

# The Surrogacy Regulations Bill 2016: The Interference in Assisted Procreation

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## ABSTRACT:

"*Necessitas non habet legem*" Necessity knows no law, and hence, the inability to procreate and propagate one's species has driven people the world over to explore the world of assisted reproductive technology; particularly, surrogacy. Every essential process in the world with the scope for human interference begs us to question the ethical, social and practical aspect of it all. Surrogacy, a practice which actually has so many benefits, is a topic that is under intense debate today, due to the simple fact that the room for exploitation and manipulation of parties involved in surrogacy is too much to leave to chance. Commercial Surrogacy, was recently banned in India, sparking a fire of protest and debate throughout the country. Although the Surrogacy (Regulations) Bill, 2016, was passed two years ago, it remains a subject of unresolved debate.

The authors of this paper, in the entirety of the paper, address the issues surrounding the practice as well as point out that the demerits of a complete blanket ban on surrogacy are a whole lot worse than the demerits in the alternate scenario. The authors believe that the argument essentially boils down to the contravention of Article 23 and 24 of the Indian Constitution, in comparison to the contravention of Article 14 and 19; the best among the worst case scenarios.

The authors believe that rather than imposing a blanket ban which seems draconian in itself, the government should seek to amend the Surrogacy (Regulations) Bill, 2016 to ensure that a strict legal framework is in place and all surrogacy matters are dealt with by competent individuals to ensure minimalistic, to no violations of Article 23 and 24, the right against exploitation.

In conclusion, the authors believe that policies made with the fear of human intervention in mind are often in vain, and thus a stand should be taken with respect the issue of surrogacy.

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## I. INTRODUCTION

It is astonishing to observe that commercial surrogacy<sup>1</sup>, although made legal in the year 2002 had minimal legislative backing. There was not so much mention of the word surrogate or its definition. The primary objective in this paper is to define certain terms which are pivotal in our understanding of the subject legally, ethically and socially. In ordinary language a surrogate connotes giving birth to a child for another individual or set of individuals owing to their inability to procreate.

Surrogacy can be differentiated into two distinct categories, altruistic surrogacy<sup>2</sup> and commercial surrogacy. The distinction between the two, being brought out in the financial gain of the surrogate mother in the latter.

India, until the year 2015, was the hub of surrogacy tourism<sup>3</sup>. The Surrogacy bill, 2016 approved by the cabinet aims to ban commercial surrogacy. The whole issue revolving around the topic of in spite of the countless

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<sup>1</sup> S. 2(f), The Surrogacy (Regulations) Bill, 2016

<sup>2</sup> S. 2(b), The Surrogacy (Regulations) Bill, 2016

merits of the process is the scope for the violation of a fundamental right prescribed in Article 21 of the Indian Constitution which gives us a right against being exploited. Due to communication occurring directly between the commissioning parents<sup>4</sup> and the surrogate mother the risk of exploitation of the surrogate mother especially in a country with the vast majority of the population in poverty is ever present. Thus in essence, there exists a clash between a combination of articles 14 and 19 and the sole article 21. There exists a clash between the right to life and personal liberty and the right against exploitation.

The right to life and procreation exists within each and every individual citizen of India, and no one should be denied this right. There exists now, due to the new bill, an atmosphere of rigidity.<sup>5</sup> In the view of the new bill, commercial surrogacy has now entirely been banned, and the authors are in opposition of any ban of such a nature due to the simple fact that in the effect of such a ban, the practices of surrogacy will not be curbed, instead blackmarkets will arise, destroying the original purpose of introducing such a bill.

## II. HISTORY

Contrary to popular belief that surrogacy is a completely nascent process; surrogacy has existed in the Indian scenario for at least a century. The definition of the term has of course metamorphosed over this period of time. India, since its first and the world's second success<sup>6</sup> story of successful surrogacy has boomed in the particular industry. After the first American ruling of the "Baby M" case, the question of legality of surrogacy practices has been questioned.<sup>7</sup>

Since the birth of Kanupriya alias Durga, India's first test tube baby, in the 70's, the assistive reproductive technology has rapidly developed. Although there was a development of this particular procedure many years ago, it becomes clear that the government did not legally recognise it and used the shadows principle to maintain that whatever happened without the knowledge of the state did not concern the government. The lax nature of these laws have incentivised people from other countries, whose surrogacy laws are stringent, to move to India if only temporarily for the very cost effective procedure, which further incentiveizes. Indians as well as

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<sup>3</sup> The Associated Press on, 31 December 2007, published, "Business is booming for India commercial surrogacy program" in The Albuquerque Tribune, New Mexico.

<sup>4</sup> The legality of the surrogacy can often be complex, and diverse when compared from country to country. In a lot of countries it has been noted that the birth mother of the child, i.e. the woman giving birth to the baby should gain the legal identity of the child's mother. However, in other countries, for example India, the legal recognition is given to the commissioning parents, of the child.

<sup>5</sup> Nidhi Gupta, "What's Wrong With the Surrogacy Bill", on 9/09/2016, The Hindu, available at <http://www.thehindu.com/thread/politics-and-policy/article9090866.ece>, last seen on 21/12/2016

<sup>6</sup> In 1986, "Baby M", (legal name Melissa Stern), was born through the process of Surrogacy. William Stern and his wife Elizabeth Stern, entered into a surrogacy contract with Mary Beth Whitehead, who after the birth of the child, refused to give up custody of the said baby. The New Jersey Courts initially found the surrogacy contracts invalid and decided that the surrogate mother should be recognised as the legal mother of the baby, however for the well being of the child, the court awarded custody of Baby M, to the Sterns, and allowed visitation for Whitehead.

<sup>7</sup> Iver Peterson, "Baby M's Future" available at <http://www.nytimes.com/1987/04/05/weekinreview/baby-m-s-future.html>, last seen on 28/11/2017

foreigners to take full advantage of this process. Examples of celebrities in India, such as Karan Johar<sup>8</sup> or Tushar Kapoor show us that the surrogacy process is being greatly utilised to deliver children for individuals or families who cannot deliver children on their own.

India has been the top choice for those wanting a surrogate baby, due to the easy and cheap availability of the service<sup>9</sup>. However, over the years, it has been observed that an overuse of this practice has become prevalent, due to commissioning parents arriving from all over the globe. Thus to act as a regulatory measure, the Indian Council of Medical Research (ICMR) created a framework of guidelines, however, this was not given adequate legislative backing, and thus the malpractices continued.

Another bill, called the Assisted Reproductive Technology, Bill was drafted<sup>10</sup> in 2010, which proposed certain conditions for the procedures, including the number of times a birth mother is allowed to engage in a surrogacy contract. Under the pretext of this bill, even single parents were allowed to enter into a contract for surrogacy. The only condition for this was that a woman would have to prove that she was infertile, and the men had no such condition. The bill did not provide protection to the surrogate mother, and did not even allow foreign nationals/ homosexual couples to avail the surrogacy service. Due to these inconsistencies in the bill, it was never passed as a law.

### III. PRECEDING LEGISLATION

When it comes to talking about the laws governing the process before the bill of 2016, it can be seen that though surrogacy is a topic of immediate concern and intense debate, the legislations regarding the matters simply fall into a grey area which ensure that though the process has been very prevalent, the legislations backing the process are still in the nascent stage. The guidelines that were used to govern the process were those of the assisted reproductive technology. There stand a number of cases tried which point out the upside and the downside of surrogacy but after intense debate and the needs of the people commercial surrogacy was

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<sup>8</sup> Think Change India, "Karan Johar Becomes Father of Twins Through Surrogacy", available at <https://yourstory.com/2017/03/karan-johar-surrogacy>, last seen on 28/11/2017

<sup>9</sup> World Vision Report, 2009 mentioned, "All kinds of US jobs are being outsourced to India, from telemarketing to computer programming. Now you can add one more service to that list: childbearing. Yes you heard right. Some childless couples in Europe and US are hiring Indian women as Surrogates."

<sup>10</sup> Tarsihi Verma, "What are the Surrogacy Laws In India: Everything You Need To Know" for The Indian Express, on 6/03/2017 in which she says, "A draft ART (Assisted Reproductive Technology) Bill was formulated in 2010, but was never passed as a law. The bill lays down further conditions and procedures for surrogacy and notes that there are no regulations as to how many times a birth mother may be allowed to reproduce. The bill also enabled single parents, male or female, to have a child through surrogacy. Here, the women had to prove they were infertile and couldn't give birth while the men had no such condition. A research undertaken by Centre for Social Research (CSR) points out that the bill did not protect the rights of a surrogate mother. The bill also did not allow single foreign nationals and homosexual couples to be commissioning parents. It defines "couple", as "two persons living together and having a sexual relationship that is legal in India.", Available at <http://indianexpress.com/article/research/karan-johar-surrogate-children-yash-roohi-what-are-the-surrogacy-in-laws-in-india-here-is-everything-you-need-to-know-4555077/>, last seen on 27/11/2017

finally made legal in the year 2002 and it was stated so in the **Manji Yamada** case<sup>11</sup>.

In this case, a Japanese couple opted for a child through surrogacy and got divorced before the birth of the child, when father was denied custody while the mother refused to accept the baby the child was raised by his grandmother after Japan's government gave the boy a humanitarian visa. Japan's legislation regarding surrogacy remains undecided<sup>12</sup>, and hence Japanese authorities were unable to grant citizenship to Baby Manji. After the decision of this case, it became clear that the parties to a surrogacy, needed to be protected to ensure the well being of the all parties involved. There have been factions who stand divided on the subject due to a variety of reasons such as commercialisation of the process or the exploitation of the birth mother which will further be elucidated upon later in the paper.

No formal legislation had been passed to concretely govern the process of surrogacy. The lack of codification as stated before has made India a very desirable destination to migrate to in case a couple is incapable of bearing child. This lack of legislation as stated before also leads to problems such exploitation, problems of nationality etc. The legislations of the ART<sup>13</sup> briefly describe a variety of clauses in attempt to minimise the negatives and enhance the positives of the process of surrogacy.

1. The terms require the process to be performed only by those who are physically incapable or unable to carry children through the gestation period. Medical and physical impossibility are the only two reasons why surrogacy should be practiced.
2. Payments to surrogate mothers should cover all the medical expenses related to the pregnancy, the guidelines also require there to be documentary evidence to ensure no foul play or exploitation and to avoid unnecessary complications.
3. The responsibility of finding a surrogate mother was meant to fall on those looking for a surrogate mother or semen banks and not on the ART clinic to advertise and find a surrogate mother.
4. The responsibility of checking whether the surrogate mother is under 45 years of age and fulfils all the necessary criteria to undergo a full successful pregnancy is on the ART Clinic.
5. Relatives, known as well as unknown people can be surrogate mothers. If the relative plans to be the surrogate mother, the relative must belong to the same generation of the actual mother<sup>14</sup>.

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<sup>11</sup> *Baby Manji Yamada vs. Union of India and Another* (2008) 13 SCC 518

<sup>12</sup> Philip Brator, "Japanese Tradition Denies Surrogacy" on 6/05/2017, The Japan Times, available at <https://www.japantimes.co.jp/news/2017/05/06/national/media-national/japanese-tradition-denies-surrogacy/#.Wh0y4cZ7Gu4> last seen on 9/05/2017

<sup>13</sup> *Supra*, 10.

<sup>14</sup> The Globalization of Motherhood: Deconstructions and Reconstructions of Biology and Care, Edited by Wendy Chavkin and Jane Maree Maher, 2013 "... Globalized ART in India has ultimately exacerbated women's 'unfreedom's', and therefore examined, rather than supported, their agency. While sex selection has helped lead to the phenomenon of '10 million missing women' in the world and

6. The guidelines also prohibited women acting as a surrogate mother more than three times in their lifetime.
7. A prospective surrogate mother must be thoroughly tested for HIV virus and she must also sign a written certificate that says that she has not consumed a drug intravenously administered to her through a shared syringe, she has not undergone any blood transfusions or be involved in extra marital relationships.
8. Surrogate mothers were not allowed to undergo blood transfusions excepting ones from a certified blood bank.

The law commission of India suggested many reforms to the underlying guidelines and labeled them “Need for legislation to regulate assisted reproductive technology clinics as well as rights and obligations of parties to a surrogacy,”<sup>15</sup>. The observations made by the commission were mainly regarding the care of the surrogate child in cases of extraneous circumstances.

The law commission expected one of the commissioned parents to be a donor as this would reduce child abuse due to biological belonging of the child to one of the parents; this is also one of the reasons why adoption beats surrogacy. The commission expected for the contract between parties with all the terms and financial aid in place to remain the same, but they wanted to prevent commercialisation of the act. Commissioning parents must automatically be the parents of the child without actually adopting him. The right to privacy was to be maintained and sex selective surrogacy wasn't to be entertained. The birth certificate of the surrogate child was to only have the name of the commissioning parents and not the actual birth parents.<sup>16</sup>

#### IV. THE NEW LEGISLATION

Since India is one of the important hubs for availing the services of a Surrogate, the industry was well established in India, and brought an estimated a yearly turnover of 3000 Crore rupees<sup>17</sup>. But due to the evident legal fallacies surrounding the business, there rose a need for stringent regulation of the procedures and the contracts arising out of surrogacy arrangements<sup>18</sup>, as held in *Jan Balaz v Anand Municipality*.<sup>19</sup> For this

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therefore contributed to the entire gender's 'illbeing', the phenomenon of 'wombs for rent' has not only commodified the bodies of women and the children they bear, but it has enacted a discursive cultural violence against Indian Motherhood itself. Through Indo-Wester Surrogacy, Indian women become reduced to their body parts at the sacrifice of their most empowered social role. Rather than mothers, they are, for all intents and purposes, disembodied wombs.”

<sup>15</sup> P. Geetha v. The Kerala Livestock Development Board Ltd., 2015 SCC OnLine Ker 71, decided on 06/01/2015 and *Kalaiselvi v. Chennai Port of Trust*, 2013 SCC OnLine Mad 811

<sup>16</sup> Report of the Indian Law Commission, Report No. 228, India, August 2009, available at <http://lawcommissionofindia.nic.in/reports/report228.pdf>

<sup>17</sup> Moushumi Das Gupta, for *Hindustan Times* available at <http://www.hindustantimes.com/india-news/india-proposes-ban-on-commercial-surrogacy-homosexuals-live-ins-worst-hit/story-Vb1fKz0XSJPdCT7GbympkO.html> last seen on 24/08/2016

<sup>18</sup> *Jan Balaz v Anand Municipality* AIR (2010) Guj21

purpose, the Minister of Health and Family Welfare introduced the Surrogacy (Regulations) Bill, in 2016, in the Lok Sabha which proposed extreme restrictions on the culture of commercial surrogacy. Some of the salient features of the bill are enlisted here.

- To allow altruistic surrogacy to intending childless couple between the ages of 23- 50 years for female and 26-55 years for male parent.
- The intending parents must be Indian citizens, married for a minimum of five years.
- The couples seeking surrogacy services should not have any other biological children or any adopted children. However, they can avail these services only if their child is challenged mentally or physical, or is suffering from a terminal disease that has no cure.
- The intending couples should not abandon the child, born out of the procedures. However the bill is silent on the issue of breach of surrogacy arrangement by either party.
- The rights that would be available to a biological child should be made available to the surrogate child as well.
- A woman can act as a surrogate only once, should be a close relative of the intending couple and should ideally be between the ages of 25-35 years.
- A first class Magistrate can pass orders relating to the parentage and custody of the child.
- An insurance coverage of reasonable and adequate amount shall be ensured in favor of the surrogate mother.
- National Surrogacy Board shall be allocated with certain powers and functions that need to be performed by the Board. This board shall consist of Minister of Health and Family Welfare as the chairperson. The Secretary to the Government of India would be the vice chairperson and would work alongside three women members of the Indian Parliament.
- Only the National Surrogacy Board, and the State Surrogacy board, can be allowed to be the Policy making bodies for the regulation of surrogacy services.
- No person/ organisation/ surrogacy clinic/ laboratory or even clinical establishment of any sort shall undertake any activity of commercial surrogacy, or abandon the child, or even exploit the surrogate mother, sell or import embryo for the purpose of surrogacy. Violation of any of these provisions as laid

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<sup>19</sup> Yasmine Ergas, "Babies Without Borders: Human Rights, Human Dignity, and the Regulation of International Commercial Surrogacy", Volume 27 Issue 1, Emory International Law Review, Emory University, available at <http://law.emory.edu/eilr/content/volume-27/issue-1/articles/babies-without-borders.html>

out by this Act, shall be recognised and viewed as a punishable offence with imprisonment for a term of not less than ten years and with fine of up till ten lakh rupees.

## V. INTERFERENCE, AND RIGHT TO PRIVACY

In the sense that is intended here, the word “privacy” denotes a particular aspect of liberty and freedom. It refers to freedom from public interference in matters that are regarding an individual as a private citizen. For example, freedom from government/ public interference in decisions making regarding procreation, family, and other private issues. The Supreme Court has recently held that all Indian citizens are entitled to this basic, constitutional right to privacy. Thus, it has become a must for the country and its government to invalidate all those laws that seem to be obstructing these decisions that are actually autonomous in nature. However, this has sparked counter arguments, saying that constitutional privacy has not provided any sanctuary for those families which face violence within themselves, such as wife beating, and abuse of children.

## VI. CRITICAL ANALYSIS

Till recent times, India was the ideal destination for commercial surrogacy because of the relatively low costs and the flexible legislation of our country regarding the processes of surrogacy. After various changes, and imposing specified laws in order to regulate<sup>20</sup> surrogacy tourism in India, the government finally passed the Surrogacy (Regulations) Bill, 2016, which banned commercial surrogacy in India for the purpose of ensuring an entirely altruistic approach surrounding the practices of “hiring a womb”<sup>21</sup>.

However, an extremely negative criticism was received by the government, for passing the said Act. The bill became the receiving end for severe backlash, and was cited as discriminating or even draconian<sup>22</sup> in nature.<sup>23</sup> Many view these rigid and thorough limitations of Surrogate practices as a grave violation of the fundamental rights of several women, and childless couples.

Though the primary objective of this bill was to avoid and prevent the exploitation of those women offering their bodies for the purpose of Surrogacy, it seems to have caused more harm than good. The concept of “altruistic surrogacy”, limits potential surrogate mothers as well as those couples that desire children. Adoption,

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<sup>20</sup> Corinne Donnelly , “Two Sides of The Surrogacy Debate”, on 30/05/2013, available at - <http://www.eggdonor.com/blog/2013/05/30/sides-surrogacy-debate/> last seen on 25/06/2013

<sup>21</sup> *Wombs for rent: A tale of two mothers*, BBC News World, July 28, 2011, available at <http://www.bbc.co.uk/news/world-14138394> last seen at, 28/06/2011

<sup>22</sup> Schneider, “Kinship, Nationality and Religion in American Culture: Toward a Definition of Kinship in SYMBOLIC ANTHROPOLOGY: A READER IN THE STUDY OF SYMBOLS AND MEANINGS” at 66, (J. Dolgin, D. Kemnitzer & D. Schneider, Eds. 1977)

<sup>23</sup> *Kim Cotton case, England*, Julian Robinson, “Britain's first surrogate mother felt 'cheated' after handing over a baby she gave birth to 30 years ago - to a couple she never met”, 4/01/2015, Mail Online, available at, <http://www.dailymail.co.uk/news/article-2895894/Britain-s-surrogate-mother-felt-cheated-handing-baby-gave-birth-30-years-ago-couple-never-met.html> , 4/01/2015.

as an alternative, describes long and tedious procedures, with most families desiring their own biological children.

As per the new bill, a woman can be a surrogate only once, and can only for close, blood relatives. In this manner, the bill does not impose a blanket ban on surrogacy, but only the commercialisation of the process. However, this causes extreme limitations to the parties that usually involve themselves in a surrogacy arrangement.

First, it entirely cuts off the income of those women that are dependent upon the monetary compensation received at the end of the process, to support their families<sup>24</sup>. According to most critics, a woman has every right to willingly consent to being a surrogate for a couple, in exchange for a monetary reward, especially if she is provided with the proper medical care, and a safe delivery. The state, in their opinion has no right to limit her to only one procedure of surrogacy. This is a clear violation of a woman's fundamental right to livelihood guaranteed by Article 21 of the Indian constitution.

Second, the provision that requires that a woman may act as a surrogate only for a close blood relative of the intended couple, might cause complications and requires the addressing of ethical issues that may arise regarding the development of intimate binds between the surrogate mother and the baby. The affair, taking place within the family is also a controversial issue<sup>25</sup> because her identity cannot be maintained as a secret and thus can ensure no privacy<sup>26</sup> to the surrogate mother. Also, the complete prohibition on the options available through commercial surrogacy, may give rise to the development and growth of black market businesses for surrogacy, or worse, victimisation and the forceful subjugation of oppressed women in joint families and marital homes to agree to bear children for relatives.

The bill also provides that a couple can only qualify for obtaining the services of a surrogate mother if they have been legally married for a minimum period of five years. However, reproduction and the desire of parents for children, is an extremely personal aspect of a couple's life and should not be interfered into by the state. The age restrictions set out by this bill do not achieve any specific purpose and are an arbitrary and unnecessary provision.

Another provision listed out in the act is the complete blanket ban on the options of Surrogacy by all

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<sup>24</sup> The Associated Press on 31 December 2007, published, "Indian women carrying babies for well-off buyers, 'Wombs for rent' pleases women and customers, but raises ethical questions". *CBC News*. Canadian Broadcasting Corporation.

<sup>25</sup> Shelley M. Tarnoff, JD, LMFCC, "ALL IN THE FAMILY: Using a Family Member as A Surrogate " available at - <http://www.opts.com/family.htm> last seen on 22/11/2017

<sup>26</sup> Janet L. Dolgin, Status and Contract in Surrogate Motherhood: An Illumination of the Surrogacy Debate, 38 *Bu . L. Rev.* 515 (1990) Available at: [http://scholarlycommons.law.hofstra.edu/faculty\\_scholarship/438](http://scholarlycommons.law.hofstra.edu/faculty_scholarship/438) , Page 531

homosexual couples<sup>27</sup>, and this is a direct violation of the rights granted to all homosexual couples by Article 14 of the constitution, since they are not illegal per se. This provision displays the total disregard of the government for gay rights, as well as their evident homophobia. Moreover, this has caused a global debate over the difference in legality of Surrogacy procedures from country to country<sup>28</sup>.

However, some of the provisions of the act are required for an effective protective environment surrounding the people involved in a surrogacy arrangement. The culture of reproductive tourism has attracted a large number of people to India, due to the cheap costs and the previously lax legislations. However, due to these relaxed laws, many issues arose, concerning the citizenship of the child, and sometimes even the custody of the said child. For example in the case of *Baby Manji v Union of India*<sup>29</sup>, wherein one Japanese couple availed surrogacy services in a small town of Gujrat. However, by the time the healthy baby girl was born, the couple had separated, and the child was left parentless, and stateless, stuck between the legislations<sup>30</sup> of two different countries. The child finally ended up in her grandmother's custody without citizenship, due to the illegal nature of surrogacy in Japan.

Similarly in the case of *Jan Balaz v Anand Municipality and Ors*<sup>31</sup>, two twin Children born through surrogacy in India, were not granted citizenship by the intended parents' home state, Germany. Thus the primary reason for avoiding foreign parents from coming to our country for the purpose of hiring a surrogate mother is to prevent complexities regarding citizenship.

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<sup>27</sup> IANS, "Spanish gay couple's child dream comes true in India", SIFY NEWS, 16/02/2011, available at <http://www.sify.com/news/spanish-gay-couple-s-child-dream-comes-true-in-india-news-health-lcqt4jbigbighisi.html>, last seen at 16/02/2011

<sup>28</sup> Silvia Blanco, "Spain Struggles with Surrogate Pregnancy Issue", 24/02/2017, El Pais, available at, [https://elpais.com/elpais/2017/02/21/inenglish/1487696447\\_837759.html](https://elpais.com/elpais/2017/02/21/inenglish/1487696447_837759.html), last seen on 26/11/2017, says, "Surrogacy is not legal in Spain, so those who want to work with a surrogate mother must go abroad. If everything goes well, they will work with agencies of varying trustworthiness. These, in exchange for money, will hire women who are willing to undergo hormonal treatment, carry another person's baby to term and promise to give it up after giving birth. These women, most commonly, are from countries poorer than Spain. Throughout the process, the hopeful parents are forced to navigate a lucrative and opaque industry that often operates on the edge of legality and ethics. It's a global process which has, in turn, created a global debate over whether or not the practice should be regulated, and if so, how."

<sup>29</sup> *Supra*, 7

<sup>30</sup> Matter of Baby, 217 N.J. Super. 313, 525 A.2d 1128 (1987), *aff'd in part and rev'd in part*, 109 N.J. 396, 537 A.2d 1227 (1988). The Baby M case has been the subject of extensive commentary, both in the popular press and in professional journals. See, e.g., Areen, Baby M Reconsidered, 76 GEO. L.J. 1741 (1988) (surrogacy described as an arena in which the domestic sphere and the public sphere coalesce); Ishii, Baby "M" and the Application of Adoption and Parentage Statutes, 24 Willamette L. REV. 1086 (1988) (urging either promulgation of new legislation or the appropriate reformulation of existing adoption and parentage statutes to protect welfare of child and interest of parties to surrogacy contracts); Mayo, Medical Decision Making During a Surrogate Pregnancy, 25 House. L. REV. 599 (1988) (discouraging specific performance of aspects of surrogacy contract that concern medical decisions during pregnancy); Miller, Surrogate Parenting and Adoption Statutes: Can a Square Peg Fit into a Round Hole?, 22 FAM. L. Q. 199 (1988) (recommending legislation providing for enforceability of surrogacy contracts); Schuck, Some Reflections on the Baby M Case, 76 GEO. L.J. 1793 (1988) (surrogacy has significant benefits and potential risks can be adequately regulated); Comment, Surrogate Mother Contracts: Analysis of a Remedial Quagmire, 37 EMORY L.J. 721 (1988) (absent legislative action, surrogacy contracts should be viewed as extrajudicial agreements).

<sup>31</sup> *Supra*, 11

In theory, the government should probably not ban commercial surrogacy entirely, and instead move towards a more regulatory approach towards the industry. Thus avoiding issue caused by “baby farms”<sup>32</sup> where the middlemen make most of the money and allow the actual surrogate mothers to receive only a pitiful amount as monetary reward. Rather than absolutely banning the commercialised practices of surrogacy, there must be an organised framework of laws that restricts and protects women from exploitation and ensures punishment and penalisation of those who do not honour the rules of the agreement. The government must make sure that all women acting as surrogates are properly advised and counselled about the process, and that they fully understand all the implications involved in the process, as well as the medical and economical repercussions. All surrogacy contracts should compulsorily include care of medical expenses and the proper nourishment of the mothers, during pregnancy as well as during her post-partum<sup>33</sup> time period. The process should be well regulated, at the same time being entirely pro choice.

In a wide interpretation of Article 26 of the Indian Constitution, which safeguards the rights of minorities, surrogacy can be included in right to life. Considering this fact, no newly married couple should be denied their right to procreation if they themselves are medically unfit.

Such a rigid framework of legislation may prove to be detrimental to our Indian Society. The current situation poses several other setbacks due to the existence of blackmarkets, hence destroying the original purpose of introducing the bill.

## VII. CONCLUSION

The decision to rent or sell any part of a woman’s body, whether it be her vagina, her kidney, or her womb, is entirely her prerogative. The state must not interfere with any of these trade practices beyond a certain limit. The absolute ban on the practice of surrogacy causes much more harm than good, in the sense that it causes resentment because of the limitations on these women’s rights to livelihood. Rather than banning the idea of commercial surrogacy entirely, and thus causing black markets to emerge, the government should provide an efficient framework of laws that control, monitor and regulate the industry. The government should provide legal employees to ensure that all agreements arising out of the surrogacy arrangements, are made in a proper manner by every single party involved, and breaches do not occur, in order to protect surrogate mothers, and the resulting children from the adverse effects. These legal representatives should be appropriate and should

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<sup>32</sup> "India's baby farm" in *The Sun-Herald* on 6/01/2008

<sup>33</sup> Kishwar Desai, “India’s Surrogate Mothers are risking their lives, They Urgently Need Protection”, 5/06/2012, *The Guardian*, available at <https://www.theguardian.com/commentisfree/2012/jun/05/india-surrogates-impoverished-die> , last seen on 5/06/2012 “Premila Vaghela, was thirty year old woman from a poor financial background, who agreed to be the surrogate mother for a commissioning American parent. Due to poor health care facility and medical complications, Premila died soon after giving birth to the baby, while waiting for a routine examination at an Ahmedabad hospital.”

possess competent authority. Thus the bill requires major amendments which should immediately be looked into the legislators of the country.