrogacy be representative its most vulnerable stakeholder - the surrogate. To do this, the voice of the surrogate needed to be made visible - a process I referred to in this thesis as visibilising or visibilisation. A central argument of this thesis is that the surrogate mother, by virtue of her structural reality, is vulnerable to exploitation, subject to the legal framework that is designed around her. In order to design a regulatory approach that takes her structural realities into account, it is necessary to expose her vulnerabilities, understand if those involved in designing regulations have been listening to her sufficiently, and if the current proposed regulatory regime ameliorates or exacerbates her vulnerabilities.

The main research question that this thesis answers was formulated as follows:

How can visibilising the vulnerabilities of surrogate mothers through a constitutional lens impact the trajectory of policy development on surrogacy in India?
Summary

The main research question was answered with the help of three research sub-questions.

1) What are the structural realities of a surrogate mother or potential surrogate in India that contribute to her vulnerabilities?

2) What is the trajectory of policy development on surrogacy, the role of the surrogate in it and the impact of the policy developments on her?

3) What are the gaps between policy objectives and practice, and are there any ways of dealing with such gaps in order to help the surrogate cope with her vulnerabilities and also result in policies that are constitutionally sound?

These sub-questions were based on a mixed method approach. These questions formed a common preface, which, over the course of five chapters (Chapters 4 to 8), this thesis progressively attempted, to answer the main question.

Chapter 4

The Government’s changing stance on surrogacy was supposedly to end exploitation of the surrogate mother, but we cannot really begin to understand what exploitation entails if we don’t first have an adequate idea of who it is that is being exploited and where this exploitation comes from.

The main aim of Chapter 4 was thus to develop an understanding of the construct of the surrogate and, concomitantly, understand how the possibilities of exploitation and its regulation are necessarily framed by interconnected legal, societal, medical and economic structures. In this regard, the question of the surrogate’s vulnerability to potential exploitation formed one of the central aspects of this paper in its attempt to understand the construct of the surrogate in the Indian context.
Another key element was to understand the relationship between the law, vulnerability and the possibility of exploitation before we asked how this relates more specifically to the issue of surrogacy. This understanding is highly relevant today as actions seeking to protect vulnerable individuals or groups may often appear paternalistic, and therefore are questioned by the very groups for whom protection is sought.

In Chapter 4, utilising studies done amongst surrogates in India, we developed an understanding of the construct of the surrogate and also aimed to understand how the possibilities of exploitation and its regulation are necessarily framed by interconnected legal, social, medical and economic structures.

Upon analysis, several further and differentiated layers of vulnerability become visible when one read the practice of surrogacy against the referential framework of biomedical research (i.e., the surrogate mother) as the ICMR 2000 Guidelines proposed: vulnerabilities such as cognitive or communicative, deferential, economic, and social emerge thus as separate and overlapping layers.

We then went on to examine the ways in which legislators and policy-makers can understand these key vulnerabilities in a visible manner in order to examine their potential for exploitation. This lead to the development of the Vulnerability Construct.

Chapter 5

In this chapter, we analysed how the position and rights of surrogate mothers were changed by the two proceedings before the Supreme Court of India, which took place in 2008-2009 and 2014-2015. This analysis took, as its starting point, the vulnerability of the surrogate mother and then aimed to understand the consequences for her of the rulings of the Supreme Court in the context of a highly controversial procedure. The two events were examined in relation to
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Supreme Court records, first-hand experiences, interactions with stakeholders and media accounts.

The analysis showed that surrogate mothers have been at the receiving end of discriminatory treatment by both the Government of India and the Supreme Court of India. In 2008-2009, it led to the exacerbation of vulnerability and the creation of a multi-million-dollar surrogacy industry, which was fuelled by and generated further discriminatory treatment. In 2014-15, it led to de-recognition of the surrogate as a stakeholder and put her at risk in a shifting black market with no legal protections. The legislative body’s unwillingness to look at the situation through a prism of the constitutional ideals of personal liberty, equality and dignity, with safeguards against discrimination, has led to active discrimination against the surrogate mother and her systematic exclusion from stakeholder groups. It was concluded that the Supreme Court’s volte-face cost the surrogates much more as they were left to their own devices, possibly worse off than when they had approached the judiciary. By declining to contradict the stance of the Union of India, the Supreme Court rendered the surrogate invisible. From here on, if she participated in a surrogacy arrangement, the onus was on her to show how she was exercising her reproductive rights within the confines of marriage and in accordance with the instructions of the Union of India. Anecdotal evidence that was considered also revealed that in reality surrogacy continues but is now under wraps and the surrogate is now even more invisible, more vulnerable, and more difficult to access.

From the analysis in Chapter 5, we also learnt that there is no documentary evidence of the ICMR having initiated research among surrogate mothers or that its policies have been informed by their experiences.

Chapter 6

In this chapter we critically examined the extreme shifts in the Indian regulatory position for surrogacy that have come about in the past decade, with a specific focus on the 2016 Surrogacy
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(Regulation) Bill (now recast as the 2019 Bill). This proposed legislation now only permits altruistic surrogacy with an added condition that the surrogate must be a close relative. The stated objective of the proposed law is the prevention of exploitation of surrogates. Through the conceptual lens of vulnerability, developed in dialogue with Chatterjee (1998) and Mackenzie et.al (2014), this paper asked how the 2016 bill impacts the vulnerability of a surrogate mother and whether it serves as a constitutionally sound approach to end her exploitation. It problematized the government’s proposed legislative stance, which retains a legally enforceable contract in the “altruistic” arrangement with a close relative, and argued that such a stance does not place the surrogate and her vulnerabilities at the heart of the arrangement.

The overarching concern borne by the analysis was the impact on the Vulnerability Construct, particularly legal vulnerability. As the term suggests, “legal vulnerability” is necessarily contingent upon the legal framework that frames an issue; surrogacy in this case. As a proposed law increases restrictive positions or is unable to address the interplay of the above vulnerabilities, the scope of legal vulnerability deepens. Hence, legal vulnerability should be understood as an all-encompassing risk that needs to be assessed not only when a woman agrees to act as a surrogate but throughout the surrogacy arrangement and even after it ends. Thinking towards an ethics of vulnerability for surrogacy, we begin to understand that it is incumbent upon legislative bodies to keep the risk of legal vulnerability to a minimum. In the Vulnerability Construct, the category of “legal vulnerability” can be seen to have an impact on every layer of vulnerability with the capacity to exacerbate or ameliorate each layer.

The proposed Bill seeks to avert the exploitation of surrogates by, primarily banning the commercial aspect of surrogacy, i.e., only allowing altruistic surrogacy, and, thereafter, only allowing a close relative to act as a surrogate. A contract however has been deemed necessary in the event that the surrogate refuses to hand over the child. This suggests that while a surrogacy arrangement will have no commercial elements, it is still to be enforced legally by
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way of contract; meaning, a close relative acting as a surrogate would need to be bound by contractual obligations.

The analysis in this paper showed that the familial bonds emphasized by the altruistic arrangement are at odds with a legally enforceable mandatory contractual arrangement. The morality of a legally enforceable contract in surrogacy is questionable, particularly one that cannot be withdrawn from given the nature of the transaction. The added fact that the surrogate cannot legally be remunerated for her role makes it akin to bonded labor. This possibility may raise the risk of the contract of surrogacy becoming “forced labor”. Article 23 of the Constitution of India prohibits forced labor. That the surrogacy arrangement is to take place within the four walls of family or that of a surrogacy hostel, renders invisible an arrangement that could well be the breeding ground for domestic violence and exploitation. All of this suggested that the 2016 / 2019 Bill might bring about a position of even greater vulnerability for a surrogate mother.

The analysis also concludes that the 2016 Bill reflects an acute lack of consideration for the efforts of the surrogate and fails to recognize her contribution in the arrangement. It also fails to dismantle the surrogacy industry (ART clinics, surrogate hostels and agents) and criminalizes the surrogate for her participation without understanding her economic or deferential vulnerability. This legal position compounds her legal vulnerability.

Chapter 7

India’s current move to prohibit commercial surrogacy is by no means an isolated one; rather, it is part of a global outlook towards regulating surrogacy in various ways that is taking shape across the world. While some countries like France and Germany ban all forms of surrogacy, others such as Australia, New Zealand, Greece, the United Kingdom and South Africa have legislations that ban commercial surrogacy while allowing altruistic surrogacy. With India’s current stance, it has joined Cambodia, Nepal, Thailand and the Mexican State of Tabasco, in
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the shift from permitting commercial surrogacy for both its nationals and foreign nationals towards prohibiting or limiting such arrangements. Georgia, the Russian Federation, Ukraine and some states of the USA such as California remain in the minority as they continue to provide commercial surrogacy not only for their own citizens, but also for foreign nationals. Israel allows commercial surrogacy only for its own nationals in a tightly regulated structure. Vietnam is possibly the only country in the world that reversed its complete prohibition on surrogacy and now allows altruistic surrogacy through close relatives – a position very similar to what India is hoping to achieve with the 2019 Bill.

One of the key concerns that formed the basis of this paper was that in following this mind-set about surrogacy, the Indian government might be undermining the socio-cultural, economic and political conditions peculiar to the Indian legal subject, namely, the intersections between individual freedoms guaranteed under the constitution of India and the socio-economic inequalities and discrepancies that obstruct this access on account of gender, class and caste norms. What may be being overlooked in India’s current stance is that the 10-year run of commercial surrogacy rested on the concept of consent and an individual freedom of contract. From this, we have moved to a state-imposed restriction.

In this chapter, we first sought to comprehend and understand the Indian perspective on surrogacy by analysing the vulnerability of Indian surrogates through a vulnerability construct, while also highlighting the relevance of this construct to surrogacy. Further, we identified that the regulatory position on surrogacy has oscillated greatly since the inception of the surrogacy industry in India. We traced these oscillations along a spectrum – Prevention (at the outset of the practice, preventing exploitation and misuse of technology and the body), Proliferation (the growth of surrogacy into an industry, largely unregulated) and Prohibition (a complete ban in response). We then pictorially interpreted this spectrum. This was to understand, in a side-by-side comparison, the various changes that have occurred over the spectrum in key features of each of the shifts in legal position. This allowed us to substantiate the disconnects with the legal
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stance that regulators wish to adopt that have happened during the development of the law on surrogacy as each shift has occurred on the spectrum.

In the second part, we drew upon international comparisons and approaches to commercial and altruistic surrogacy across the globe to cull out lessons that can be learnt from each jurisdiction. This thorough study of the journey of surrogacy in India and a comparative study of the legal positions in different jurisdictions ultimately suggested a dire need for the Indian law makers to revisit, reassess and re-analyse the Surrogacy Regulation Bill, 2019, before it becomes a law that may not be constitutionally sound.

In conclusion, we saw that the 2019 Bill does not provide for the rights of the surrogate, as is usually done in all altruistic regimes; these include her right to medical termination of the pregnancy under the law of the country (without discrimination) and her right to counselling before and during the arrangement. There is also no provision for her actual expenses incurred during the arrangement, which is provided in all other altruistic regimes with the exception of Vietnam. The 2019 Bill mandates pre-birth consent, and the surrogate in effect surrenders all her rights before she has even undergone the rigours of the surrogacy process. Such pre-birth orders are common in jurisdictions that allow commercial surrogacy through a gestational carrier such as New Jersey (USA), New Hampshire (USA), Israel and California (USA). All altruistic regimes, with the exception of Greece (in compensation, it has a post-birth parentage order requirement), require the surrogate’s post-birth consent. We observed that no post-birth oversight is provided for in the 2019 Bill on surrogacy. Another critical point of departure in the 2019 Bill is that it fails to declare the surrogacy arrangement as unenforceable. This position has been adopted by all five altruistic regimes in comparison. Enforceability of the surrogate contract is a familiar element only of countries that allow commercial gestation surrogacy.

Whilst understanding the gaps, we also learnt from the comparative analysis with other jurisdictions that they offer lessons that regulators can learn from, to fill these gaps. The
Vietnamese experience suggests that while the risk of illegal surrogacy still remains, on the whole, the offer of intra-familial, non-commercial surrogacy can be operationalized, but to do this, the law and policy need to center around the surrogate in the surrogacy arrangement. The surrogate needs recognizable rights as the legal mother irrespective of the genetic contribution of the intending parents. Greece shows that despite checks and balances, altruistic surrogacy is not easy to attain, even in its widest definition, and under the table transactions continue to occur. This also demonstrates the need to consider compensated surrogacy, with sufficient safeguards, as has been suggested by the Parliamentary Committee, or as is now being considered as a reform in the United Kingdom. The Thai experience shows us that by placing the onus of responsibility on the service providers, i.e., the medical practitioners, for ensuring that every case placed before the committee for approval abides within the requirements of the law (and consequent penalty for failure), we can create a strong deterrent against misuse. Moreover, the Thai law has a single window of clearance, which allows better record keeping, tracking, monitoring, and documentation. Additionally, the power of the surrogate under Thai Law, i.e., her right to an abortion (conducting it or refusing it) and determining the surrogacy arrangement as voidable while still continuing to be eligible to claim for expenses, is a very positive step and a lesson worthy of being emulated. From Australia, we learn the importance of a post-birth parentage framework in addition to pre-conception safeguards. Oversight is necessary at every stage to ensure the surrogacy arrangement is not exploitative of the surrogate. It is further noted that in all the countries that only allow altruistic arrangements, the surrogacy arrangement is not treated as a contract. In the majority of those jurisdictions, there is no automatic transfer of parenthood, and the birth mother is considered the legal mother. Clearly, altruistic surrogacy has not been treated as an arrangement incurring a mandatory obligation, which is legally enforceable.

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 is causing a juxtaposition of conditions, which are more in sync with commercial arrangements.
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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.

Chapter 8

In Chapter 8, our focus was to see how the proposed law could successfully prohibit the potential exploitation of surrogate mothers in a manner that strengthens them and is constitutionally sound. We summarised what is known about the surrogate mother or the potential surrogate mother (referred to as a surrogate in this thesis) and their structural realities. We briefly described the theoretical approaches to surrogacy and suggested that these are subsumed in the Constitution of India. Here, we developed 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 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.

We then suggested 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. Here we took coping to be a crucial counterpart to vulnerability. If we understand vulnerability as an indication of an individual’s reduced capacity to respond and act, the act of coping with the very circumstances that render them vulnerable is thrown into sharp relief.

Taken together, an overarching finding of this study is that the mere existence of vulnerability does not automatically suggest the existence of exploitation. The majority of the surrogates who participated in the research studies appear to be making very active choices among the
limited options they have. They also appear to be exerting their agency, sometimes even against their spouses and family members, to achieve their aspirations. As they learn from their experiences, they find themselves in better positions of negotiation. This is the roadmap of empowerment.

Another prime conclusion of this study is that after being excluded, surrogates have been systematically discriminated against in various clinical practices and even the altruistic nature of surrogacy proposed may be a restriction on their fundamental rights of reproduction and against forced labour. Also, there are concerns of their rights of bodily integrity being violated and their agency in abortion (of the limited nature given in the MTP Act) is being subjected to the requirements and consent of others. While restrictions may be imposed on certain fundamental rights, it is necessary that such restrictions do not trample on any of the other fundamental rights.

The significance of this is even more pressing when we consider legal vulnerability and visibilise its impact on the surrogate. Here in the research we are able to uncover constitutional unsoundness in the proposed legislation. This is primarily found in the forced nature of the altruistic transaction for the surrogate. With the knowledge that such legislation may be doomed to fail and has failed the surrogates it wishes to protect, this thesis hopes to impress on regulators that they need to consider different solutions than the 2019 Bill and address surrogacy through various modes and mixes of regulation for the ultimate goal of a constitutionally sound legislation is to prevent exploitation. The state itself, through the legal positions it takes, can exacerbate or ameliorate vulnerability or what we have identified and specifically verbalised in the vulnerability construct as legal vulnerability that encompasses all other forms of vulnerability. The positive / negative influence of law on vulnerability to cause vulnerability in itself has not previously been discussed and this we believe is key in this analysis.
ACKNOWLEDGEMENT

It takes a village to raise a child. And when one has to complete a doctoral thesis along with raising a child, it possibly takes several townships. I would not be penning this concluding chapter if not for the people who stood behind me and with me every step of the way in this journey. Their constant motivation, support and encouragement are a debt I cannot settle in this birth or the next.

First and foremost, I thank my promoters Professor Dr Joske Bunders, Professor Dr J. T. de Cock Buning and my co-promoter Dr Soumitra Pathare. It is their guidance that helped focus my work. Prof. Buning’s interest in my subject and early comments gave my work direction and Dr. Pathare’s insightful and timely comments helped me better my writing. I am particularly indebted to Prof. Bunders, without whose efforts I can truly say this work would not have reached its conclusion. Her intuitive questions helped give my work shape and under her patient tutelage my mess of thoughts found a clear voice. I am forever grateful to her for her optimism and her faith in me. It kept me going through many dark times when I felt lost.

Next, I thank my co-author Ms. Divya Nadkarni who, along with Prof. Bunders, gave my often ramblings much needed succinctness. Ms. Nadkarni lent me not just the wealth of her knowledge and the beauty of her penmanship but also her good humour and patience tempered with criticism when merited and a healthy dose of sarcasm to help me see the light when most needed.

I thank Ms. Alison Fisher, Ms. Deborah Eade and Mr. Callum Gunn for editing my work, often at very short notice and yet in a timely and complete manner.

I am grateful to the members of doctoral committee for reading my thesis and supporting my work. I also thank the administration of Athena Institute for Research in Innovation and
Acknowledgement

Communication in Health and Life Sciences, Vrije Universiteit Amsterdam and ILS Law College, Pune for their kind support.

I owe a world of gratitude to Prof. Jaya Sagade. Her empathetic guidance showed me the path to completion. I thank Prof. Vaijayanti Joshi for her faith in my abilities and support. I also thank Prof. Nilima Bhadbhade who has forever inspired me towards original thought. I wish that Prof. H. P Deshmukh could have been alive to see me realise this milestone that he had hoped for me ever since I studied law under him.

I thank Dr. Julie Thekkudan, Mr. Varad S Kolhe, Ms. Dhanya Nair, Advocate Arjun D Singh, Ms. Shrruti Garg and Prof. Suvarna Nilakh for their unfaltering support and enthusiastic help. I owe a special thanks to Ms. Kiran Doshi who illustrated the cover of this work and captured the strength and dreams of the feminine being in her imagery. A special mention is necessary for my friend Mr. Karel Njimen without whom I would not have been able to study the surrogacy industry as closely as I got to.

Last but not the least, I thank my parents – Dr. Pushkar Singh and Dr. Rashmi S Rudainwal, not just for their parenting but for being my inspiration to examine the intersections of law, health and gender. I thank Ms. Bindu Saxena and Mr. Shailendra Swarup who did not just mentor me in law but helped me persevere through unimagined difficulties as this work took shape. Finally, I thank my son – Vivaan, who despite being only six blessed me with resolve and wisdom beyond his years.