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WHAT DOES A SOUND, PROGRESSIVE AND INCLUSIVE SURROGACY BILL NEED TO CONSIDER?

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ABSTRACT

Surrogacy is so complex and divisive an issue that it is yet to witness a unanimous judgement amongst feminists, welfare groups and state actors. Questions and concerns about monetizing reproductive labor, commodification and exploitation are wholly valid but are juxtaposed with equally valid concerns about reproductive autonomy and individual choice. Consequently, we lack a cohesive and coherent legislature that addresses the needs of all stakeholders while carefully preventing moralizing rhetoric from monopolizing the discourse. The 2016 and 2019 Surrogacy (Regulation) Bills were a response to India's unregulated commercial surrogacy market and marked an attempt to regulate the practice. A critical look at the proposed legislations exposes key shortcomings in understanding the social contexts within which stakeholders make decisions and in addressing the unique that gender, sexuality and class distinctions pose. However, the two bills can be used as a lens to understand dominant social and political perceptions of personhood, family and parenthood to arrive at a policy that is cognizant of social realities and is premised on the promise of reproductive justice.

Keywords: Commercial Surrogacy, altruistic surrogacy, assisted reproductive technology, exploitation, reproductive autonomy, Surrogacy (Regulation) Bill (2016, 2019)

TECHNOLOGY AND ITS VALUE-LADEN CONTEXT

Developments in technology since the 1960s have challenged natural barriers to human ability, allowing people more control over their circumstances. With advances in technology aiding medical efforts, it came to be accepted as a solution to the problems of life. However, the

human body, which is the site of medicinal practices, is layered with social, political, cultural and religious meaning. Therefore, technological encroachments on the body, whether they be to create, destroy, alter or sustain, cannot be value neutral in their intent or in their consequence. Being beyond the natural order of things, they challenge normative conceptions of ethics, morality, personhood, ownership and these challenges have led to dialogues in political, religious and cultural spheres.

Women's bodies become specific sites of contestation and conflict. Battles for autonomy, self-determinism and control are juxtaposed with limiting gender roles, taboos, stereotypes and expectations of virtue. Across cultures it is often explicit that motherhood is the highest possible virtue a woman can attain, which is why women who face issues with infertility and are unable to produce a child naturally have been looked down upon. While fatherhood may not be seen as the penultimate aim for men, the natural ability to produce a progeny has been given much social, cultural and religious importance. Societal expectations aside, it is natural for men and women to experience an innate biological desire to have children genetically linked to them. To confront one's inability to naturally conceive a baby of one's own is often a traumatic experience and has been linked to cases of depression and anxiety.

ASSISTED REPRODUCTIVE TECHNOLOGY

In the light of this characterization of reproduction as being socially embedded, technology that enhances one's abilities or chances of reproduction has gained a specific niche in public and political conversations. Assisted Reproductive Technology (ART) is that technology that deals specifically with the issue of infertility. Along with gamete preservation and IVF, it has also made it possible to detect the sex of a fetus, check for chromosomal abnormalities, and make the process of abortion safer and more medically precise. India's efforts to regulate ART can be traced back to the Pre-Conception and Pre-Natal Diagnostic Techniques Act of 1994[i] in response to the rise of prenatal sex-selection practices, female feticides and the consequent fall in the country's gender ratio (National Commission for Protection of Child Rights 1994). Furthermore, the Indian Council for Medical Research (ICMR) issued the National Guidelines for Accreditation, Supervision and Regulation of ART Clinics[ii] and set up rules and terms for stakeholders involved in the ART industry (Indian Council of Medical Research 2005). In 2009, the Law Commission of India observed the shortcomings of the commercial surrogacy industry in India and recommended the prohibition of commercial surrogacy, and regulating surrogacy practices in India to allow for only altruistic surrogacy[iii] (India 2009)

What prompted India to propose these regulatory measures was the rise in reproductive tourism in the early 2000's. At that time there were no statutory laws or acts pertaining to ART in general and surrogacy in particular. Apart from easy access to infertility treatments and cheap services at thousands of ART banks and clinics, India made it easy for foreign intended parents to procure a surrogate and avail her gestational services in exchange for monetary compensation. This is known as commercial surrogacy and the Indian commercial surrogacy industry was estimated at $400 million dollars a year in 2012 by the United Nations (Reuters 2013)[iv]. Following that there were multiple, separate attempts to regulate surrogacy. In 2013, homosexual couples and single parents, foreign or national, were banned from availing surrogacy (The Telegraph 2013)[v]. The draft ART Bill that was formulated in 2008, reviewed and redesigned in 2010 and 2014 but was never passed as law. In 2015, in a sudden move, the government banned commercial surrogacy altogether for foreigners (BBC 2015)[vi]. Shortly thereafter, the Surrogacy (Regulation) Bill, 2016 was introduced in the Lok Sabha which sought to ban commercial surrogacy in India and making altruistic surrogacy through a close female relative the only alternative for married, Indian, heterosexual couples who could prove five years of infertility.

THE SURROGACY REGULATION BILL, 2016

The 2016 bill[vii] pertaining to surrogacy accurately represents the fears of those who oppose the practice of commercial surrogacy. The primary argument against commercial surrogacy is focused on the well-being of the surrogate and is based on the legitimate fears that poor, uneducated and marginalized women who are contracted as surrogates will be exploited at the hands of middlemen and surrogacy clinics. This was the ground reality for many women who were underpaid while being kept in environments unsuitable for pregnant women with undesirable medical and nutritional facilities. Surrogates were often forced by middlemen or husbands into multiple cycles of gestating children for intended parents, which took a toll on their physical and psychological health. Furthermore, it was reported that in the unregulated commercial surrogacy market, as many as 88% surrogate mothers interviewed in Delhi did not know the terms of their contract[viii] (Tribune India 2019).

The primary feature of the 2016 bill was the ban it placed on commercial surrogacy; a commitment echoed in its 2019 successor. In hopes of preventing the exploitation of surrogates and safeguarding the interests of the child, it allowed only altruistic surrogacy, by a close relative of the couple, provided that the woman be between the age of 25-35, be married, having

a child of her own and having no past record of being a surrogate (The Surrogacy Regulation Bill, 2016 , 257 of 2016, Cl. 4(b))[ix]. Notably, the bill did not define the term 'close relative'. The surrogate would also have to possess a certificate attesting to her mental and psychological fitness for surrogacy. According to the bill, intending parents could be only Indian couples who had been married for at least five years, possessing a certificate of essentiality and certificate of eligibility, which attested to the infertility of either one or both partners, could avail surrogacy services (Clause 4(c)). The intended mother would have to be between 23-50 years and the intended father between 26-55. Couples having any surviving biological, adopted or surrogate children would not be able to avail surrogacy as an option, with the exception of couples with surviving children who were terminally ill or having mental or physical disabilities. The intended parents would also have to possess a court order concerning the parentage and custody of the child born through surrogacy, claiming that any child so born will be considered a biological child of the intended parents and will possess all the rights and privileges available to a natural child. This prenatal order, by understanding the surrogate child to be the biological child of the intending couple, aims to prevent any kind of abuse, abandonment and exploitation (Clause 7).

The bill also mandated setting up appropriate authorities, National Surrogacy Boards and State surrogacy boards that would work to oversee the registration and certification of surrogacy banks and clinics, set up rules and guidelines for such banks and clinics as well as authorize the certification of intending couples and surrogates who fulfilled criteria established by the authorities (Clause 10-35). In its initial draft, the bill granted a minimum of five years in prison and a fine of up to ten lakh rupees for parties contravening the provisions of the bill or initiating commercial surrogacy (Clause 36). A proposed amendment to the bill that circulated the Lok Sabha in 2018[x] recommended several changes. It added that a surrogate mother could not provide her own gametes for the process (Clause 4(iii)(b)(III) and while it noted that the bill had made provisions to obtain the informed and written consent of the surrogate (Clause 6), the amendment included that she be able to withdraw her consent before the embryo was implanted in her womb (Mann, Gayatri 2018). It also prohibited any form of sex-selection (Clause 7) and expanded the definition of insurance coverage to include 16 months of coverage, covering postpartum complications (Clause 4(iii)(a)(III). Noting that there was no time frame provided to the authorities to respond to those applying for certificates, it established that applicants be notified of a grant or rejection within 90 days. The amendment also changed the penalty, established under Clause 36 as a minimum of five years, to a maximum of five years.

Notably, neither the bill nor the subsequent amendment addressed the lack of review or appeal mechanisms in case an application is rejected.

THE SURROGACY REGULATION BILL, 2019

The initial draft of the Surrogacy Regulation Bill, 2019[xi] was largely an unmodified version of the 2016 bill and was presented to the Lok Sabha in July 2019 and was passed by the House in August 2019. When presented to the Rajya Sabha, it was referred to a select committee in November 2019. The 2019 bill echoed the call to ban commercial surrogacy and legalize altruistic surrogacy. It remained the same in the purposes for which surrogacy would be allowed, the eligibility criteria for the couple, the surrogate who was to remain a close relative, and retained the mandate for appropriate authorities and surrogacy boards at the central and state level. In a new addition, the surrogate would be given 16 months of insurance coverage for post- delivery complications, pregnancy or delivery related medical expenses and situations of death [The Surrogacy Regulation Bill, 2019, 156 C of 2019, Cl.4(iii)(a)(III)]. Termination of pregnancy under any situation would be compliant with the Medical Termination of Pregnancy Act of 1971 and sex-selection of fetus was made illegal [Section 2, Clause 3 (vi)]. Furthermore, in a small yet consequential change, the bill made the punishment for initiating surrogacy more stringent, by increasing the five-year imprisonment to ten years (Section 7, Clause 37). However, by February 2020 the Select Committee Report (SCR 2020)[xii] had submitted its recommendations which were consequently approved by the Cabinet and passed by the Rajya Sabha.

Under the new and approved amendments, there is no longer a compulsion for the surrogate to be a close relative of the intending parents and any 'willing woman' can render her altruistic services[xiii](Report of the Select Committee on the Surrogacy Regulation Bill, 2019, 4.53). The reason provided for the same was that the caveat of a "close relative" would restrict the options of the couple, enhance the propensity of exploitation of women by relatives and invade the privacy of the couple by forcing them to disclose infertility to their family (SCR 2020, 4.49). Notably, the committee recommended that the altruistic model for surrogacy be abandoned to favor a compensatory model where surrogates (4.12, 4.13). In the spirit of compensation, it increased the insurance coverage from 16 months to 36 months for the surrogate mother (4.44). While the initial draft allowed only legally married Indian from availing surrogacy as a reproductive option, the amendment recommended that the eligibility criteria be expanded to

include divorcees or widows between the age of 35-45 (4.35). The SCR 2020 also demanded that the option of surrogacy be made available to Non-Resident Indians (NRIs) (4.36), while Persons of Indian Origin (POIs), Oversea Citizens of India (OCIs) and foreign citizens remain excluded. In attempts to bridge the lacunae with regards to review and appeal mechanisms, the amended bill allows for couples and surrogates to make appeals to state and central governments if their application for eligibility and essentiality certificates be rejected (4.59).

STANDING COMMITTEE REPORTS OF 2016 AND 2019 AND MULTI-ISSUE ANALYSES

The Standing Committee Reports on both draft bills are critical of altruistic surrogacy models, the exclusion of live-in couples, single men and women and non-Indian citizens (PIOs, OCIs and foreigners).

ON ALTRUISTIC SURROGACY

The One Hundred and Second Report on the Surrogacy (Regulation) Bill, 2016 (hereon, the SCR 2018)[xiv] and The Report of the Standing Committee on the Surrogacy (Regulation) Bill, 2019 (hereon, the SCR 2020)[xv] both held the surrogate to be the most important stakeholder and agreed that the removal of the commercial aspect from the surrogacy arrangement would not ensure the removal of exploitation (SCR 2018, 5.8, 5.10; SCR 2020, 4.49). In fact, non-compensation for the physically and emotionally laborious process of gestating a child is synonymous to forced labor (SCR 2018, 5.10). It is unreasonable to expect a woman to expend her services with no remuneration, especially when surrogacy exists amidst great social stigma, is accompanied by massive physical and mental upheavals and is likely to result in the loss of livelihood for the surrogate. It is also worth mentioning that many surrogates come from economically lower strata, who see surrogacy as a viable means of generating income for themselves and their families and overcoming structural barriers to earning a livelihood (SCR 2018, 5.9). The expectation that a pure altruistic drive and compassion being the only motivation to offer gestational services is in itself exploitative, unjust and unrealistic (SCR 2018,5.20).

For that reason, both SCRs recommend that instead of an altruistic model, a model premised on compensation be implemented instead. Stakeholders such as the Indian Society of Third Party Reproduction, International Surrogacy Forum and Ministry of Women and Child Development have even recommended that a cap be placed on the minimum or maximum amount of compensation involved (SCR 2018, 4.6, 4.8; SCR 2020, 2.16), and that intending

parents can either submit the money directly into the bank account of the surrogate mother or deposit the amount directly with the courts who would then pass it on the surrogate and her family. This mechanism eliminates the illegal and exploitative middleman. However, compensation through insurance has been a more popular solution to the problem. Compensation will be received in the form of insurance coverage that is to cover the surrogate for medical expenses, postpartum medical needs and sudden death. Notably, the SCR 2018 claimed that 'medical expenses' be expanded to include other reasonable costs incurred by the surrogate mother, who would now be unable to take care of her own children (5.24). Furthermore, the surrogate would also incur extra non-medical costs by virtue of needing more nutrition, maternity clothing, etc. that would not be covered if insurance be restricted only to medical expenses. Therefore, the Committee in 2016 had recommended that a fixed quantum be decided that would cover the costs the loss of wages over the course of surrogacy, medical and psychological screening of the surrogate, child care support and psychological support for the surrogate's own children, dietary and medical supplements, maternity clothing and post-delivery care.

Evidently this recommendation was not incorporated to the fullest in the subsequent bill. Even the SCR 2020 falters in supporting this recommendation while appreciating the need for adequate and proportionate compensation, claiming that the line between commercial and compensated surrogacy is diffused and blurred. The SCR 2020 recommends that there be insurance coverage for 'expenses incurred by the surrogate mother', but the bill does not reflect this and remains arbitrary on what expenses are to be covered by insurance. A preliminary reading of the bill, even after it has been amended, gives the impression that insurance is to be for medical expenses only and does not explicitly convey that loss of wages will be compensated or what extra-expenses will be insured for the surrogate mother. While the Department of Health Research clarified that surrogates would be privy to maternity benefits including extended leave under the Maternity Benefit Act, 2017 (SCR 2020, 4.3), it is curious that this provision is not clarified in the bill itself. Furthermore, self- employed or unemployed women or women working in the informal sector, fields, farms or at homes are not likely to be covered under the Maternity Benefit Act and receive maternity benefits as there are no employers or organizations to hold liable[xvi]. The situation for surrogates from this demographic becomes ambiguous. To say that an employed, educated surrogate who is covered by the Act deserves more in compensation than a poor, unemployed or self- employed surrogate for the same service is inherently discriminatory.

The SRC 2020, taking cognizance of the need for compensation, recommended that the definition of altruistic surrogacy be changed to 'the surrogacy in which no charges, expenses, fees, remuneration or monetary incentive of whatever nature, except the medical expenses and such other prescribed 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' (SCR 2020, 4.13). Notably, the recommendation is to clearly state the extra- provisions and broaden the scope of insurance to include coverage for the dependents of the surrogate. However, this language has not yet been incorporated into the bill which remains ambiguous. Given the reality of legal illiteracy, such an ambiguity can be detrimental for surrogates themselves, who may not feel empowered to demand compensation for basic expenses out of fear of being penalized lest they be misunderstood to be commercializing the surrogacy, a fear exacerbated by the harsh penalties prescribed by the bill.

ON WHO SHOULD BE ALLOWED ACCESS TO SURROGACY

A salient feature of the bills, along with the ban on commercial surrogacy, was the ban on surrogacy by and for all foreigners[xvii]. Under the 2019 bill, NRIs were given access to surrogacy services but PIOs and OCIs remain excluded. This has been justified by the argument that NRIs are Indian citizens. Addressing the Committee, the Department of Health Research outlined that the opposition to POIs, OCIs and NRIs is usually based in the following considerations- the possibility of abandonment of children; the challenges of determining the child's citizenship because of laws in the intending parent's home country being hostile to migrating surrogate babies; it is also possible for POIs and OCIs to avail surrogacy services in their own country; the allowance given to foreigners often results in the exploitation of surrogates (SCR 2020, 4.33). According to the Ministry of External Affairs, there have been instances where foreign intending couples have suppressed facts during visa application which has hindered antecedent verification processes and caused great inconvenience to the child and the surrogate mother (SCR 2020, 4.33). The Ministry also reiterated the issue of home countries refusing to provide a passport to the child, causing the child to be stateless, since India does not allow for dual citizenship[xviii].

The Committee remarked that these are practical considerations based on facts and figures and cannot be dismissed. However, the Committee also noted that PIOs and OCIs are eligible to adopt Indian children. Multiple relevant stakeholders, including the Ministry of Women and Child Development, were in favor of allowing foreigners access to surrogacy services in India. PIOs and OCIs as well as NRIs can adopt Indian children under the Guardians and Wards Act

of 1890 and the adoption process is closely monitored and regulated by the Central Adoption Resource Agency (CARA)[xix]. This fact raises several points of issue. Firstly, if PIOs and OCIs can be trusted with adoption, it is logically inconsistent for them to be barred from availing surrogacy (3.18). Secondly, it seems arbitrary to believe that NRIs are not going to exploit or abandon a child while PIOs and OCIs remain unreasonably suspect of the same.

In a pointed question, directed to the Department of Health Research, the Committee asked how the government intended on regulating exploitation, abuse or violations of a child and their rights by NRI parents. The Department responded by claiming that NRIs are Indian citizens and the surrogate will be their relative which eliminates the possibility of any exploitation. This response is wholly unsatisfactory. It is important to note that OCIs usually enjoy parity with NRIs in financial, economic and educational fields, except the acquisition of agricultural land and plantation properties[xx]. Furthermore, it assumes that the surrogate is a close relative, and does not consider the question in the light of a situation where the surrogate is not a close relative but only 'any willing woman' as the bill now allows. Secondly, it is a logical leap to assume that a child will not be exploited if the surrogate mother is a close relative and to take for granted that family values and ties are enough to abate the possibility of exploitation. It is important to consider the possibility that an NRI couple may abandon the child, taking advantage of the fact that the child is with its surrogate mother and its biological, if not intended, family. Therefore, it is fallacious to assume that PIOs or OCIs are more likely to exploit the option of surrogacy. There is no reason why the surrogacy process for foreigners, PIOs, OCIs and NRIs cannot borrow from the existing thorough and robust legal mechanism provided by CARA. With respect to the concern of the child's citizenship, the government, with the help of the Ministry of External Affairs, can choose to not authorize couples from countries that do not support the migration of surrogate children but it is unfair to ban even couples who come from countries that allow for a conflict-free migration process.

People in live-in relationships, unmarried, widowed, single people and same sex couples or transgender citizens also do not get to avail surrogacy services[xxi]. Several stakeholders such as the United Nations Population Fund (UNFPA), representatives of the Ministry of Women and Child Development, lawyers and independent social researchers oppose this exclusion. The bill is in direct violation of constitutional guarantees such as the right to life and personal liberty (Article 21), the right to equality (Article 14) by discriminating based on sexual orientation and marital status. In denying these groups legal access to surrogacy, the bill is essentially criminalizing people acting within reproductive rights. With the scrapping of Article 377 and the decriminalization of homosexual couples through Navtej Singh Johar vs. The Union of

India, such an exclusion is against the spirit of the strides made towards inclusivity. Sexual minorities do not exist in the fringes of society and experience the same urge to have children and to create a family of their own.

The Department of Health Research claimed that same-sex couples and live-in couples are not bound by law, which leaves the future of the child obtained by surrogacy vulnerable to parents who can separate anytime. Furthermore, the Department believed that it is important to guarantee a "complete family" with a mother and father who are equally committed to the upbringing of the child, a definition that alienates even single, unmarried, divorced or widowed women from availing surrogacy. However, such a myopic definition is premised in stereotypes and reinforces essentialist ideas about gender roles and parenthood. To claim that only heterosexual marriages are stable is incorrect in the face of factors such as rising divorce rates and reports of domestic and familial abuse. Even heterosexual couples can separate, and many do, while continuing to be committed to the well-being of the child.

Same-sex couples are not unmarried by choice but because they still remain unable, by law, to marry their partners (Economic Times 2020). They often must hear that they are beyond the family because two people of the same gender cannot reproduce to have biological children. Surrogacy provides a unique opportunity for same-sex couples to have a child that is biologically linked to at least one of them and reclaim family as a social space that extends beyond its heterosexual patriarchal conception[xxii]. Furthermore, it is noteworthy that the Supreme Court has given legal sanctity to live-in relationships and children born out of wedlock to live-in couples are considered legal wards of the individuals[xxiii]. Also important to consider is that single women and transgender women are legally able to adopt children in India. Social notions of family are dynamic, as is evidenced by the fact that more people today live in nuclear families than joint ones. Therefore, the exclusion of these stakeholders on the basis of lack of heterosexual matrimonial bonds is inconsistent both with logic and with the progress that Indian jurisprudence has achieved through its recognition of same- sex couples, live in couples and the adoption rights of single and/or transgender parents.

ON INFERTILITY

The World Health Organization defines infertility as the inability to achieve a clinical pregnancy after 12 months or more of regular, unprotected sexual intercourse[xxiv]. Even the ART Bill recognizes infertility after 12 months of trying, making it incompatible with the

Surrogacy Bill which recognizes infertility after five years. Taking note, stakeholders recommended removing the five- year qualifying requirement for couples and subsequently asked for the definition of infertility to be removed too, claiming that any couple for whom a gestational surrogacy is the only medical alternative, should be allowed to avail surrogacy without a waiting period (SCR 2018, 5.3, 5.43-5.46; SCR 2020, 3.9, 4.18, 4.20). The recommendations were accepted and the definition of infertility and now accepts one year of proven infertility. However, that infertility must be medically and legally declared is still objectionable to many. Both the 2016 and 2019 SCRs took note of the prevailing social taboos that surround infertility (SCR 2018. 5.40. 5.114; SCR 2020, 2.8), and that forcing a woman to declare her infertility makes her vulnerable to domestic abuse, name shaming, annulment of the marriage and ostracization at the hands of family (SCR 2018, 5.11). Therefore, this can be seen as a violation of the right to privacy as guaranteed under Article 21.

Infertility is also narrowly defined as an inability to conceive. However, there are many women who may conceive but are unable to carry a pregnancy to term and have had multiple miscarriages or congenital issues such as Polycystic Ovarian Disease (PCOS) and uterine fibroids. Furthermore, there are many reasons beyond infertility due to which surrogacy is availed. Many women are born without uteruses or underdeveloped uteruses or may have suffered diseases like TB or cancer that severely damage the uterus and rule out the possibility of natural pregnancies[xxv]. Furthermore, proving infertility itself uncertain as many couples believed to be infertile end up conceiving naturally after adopting other children or undertaking surrogacy. Taking cognizance of these cases, both the 2016 and 2019 SCRs were against the requirement of a certificate of infertility (SCR 2018, 5.114; SCR 2020, 4.20), since it seems unnecessary and wasteful to make people wait for a stipulated period of time, especially if they know natural pregnancy is impossible, and because infertility itself can be an imprecise determination. Forcing people to get a certificate is an interference by the state in the reproductive autonomy of a couple by forcing them to get entangled in bureaucratic red-tapism, corruption and paperwork. Also, bureaucratic agents may be unwilling to engage with the specificity of the circumstances of a couple because the definition of infertility prescribed by the Bill does not truly encompass the diversity of reproductive experiences. Therefore, in harming the reproductive rights and chances of intended parents, the Bill is allowing harm to a pivotal stakeholder without giving them the due consideration or attention that is, otherwise, being paid to the surrogate mother.

ON THE EFFICACY OF BANNING COMMERCIAL SURROGACY

The Ministry of Women and Child Development, UNFPA, various doctors, advocates and consultants who contributed to the Standing Committee Reports believed that a ban would only give rise to underground black markets which would be beyond regulation (SCR 2018, 4.1, 4.12; SCR 2020, 2.12, 2.15, 2.20). This is evidenced by the black market that emerged around the sale of kidneys despite donations being restricted to close family. Fake certificates are easy to procure through under the table cash transactions; infertility clinics carrying out surrogacy may lie that they are merely providing infertility treatment to women; money being transferred to surrogates for 36 months under the guise of insurance may be clandestine remuneration[xxvi]. Furthermore, many couples who have exhausted treatment routes but do not wish to adopt are still likely to avail commercial surrogacy. Surrogates might also be taken abroad to deliver the child to evade India's stringent laws, as was common practice after the 2015 ban wherein surrogates were moved to Nepal or Kenya[xxvii]. The experience of other countries strongly suggests such an outcome. It is notable that as many as 10,000 babies are born of commercial surrogacy in China, where commercial surrogacy is illegal[xxviii]. Therefore, a ban, in its consequence, could distance the state from surrogacy arrangements and further diminish its regulatory scope. The state will be unable to oversee the quality of the fertility treatments, neutralize inequalities between the commissioning parents and surrogate or maintain a balance of interests in the contract. As a result, a surrogate in the unregulated market remains unable to demand protections and stays vulnerable to exploitation.

ON ALTERNATIVES TO SURROGACY

Several feminist advocacy groups and stakeholders concerned about the wellbeing of the surrogate mother often question the need for surrogacy and ART like IVF altogether. Feminists have raised concerns that IVF is a patriarchal tool that is used to maintain the purity of bloodlines and monetizes off of essentializing motherhood[xxix]. However, one cannot be moralizing about pro-natal sentiments that are often biological prerogatives. Even if the desire to have a child is manufactured by years of patriarchal conditioning, it is not the place of the state or any group to deny what can be essential to someone's happiness or well-being. Furthermore, one can argue that even adoption essentializes parenthood or motherhood. Parents who adopt may do it to give a young child a home but the primary force acting on them is not always altruism but the desire to experience fatherhood or motherhood. Adoption agencies, while de-essentializing blood relations, do also feed into the same sentiment of being a parent or a mother who provides love and nurture to a child. Furthermore, adoption cannot always be the sole route presented to intending parents. The 2016 SCR cited a study done by CARA in

2016 which showed that only 1600 odd children were available for adoption while there were 7700 applications from prospective parents[xxx]. The availability of children for adoption clearly outweighs the number of willing parents. The Committee noted that a couple deserved equal access to both adoption and surrogacy and that access to surrogacy could not be compromised in the effort to promote adoption as the first choice when adoption is a benevolent choice available to the community at large.

Keeping in mind that surrogacy is used by surrogates to generate an income, it is still a safer option than most alternatives available to them. Most surrogates who involve themselves in the commercial surrogacy market are often uneducated, poor women who enter into surrogacy because of economic necessity (SCR 2018, 4.14; SCR 2020, 3.17) but also because it does not demand a particular skill or qualification other than mental and physical soundness (Kumari n.d., 40-54). The alternatives available this demographic of women is prostitution or working in small workshops or factories, which as the Committee noted, are also deeply exploitative and do not offer nearly as much remuneration as surrogacy does (SCR 2018, 5.18). While the state can continue to divert funds into educational and vocational upliftment of women, those efforts do not warrant a ban on commercial surrogacy practices altogether, as they hold value to the stakeholders involved. Instead, the exploitative aspects can be fixed or monitored under a regulatory mechanism that is prepared for a diversity of situations, addresses all stakeholders' interests and clearly delineates the extents of government involvement and private autonomy.

FURTHER CONSIDERATIONS IN THE INTEREST OF A HOLISTIC POLICY

In its review of the 2016 Surrogacy Bill, the Committee took note of the claim that surrogacy is not a right but a privilege. However, surrogacy represents an intersection of various rights that the Indian courts have validated in their past judgements. For instance, in Puttaswamy vs. Union of India[xxxi], the Supreme Court specifically outlined that the right to privacy was inclusive of the right to bodily integrity, autonomy over personal decisions, as well as the privacy of health records and the right to preserve personal reputation. The right to reproductive autonomy was earlier separately pronounced by the Andhra Pradesh High Court in 2000 via the B K Parthasarathi v Government of Andhra Pradesh[xxxii]. It was rightly observed by the SCR 2018 that the ban on surrogacy and the model of altruistic surrogacy that the bill proposes "promotes forced labor as non-payment of any compensation is against Article 23 of the Indian Constitution" (SCR 2018, 5.8) and can be viewed as violating the right to equality, reproductive freedom and the right to earn a livelihood [as protected by Article 19(1)(g)]. It also contradicts the spirit of various pronouncements such as Navtej Singh Johar vs. Union of India that sought

to bestow legal entitlements to gender and sexual minorities. Furthermore, the ethical opposition to surrogacy is also rooted in rejecting the commodification of a woman's reproductive labor[xxxiii] (Brandel 1995), moral concerns about the practice of baby-selling and the idea that the body and its parts cannot be commercialized[xxxiv] (Gupta and Chaturvedi 2020). Interesting to note, is that men are compensated for sperm donation and prostitution is legal in India. Therefore, the opposition to surrogacy appears to be inconsistent with existing laws and practices, making it easy to speculate that the bill was being moralistically paternal.

In order to be efficient, the Bill must be clear in its aims and widen its stakeholders. As it stands, the Bill fails to consider the rights of intended parents, consequently failing to outline the government's duties towards them. Surrogacy practices, while potentially exploitative for surrogates, can also render intending parents vulnerable to actions taken in bad faith. They also require protection from the state as the process of surrogacy, from fertilization to the child being relinquished to them, is an emotionally fraught process that also makes them vulnerable to economic exploitation at the hands of middle- men, surrogates and their families. Many intended parents are often forced to make further payments to the surrogate despite failure of conception. They feel unable to make health decisions regarding the child during the pregnancy, which is exacerbated during altruistic surrogacy arrangements. Furthermore, most intended parents face anxieties about the surrogate wanting to establish contact with the child, a situation the bill neither addresses nor protects the parents from. The characteristic of the surrogate mother as a benevolent entity in absolute terms does little to understand their actions and circumstances, as was noted by the Committee, but can also be a misrepresentation of ground realities. All intended parents have the right to avail surrogacy, be morally, legally and contractually responsible for the child, to have the child relinquished to them upon birth and to have complete information about the surrogate and her health and have complete inheritance rights of the child's property.

It is then imperative that reproductive justice be considered the end goal of the Bill. Inclusion, class sensitivity, accessibility, protection of autonomy and dignity, appropriate compensation, gender mainstreaming are all aspects of reproductive justice. Currently, in banning commercial surrogacy and erecting a bureaucratic hurdle in front of potential parents, the bill is promising a long, arduous journey to parenthood. Middle class individuals or couples have little to no alternative but to submit to this ordeal. However, richer individuals and couples can travel abroad for medical tourism and circumvent the stringent Indian process by outsourcing surrogacy from another country. To pose a harder task to parents who cannot afford reproductive tourism is inherently discriminatory. Furthermore, the bill continues to remain

unclear and fails to specify provisions meant to empower the surrogate. What she is entitled to under insurance is ambiguous. Therefore, the arrangement benefits everyone except the surrogate. The parents get the child they wished for, the clinics and the doctors get paid, but surrogates who come from impoverished backgrounds are denied the money that they would otherwise invest in their businesses, their children's education or use to improve their quality of life. The bill also fails to successfully enforce that any contracts or documents be in the surrogate's preferred language and in doing so ignores the reality of legal illiteracy. The bill is dedicated to ensuring the mental and physical soundness of the surrogate but is yet to speak emphatically on providing psychological evaluations to ensure the validity of consent provided by the surrogate. Determining that the consent is valid and informed is important, even in altruistic surrogacy arrangements, as women are vulnerable to emotional exploitation and coercion at the hands of family. While the bill has provided for a redressal mechanism, it is yet to be determined how accessible and efficient it will be in practice. Lastly, the bill needs to work alongside a robust ART Bill that supplements the Surrogacy Bill by regulating reproductive technology and its modes and practices. According to experts consulted in the SCR, the ART Bill must come before the Surrogacy Bill to avoid duplication of Boards (SCR 2020, 4.88). ART Bills are to regulate the largely technical and medical practices arising from reproductive technology while Surrogacy Bill addresses the specific moral, legal and social consequences of involving a third party in the process of reproduction.

In conclusion, surrogacy represents a gray area in moral, legal and developmental practices. It has, and shall continue, to remain a divisive issue for advocates, experts and feminists alike. However, a final, progressive bill cannot echo the moral aspirations of any one group nor can it be condescending towards people and their choices. Moralizing arguments do little to assuage the difficulties and desires of actual stakeholders. A proper framework must exist to allow for freedom of choice to be exercised in a manner that follows principles of equity in order to reach an outcome that balances the interests of all. Technology is going to continue developing and legislations like the surrogacy bill or the ART bill will determine whether these advancements exacerbate existing inequalities or finally help bridge them to the betterment of all involved.

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