

ONE STEP FORWARD, TWO STEPS BACK: A CRITIQUE OF THE SURROGACY (REGULATION) BILL, 2019

Daksha Khanna & Abeera Dubey***

Abstract

The Surrogacy (Regulation) Bill, 2019 is a much-awaited law which seeks to regularize the multi-million-dollar industry of surrogacy in India, which was, until now, functioning without any concrete legislative framework. The need for this law was felt because of the exploitation of surrogate mothers by unethical practices of middlemen and occasionally by intending couples, and abandonment of children born out of surrogacy. It provides for the setting up of National and State Surrogacy Boards to, inter alia, supervise the functioning of surrogacy clinics and to monitor the implementation of the provisions of the Bill. It also provides financial protection to the surrogate mother in the form of medical expenses and insurance coverage. However, the prohibition of commercial surrogacy and adherence to the altruistic model of surrogacy has raised various constitutional and socio-economic concerns. The option of surrogacy

*Daksha Khanna is a fifth-year student at Government Law College, Mumbai. The author may be reached at k.dakshakhanna@gmail.com.

**Abeera Dubey is a fifth-year student at Government Law College, Mumbai. The author may be reached at abeeradubey@gmail.com.

has been limited strictly to infertile Indian married heterosexual couples, which has opened the Bill to castigation on the grounds that it is exclusionary to LGBTQ+, live-in couples, single parents, widow(er), divorcees, OCIs and PIOs. The conditions imposed on the eligibility of the surrogate mother has also drawn the ire of certain stakeholders as being conservative, and placing undue importance on the amorphous concept of 'public morality'. In the background of emphatic reiteration of the right to privacy and growing demand of the autonomy of women and their freedoms, this article attempts to evaluate the Bill from an objective legal lens. This article begins with scrutinizing the constitutionality of the Bill by applying the Golden Triangle test, then evaluating the issue of Excessive Delegation and overcriminalization, finally moving on to cover other miscellaneous issues.

I. INTRODUCTION

The surrogacy industry in India is estimated at around 400 million dollars per year and has witnessed the emergence of over 3000 fertility clinics all over the country.¹ The Surrogacy (Regulation) Bill,

¹Shubhangi Priya, 'Evaluating Surrogacy Legislation in India' (*Social and Political Research Foundation*, 2 Aug 2019) <<https://www.sprf.in/post/2019/08/02/evaluating-surrogacy-legislation-in-india>> accessed 23 June 2019.

2019 (“**the Bill**”) was passed by the Lok Sabha on 5th August 2019. The Bill bans commercial surrogacy and permits only altruistic surrogacy i.e., surrogacy with no monetary compensation apart from coverage of medical and insurance related expenses of the surrogate mother.² Subsequently, the Rajya Sabha, on 21st November 2019, referred the Bill to a Select Committee which submitted their report on 3 February 2020³ (“**Select Committee Report**”). The 228th Law Commission Report⁴ also recommended banning commercial surrogacy and allowing only the altruistic model of surrogacy. Earlier, the 2016 version of the Bill had been considered by the 102nd Department-related Parliamentary Standing Committee on Health and Family Welfare⁵ that submitted its report on 10th August 2017 (“**Parliamentary Committee Report**”). In 2002, the Indian Council of Medical Research (ICMR) had laid down guidelines for surrogacy, which made the practice legal, but did not give it legislative backing.⁶ The Bill has raised a number of constitutional, socio-economic, legal, and women’s rights concerns.

In this article, a detailed analysis of the Bill is presented with special focus on the aspect of constitutionality. The article examines these issues applying the jurisprudence developed through numerous precedents on the subject, in the context of reasoning furnished by the abovementioned committee reports which give conflicting recommendations on various key provisions of the Bill. The ethical and moral debate on the act of surrogacy itself is outside of the purview of this article.

²Surrogacy (Regulation) Bill 2019, s 4(ii).

³Rajya Sabha, *Report of the Select Committee on Surrogacy (Regulation) Bill, 2019* (presented on 5 February 2020).

⁴Law Commission, *Need for Legislation to Regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of parties to a Surrogacy* (Law Com No 228, 2009).

⁵Department-related Parliamentary Standing Committee On Health And Family Welfare, *The Surrogacy (Regulation) Bill 2016* (Rajya Sabha No. 102, 2017).

⁶*ibid* para 5.17.

II. THE GOLDEN TRIANGLE TEST AND MORE: SCRUTINIZING THE CONSTITUTIONALITY OF THE BILL

A. *Deriding Equality: The Litmus Test of Article 14*

Under the Bill, only an intending couple can opt for surrogacy. Intending couple has been defined as “a couple who have been medically certified to be an infertile couple and who intend to become parents through surrogacy”.⁷ The Bill imposes certain conditions of eligibility on the intending couple and the surrogate mother for them to avail altruistic surrogacy. Since these conditions restrict certain categories of people from engaging in altruistic surrogacy, the article examines whether they violate the fundamental right which guarantees “every person equality before the law, and equal protection of the law” under Article 14 of the Constitution of India.

In the case of *M. Nagaraj and Ors. v. Union of India and Ors.*⁸ the Supreme Court held that, “Article 14 confers a personal right by enacting a prohibition which is absolute. By judicial decisions, the doctrine of classification is read into Article 14. Equality of treatment under Article 14 is an objective test. It is not the test of intention. Therefore, the basic principle underlying Article 14 is that the law must operate equally on all persons under like circumstances.” For an Act or provision to pass the reasonable classification test under Article 14, following conditions must be fulfilled: (i) the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and (ii) that differentia must have a rational relation to the object sought to be achieved by the statute in question.⁹ This section

⁷Surrogacy (Regulation) Bill 2019, s 2(r).

⁸*M. Nagaraj and Ors. v. Union of India and Ors.* AIR 2007 SC 71.

⁹*Budhan Choudhry v. State of Bihar* 1955 SCR (1)1045.

focuses on whether the numerous conditions set out for the intending couple and the surrogate mother pass the reasonable classification test of Article 14.

a) *Restrictions Imposed on The Intending Couple*

In order to have a child through surrogacy in India the intending couple needs to fulfil the following requirements:

- I. Either or both suffering from proven infertility¹⁰
- II. Age of intending couple is between 23 to 50 years in case of female and between 26 to 55 years in case of male¹¹
- III. Married for five years and are Indian citizens¹²
- IV. Should not have a surviving child¹³

The above restrictions eliminate a wide range of people from availing surrogacy. Multiple concerns on imposing these conditions have been raised by organisations, activists, scholars and parliamentarians. In light of Article 14, the conditions imposed on the couple can be tested for intelligible differentia and rational nexus.¹⁴ The conditions of being legally married for five years required under the Bill can be put to test for violating Article 14 of the Constitution.

Only heterosexual couples can get married under the personal laws of respective communities and Special Marriage Act, 1954 in India. The proviso requiring couples to be legally married for opting surrogacy effectively excludes non-heterosexual couples. It further eliminates the chances of other live-in couples, single parents, widow(er) and divorcees from having a child through surrogacy. If the permissible

¹⁰Surrogacy (Regulation) Bill 2019, s 4(ii)(a).

¹¹ibid, s 4 (iii)(c)(I).

¹²ibid, s 4 (iii)(c)(II).

¹³ibid, s 4 (iii)(c)(III).

¹⁴*Vikram Cement v. Union of India* AIR 2007 SC 7.

classification test is applied, it must be examined if the above categorisation of people by allowing only married couples is based on intelligible differentia and if there is a rational nexus with the object of the Act.

The argument presented by the Department of Health Research (“**the Department**”) for keeping the above classification for excluding single woman has been to protect the rights of child born out of surrogacy, as marriage is an institution where both partners have mutual legal responsibility of the child that can be equally shared.¹⁵ The view extended in favour of the classification is therefore, based on the premise that married couples are bound by a legal institution and can provide the best environment for the protection and growth of the child, which is the object sought to be achieved by the statute. The argument advocates that only married couples are capable of raising children in a safe and wholesome environment as they are bound by an institution and can share the responsibility. In this regard, it is pertinent to note that live-in relationships are recognised under Protection of Women from Domestic Violence Act, 2005 as a *relationship in the nature of marriage* through Supreme Court Judgment in the case of *Nandakumar and ors. v. State of Kerala and ors.*¹⁶ The courts have also held that children born out of live-in relationships are legitimate under the law.¹⁷ Further, Central Adoption Resource Authority Guidelines allows single females and males to adopt a child (with the condition that men cannot adopt a girl child).¹⁸

Although live-in relationships and children born out of such relationships have been recognised through different judgments and

¹⁵Select Committee Report (n. 3) para 3.22.

¹⁶*Nandakumar and Ors. v. State of Kerala and Ors.* AIR 2018 SC 4321[10].

¹⁷*S.P.S. Balasubramanyam v. Suruttayan* AIR 133 SC 460; *Tulsa v. Durghatiya* AIR 2008 SC 1193.

¹⁸Adoption Regulations 2017, s 5.

adoption guidelines allows adoption by single parents, the classification on the basis of marriage can be argued as arbitrary as it is based on a presumption that married couples would be best suited to raise a child. Married couples, even though bound by a legal institution, can separate from each other and also do not guarantee development of the child in a nourishing environment. Studies over the years have shown that children raised by same sex couples do as well emotionally, socially and educationally as children raised by heterosexual couples.¹⁹ Moreover, research has shown that problems faced by single mother families are by no means exceptional, and the same problems are also faced by two parent families.²⁰ Based on this, it can be contended that the provision makes unreasonable classification between these categories of people. The clause curbs the freedom of non-heterosexual couples and single parents to have a child through surrogacy and infringes on the fundamental tenet of personal freedom. It was observed in *Navtej Singh Johar and ors v. Union of India*,²¹ “What is of importance is that when discrimination is made between two sets of persons, the classification must be founded on some rational criteria having regard to the societal conditions as they exist presently, and not as they existed in the early 20th century or even earlier.” The presumption in the present Bill is founded on an erroneous criterion which discriminates against single persons, live-in couples and couples belonging from LGBTQ+ community. The objective of the statute is protection of children born out of surrogacy. The above classification requires a rational nexus to this objective. As mentioned above, the classification is based on regressive presumption and is discriminatory in nature. The object aimed to achieve from the classification is in no way affected if the child is raised by a married couple, live-in couple or a single parent.

¹⁹Ken W Knight, ‘The kids are OK: it is discrimination, not same-sex parents, that harms children’ (2017) 9 MJA 207.

²⁰Ellen L. Lipman, ‘Child Well Being in Single Mother Families’ [2002] P75-82.

²¹*Navtej Singh Johar v. Union of India* AIR 2018 SC 4321.

Another condition worth mentioning is that the intending couple should be married for *at least five years* to avail surrogacy.²² The rationale given by the Department for the five years waiting period is that the couple should avail and exhaust all possible Assisted Reproductive Technology Treatments (ART), and only use surrogacy as the last resort.²³ The above provision, although appears harmless, can have grave implications for some intending couples. This condition tied with allowed age to avail surrogacy for couples can have grave implications for couples who marry late or have a substantial age difference. In the case of *Anuj Garg and Ors. v. Hotel Association of India and Ors.*²⁴ it was stated that the legislation should not only be assessed on its proposed aims but rather on the implications and the effect. If the present clause is imposed, and many couples have to wait for five years then they may not be able to have a child through surrogacy.

b) Restrictions Imposed on The Surrogate Mother

The Bill defines a surrogate mother as a woman who is genetically related to an intending couple and bears a child through surrogacy fulfilling the requirements provided in the Bill.²⁵ The following conditions are imposed on the surrogate mother under the Bill:

- I. Married with a child of her own²⁶
- II. Between the age of 25-35 years²⁷
- III. Close relative of the intending couple²⁸

²²Surrogacy (Regulation) Bill 2019, s. 4(iii)(c)(II).

²³Select Committee Report (n. 3) para 3.10.

²⁴*Anuj Garg and Ors. v. Hotel Association of India and Ors* AIR 2008 SC 663.

²⁵Surrogacy (Regulation) Bill 2019, s 2(zf).

²⁶*ibid*, s 4(iii)(b)(I).

²⁷*ibid*, s 4(iii)(b)(I).

IV. Not act as surrogate for more than once in her lifetime²⁹

V. Only for altruistic purposes³⁰

The conditions required to act as surrogate mother precludes many genuine women from acting as surrogate mothers. Concerns have been raised on many of the above points; however, this section covers the condition of the surrogate mother being married with a child of her own and its validity under Article 14. Subsequent sections of this article will cover how the altruistic model infringes Article 19(1)(g) of the Constitution.

The Bill specifies that “*no woman, other than an ever-married woman having a child of her own.*”³¹ If the reasonable classification test is applied, the classification here is based on the marital status of the surrogate mother and the fact that she should also have a child of her own. In the Select Committee Report, it was observed by the committee, if a young widow or a divorced woman wishes to have a child they might not be able to because of the social stigma attached to pregnancy of a single woman in the society and she should therefore, be given the option to avail surrogacy.³² If the same logic is applied in the present classification, that a single woman is disallowed from acting as a surrogate mother because of the social stigma, it is observed that it is an imposition of society’s moral standards that eliminates the choice of genuine women to act as surrogate mothers. Additionally, the requirement to have a child of her own first before acting as a surrogate can also be only seen as an ambiguous moralistic idea that the surrogate should be a mother of her own child first, prior to acting as surrogate mother to deliver a child for somebody else.

²⁸ibid, s 4(iii)(b)(II).

²⁹ibid, s 4(iii)(b)(IV).

³⁰ibid, s 4(ii)(b).

³¹ibid, s. 4(iii)(b)(I).

³²Select Committee Report (n 3) para 4.24.

Given that the object of the statute is the protection of the children and surrogate mother from exploitation,³³ the above classification would lead to an absurd implication that a single woman in the absence of a husband would be exploited. Moreover, the condition that a woman needs to have a child of her own to act as a surrogate mother for altruistic purposes does not have nexus with the proposed classification. Here as well, the nexus is based on moralistic ideas and age-old perceptions of women and motherhood. Any practice which is not immoral by societal standards cannot be thrust by the legislature of its own notion of morality to impose control, and such legislation has to pass the muster of constitutional provisions.³⁴ From the above discussion, it can be said that there is no reasonable nexus between the basis of classification and the object of the statute under consideration. Therefore, these provisions of the Bill are discriminatory in nature and perpetuate age-old ideas of morality.

It was held in the case of *ShayaraBano and Ors. v. Union of India (UOI) and Ors.*³⁵ that when something is done by the legislature capriciously, irrationally and/or without adequate determining principle, such principle would manifestly be arbitrary. The above discussed restrictions put on intending couples and the surrogate mother lack any rational and adequate determining principle, and appear to be suffering from the vice of manifest arbitrariness.

B. Freedom of Trade and Right to Livelihood: Ripples of the Ban on Commercial Surrogacy

‘Commercial surrogacy’ is defined in the Bill as “*commercialisation of surrogacy services or procedures or its component services ... or*

³³ibid para 4.1.

³⁴*State of Maharashtra v.Indian Restaurants and Hotel Association* AIR 2019 SC 589.

³⁵*Shayara Bano and Ors. v. Union of India (UOI) and Ors.* AIR 2017 SC 4609.

*trading the services of surrogate motherhood by way of giving payment, reward, benefit, fees, remuneration or monetary incentive in cash or kind, to the surrogate mother or her dependents or her representative, except the medical expenses incurred on the surrogate mother and the insurance coverage for the surrogate mother”.*³⁶ Sub-section (ii)(c) of Section 4 of the Bill bans surrogacy for financial gain and allows surrogacy only for altruistic purposes. In this aspect, the Bill of 2019 makes a departure from the Bills of 2008 and 2014 which permitted commercial surrogacy.³⁷ In addition, only a ‘close relative’ can act as a surrogate mother for the intending couple.³⁸ Since commercial surrogacy had become a source of income for a faction of underprivileged women,³⁹ the question which naturally arises is that, whether the complete ban on commercial surrogacy is in contravention of Article 19(1)(g) of the Constitution of India which grants every citizen of India the freedom of trade and occupation.

Whether this blanket ban on commercial surrogacy previously implicitly acknowledged as legal by the Supreme Court⁴⁰ is sound legally, ethically and morally is a complex question with compelling arguments on either side. The view that favours the ban primarily relies on “...*reported incidents of unethical practices, exploitation of surrogate mothers, abandonment of children born out of surrogacy...rackets of intermediaries, unregularized clinics practicing*

³⁶Surrogacy (Regulation) Bill 2019, s 2(f).

³⁷Bhumitra Dubey, Yash Tiwari, ‘Analysis of the Surrogacy (Regulation) Bill, 2020’ (2020) ILJ <<https://indialawjournal.org/analysis-of-the-surrogacy-regulation-Bill.php>> accessed 28 December 2020.

³⁸Surrogacy (Regulation) Bill 2019, s 4(iii)(b)(III).

³⁹Neeta Lal, ‘India Poised to Restrict Surrogate Pregnancies’ (*YaleGlobal Online*, 2019) <<https://yaleglobal.yale.edu/content/india-poised-restrict-surrogate-pregnancies>> accessed 27 June 2020.

⁴⁰*Baby Manji Yamada v. Union of India* AIR 2009 SC 84, *Jan Balaz v. Anand Municipality* AIR 2010 Guj 21. In both these cases, the Court directed the enactment of legislation on surrogacy.

surrogacy...noble act of motherhood".⁴¹ The other view prominently propounded by the United Nations Population Fund (UNFPA), other stakeholders and various non-governmental organizations, point out that a complete ban on practice will drive it underground and instead advocate that the law should introduce strict regulation and protection mechanisms to regulate commercial surrogacy.⁴² The Bill purports to balance these two extreme views by allowing only altruistic surrogacy and banning and criminalizing commercial surrogacy. Since the prohibition on commercial surrogacy has been a highly contested subject, this section analyses the constitutional contentions in the context of Article 19(1)(g) and the right to livelihood under Article 21.

a) Dissecting 'Reasonable Restriction' Under Article 19(1)(g)

An activity can be regarded as a 'trade or business' under Article 19(1)(g) if it is carried on for a profit motive.⁴³ Here, commercial surrogacy can fairly be considered a 'trade or business' because it serves as a means of livelihood for the surrogate mother.

The test to assess the constitutionality of a restriction under Article 19(1)(g) on the freedom of trade and occupation is, that it should be a reasonable restriction under Article 19(6) i.e. it should not be arbitrary and excessive and it should be made in public interest.⁴⁴ This test was further elucidated in *Sivani's* case⁴⁵ by stating that, in examining reasonableness, the broad criterion is whether the law strikes a proper balance between social control on one hand and the right of the individual on the other hand. Judicial scrutiny would entail taking into

⁴¹Select Committee Report (n 3) para 5.8, para 4.1.

⁴²*ibid* para 2.12.

⁴³*Unni Krishnan v. State of Andhra Pradesh* 1993 AIR 2178.

⁴⁴*Chintaman Rao v. State of Madhya Pradesh* 1951 AIR 118.

⁴⁵*M.J. Sivani and Ors. v. State of Karnataka and Ors.* AIR 1995 SC 1770.

account factors like nature of the right enshrined, underlying purpose of the restriction imposed, evil sought to be remedied by the law, its extent and urgency, how the restriction is or is not proportionate to the evil and the prevailing conditions at that time.⁴⁶

In the present Bill, admittedly, the primary evil sought to be remedied is the exploitation of surrogate mothers at the hands of middlemen, and occasionally intending couples. As noted in the Parliamentary Committee Report, the potential for exploitation is linked to the lack of regulatory oversight and lack of legal protection to the surrogate and can be minimized through adequate legislative norm-setting and robust regulatory oversight.⁴⁷ The automatic equivalence of commercial surrogacy with exploitation seems misplaced. Therefore, in light of this observation, it becomes arguable that, instances of exploitation being reported might have been largely due to the lack of comprehensive and binding legislation on the subject, and therefore, allowing commercial surrogacy within the regulatory framework that the Bill proposes would have possibly reduced such instances. In western countries where commercial surrogacy is legal, risks (both physical and psychological) of surrogacy have been largely mitigated by intensive counselling and support for surrogate mothers and intended parents.⁴⁸ At the consultations stage, there were also concerns raised by stakeholders that endorsing altruistic surrogacy will enforce emotional and social pressure on close female relatives without any compensation for immense emotional and bodily labour of gestation involved in surrogacy as well as loss of livelihood.⁴⁹ The livelihood of numerous women who choose to become surrogates for

⁴⁶ibid.

⁴⁷Parliamentary Standing Committee Report (n 5) para 5.17.

⁴⁸Viveca So"derstro"m-Anttila, Ulla-Britt Wennerholm, Anne Loft, Anja Pinborg, Kristiina Aittoma"ki, Liv Bente Romundstad, and Christina Bergh (2015) Human Reproduction Update Vol.0, No.0 pp. 1–17, 2015 <<https://pubmed.ncbi.nlm.nih.gov/26454266/>>.

⁴⁹Parliamentary Standing Committee Report (n. 5) para 5.8.

economic benefits is at loggerheads with the reasoning of Select Committee Report which purports to prevent ‘forced labour’ and states it as a ground to justify the altruistic model.⁵⁰

Herein, another important aspect is the test of proportionality recently also enunciated in the case of *Modern Dental College*⁵¹ in the following words, “*there needs to be a proper relation (‘proportionality stricto sensu’ or ‘balancing’) between the importance of achieving the proper purpose and the social importance of preventing the limitation on the constitutional right*”. Interference prescribed by state for pursuing the ends of protection should be proportionate to the legitimate aims and the standard for judging the proportionality should be a standard capable of being called reasonable in a modern democratic society.⁵² Here, it is pertinent to discuss the ‘compensated surrogacy’ model that the Parliamentary Committee Report endorsed. Emphasizing that a surrogate is the most important stakeholder in this whole process, “*the compensation should be commensurate with the lost wages for the duration of pregnancy, medical screening and psychological counselling of surrogate; child care support or psychological counselling for surrogate mother’s own child/children, dietary supplements and medication, maternity clothing and post-delivery care and should be fixed by relevant authorities, not subject to bargain*”.⁵³ The Select Committee Report adopts these recommendations partially providing for coverage of the above-mentioned expenses (to be prescribed later under rules) except loss of wages. Whether the compensated model is more proportionate to the state aim of curbing exploitation remained an issue which divided the

⁵⁰Select Committee Report (n 3) para 4.3.

⁵¹*Modern Dental College and Research Centre v. State of Madhya Pradesh* AIR 2016 SC 1559.

⁵²Anuj Garg (n. 25).

⁵³Parliamentary Standing Committee Report (n 5) para 5.8.

opinion of various stakeholders represented in the Committee. It is indeed difficult to reconcile a model which offers no benefits to the surrogate mother for undergoing great physical and mental ordeal with the abovementioned reasonableness standard. In fact, there are numerous instances wherein the money earned from undertaking surrogacy has helped them alleviating their families from poverty, eventually reducing their dependency to take up surrogacy again.⁵⁴ The social control exerted by the State by imposing such a blanket ban is asymmetrically biased against the rights of the women.

b) Exploring Alternative Models

The other standard of judging reasonability of restriction which amount to prohibition is that a total prohibition must also satisfy the test that a lesser alternative would be inadequate.⁵⁵ It was observed in the case of *Anuj Garg*,⁵⁶ in the context of barring employment of women in certain workplaces on grounds of security concerns that, instead of putting curbs on women's freedom, empowerment would be a more tenable and socially wise approach. This empowerment should reflect in the law enforcement strategies of the state as well as law modelling done on this behalf.⁵⁷ The compensated model (discussed above) also proves to be a viable alternative model. Therefore, it is arguable that, the Bill would have been more practical and protecting in women's freedom had it supplied complementary models like employment counselling and connecting surrogates with opportunities for paid employment outside of surrogacy and fertility

⁵⁴Neeta Lal, 'India Poised to Restrict Surrogate Pregnancies' (*YaleGlobal Online*, 2019)

<<https://yaleglobal.yale.edu/content/india-poised-restrict-surrogate-pregnancies>> accessed 27 June 2020.

⁵⁵*State of Gujarat v. Mirzapur Moti Kureshi Kassab Jamat* 2005 (2) MPJR (SC) 407 (approved in *State of Maharashtra v. Indian Restaurants and Hotel Association* 2019 SCC OnLine SC 41).

⁵⁶*Anuj Garg* (n 25).

⁵⁷*ibid.*

clinics that can help women create economic sustainability for themselves and their families.⁵⁸ Admittedly, the government does have schemes like Mahila Shakti Kendra Scheme (MSKS), Scheme Training and Employment Programme for Women (STEP) etc, however, if, despite these schemes women were taking up surrogacy, it implies that it was possibly due to gaps in the implementation of these programmes. This lacunae in the policy requires a comprehensive action plan, instead of a blanket ban.

c) *Imposition of a Regressive Moral Standard*

It is also pertinent to note that, making commercial surrogacy illegal denies women agency over their own bodies while also depriving them of livelihood.⁵⁹ Studies suggest one key motivation among surrogate parents is altruism; others have specific goals in mind, such as sending their children to better schools or clearing family debt, for many it is a pathway out of poverty.⁶⁰ The Parliamentary Committee Report itself notes that, a lot of women that were examined by the committee stated that alternative means of livelihood available for them were, if not more, equally exploitative and significantly less remunerative than surrogacy.⁶¹ Permitting women to provide reproductive labour for free to another person but preventing them

⁵⁸Sarah Huber, Sharvari Karandikar and Lindsay Gezinski, 'Exploring Indian Surrogates' Perceptions of the Ban on International Surrogacy' (2017) 2018, Vol. 33(1) 69-84 <<https://journals.sagepub.com/doi/pdf/10.1177/0886109917729667>> accessed 27 June 2020.

⁵⁹Neeta Lal, 'India Poised to Restrict Surrogate Pregnancies' (*YaleGlobal Online*, 2019) <<https://yaleglobal.yale.edu/content/india-poised-restrict-surrogate-pregnancies>> accessed 27 June 2020.

⁶⁰ibid.

⁶¹Parliamentary Standing Committee Report (n 5) para 5.18.

from being paid for their reproductive labour is grossly unfair and arbitrary.⁶²

However, the Select Committee Report makes certain regressive comments to support the prohibition on commercial surrogacy, venturing as far as implying that commercial surrogacy is an immoral and unethical practice and women who engage in such practices will not be treated with same respect as other women and mothers get in the society.⁶³ It arguably places undue reverence on the 'noble act of motherhood', declaring altruistic surrogacy as 'setting an example of a model woman', denigrating the financial benefits that surrogate mothers derive which in turn are used to improve their standards of living. A feminist critique of the reasoning furnished in the Select Committee Report demonstrates 'the noble act of motherhood' hints of biological essentialism, which is frequently used to reinforce conventional sex roles, gender divisions of labour, and inequalities of power, were biologically determined and therefore could not be challenged.⁶⁴ The undertones of essentialism can be observed in the reasoning furnished in the Select Committee Report, which states that, "*The surrogate mother shows a strong inclination to render selfless service and takes a forward step to abolish the stigma of infertility from the society.*" The problem of essentialism is one of overgeneralization, stereotyping, and a resulting inability to even 'see' characteristics that do not fit preconceptions and in practice, this leads to discrimination⁶⁵ and hence it is not a desirable rationale for basing crucial legislation.

⁶²Parliamentary Standing Committee Report (n 5) para 5.18.

⁶³Select Committee Report (n 3) para 4.9 - 4.11.

⁶⁴Raewyn Connell, 'Feminism's Challenge To Biological Essentialism' (*The Sydney Morning Herald*, 2013) <http://www.raewynconnell.net/2013/03/feminisms-challenge-to-biological.html>> accessed 28 December 2020.

⁶⁵Anne Philips, 'What's wrong with Essentialism?' (2011) *Distinktion: Scandinavian Journal of Social Theory* 11:1, 47-60

d) *Deciphering The 'Public Interest' - 'Public Morality'*
Conundrum

Perhaps the most contentious aspect of constitutionality of the restriction introduced by the Bill arises when an examination of the ban on commercial surrogacy is done on grounds of public interest. For the purpose of prohibiting illegal/immoral trade, or trade injurious to public welfare, the government is empowered to regulate the prevailing conditions of the concerned trade.⁶⁶ If the precedents on regulation of liquor trade are traced, it is observed that, it has been repeatedly held that there was no fundamental right to carry on trade in liquor because of the reasons of public morality, public interest and harmful and dangerous character of liquor.⁶⁷ The aforesaid ratio jeopardized the observations in *Krishan Kumar's case*,⁶⁸ wherein it had been held that while standards of morality could afford guidance to impose restrictions, they could not limit the scope of the right. It is observed that if challenged in Courts, the precedents which curb the freedom on trading liquor and also activities related to prostitution⁶⁹ can plausibly be argued to uphold the ban of commercial surrogacy on grounds of 'morality' and 'public interest' as it commodifies motherhood.⁷⁰ There is also uncertainty surrounding the contention

<<https://wtsoneww.tandfonline.com/doi/abs/10.1080/1600910X.2010.9672755?src=recsys>> accessed 28 December 2020.

⁶⁶Sivani (n 46).

⁶⁷*Nashirwar v. State of Madhya Pradesh* AIR 1975 SC 360.

⁶⁸*Krishna Kumar Narula Etc v. The State Of Jammu And Kashmir & Ors* 1967 AIR 1368.

⁶⁹*State Of Uttar Pradesh v. Kaushaliya* 1964 SCR (4)1002.

⁷⁰Select Committee Report (n 3) para 4.8.

whether surrogacy is *res extra commercium*⁷¹ and therefore, not entitled to the protection of Article 19(1)(g).

However, there are equally if not more meritorious arguments opposing the prohibition on commercial surrogacy. The United States Supreme Court in the case of *Joseph Patstone*⁷² held that the state may direct its law against what it deems evil as it actually exists without covering the whole field of possible abuses, but such conclusions have to be reached either on the basis of general consensus shared by the majority of the population or on the basis of empirical data. Admittedly, no empirical studies have been undertaken by the government on this issue. The aforesaid ratio has also been approved in the case of *State of Maharashtra v. Indian Restaurants and Hotel Association*⁷³ wherein the Hon'ble Supreme Court struck down a rule which was imposed on grounds of public morality, prohibiting dancing in certain establishments also holding that, dancing is not *res extra commercium*. This was held despite the fact that it was submitted that girls had not opted for this profession out of choice but have been brought into this by middle men or other exploitative factors much like in the case of surrogacy.⁷⁴

Additionally, numerous provisions run the risk of in fact appearing contrary to public interest. The Parliamentary Committee Report, noted that whereas it is desirable that women be discouraged from opting for surrogacy as a means of livelihood, the altruistic model proposed by the Bill in fact is divorced from reality.⁷⁵ In the *Indian*

⁷¹Res extra commercium means a thing outside of commercial intercourse i.e. things not subject to ownership, commerce, or trade, such as the high seas or air (Oxford Reference).

⁷²*Patstone v. Pennsylvania* [1914] 58 L Ed 539: 232 US 138 (1914).

⁷³*State of Maharashtra v. Indian Restaurants and Hotel Association* AIR 2019 SC 589.

⁷⁴*ibid* para 24.

⁷⁵Parliamentary Standing Committee Report (n 5) para 5.40.

*Restaurants and Hotel Association case*⁷⁶ it was brought on record that, many of women relieved from employment in dance bar establishment have been compelled to take up prostitution out of necessity for maintenance of their families and that the impugned legislation has proved to be totally counterproductive and cannot be sustained being *ultra vires* Article 19(1)(g). These concerns are also valid in the context of surrogacy, wherein women from underprivileged backgrounds will either have to function in the unregulated surrogacy industry functioning underground or take up other desperate measures. It is state's duty to ensure circumstances of safety which inspire confidence in women to discharge the duty freely in accordance with the requirements of the profession they choose to follow.⁷⁷ Commercial surrogacy is analogous to the aforesaid cases in numerous aspects and provides some jurisprudential guidance in the event the Bill is challenged in courts. Here it is worth mentioning that the government has submitted, that the stringent punishment in the provisions of the Bill and allowing any woman to be a surrogate only once, monitoring provisions in the Bill and need based additional measures/policy interventions made by the National Surrogacy Board would go a long way in preventing black marketing of surrogacy services.⁷⁸

From the above discussion, it can be concluded that various aspects and implications of the Bill exist on a thin line between unconstitutionality and Article 19 and Article 21 (discussed below) of the Constitution. It also remains to be seen how the Bill finally materializes.

⁷⁶*State of Maharashtra v. Indian Restaurants and Hotel Association* AIR 2019 SC 589.

⁷⁷Anuj Garg (n. 25).

⁷⁸Select Committee Report (n.3) para 3.4.

C. *The Article 21 Paper Tiger: Examining The Bill From The
Lens of Right to Privacy*

In August 2017, in the case *Justice K S Puttaswamy v. Union of India*,⁷⁹ a nine-judge bench of the Supreme Court in a landmark judgment held that right to privacy is an inalienable fundamental right. Right to privacy was held to be an element of human dignity which is the foundation of other fundamental rights, and further the court stated that, the duty of the state is to safeguard the ability to take decisions and the autonomy of the individual- and not to dictate those decisions⁸⁰ Approving the ratio in *Suchita Srivastava's* case,⁸¹ the court held that the right to make reproductive choices is a part of a woman's right to privacy, dignity and bodily integrity-dimension of "personal liberty" under Article 21. The right to make a decision about reproduction is essentially a very personal decision, the intrusion of the State into such a decision making process of the individual is scrutinized by the constitutional courts.⁸²

a) *Privacy From The Perspective Of Intending Couples*

The Bill limits the option of surrogacy solely to infertile⁸³ Indian heterosexual married couples within the altruistic framework, criminalizing any other circumstance where people may want to opt for surrogacy⁸⁴ (covered in detail in Section C). This exclusionary policy infringes the reproductive autonomy of a host of other categories of people like, single parents, widow(er), un-married,

⁷⁹*Justice K.S. Puttaswamy v. Union of India* AIR 2017 SC 4161.

⁸⁰*ibid.*

⁸¹*Suchita Srivastava v. Chandigarh Administration* AIR 2010 SC 235.

⁸²*B.K. Parthasarathi v. Government of A.P. and Ors.* AIR 2000 AP 156.

⁸³Surrogacy (Regulation) Bill, s 2(p): "infertility" means the inability to conceive after five years of unprotected coitus or other proven medical condition preventing a couple from conception.

⁸⁴Surrogacy (Regulation) Bill, s 35.

LGBTQ+ couples, divorcees etc. who may want to have children. The reasoning given by the government that LGBTQ+ couples are not legally recognized and hence are excluded from deriving the benefit of surrogacy⁸⁵ is jeopardized in the light of the decision in *Navtej Singh Johar*.⁸⁶ It also ignores the legal recognition granted to live-in couples by Supreme Court.⁸⁷ If the state cites legal complications and custody issues for denying access to surrogacy outside a marriage, it may have an uphill task meeting the just, fair and reasonable standard.⁸⁸ The waiting period of five years for infertile couples (who are permitted to opt for surrogacy) also has the effect of curtailing the reproductive choice as World Health Organization terms infertility as “*a disease of the reproductive system defined by the failure to achieve a clinical pregnancy after 12 months or more of regular unprotected sexual intercourse*”.

It is observed that considerable freedom has been taken away in terms of choices that people may want to resort to for having children (but are unable to by conventional methods for various reasons). The instrumental facet of dignity signifies that dignity and freedom are inseparably intertwined, each being a facilitative tool to achieve the other.⁸⁹ Dignity is inextricably grounded in all fundamental rights, including privacy. Decisional autonomy was explicitly propounded in the *Puttaswamy* case, as including “*intimate personal choices such as those governing reproduction as well as choices expressed in public such as faith or modes of dress*”.⁹⁰

⁸⁵Answer given by the Health Minister answer in Lok Sabha on 5 August 2019.

⁸⁶*Navtej Singh Johar v. Union of India* AIR 2018 SC 4321.

⁸⁷*S. Khushboo v. Kanniamma* AIR 2010 SC 3196.

⁸⁸Arijeet Ghosh, Nikita Khaitan, ‘A Womb of One’s Own: Privacy and Reproductive Rights’ (Economic and Political Weekly, 2017) Vol. 52, Issue No. 42-43 <<https://www.epw.in/node/150120/pdf>> Accessed 20 June 2020.

⁸⁹*Puttaswamy* (n 80).

⁹⁰*ibid* para 142.

If the state purports to restrict this reproductive autonomy, then the aforesaid restriction must pass the test of proportionality laid down in *Puttaswamy*⁹¹ and *Modern Dental College*.⁹² The first requirement is that there must be a law in existence to justify an encroachment on privacy, which is also an express requirement of Article 21. Second, the requirement of a need, in terms of a legitimate state aim, which should ensure that the nature and content of the law which imposes the restriction falls within the zone of reasonableness mandated by Article 14, which is a guarantee against arbitrary state action. Third, the restriction must be proportional to the object and needs to be fulfilled by the law and fourth, that it should be the least restrictive measure.

The first condition is fulfilled by enacting the Bill, and the second condition has been already discussed in Section B(1) of this article. Hence, it is now important to examine the third and fourth condition of proportionality and least restrictive measure respectively. The least restrictive measure prong of the proportionality test is a fact-based test as it necessarily entails for the court to examine various alternative measures that can be adopted to achieve the intended goal of the state.⁹³ A judgment must be made whether the government measure is the best of all feasible alternatives, considering both the degree to which it realizes the government objective and the degree of impact upon fundamental rights.⁹⁴ There is little merit in considering adoption as an alternative to surrogacy, as surrogacy and adoption have to be an equal choice and in the name of adoption, the

⁹¹Puttaswamy (n 80).

⁹²*Modern Dental College and Research Centre v. State of Madhya Pradesh* AIR 2016 SC 1559.

⁹³Ankush Rai, 'Proportionality in Application – An Analysis of the "Least Restrictive Measure"' (Indian Constitutional Law and Philosophy, 2020) <<https://indconlawphil.wordpress.com/?s=proportionality+test&search=Go>> accessed 28 June 2020.

⁹⁴Per Bilchiz Test approved in *Anuradha Bhasin v. Union of India* 2020 ALL MR (Cri) 1372.

Government cannot take away the reproductive rights of couples to have a biologically related child through surrogacy.⁹⁵ As already discussed in Part 2(b) of the article, it can be argued that the compensated model endorsed by the Parliamentary Committee Report is a less restrictive measure, which balances the rights of the surrogate mother against the freedom of choice of the intending couple and hence more proportional to the object of the law i.e. prevention of exploitation of surrogate mothers. In fact, the Parliamentary Committee Report had criticized the narrow ambit of the eligibility provision, and gone as far as observing that such provisions render the whole option of surrogacy virtually nugatory⁹⁶. The eligibility conditions as they stand now, have the effect of dictating the decision of reproduction for people, instead of allowing them to exercise their autonomy.

b) Privacy from The Perspective Of The Surrogate Mother

The decisional autonomy mentioned above, also extends to the surrogate mother herself. The conditions of eligibility for the surrogate mother already discussed in Section B(1) of this Article run afoul of Article 14, the same sets of conditions are also arguably in contravention of right to privacy.

It is pertinent to mention the case of *State Of Uttar Pradesh v. Kaushaliya*⁹⁷ wherein the court upheld a section of Immoral (Traffic) Prevention Act, 1956 which discriminated between women who engage in prostitution and other women of different occupation on grounds of public morality.⁹⁸ This deserves reconsideration in light of *Puttaswamy*, where the centrality of choice was highlighted on

⁹⁵Parliamentary Standing Committee Report (n 5) para 5.23.

⁹⁶ibid para 5.40.

⁹⁷*State Of Uttar Pradesh v. Kaushaliya* 1964 SCR (4) 1002.

⁹⁸ibid para 17.

various occasions, with Justice Chelameswar correctly pointing out that decisional autonomy includes choice of work.⁹⁹ Therefore, if decisional autonomy includes choice of work, then surely there exists no *a priori* moral difference between someone who is a ‘prostitute’ and someone who is engaged in any other occupation.¹⁰⁰ Since there exist similar grounds of public morality and exploitation of women to prohibit the surrogacy industry as there does in prostitution, it is noted that the aforesaid ‘choice of work’ as a facet of decisional autonomy can possibly be extended to surrogate mothers.

The repeated portrayal of surrogate women as being ‘vulnerable’ due to their economic conditions¹⁰¹ has an effect of ignoring the role ‘choice’ plays in given circumstances and ultimately denying women agency over their bodies. However, certain research studies show that surrogates exercise a kind of pragmatism in their choice to undertake surrogacy.¹⁰² Interviews with women who chose to provide gestational services for a fee have shown that it is a well-considered decision made in constrained economic conditions.¹⁰³ This appears as a ‘better option’ than the kind of underpaid wage labour the surrogates perform at the local factory in harsh, unhealthy conditions.¹⁰⁴ Thus, to choose stigmatized work like prostitution or surrogacy does not only mean the lack of other available options but

⁹⁹Guatam Bhatia, ‘The Supreme Court’s Right to Privacy Judgment – V: Privacy and Decisional Autonomy’ (Indian Constitutional Law and Philosophy, 2017) <<https://indconlawphil.wordpress.com/2017/08/31/the-supreme-courts-right-to-privacy-judgment-v-privacy-and-decisional-autonomy/>> accessed 28 June 2020.

¹⁰⁰*ibid.*

¹⁰¹Select Committee Report (n.3) para 17.

¹⁰²Rudrappa’s (2012) study cited in Anindita Majumdar, ‘The Rhetoric of Choice: he Feminist Debates on Reproductive Choice in the Commercial Surrogacy Arrangement in India’ (2014) 18(2) 275–301 <<https://journals.sagepub.com/doi/abs/10.1177/0971852414529484>> accessed 28 December 2020.

¹⁰³Gargi Mishra, ‘Our Notions of Motherhood’ *Indian Express* (9 August 2019).

¹⁰⁴Rhetoric of Choice (n 103).

also a conscious choice in itself.¹⁰⁵ Agency forms an essential way of giving voice to those who feel unempowered within an arrangement that seems overwhelmingly debilitating.¹⁰⁶ Thus, it can be argued that exercising agency over one's body is another notable manifestation of right to privacy.

Notwithstanding the arguments furnished above, the aforesaid issue is contentious as there is scarce jurisprudence on reproductive rights in the context of surrogacy in India. Irrespective of the earlier cases wherein the Supreme Court had entertained cases pertaining to surrogacy without going into the legality thereof,¹⁰⁷ any future challenge to the Bill, will be a pioneer in laying down the constitutional position on commercial surrogacy.

*D. To Delegate Or Not To Delegate: Investigating The Powers
Given To The National Surrogacy Board*

It is a settled principle that the Indian legislature cannot confer unfettered power to the executive to make regulations which are necessarily the function of the legislature; contravention of the same would be *ultra vires* the Constitution.¹⁰⁸ Delegation is valid only when it is confined to legislative policy and guidelines which are adequately laid down and the delegate is only empowered to implement such policy within the guidelines laid down by the legislature.¹⁰⁹ When the Constitution entrusts the duty of law-making to Parliament and the Legislatures of States, it impliedly prohibits them from throwing away that responsibility on the shoulders of some

¹⁰⁵ibid.

¹⁰⁶ibid.

¹⁰⁷Manji Yamada, Jan Balaz (n 41).

¹⁰⁸*Hamdard Dawakhana (Wakf) v. Union of India* AIR 1960 SC 554 [35].

¹⁰⁹*IK. Industries Ltd. v. Union of India* [2007] 13 SCC 673 [66].

other authority.¹¹⁰ There are two instances where the Bill delegates power to the National Surrogacy Board (“**the Board**”) constituted by a Central Government notification¹¹¹ to prescribe certain regulations and conditions that risk endangerment if challenged as being *ultra vires* of the Constitution.

In the first instance, the Bill specifies certain eligibility criteria for the intending couple (as mentioned above). In addition to these conditions the Bill allows the Board to prescribe “*such other conditions as may be specified by the regulations*” that the couple may be required to fulfil in order to acquire an eligibility certificate from the appropriate authority.¹¹² In the second instance, the Bill specifies the purposes for which surrogacy procedure can be undertaken.¹¹³ Here, the Bill grants the power to the Board to prescribe “*any other condition or disease*” to qualify for availing surrogacy.¹¹⁴ In the Memorandum Regarding Delegated Legislation in the Bill, it is stated that “*the matters in respect of which the said rules and regulations may be made are matters of procedure and administrative detail, and the delegation of legislative power is of a normal character*”.

It is pertinent to note that in a later section of the Bill, it is mentioned that any regulation made by the Board under the Bill shall be laid down before each House of Parliament, as soon as may be after it is made, to make any modifications or annulments, however, such annulment shall be without prejudice to the validity of anything done previously under those rules and regulations.¹¹⁵ The introduction of this section makes room for the legislature to deliberate on a condition decided by the Board and gives power to the legislature to

¹¹⁰*Kishan Prakash Sharma and Ors. v. Union of India and Ors.* AIR 2001 SC 1493.

¹¹¹The Surrogacy (Regulation) Bill 2019, s 14(1).

¹¹²*ibid* s 4 (iii)(c)(IV).

¹¹³*ibid* s 4 (ii).

¹¹⁴*ibid* s 4 (ii)(e).

¹¹⁵*ibid* s 49.

annul any rule or regulation that it does not approve. However, the process before which a rule or regulation can be annulled by the Parliament is lengthy and time consuming as Parliament presides only twice in a year, and considering the clause states that the decision of the Parliament will not affect the validity of any act already done under its provisions, leaves inordinate room for the Board to exercise unfettered and unregulated powers for a long duration of time amounting for the argument of excessive delegation to come into picture. Therefore, the next part shall apply the test for excessive delegation to analyse if the powers allocated to the Board under the Bill are within constitutional limitations.

a) Applying The Test For Excessive Delegation

Whether the power delegated by the legislature to the executive has exceeded the permissible limits, in a given case, depends on the exact nature of power that has been delegated and the standards which have been set to guide the administrative authority. The test adopted in the case of *Hamdard Dawakhana (Wakf) v. Union of India* (“**Hamdard case**”)¹¹⁶ was that it should not amount to *abdication* of the legislative function. In *Hamdard case*, the Court invalidated Section 3(d) of the Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954, which used the term “*or any other disease or condition which may be specified in rules made under this Act*”, on the basis that there was no legislative guidance on how these “diseases” were to be selected. It was further observed, “*Parliament has established no criteria, no standards and has not prescribed any principle on which a particular disease or condition is to be specified in the Schedule*”.¹¹⁷ Similarly, in the present Bill, the legislature has delegated the power of prescribing additional conditions for undertaking the practice of

¹¹⁶*Hamdard Dawakhana (Wakf) v. Union of India* AIR 1960 SC 554 [35].

¹¹⁷*ibid* para 34.

surrogacy. The Board can decide the extra conditions the intending couple needs to fulfil in order to avail surrogacy services, as well as any other condition or diseases required to exercise surrogacy in India. Applying the above standards set out by the Supreme Court to the present Bill, it is observed that the powers delegated to the administration are well beyond ‘only matters of procedure and administrative detail’.

The power to determine the requirements for opting surrogacy involves profound deliberation and resolution which falls under the ambit of the powers of the legislature. However, while allowing the Board to prescribe extra conditions, the board is now exercising powers which are, in fact, legislative in nature. Further, the Bill does not prescribe any criteria, standard or principle on the basis of which the additional conditions or the diseases are to be selected. In the aspect of delegating powers to the administrative authority, the Bill is analogous in nature to Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954 and seemingly falls short of meeting the criteria set out by this test. Without any guidance from the legislature, the power given to the Board exceeds appropriate delegation which the parliament can authorize.

Another test to ascertain excessive delegation has been laid down by the Supreme Court in the case of *Gwalior Rayon Silk Mfg v. Asst. Commr. Of Sales Tax*¹¹⁸ written by Justice Khanna while referring to Willoughby, an American constitutional scholar wherein he propounded that while the real law-making power may not be delegated, a discretionary authority may be granted to executive and administrative authorities¹¹⁹ : (1) to determine in specific cases when and how the powers legislatively conferred are to be exercised and (2) to establish administrative rules and regulations, binding both upon their subordinates and upon the public, fixing in detail the manner in

¹¹⁸*Gwalior Rayon Silk Mfg v. Asst. Commr. Of Sales Tax* AIR 1974 SC 1660.

¹¹⁹*ibid* para 24.

which the requirements of the statutes are to be met, and the rights therein created to be enjoyed.

In the present Bill, the legislature does not only allocate the powers to determine the time and manner in which requirements of the Bill are to be met, but also confers the power to establish those requirements to the Board.¹²⁰ The Bill also omits to specify details for the manner in which the requirements of the statute to provide those conditions are to be met. The only condition specified under the Bill is that the regulation should not be inconsistent with the provisions of the Bill.¹²¹ Therefore, the Bill flounders in specifying clear guidelines for the Board to follow in case of prescribing regulations and allows the board to legislate which is evidently a case of excessive legislation.

III. A CASE OF OVERCRIMINALIZATION? - TAKING A LOOK AT THE OFFENCES UNDER THE BILL

The Bill penalizes the practice of commercial surrogacy with strict punishments. The medical practitioners practicing commercial surrogacy can be imprisoned for a period of up to 5 years and with fine up to 10 lakh rupees, and the intending couple seeking commercial surrogacy can be imprisoned for up to 5 years with fine up to 5 lakh rupees. All the offences prescribed under the act are cognizable, non-bailable and non-compoundable.¹²²

As per the Bill, *“anyone undertaking commercial surrogacy can be punished for a period of up to 10 years of imprisonment and a fine of*

¹²⁰The Surrogacy (Regulation) Bill 2019, s 4(ii)(e), 4(iii)(c)(IV).

¹²¹The Surrogacy (Regulation) Bill 2019, s 48.

¹²²*ibid*, s 40.

up to 10 Lakh rupees under the Bill".¹²³ The word 'undertaking' implies that even a woman who agrees to be a surrogate for an intending couple due to poverty or unfortunate circumstances can be held liable for a disproportionately high prison term and fine. It is pertinent to note that the Bill places the surrogate mothers on par with agents and other touts running a racket of commercial surrogacy as both sets of alleged perpetrators can be prosecuted and subject to the same punishment i.e., imprisonment for a period for up to 10 years and fine up to rupees 10 lakhs. In simple words, the surrogate mother is being placed on par with the very people who have been exploiting such women. The provision is in conflict with the Statements of Objects and Reasons of the Bill which seeks to prohibit the exploitation of surrogate mothers and to protect the rights of children born through surrogacy. Here, by punishing the women who undertake surrogacy, it targets the very section of society which it aims to protect through the intended legislation.

One view also suggests that the punitive measures in the Bill are inserted to prevent exploitation of surrogate mothers and the word 'undertaking' does not extend to surrogate mothers. The Bill however, does not exclusively mention that surrogate mothers would not be penalized under the Bill and leaves room for undesirable interpretational uncertainty.

Further, if a surrogate renders services other than within the permissible limits of the Bill, it shall be presumed that she was compelled to do so by her husband, the intending couple or any other relative, depending on the case and they will be held liable for abetment.¹²⁴ The Bill introduces the clause for presumption of guilt on the part of people related to the surrogate mother, and holds them liable under abetment of the offence. However, it fails to mention whether the surrogate mother will be deemed innocent so far as the

¹²³ibid, s 35.

¹²⁴ibid, s 39.

guilt of others in compelling her is presumed. The Immoral Traffic (Prevention) Act, 1956 punishes persons living on the earnings of prostitution.¹²⁵ The act explicitly mentions that, “*any person living on the earnings of prostitution of any other person*” shall be punished. With the use of the term ‘any other person’ the act clears the air that the person involved in the sex work themselves would not be held liable under this section. The Surrogacy Bill, however, falls short of mentioning that the surrogate mothers would be protected from penal actions. In the absence of which, the uncertainty of excessive prison terms and fine looms over the surrogate mother.

It has been alleged that the aforesaid punitive provisions showcase the state’s heavy reliance on criminal law for managing social issues, criminalization of choice and prejudiced ideas of what constitutes a family.¹²⁶ Though the issues of over-criminalization and disproportionate consequences for people, there is no sustained or coherent dialogue amongst law makers on the policy of criminalization followed by the criminal justice system in India.¹²⁷ The imposition of the harsh punishments prescribed for the intending couples and surrogate mother involved is disproportionate to the ‘crime’ committed. The concerned parties are neither criminals nor are they threat to the society.¹²⁸ Moreover, penal sanctions on the commissioning parents would have a definite impact on the surrogate child as it would be separated from his/her own biological parents.¹²⁹ It is more reasonable that harsh punishments are limited to mala fide and fraudulent activities.

¹²⁵The Immoral Traffic (Prevention) Act 1956, s 4.

¹²⁶Gargi Mishra, ‘Our Notions of Motherhood’ *Indian Express* (9 August 2019).

¹²⁷Latika Vashist ‘Re-thinking Criminalisable Harm In India: Constitutional Morality As A Restraint On Criminalisation’ (2013) *Journal of the Indian Law Institute* Vol. 55, No. 1, pp. 73-93.

¹²⁸Parliamentary Standing Committee Report (n 5) para 5.160.

¹²⁹*ibid*.

IV. OTHER MISCELLANEOUS CONCERNS

There are certain other concerns under the Bill, relating to health and technology like the definition of infertility, passing of the. Artificial Reproductive Techniques Bill, prohibition on the storage of embryo and gamete, etc.¹³⁰ These issues are outside the purview of the present article. However, there are some concerns, which touch upon some legalities, and are hence discussed below.

A. Definition of 'Altruistic Surrogacy' and 'Close Relative'

In section 2(b) to the Bill, 'altruistic surrogacy' is defined as, "*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.*"

Here, provision is made for transferring the medical expenses and insurance coverage to *either* the surrogate mother *or* her dependents *or* her representative. This can open the possibility of misuse of the money by such other relative who is receiving it on the surrogate's behalf. It is even more problematic, if a *representative* is allowed to receive money which may include agents and middlemen, who are in fact perpetrators of the exploitation that the Bill so emphatically seeks to prevent.

The Bill, till date does not contain definition of 'close relative' which is admittedly a key term of eligibility for the surrogate mother. It is

¹³⁰PRS Legislative Research, 'Issues for Consideration: The Surrogacy (Regulation) Bill, 2019' (PRS Legislative Research, 2019) https://www.prsindia.org/sites/default/files/Bill_files/The%20Surrogacy%20%28Regulation%29%20Bill%202019-Issues%20for%20Consideration%20%282%29.pdf.

reported that the National Surrogacy Board that will be made under the Act will clarify the definition.¹³¹

B. *Provision for Abortion of Foetus*

According to sub-section (vi) of Section 3, abortion of the surrogate child cannot be done without the written consent of the surrogate mother and an authorization by the appropriate authority. The authorization of the appropriate authority shall be subjected to the provisions of Medical Termination of Pregnancy Act, 1971 (“**MTP Act**”). However, no time limit has been mentioned by which the appropriate authority has to give the permission. It is pertinent to note that the MTP Act does not allow pregnancy to be terminated after a 20 weeks period.¹³² In the absence of any prescribed time limit for the appropriate authority to reply, the period of 20 weeks can likely be crossed leaving the surrogate mother with no choice but to carry the pregnancy to term. Although it is not mentioned in this section that the time period would be prescribed in the rules, it should be noted that the rules which will be made once the Bill is passed can contain the time limitation.

The Bill further states that no person may force the surrogate mother to abort the foetus.¹³³ If a child being born out of surrogacy arrangement is at the risk of physical or mental abnormalities, under the Bill only the surrogate mother’s consent will be required to abort the child and the intending couple will have no role in this decision.¹³⁴

¹³¹Select Committee Report (n 3) para 3.12.

¹³²Medical Termination of Pregnancy Act 1971, s 3.

¹³³The Surrogacy (Regulation) Bill 2019, s 9.

¹³⁴PRS Legislative Research, ‘Issues for Consideration: The Surrogacy (Regulation) Bill, 2019’ (PRS Legislative Research, 2019) <https://www.prsindia.org/sites/default/files/Bill_files/The%20Surrogacy%20%28Regulation%29%20Bill%202019-

Given the fact that it is the intending couple who have to raise the child, their decision has not been allowed any weight under the Bill. There is no question that the opinion of the surrogate mother should hold the most importance, however, the Bill omits to even mention to consider the opinion of the intending couple in the decision.

C. Lack of Procedure for Appeals and Reviews

According to Section 4, the surrogate mother and the intending couple are required to obtain certificates of eligibility and essentiality from the prescribed authorities before they can opt for altruistic surrogacy. However, the Bill does not specify a review or appeal procedure in case the surrogacy applications are rejected.¹³⁵ It is pertinent to note that, other laws such as the Transplantation of Human Organs and Tissues Act, 1994, and adoption related provisions of the Juvenile Justice (Care and Protection) Act, 2015 provide the procedure for review and appeal, in case such an application is rejected.¹³⁶ In the absence of an appellate/review mechanism within the Bill, the only recourse available seems to be under the writ jurisdiction, which is again an expensive and time consuming process.

V. CONCLUSION

To conclude the analysis, we are tempted to borrow the following words from the Parliamentary Committee Report, “*the Committee is convinced that the altruistic surrogacy model as proposed in the Bill is based more on moralistic assumptions than on any scientific criteria and all kinds of value judgments have been injected into it in a paternalistic manner*”. After subjecting the altruistic model to the

Issues%20for%20Consideration%20%282%29.pdf> last accessed 27 December 2020.

¹³⁵ibid.

¹³⁶ibid.

various constitutional tests, it becomes arguably indefensible. The disproportionate reliance on ‘noble ideals of motherhood’ which ultimately proves to be a ‘public morality’ argument is given undue reverence, disregarding the economic benefits that the surrogate mothers derive from commercial or even compensated surrogacy. It also has the effect of denying women agency of their bodies, and treating them as entities which require constant protection by the State by policing. Stifling means of livelihood of these women with the lack of focus on measures to discourage commercial surrogacy simultaneously in the form of vocational training and employment opportunities indicates an abdication of responsibility. Additionally, the discriminatory provisions guised in the form of ‘eligibility criteria’ are untenable in light of progressive rights-based judgments like *Puttaswamy*, *Navtej Singh Johar*, and *NALSA*. The spirit of the aforesaid judgments calls for equal treatment of these marginalized groups and rectifies laws, granting them civil rights on par with the rest of the population. For a great section of the categories of people including LGBTQIA community (and others mentioned above) are excluded from acting as ‘intending couples’, surrogacy is an indispensable method through which they can have biological children. The aggressive restraint on their reproductive choices violates their right to privacy grounded in the fundamental rights of Article 14, 19 and 21. The tough punishments meted out in the Bill, without addressing core concerns of the surrogacy industry, are an indication of over reliance on the coercive power of the government. In addition to this, there are the technical issues in the form of excessive delegation on the Surrogacy Boards and lack of prescription of appellate and review procedure in case of rejection of certificate of eligibility for the surrogate mother and the intending couples. These provisions call for rectification. At this juncture, it is our submission that the recommendations of the Parliamentary Committee Report which endorsed a compensated surrogacy model, and more inclusive

provisions of eligibility are more appropriate in balancing rights of the surrogate mother with that of the prospective parent(s) who desire children through surrogacy. It remains to be seen whether these recommendations are adopted before the Bill is passed by the Parliament. It will also be interesting to note the Court's findings if the constitutionality of the Bill is challenged in the future.