

April 13, 2017

To,
The Hon'ble Chairperson and Members,
Department-Related Standing Committee on Health and Family Welfare,
Sansad Bhawan,
New Delhi

Respected Committee Members,

Subject: Memorandum on The Surrogacy (Regulation) Bill, 2016

This is in response to the Press Release issued by the Department Related Standing Committee on Health and Family Welfare seeking responses from the public in relation to The Surrogacy (Regulation) Bill, 2016, which is under consideration by the Committee. Please find attached a memorandum submitted by the undersigned – Dr. Aparna Chandra, Assistant Professor of Law, National Law University, Delhi; Dr. Mrinal Satish, Associate Professor of Law, National Law University, Delhi, and Prof. Sital Kalantry, Clinical Professor of Law, Cornell Law School, USA. The memorandum is based on a study conducted by a research team from National Law University, Delhi, and Cornell Law School. As we detail in the memorandum, we have conducted extensive desk and field research on the issue of surrogacy law and believe that our contribution will be of assistance to the Standing Committee in finalising its report. The final report of our study will be ready by the end of May, 2017 and we will be happy to share our Report with the Hon'ble Committee.

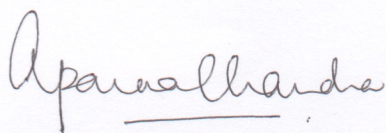
Two of the three signatories to this memorandum – Dr. Aparna Chandra and Dr. Mrinal Satish are available and willing to appear before the Hon'ble Committee to give oral evidence. Our contact details are as follows:

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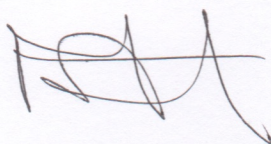
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Thanking you,

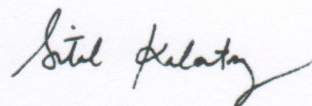
Yours sincerely,



Dr. Aparna Chandra



Dr. Mrinal Satish



Prof. Sital Kalantry

MEMORANDUM ON THE SURROGACY (REGULATION) BILL, 2016

Under the direction of Dr. Aparna Chandra, Assistant Professor of Law, National Law University, Delhi (NLUD), Dr. Mrinal Satish, Associate Professor of Law, NLUD, and Professor Sital Kalantry, Cornell Law School, New York, USA, a team of 20 researchers from the two Universities has been researching and writing an evidence-based report on surrogacy law and practice in India.

This comment is a brief summary of some of the most important findings that will be included in our report, which will be published in May 2017. Among other things, the full report will describe how each country in the world treats surrogacy. This includes countries which have socio-economic condition and various concerns similar to India. In the full report, we will also locate the practice of surrogacy within India's international human rights obligations.

Who We Are

Our research is based on our long-standing work on, and commitment to, the rights of women. We have no partisan interest in the issue of surrogacy.

Dr. Aparna Chandra and Dr. Mrinal Satish are Directors of the Centre for Constitutional Law, Policy and Governance at the National Law University, Delhi. The Centre focusses on various human rights issues. Studying gender-related issues such as domestic violence and sexual assault forms a large part of the work of the Centre.

Dr. Mrinal Satish was part of the research team that assisted the Justice Verma Committee on Amendments to the Criminal Law (2013). He has authored a book on rape sentencing in India. Dr. Satish was also part of the team that drafted the 262nd Report of the Law Commission of India on "The Death Penalty." He has been appointed as *amicus curiae* by the Hon'ble High Court of Delhi in matters relating to criminal law.

Dr. Aparna Chandra works extensively on issues relating to law and gender. She has assisted the Law Commission of India in various reports. Dr. Chandra has also assisted various government ministries and the judiciary in a range of policy matters. Most recently, she assisted the Ministry of External Affairs, Government of India in drafting India's national report for the third Universal Periodic Review before the U.N. Human Rights Committee.

Prof. Sital Kalantry is director of the International Human Rights Clinic at Cornell Law School and a clinical professor of law. She has worked extensively with non-profit organizations in India to promote gender rights, including Human Rights Law Network, Commonwealth Human Rights Initiative, and Center for Reproductive Rights. Her forthcoming book takes a comparative look at sex-selective abortion bans in the United States and India.

The research team, coordinated by the three of us, along with Prof. Bradley Wendell of Cornell Law School, consists of twenty law students from National Law University, Delhi and Cornell Law School. These students are in advanced classes of their respective degree programmes. The team also consists of two full-time research associates, Ms. Keerthana Medarametla at the Centre for Constitutional Law, Policy, and Governance at NLUD, and Ms. Rebecca Helm at Cornell Law School.

Research Methodology

Our team has conducted extensive international, comparative and inter-disciplinary desk-based research since January 2017. We have read laws and cases from around the world, reviewed ethnographies of surrogate mothers and surrogate homes, examined the varied ethical perspectives on the topic, and researched the medical aspects of ART procedures.

In April 2017, our research team also conducted field-work in New Delhi and in Anand, Gujarat. Four teams of researchers conducted interviews with actors involved in the surrogacy process—surrogate mothers, doctors, agents, ART Banks, and lawyers. We also met with numerous government officials, including from the National Commission for Women and the Ministry of Health and Family Welfare, Government of India. We solicited the views of NGOs that have been vocal on surrogacy, as well as scholars and academics who work on surrogacy and related issues.

Our major findings are as follows:

Need for Regulation of Compensated Surrogacy

We commend the Government of India for taking this step to adopt regulations on the practice of surrogacy. Since the first surrogate child was born in India two decades ago, there has been no legislative framework on surrogacy or ART procedures in general. Even though multiple Bills have been proposed over the last ten years, they were never enacted. In 2015, the Ministry of External Affairs effectively prohibited non-Indian citizens from having children with the assistance of surrogates in India. The Supreme Court of India has also been seized of the issue and has passed various orders.

Currently, there are no binding rules for the protection of surrogates or for the proper control of the protocols and medications used in the medical procedures for egg donors (if any), commission mothers, and surrogate mothers. ICMR issued non-binding guidelines in 2005. Since these guidelines do not have the force of law, clinics are not required to adhere to them, although many do so voluntarily. Moreover, these guidelines provide very little protection for surrogate mothers.

Due to the lack of a binding and comprehensive regulatory regime, our research has found a spectrum of practices in the field. Some clinics go beyond the mandate of the ICMR Guidelines. They provide full information and compensation to surrogates in a time-bound and transparent manner. At the same time, in other clinics, we found that the

surrogates had very little information about what medications were being used on them, the risks involved, their legal rights or even the content of the contracts that they had signed. Many did not have a copy of the contracts, and had little recourse to legal options in case of non-payment of the promised compensation.

Since the government has not issued specific minimum labour requirements for surrogates – such as post-natal care, life insurance, and informed consent - medical clinics are free to include or exclude whatever they want in the contract with the surrogates. The surrogacy industry in India is currently governed by the private contract model, which relies on the bargaining power of the parties in setting the terms of the contract and its enforcement. Our study indicates that this model is not appropriate for India since there are enormous inequalities in the bargaining power of surrogates vis-à-vis medical clinics and commission parents, as a result of illiteracy, socio-economic marginalization and lack of access to legal representation. For example, our study as well as a research report by the Center for Social Research, New Delhi has found that clinics and agents often do not enter into contracts with surrogates till the end of the first trimester of pregnancy when the chances of miscarriage reduce significantly. As a result, surrogates are left completely unprotected and vulnerable in this time period. Furthermore, many are not provided a copy of the contract, and are therefore neither aware of their rights under the contract, nor do they have the documentation required for legal redress.

For these reasons, we commend the Bill for creating an independent regulatory authority to monitor surrogacy. We believe that the regulator can be further empowered to ensure that the rights of all parties concerned, especially the surrogates and children born out of surrogacy, are adequately and effectively protected.

Policy Positions in India about Banning Compensated Surrogacy.

Many of the vocal critics of compensated surrogacy are motivated by strong moral beliefs against surrogacy. Many scholars, NGOs, and government officials we spoke to believe that it is simply wrong for a woman to be able to sell her reproductive labour. From a different perspective, others argue that infertile couples should be content with not having children or should adopt a child instead of opting for surrogacy. Those who are morally opposed to surrogacy often justify their arguments for banning compensated surrogacy by focusing on cases of deaths or abusive conditions in which surrogates work. We believe that these outcomes can be avoided through adequate legislative norm-setting and regulatory oversight. They do not, by themselves, justify wholesale prohibition of the practice.

We believe that the proponents of a ban who come from purely moral objections to the commodification of women's reproductive labour are seeking to enforce their own morality on women who seek to exercise their bodily and reproductive autonomy by becoming surrogates. Many opponents of compensated surrogacy argue that poor women who become surrogates are not capable of exercising "real" autonomy since they are in such dire economic situations that they are coerced by their circumstances to engage in

surrogacy. We believe that banning compensated surrogacy will only further narrow their options. We agree that the unregulated surrogacy model that currently exists in India can and does exploit surrogate women since their economic circumstances limits their ability to effectively negotiate favourable terms. However, we think that the government could adopt a regulatory regime to ensure that the rights of surrogates are protected, including through ensuring that their consent is informed.

Insisting that infertile couples should adopt rather than engage in surrogacy, places an unequal burden on infertile couples. If adoption is to be considered the preferred method of building families, then this should apply regardless of one's fertility. If there is no prohibition on fertile persons to procreate, there should not be such a prohibition on infertile couples. Making any such distinction may be constitutionally suspect. Along the same lines, all persons who are eligible to adopt should also be eligible to have a child through surrogacy (albeit with the same safeguards as are present in the adoption process). If a person can be allowed to have a child through the process of adoption, there is no reason why the same person may not be fit to have a child through surrogacy. Such a distinction may also fall foul of Article 14 of the Constitution.

Some of the concerns regarding transnational surrogacy stem from a few high profile cases where children were rendered stateless because of prohibitions on surrogacy in the home countries of the commissioning parents. We believe that this issue can be tackled through pre-surrogacy certification by the concerned country that it will grant citizenship/travel documents to the surrogate child. This model was proposed in the previous ART Bills, and it remains unclear why this was not adequate to address the concerns about statelessness of children born through surrogacy.

The only strong voices we hear in favour of surrogacy are those of fertility specialists and commissioning parents. They argue that surrogacy benefits all of the actors—infertile couples are able to have children, a woman is lifted from poverty, and the infertility doctors get more business. However, their views are often treated as suspect since they have a personal stake in continuing the status quo.

Lack of Voice for Surrogates

Some feminist NGOs, policy centers, and scholars we spoke with have conducted research reports on surrogates and found exploitation of surrogates and a range of unethical practices by clinics and agents. From reading their policy papers, we assumed they supported a ban on compensated surrogacy. But we were surprised to learn that they thought it should be legal but heavily regulated. However, many of them do not actively publicize these positions.

Surrogates themselves do not have an incentive to form a collective or unionize since many women they become surrogates only once and many hide the fact that they are surrogates from their communities. However, every surrogate we met felt that she was not doing anything wrong, and that surrogacy should be legal because everyone benefits from it. Even those surrogates who we felt were not informed about their contract, still

wanted surrogacy to be a legal work option for them. Many had no other jobs and were using surrogacy to supplement their family income. While most of them recognized that they were engaging in surrogacy primarily out of economic necessity, they preferred this to their rather limited economic options. They also often pointed out that their other economic options were equally, if not more, exploitative, such as back breaking domestic work, construction work, etc. These other options, while being exploitative, were not anywhere close to being as remunerative as surrogacy. Hence, they preferred to exercise this option.

We were shocked to learn that the voices of surrogates have been excluded from the policymaking about surrogacy. We were told that when the National Commission for Women held their consultation on surrogacy in 2015, they did not invite even one surrogate to the consultation. In a PIL brought by Jayashree Wad based on her reading of a news article about surrogacy and without speaking to any surrogate, surrogates are not represented in the litigation before the Supreme Court.

We are therefore in a situation where policymakers, lawyers and judges have imposed their own moral views on the issues without ever hearing from surrogates. When surrogates claim they want the economic opportunities that they gain from surrogacy they are dismissed in a paternalistic manner and are deemed to not have the capacity to make informed choices because of their poverty.

Ultimately, all surrogates we spoke to saw surrogacy as a means of economically uplifting their families. They use the money to buy a house, pay for hospital bills for other family members, and children's education. We believe that they should be permitted to engage in this practice, but the government should heavily regulate it just as the government would regulate other professions where there are health risks. In the recommendations section below, we propose some suggestions for how a regulatory model could both permit compensated surrogacy and protect surrogates.

Uncompensated (Altruistic) Surrogacy v. Compensated Surrogacy

The Surrogacy (Regulation) Bill of 2016 permits women to provide their reproductive labour for free to another person (i.e., altruistic surrogacy) but prevents women from being able to be paid for their reproductive labour (i.e., compensated surrogacy). We think this is problematic for both principled reasons and consequences-based reasons.

On principle, we believe that permitting uncompensated surrogacy but prohibiting compensated surrogacy assumes that women's inherent role is to birth children. Yet, it denies women the capacity to earn wages for this work. This reinforces stereotypes that a woman's role is in the family sphere, which is based on notions of love and duty, and she should not expect to be remunerated for her work. This invisibilizes women's labour.

At the same time, we need to recognize the power equations and power differentials within families. Not every member of a family has the ability to resist a demand that she be a surrogate for another family member. As such, intra-family surrogacies might

become even more exploitative than compensated surrogacy. It may also lead to various psychological issues for surrogates and children, since they will remain in close proximity to each other.

We believe that there will also be negative consequences of a regulatory model that permits uncompensated surrogacy but prohibits compensated surrogacy. Mainly it will be very difficult to monitor and police whether the surrogate is a “close relative” (which is yet to be defined) or whether or not a surrogate is being compensated illegally. By banning compensated surrogacy there could be a black market in surrogacy services. While operating a black market in surrogacy will be challenging, since demand for surrogacy is so high, we may see a range of practices that seek to evade the law. As an example, Indian fertility doctors or agents may move surrogates to neighboring countries. They could have the embryo transfer done in India but have the surrogate give birth in Nepal (Nepal currently permits foreign citizens to be surrogates). This has happened in other countries which have completely banned the practice of surrogacy. Ultimately, any illegal trade or black market that results will be rife for abuse of surrogates, children, and intending parents. As such, a prohibition is likely to hurt the very people it seeks to protect.

Finally, if India bans compensated surrogacy, wealthy Indian parents will go abroad for surrogacy. The Surrogacy (Regulation) Bill of 2016 does not account for situations where Indian parents use surrogates from abroad, and does not specifically address citizenship issues that might arise in such a situation.

Recommendations for Regulation

1. The Parliamentary Standing Committee should reject the Surrogacy (Regulation) Bill of 2016 for the reasons noted above.
2. Parliament should instead enact a regulatory bill that permits compensated surrogacy and should view this as a form of labour that requires adequate labour protections:
 - a. Surrogates should be granted minimum conditions of work such as life insurance, limits on the number of embryos that can be transferred, guaranteed payment from the moment they begin any use of medication, a wage floor set by the regulator, etc.
 - b. Fertility medications, protocols, and treatments should be examined and appropriate regulations created.
 - c. The Government should set up a body to monitor compliance with the regulations. Such a body should consist of independent functionaries, including civil society representation. The regulatory authority should have rule making power as well as monitoring and enforcement powers. The authority should also act as a registry for surrogates, ART Banks, fertility clinics, etc. All dealings with surrogates should be through the regulatory body.

- d. One avenue of exploitation of surrogates is through their virtual incarceration in surrogate homes. It is very difficult to regulate the conduct of such homes, or to monitor their day to day practices. Running such homes should therefore be prohibited. Surrogates should be permitted, as they are in all other parts of the world, to reside in their own homes.
3. Currently, the restrictions on who is eligible to be a commissioning parent and who is eligible to be a surrogate, are not based on any scientific criteria. They are based purely on moralistic assumptions about women's sexuality and reproduction, as well as stereotypes about what makes a good parent. These provisions are constitutionally suspect, and need to be jettisoned in favour of a rational and egalitarian approach.
4. As a general point, the criminal provisions in the current bill do not adhere to basic principles of criminal law and basic constitutional guarantees. For instance, Sections 35, 36, 37 and 38 provide for minimum punishments without stipulating the maximum punishment. This clearly violates Article 20 (1) of the Constitution.
5. Policies to regulate surrogacy are being made without consultation with the women who are current surrogates, former surrogates, or who want the right to be a surrogate. We urge the Standing Committee to engage with such women and hear their reasons and stories before making any policy decisions about them.
