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Indian Surrogacy: Ending Cheap Labor

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Indian Surrogacy: Ending Cheap Labor

Jaya Reddy

Table of Contents

I. Introduction.....94

II. Background.....94

 A. 2002: Legalization of Commercial Surrogacy Caused Exploitation but Allowed Impoverished Women to Escape Poverty.....94

 B. 2005: Indian Council for Medical Research Issued Extremely Narrow Guidelines Regulating “ART”.....98

 C. Child Abandonment and Citizenship Issues Came to Forefront After Publication of ICMR Guidelines.....101

 D. 2016: Draft of Surrogacy (Regulation) Bill Introduced into Indian Parliament Limited Surrogacy to Infertile, Heterosexual Married Couples, and Banned Commercial and International Surrogacy.....105

 E. 2017: Parliamentary Standing Committee Recommended Commercial Surrogacy be Allowed, and Single Women and Cohabiting Unmarried Couples be Eligible for Surrogacy.....106

 F. 2018: Bill Approved for Amendments and Passed in Lower House of Parliament.....108

 G. 2019: Surrogacy (Regulation) Bill, 2019 Introduced and Passed in Lower House of Parliament.....109

III. Statement of the Issues.....110

IV. Analysis.....110

 A. Banning International Surrogacy May Slow Reproductive Tourism, Give Rise to an “Underground” Market for Reproductive Labor, and Increase Exploitation of Surrogates.....110

 B. Restricting Surrogacy to Infertile, Heterosexual, Married, Altruistic Couples Imposes an Unreasonably Long Waiting Period, and Moralistic and Paternalistic Law.....115

V. Proposed Solution.....120

 A. National Surrogacy Board Must Regulate Surrogacy in India.....120

 B. International Surrogacy Should be Banned Until Further Notice.....121

 C. Surrogacy Should be Available to All Single Persons and Couples Regardless of Sexual Preference.....121

 D. Commercial Surrogacy Should be Permitted but Heavily Regulated.....122

VI. Conclusion.....122

I. Introduction

The surrogacy industry in India is valued between \$400 million and \$2 billion, and results in exploitation of vulnerable women, needy couples, and abandoned children. India attempted to regulate the industry less than 20 years after legalizing commercial surrogacy, taking guidance from the Indian Council for Medical Research (ICMR) and considering issues faced in several prominent surrogate baby cases. The ICMR suggested prioritizing availability of surrogacy to heterosexual couples in need. Similarly, India's Surrogacy (Regulation) Bill, 2019, pending in Parliament, seeks to prohibit international and commercial surrogacy except for infertile, married, heterosexual couples of Indian origin living in India. Since the Bill was introduced into Parliament in 2016, the Parliamentary Standing Committee on Health and Family Welfare has reported recommendations to Parliament for amendments to the Bill. Notably, all three recommendations for regulation of the surrogacy industry failed to provide for non-heterosexual persons.

This comment will discuss the social and economic implications of banning international surrogacy in India, and the social implications of allowing surrogacy only for infertile, married, heterosexual, "altruistic" couples. I propose that it is in the best interest of surrogate mothers, prospective parents, and subject children to allow clinics to provide commercial surrogacy services subject to regulation by a National Surrogacy Board, but ban international surrogacy. In addition, prospective surrogates should be required to seek independent legal counsel, and all individuals should be allowed to opt for surrogacy regardless of sexual orientation.

II. Background

A. 2002: Legalization of Commercial Surrogacy Caused Exploitation but Allowed Impoverished Women to Escape Poverty

In 2002, India legalized commercial surrogacy. Within a year, a British couple "commissioned" a pregnancy by a surrogate mother in India, initiating India's entry into the commercial surrogacy industry.¹ Prospective parents from the United States and Europe were drawn to India's surrogacy industry "as word [spread] of India's mix of skilled medical professionals, rela-

¹ Nilanjana S. Roy, *Protecting the Rights of Surrogate Mothers in India*, N.Y. TIMES (Oct. 4, 2011), <https://www.nytimes.com/2011/10/05/world/asia/05iht-letter05.html>.

tively liberal laws and low prices.”²

1. Legalization Improved Access to Safe Surrogacy Services

Dr. Nayna Patel, founder of Akanksha,³ the first surrogacy clinic to open in India, argued in support of commercialization stating, “the surrogate gets the blessings of the couple and financial support; the couple gets the baby – a win-win situation for all. Surrogacy allows a woman to help another woman.”⁴ Other doctors supported commercial surrogacy, citing it was in clinics’ interests to “take good care of the women involved in commercial surrogacy.”⁵ Aside from improving access to healthy surrogacy for women and prospective parents, the low cost of surrogacy in India improved the world’s access to relatively inexpensive surrogacy.

2. Low-cost Surrogacy Leads to Exploitation

Between 2008 and 2011, the cost of bearing a child via an Indian surrogate mother ranged between approximately \$14,000 and \$25,000.⁶ These figures include medical procedures, payment to the surrogate mother for her services, and two rounds of airfare and hotel stays for the prospective parents who must provide gametes, and collect the child.⁷ In 2016, Akanksha charged prospective parents approximately \$27,000 for a single baby, of which approximately \$5,500 went to the surrogate mother.⁸ Payments in this amount to surrogate mothers can be equivalent to up to nine years of their regular family income.⁹ By contrast, in the United States in 2011, the cost to procure a surrogate mother and fund the surrogate’s pregnancy was approximately \$70,000.¹⁰ In 2018, the typical cost rose to over \$100,000.¹¹ This figure includes the cost

² Amelia Gentleman, *India Nurtures Business of Surrogate Motherhood*, N.Y. TIMES (Mar. 10, 2008), <https://www.nytimes.com/2008/03/10/world/asia/10surrogate.html>.

³ “Akanksha” roughly translates to “aspire to.” *English Translation of ‘आकांक्षा करना’*, COLLINS HINDI TO ENGLISH DICTIONARY, <https://www.collinsdictionary.com/dictionary/hindi-english/आकांक्षा-करना> (last visited Oct. 22, 2018).

⁴ Nayna Patel & Mohan Rao, *Is Surrogacy a Legitimate Way Out of Poverty*, NEW INTERNATIONALIST (Nov. 1, 2014), <https://newint.org/sections/argument/2014/11/01/argument-surrogacy-poverty>.

⁵ Roy, *supra* note 1.

⁶ Gentleman, *supra* note 2.

⁷ *Id.*

⁸ ANAND, *The End of Paid Labour?*, THE ECONOMIST (Sep. 1, 2016), <https://www.economist.com/asia/2016/09/01/the-end-of-paid-labour>.

⁹ Upma Gautam & Anandita Yadav, *The (Surrogacy) Regulation Bill 2016: Pitfalls and Challenges Ahead*, 11 VIDHIGYA: THE JOURNAL OF LEGAL AWARENESS (ISSUE 2) 1, 34 (2016).

¹⁰ Roy, *supra* note 1.

¹¹ Anna Sheffer, *How Much Did Kim Kardashian’s Surrogate Cost?*, HELLO GIGGLES (Jan. 16, 2018), <https://hellogiggles.com/news/kim-kardashians-surrogate-cost/>.

to procure a surrogate, the in-vitro fertilization procedure, the pregnancy, a deposit to the surrogacy agency, and payments to the surrogate mother.¹²

i. Surrogates Use Payments to Escape Poverty

Dr. Patel has argued that while prospective parents face unwanted pressure and anxiety as a result of reproductive infertility, “[t]he poor also have a dream to live a happy life without the burden of poverty . . . Are we justified in refusing to enrol [*sic*] a surrogate, leaving her to live a life of struggle, pulling out the rug from under her?”¹³ Dr. Patel answered in the negative because surrogacy allows women to “get rid of poverty by doing the noblest deed.”¹⁴ Further, Dr. Patel underscored how surrogacy may help liberate Indian women by shedding light on the value of women’s labor where Indian domestic laborers are typically female and unpaid.¹⁵

ii. Reproductive Labor is Reproductive Slavery in Disguise

Although the cost remains low for prospective parents from developed countries, many critics argued prospective parents’ ability to “outsource” pregnancy from India creates another form of “cheap labor,” the worsening exploitation of India’s historically poor and vulnerable population. The majority of Indian surrogate mothers are poor, illiterate, and unaware of their contractual rights.¹⁶ Thus, women that opt in as surrogates become “reproductive slaves” willing to do what is necessary for their family’s ticket out of poverty, accepting the consequences to their health, despite the socioeconomic imbalance between the contracting parties.

Critics argue that outsourcing pregnancy amounts to the selling and purchasing of a human child—the commodification of human life.¹⁷ Sushma Swaraj, the Indian Minister for External Affairs, crassly opined that “rich people [commission] surrogate children like a hobby, de-

¹² *How Much Does Surrogacy Cost?*, REPRODUCTIVE POSSIBILITIES (2019), <https://reproductivepossibilities.com/estimated-expenses/>; see also *Surrogate Mother Costs*, WEST COAST SURROGACY (2019), <https://www.westcoastsurrogacy.com/surrogate-program-for-intended-parents/surrogate-mother-cost>.

¹³ Patel et al., *supra* note 4.

¹⁴ *Id.*

¹⁵ Patel et al., *supra* note 4. “Surrogacy could actually help liberate women. Domestic labour should be paid, so when reproduction and pregnancy becomes a job, we will look at the value of female labour in a new light.”

¹⁶ ANAND, *supra* note 8; see also Pragna Paramita Mondal & Achin Chakraborty, *In Search of Non-tangential Premises: The Surrogacy (Regulation) Bill, 2016*, 53 ECON. & POL. WKLY. (ISSUE 14) 1, 4 (2018); see also D.S. Bhullar, K.K. Aggarwal & S.S. Oberoi, *Critical Analysis of Surrogacy (Regulation) Bill 2016*, 16 J. OF PUNJAB ACAD. OF FORENSIC MED. & TOXICOLOGY 74, 77 (2016).

¹⁷ Gautam et al., *supra* note 9, at 42.

spite having biological ones” because “their wives cannot go through labour pain.”¹⁸

From a bio-political perspective, the surrogate mother is the last link in the production chain.¹⁹ Every actor in the chain, including marketing professionals, third-party administrators, travel agents, the hospitality industry, and surrogate hotel administrators, profits off of the surrogate mother’s reproductive labor before the surrogate gives birth.²⁰ The industry is estimated to have grown to \$2 billion.²¹ Critics argue that surrogacy, at its height, exploits Indian women to the same extent that the heavily critiqued global body-part market exploits vulnerable populations. Thus, similar to the body part trade already banned by many governments, commercial surrogacy should be banned by governments conscious of the levels of economic exploitation associated with surrogacy.²²

3. Surrogacy Can Promote Women’s Value in Indian Society but May Result in Ostracization as a Result of Negative Social Stigma

Assuming a child born from a surrogate mother knows his or her story, Dr. Patel argues “[t]he child will know early on that he or she . . . came into the world in a very special way.”²³ Thus, surrogacy offers families a unique story to share about the creation of life, and possibilities of reproduction for those who could not produce naturally or chose to partake in surrogacy for other reasons.²⁴

Dr. Patel’s argument overlooks the reality surrogate mothers face after giving birth to someone else’s child—many surrogate mothers are unable to return home, often seen as “reproductive slaves” who used their body for profit.²⁵ Essentially, these women are stigmatized as

¹⁸ *Id.* (quoting *Sushma Swaraj Slams Those Who Made Altruistic Surrogacy ‘a Fashion’*, NEWS18.COM (Aug. 24, 2016), available at <http://www.news18.com/news/india/sushma-swaraj-slams-those-who-made-altruistic-surrogacy-a-fashion-1285122.html>).

¹⁹ Patel et al., *supra* note 4.

²⁰ *Id.*

²¹ PTI, *Commercial Surrogacy Has Become \$2 Billion Illegal Industry: Government*, THE NEW INDIAN EXPRESS (Sep. 1, 2016, 11:49 PM), <http://www.newindianexpress.com/nation/2016/sep/01/Commercial-surrogacy-has-become-2-billion-illegal-industry-Government-1515261.html>; *see also* Roli Srivastava *Indian Surrogate Mothers Grab Last Chance to Make Babies Ahead of Impending Ban*, REUTERS (Jan. 18, 2017, 9:09 PM), <https://www.reuters.com/article/us-india-women-surrogacy/indian-surrogate-mothers-grab-last-chance-to-make-babies-ahead-of-impending-ban-idUSKBN1530FL>.

²² Patel et al., *supra* note 4.

²³ Gentleman, *supra* note 2.

²⁴ *Id.*

²⁵ Patel et al., *supra* note 4.

prostitutes after giving another family the gift of a child.²⁶

Although stigmatized, many women continue to engage in “reproductive slavery” for the benefit of their families. To remedy some of the industry’s issues, the Indian Council for Medical Research published suggested guidelines for the surrogacy industry in 2005, just three years after commercial surrogacy became legal in India.

B. 2005: Indian Council for Medical Research Issued Extremely Narrow Guidelines Regulating “ART”

In 2005, the Indian Council for Medical Research (“ICMR”), a branch of the Indian government’s Department of Health Research, published guidelines for accreditation, supervision, and regulation of assisted reproductive technology (“ART”) clinics in India (“Guidelines”) in response to the ballooning number of unregulated and unaccredited fertility clinics appearing throughout India.²⁷ The ICMR observed that clinics delivered highly sophisticated medical services absent proper training or infrastructure, and exhibited success rates under thirty percent at best.²⁸ Thus, the ICMR published guidelines for the legislature to adopt when considering how to regulate assisted reproduction industry in India for clinics to provide safe and ethical services to infertile couples.²⁹

Specifically, the Guidelines define surrogacy and address how surrogate mothers should be sourced, and financial and medical considerations for the contracting parties.³⁰ The ICMR also provides a sample agreement for surrogacy addressing the mother’s legal rights.³¹

1. Surrogacy is Framed as a Hetero-centric Service

The Guidelines define surrogacy as an arrangement where the surrogate mother intends to carry a pregnancy to term and hand over the child to “the genetic parents.”³² The term “genetic parents,” although not defined in the Guidelines, assumes the sources of the embryo are two parents who can both donate gametes and who will both take the child at birth. It follows that non-

²⁶ *Id.*

²⁷ INDIAN COUNCIL OF MED. RESEARCH, NATIONAL GUIDELINES FOR ACCREDITATION, SUPERVISION AND REGULATION OF ART CLINICS IN INDIA ix, xi (Radhey S. Sharma et al., 2005).

²⁸ *Id.* at ix.

²⁹ *Id.* at x.

³⁰ *Id.* at 55-76.

³¹ *Id.* at 91.

³² *Id.* at 10.

heterosexual couples are automatically ineligible as patients because only one parent can be a source of the child's genetic makeup.

Similarly, the Guidelines define "surrogacy with oocyte donation" as a process in which a woman donates her oocyte, and is inseminated by "the male partner of a couple," intending to carry the pregnancy to term and relinquish the child to the couple.³³ Again, the Guidelines used hetero-centric language, assuming or expecting that each couple seeking surrogacy contains a single male partner. It can be inferred from such definitions that the ICMR wrote the Guidelines with an eye towards assisting heterosexual couples only.³⁴

The Guidelines categorize couples into three groups: 1) couples with a single reproductive defect in one of the partners, 2) couples with multiple defects in one or both partners, and 3) couples with no apparent defect in either partner, termed "unexplained infertility."³⁵ Because both members of a homosexual couple could present multiple or no reproductive defects, homosexual couples could fall into any of the three categories.

In order to guide clinics in managing an infertile couple, the ICMR provides a flowchart outlining protocol for managing infertile couples.³⁶ The flowchart leads couples with multiple fertility defects to make use of ART or adoption, but those with no detectable defects for whom pregnancy is impossible or not recommended to make use of adoption exclusively.³⁷ Surrogacy is not explicitly mentioned on the chart. Without mention of homosexual couples in the Guidelines, it is difficult to ascertain which path the ICMR intends homosexual couples to take, if at all.

2. Sourcing of Surrogate Mothers is Extremely Narrow and Raises Concerns About Bargaining Power

The Guidelines suggest only couples and sperm banks should be tasked with finding surrogate mothers.³⁸ Law firms and sperm banks are encouraged to obtain and maintain information

³³ *Id.*

³⁴ When the ICMR published its Guidelines in 2005, sexual acts with persons of the same sex in India were punishable by law and described as "unnatural acts" in the Indian Penal Code. In September 2018, the Indian Supreme Court invalidated this portion of the Indian Penal Code. Sexuality generally being a taboo subject in South Asian society, it is no surprise the ICMR chose not to address availability of ART for same-sex couples. *See* Ben Westbott, *The Homophobic Legacy of the British Empire*, CNN (Sep. 12, 2018), <https://www.cnn.com/2018/09/11/asia/british-empire-lgbt-rights-section-377-intl/index.html>.

³⁵ INDIAN COUNCIL OF MED. RESEARCH, *supra* note 27, at 40.

³⁶ *Id.* at 42 (flowchart outlining management protocol of infertile couples divided into three categories).

³⁷ *Id.*

³⁸ INDIAN COUNCIL OF MED. RESEARCH, *supra* note 27, at 69.

about possible surrogate mothers through “appropriate advertisement.”³⁹ Failing to address the inequality of bargaining power between the surrogate mother and prospective parents,⁴⁰ the Guidelines suggest that negotiations between a couple and the surrogate mother should be conducted independently between the couple and the surrogate.⁴¹

Independent negotiations raise concerns about unequal bargaining power. Arguably, independent negotiations would eliminate the possibility of ART clinics exploiting surrogates by removing one link in the supply chain that profits from the surrogate’s efforts. However, independent negotiations could decrease the knowledge available to potential surrogates about their rights under surrogacy contracts and what specific contractual terms are fair.

Surrogate mothers are limited to relatives in the same generation as the woman desiring the surrogate, a known person, or a person unknown to the couple.⁴²

3. The Guidelines Limit Involvement of ART Clinic in Contract Negotiations

In a second effort to eliminate the clinic’s role in exploiting or protecting the surrogate mother, the ICMR suggests payments to surrogate mothers should cover all genuine expenses associated with the pregnancy and be documented without the involvement of the ART clinic.⁴³

4. The Guidelines Limit Surrogates to Three Instances of Successful Surrogacy

The ICMR suggests children born through surrogacy must be adopted by the biological parents unless the parents can establish the child is theirs through DNA testing.⁴⁴ Adoption would eliminate any confusion about the child’s legal parents and home country.

In addition, surrogacy should only be allowed for patients who would not be physically able to carry a baby to term, or for whom doctors would otherwise consider pregnancy medically impossible or undesirable.⁴⁵

A woman may not act as a surrogate more than three times in her lifetime.⁴⁶ Surrogate

³⁹ *Id.* at 68. The Guidelines fail to define “appropriate advertisement.”

⁴⁰ ANAND, *supra* note 8; *see also* Mondal & Chakraborty, *supra* note 16, at 1, 4; *see also* Bhullar et al., *supra* note 16, at 77.

⁴¹ INDIAN COUNCIL OF MED. RESEARCH, *supra* note 27, at 68.

⁴² *Id.* at 69.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

mothers should not be over the age of 45 and must be able to satisfy any medical testing to ensure they can experience a successful full-term pregnancy.⁴⁷ This age limit supports the ICMR's guideline, likely rooted in health concerns, that relative surrogate mothers must be in the same generation as the women seeking surrogacy.

5. The Guidelines Attempt to Tackle Child Abandonment

The Guidelines suggest surrogate mothers must relinquish in writing all parental rights concerning the offspring,⁴⁸ and provide a sample agreement for surrogate mothers and couples.⁴⁹

In an effort to address surrogate rights, the "Agreement for Surrogacy" avers that the mother and couple have worked out the financial terms and conditions of the surrogacy separately to be kept on file with the ART clinic.⁵⁰ The mother agrees to hand over the child to the couple as soon as permitted, or to the next listed party per the agreement in the event both the "husband and wife (the couple)" dies, again using hetero-centric language to indicate the Agreement applies only for heterosexual couples.⁵¹

The biological parents have a "legal obligation to accept their child" as delivered, and the surrogate mother agrees to maintain privacy of the couple's identity.⁵² The surrogate has the right to terminate the pregnancy at will and must refund all documented expenses incurred to the biological parents if she chooses to terminate.⁵³

C. Child Abandonment and Citizenship Issues Came to Forefront After Publication of ICMR Guidelines

After the ICMR published its Guidelines seeking to protect Indian surrogate mothers by curbing exploitation of vulnerable women, ensuring regulated facilities, and providing for safe selection of prospective parents and surrogate mothers, India saw three compelling stories that raised concerns about abandoned, stateless children born to surrogate mothers.

1. Baby Manji's Story Warns of Citizenship Issues and Abandonment.

In 2008, India tackled its most controversial story of abandonment of a child born to a

⁴⁷ *Id.*

⁴⁸ *Id.* at 63.

⁴⁹ *Id.* at 91-94.

⁵⁰ *Id.* at 92.

⁵¹ *Id.* at 92, 94.

⁵² *Id.*

⁵³ *Id.* at 93.

surrogate mother in India: Baby Manji Yamada. Prior to the birth of the baby, the commissioning Japanese couple divorced.⁵⁴ As a result of the divorce, Baby Manji was born into limbo: she had three mothers,⁵⁵ a father who was not legally allowed to adopt her as a single man,⁵⁶ and a lack of documentation allowing her to leave India.⁵⁷ To move the child to Japan, Baby Manji's paternal grandmother filed a petition in the Supreme Court of India.⁵⁸ The Court recognized that surrogates may be related or unrelated to the prospective parents, and "the intended parent [of a surrogate pregnancy] may be a single male or a male homosexual couple."⁵⁹ The Court went on to dismiss the grandmother's petition but advised the administrative agency considering Baby Manji's passport application to expedite the application.⁶⁰ Four months after birth, Baby Manji was permitted to return to Japan with her grandmother.⁶¹

Baby Manji's was the first major case to draw attention to possible abandonment and citizenship issues where commercial surrogacy was concerned. It was a sad reality that although the baby was commissioned like a piece of artwork or foreign vehicle, her commissioners could not take possession of her once she was born. Treated like a commodity, Baby Manji remained in limbo, living with her paternal grandmother at a home of an Indian family friend,⁶² for four months without a home, until her grandmother took legal action to remove her from India. Ironically, the surrogacy industry was unregulated in India but the Indian Supreme Court referred the grandmother to administrative agencies, urging them to act quickly to resolve the issue.

2. Citizenship Limbo Can Last a Significant Amount of Time

In 2009, a widely-reported citizenship struggle arose in the case of Jan Balaz's twin sons

⁵⁴ *India-Japan Baby in Legal Wrangle*, BBC (Aug. 6, 2008 12:31 AM), http://news.bbc.co.uk/2/hi/south_asia/7544430.stm.

⁵⁵ Rituparna Bhattacharyya, *Draft Surrogacy (Regulation) Bill 2016: Rhetoric or Surrogate-centric?*, 4 SPACE AND CULTURE, INDIA (ISSUE 2) 9, 14 (2016). Baby Manji's three mothers were her surrogate mother, Japanese mother, Yuki Yamada, and the anonymous egg donor from whose egg Manji was born. Manji's Japanese father, Ikufumi Yamada provided the sperm.

⁵⁶ *India-Japan Baby in Legal Wrangle*, *supra* note 54; see also Sara Sidner, *Surrogate Baby Stuck in Legal Limbo*, CNN (Aug. 12, 2008, 12:03 PM), <http://www.cnn.com/2008/WORLD/asiapcf/08/12/surrogate.baby/index.html>.

⁵⁷ Sidner, *supra* note 56.

⁵⁸ *Baby Manji Yamada v. Union of India & Anr.* (2008) 369 SCC 1656.

⁵⁹ *Id.* at para. 11.

⁶⁰ *Id.* at para. 17.

⁶¹ Rituparna Bhattacharyya, *supra* note 55, at 14.

⁶² *Japan Gate-pass for Baby Manji*, THE TELEGRAPH, (Oct. 17, 2018) <https://www.telegraphindia.com/india/japan-gate-pass-for-baby-manji/cid/534514>.

born to a surrogate mother using eggs from an anonymous donor.⁶³ When Balaz and his wife attempted to take the twins to Germany, the German government refused to recognize surrogacy as a legally valid source for Balaz's parentage.⁶⁴ Meanwhile, the Indian government refused to recognize the children as Indian citizens on the same grounds. After nearly two years, Germany allowed Balaz to apply for inter-country adoption for his two biological children. India issued exit visas for the children so they could go to Germany with their biological parent.⁶⁵

The Balaz case raises questions about inter-country acknowledgment of surrogate children. If the baby is commissioned like a commodity through a surrogate mother, it is the commissioning parents' duty to take the child home as intended. Yet, despite the German source of sperm, the German government refused to acknowledge the babies as Balaz's children. Thus, complications arise when the home country's government refuses to acknowledge the child as its own citizen despite genetic confirmation and a contract between the surrogate and parents that the child belongs to the parents. Further, the Indian government does not provide citizenship to a surrogate child. Babies born in India that cannot call India home are left to the mercies of prospective parents and foreign governments, notwithstanding weak contractual arrangements.

3. The Case of an Australian Couple that Abandoned a Male Baby Warns of Exploitation and Risks to Freedom of Contract

In 2012, India faced a heartbreaking abandonment story regarding an abandoned boy twin. An Australian couple with a son commissioned another child from a surrogate mother.⁶⁶ At the time, it was illegal in Australia for the couple to engage in international surrogacy arrangements.⁶⁷ The couple's surrogate mother from India bore female and male twin babies.⁶⁸ The biological parents refused to take the male twin home with them, stating they already had a son at home and wanted to "complete their family" with a girl.⁶⁹ Two years later, a news outlet discov-

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ Dhananjay Mahapatra, *German Surrogate Twins to Go Home*, TIMES OF INDIA (May 27, 2010, 2:27 PM), <https://timesofindia.indiatimes.com/india/German-surrogate-twins-to-go-home/articleshow/5978925.cms>.

⁶⁶ Samantha Hawley & Suzanne Smith, *India Surrogacy Case: Documents Show New South Wales Couple Abandoned Baby Boy Despite Warnings*, ABC (Apr. 13, 2015 1:39 AM), <https://www.abc.net.au/news/2015-04-13/australian-couple-abandon-baby-boy-in-india-surrogacy-case/6387206>.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

ered through Australia's Freedom of Information Act document requests that the Indian government allowed the couple to return to Australia with only the baby girl.⁷⁰

The Indian government does not recognize children of surrogate mothers as citizens, evidenced by the Balaz case. Thus, the Indian government repeatedly warned the Australian couple about abandoning the male child and leaving him stateless.⁷¹ Despite these warnings, the Australian couple refused to apply for Australian citizenship for the male twin, and went so far as to mislead Australian consulate staff to believe that the couple would give the boy to friends in India who were unable to conceive.⁷² After three days, the Australian consulate permitted the Australian couple to leave India with only the baby girl.⁷³

Shockingly, the future of the baby boy is muddled. At most, the Australian consulate is aware that "money changed hands," indicating the baby boy was sold.⁷⁴ If money was paid, the baby would not be eligible for adoption under India's Hindu Adoption Act.⁷⁵ Thus, by one couple's refusal to accept all their children, a human child's health and welfare could be at risk.⁷⁶

4. 2015: India Banned International Surrogacy Via Notice to Fertility Clinics as an Effort to Curb Reproductive Tourism

In response to the stories of abandoned, stateless children, the Indian Department of Health Research issued a warning letter in October 2015 to all Indian fertility clinics via the Indian Council for Medical Research. The letter with governmental authority directs clinics "not to entertain any foreigners for availing surrogacy services in India" because "surrogacy will be limited to Indian married couples only and not to the foreigners."⁷⁷ The letter does not warn of punishment for allowing foreigners to enlist Indian surrogates. In November 2015, the Department banned the import of human embryos for surrogacy purposes.⁷⁸

⁷⁰ Hawley et al., *supra* note 58.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Complete Ban on Surrogacy for Foreigners*, SURROGACY INDIA (Oct. 28, 2015), <http://blog.surrogacyindia.com/2015/10/>.

⁷⁸ INDIAN DEPT. OF HEALTH RESEARCH, No. V.25011/119/2015-HR, COMMISSION OF SURROGACY INSTRUCTIONS (Nov. 4, 2015), <https://dhr.gov.in/sites/default/files/latest%20Govt.%20instructions%20on%20ART%20Surrogacy%20Bill.pdf>

D. 2016: Draft of Surrogacy (Regulation) Bill Introduced into Indian Parliament Limited Surrogacy to Infertile, Heterosexual Married Couples, and Banned Commercial and International Surrogacy

The Surrogacy (Regulation) Bill, 2016 (“Bill”)⁷⁹ was introduced into the Indian Parliament.⁸⁰ Divided into eight chapters, the Bill regulates surrogacy clinics and procedures, creates a national regulatory board, and carves out crimes and corresponding punishments. Five aspects of the Bill are highlighted below.

First, the Bill creates the National Surrogacy Board (“Board”) composed of twenty-four members, including the Minister of Health and Family Welfare and three female members of Parliament elected by the Lok Sabha House of Parliament.⁸¹ The Board will also include ten experts appointed by the government, including medical geneticists or human embryologists, gynecologists and obstetricians, social scientists, representatives of women welfare organizations, and representatives from the general public “working on women’s health and child issues.”⁸² Among other functions, the Board will advise the government on relevant policy matters, implement the rules and regulations made under the Bill, and set the minimum standards of physical infrastructure, laboratory, diagnostic equipment, and employees to be employed by surrogacy clinics.⁸³

Second, the Bill permits surrogacy only for couples, defined as a “legally married Indian man and woman above the age of 21 years and 18 years respectively.”⁸⁴ This definition is in keeping with the Indian government’s visa regulations enacted in 2012, making only married heterosexual couples eligible for travel visas for surrogacy purposes.⁸⁵

Further, the intending couple must be “medically certified to be an infertile couple.”⁸⁶

⁷⁹ Surrogacy (Regulation) Bill, 2016, Gazette of India, pt. II sec. 2 (Nov. 21, 2016).

⁸⁰ PRS LEGISLATIVE RESEARCH, *The Surrogacy (Regulation) Bill, 2016*, <http://prsindia.org/billtrack/surrogacy-regulation-bill-2016>.

⁸¹ Surrogacy (Regulation) Bill, 2016, *supra* note 79, at Ch. V, sec. 14.

⁸² *Id.* at Ch. V, sec. 14(f)(v).

⁸³ *Id.* at Ch. V, pt. 22.

⁸⁴ Surrogacy (Regulation) Bill, 2016, *supra* note 79, at Ch. I, sec. 2(r), Ch. I, sec. 2(g).

⁸⁵ Sharmila Rudrappa, *Why is India’s Ban on Commercial Surrogacy Bad for Women?*, 43 N.C. J. INT’L L. 70, 78 (2018).

⁸⁶ Surrogacy (Regulation) Bill, 2016, *supra* note 79, at Ch. I, sec. 2(r).

Infertile couples are those who have failed to conceive after five years of unprotected sex.⁸⁷ An intending couple may not abandon its child born from surrogacy within India or outside for any reason including, but not limited to, genetic defect, birth defect, any other medical condition, subsequently developed defects, sex of the child, or conception of more than one baby.⁸⁸

Third, all surrogacy must be “altruistic,” meaning “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.”⁸⁹

Fourth, the Bill bans “commercial surrogacy” in all forms, including “selling or buying of human embryo or trading in the sale or purchase of human embryo or gametes or selling or buying or trading the services of surrogate motherhood by way of giving payment, reward, benefit, fees, remuneration or monetary incentive in cash or kind,” except the medical expenses incurred and the surrogate’s insurance coverage.⁹⁰

Fifth, the surrogate mother must be between the ages of 25 and 35 on the day of implantation, a close relative of the intending couple, have a child of her own, and may donate her egg to the intending couple.⁹¹ A woman may act as a surrogate only once in her lifetime.⁹²

E. 2017: Parliamentary Standing Committee Recommended Commercial Surrogacy be Allowed, and Single Women and Cohabiting Unmarried Couples be Eligible for Surrogacy

The Bill was referred to the Parliamentary Standing Committee on Health and Family Welfare after introduction into the Indian Parliament. The Standing Committee published its observations and recommendations in a report on the Bill.⁹³

First among its observations, the Committee disagreed with the Bill’s blanket ban on commercial surrogacy, although it acknowledged the Bill’s efforts to prevent exploitation and

⁸⁷ *Id.* at Ch. I, sec. 2(p).

⁸⁸ *Id.* at Ch. III, sec. 7.

⁸⁹ *Id.* at Ch. I, sec. 2(a).

⁹⁰ *Id.* at Ch. II, sec. 3(ii), sec. 2(f).

⁹¹ *Id.* at Ch. III, sec. 4(iii)(b)(I-IV).

⁹² *Id.*

⁹³ RAJYA SABHA REP. NO. 102, 13-15 (Aug. 10, 2017), available at <http://164.100.47.5/newcommittee/reports/EnglishCommittees/Committee%20on%20Health%20and%20Family%20Welfare/102.pdf>.

protect surrogate mothers who often come from the lowest socio-economic strata in India.⁹⁴ The Committee suggested setting norms through legislation and creating a robust system of regulatory oversight.⁹⁵ The Committee reasoned that surrogates should be paid for providing reproductive labor, especially if they are able to avail the economic opportunities available to them through surrogacy services. If bearing a child is considered labor, it should be paid.⁹⁶ The Committee found that the reality of uncompensated surrogacy involving a nine-month pregnancy and post-partum maintenance amounted to another form of exploitation but agreed a woman should only be able to be a surrogate mother once in her lifetime so as not to make a career out of surrogacy.⁹⁷

The Committee considered availability of surrogacy only to married Indian couples but concluded widows, divorced women, and cohabiting unmarried couples should be eligible for surrogacy.⁹⁸ Notably, neither the Bill nor Parliament acknowledge availability of surrogacy to homosexual couples. Further, the Committee addressed the Bill's exclusion of Non-Resident Indians (NRIs), Persons of Indian Origin (PIOs), and Overseas Citizens of India (OCIs) card holders.⁹⁹ The Committee expressly rejected this criteria for intended couples in favor of "[boosting] the ties of the Indian diaspora with the country of their origin."¹⁰⁰

Next, the Committee noted that the five-year waiting period as required by the Bill adversely affects the quality of couples' gametes, more of whom are getting married in their 30s and 40s.¹⁰¹ In the name of reproductive autonomy, individuals have a right to exercise their choice of when to reproduce without waiting five years.¹⁰² The Committee suggested the waiting period should be shortened to one year to be consistent with the definition provided by the World Health Organization.¹⁰³

On abandoned children, the Committee noted children born through surrogacy may not

⁹⁴ *Id.* at 13.

⁹⁵ *Id.*

⁹⁶ *Id.* at 14-15.

⁹⁷ *Id.*

⁹⁸ *Id.* at 18-19.

⁹⁹ *Id.* at 19-20.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* at 19-20.

be abandoned because of their gender, but the pending Bill did not prohibit sex-selective techniques or surgery.¹⁰⁴ It is illegal in India to use any technology to select the gender of a fetus.¹⁰⁵ Sex selection occurs when Preimplantation Genetic Diagnosis (PGD) is used to determine the gender of a fetus.¹⁰⁶ Intending parents may select a female or male embryo to be implanted into a surrogate mother via in-vitro fertilization, depending on their gender preference for their surrogate child.¹⁰⁷ Thus, the Committee suggested harmonizing the Bill with current Indian law by prohibiting sex-selective technologies, protecting surrogate mothers from further exploitation.¹⁰⁸

Lastly, the Committee approved the Board's diversified composition in the Bill to ensure the government receives informed policy advice from a qualified regulatory body.¹⁰⁹ The Committee suggested the National Surrogacy Board include a Registrar with in depth legal knowledge of surrogacy agreements who can inform the concerned parties of all agreements about legal implications of surrogacy.¹¹⁰

F. 2018: Bill Approved for Amendments and Passed in Lower House of Parliament

A bill must undergo three "readings" in the house in which it is introduced before it may be voted on.¹¹¹ The Bill underwent two of the required readings before the Prime Minister's Union Cabinet approved the Bill to be amended in March 2018.¹¹² Thus, the Lok Sabha House of Parliament could have brought forward specific amendments to the Bill, or withdrawn the Bill and brought forward a new bill after incorporating the Committee's recommendations.¹¹³ The Bill, however, was passed as is by Lok Sabha in December 2018 but lapsed after Rajya Sabha

¹⁰⁴ *Id.* at 45-46

¹⁰⁵ Priyanka Vora, *Is a Fertility Treatment Test Being Misused to Select Male Embryos? Yes, Alleges One Mumbai Woman*, SCROLL.IN (Apr. 30, 2018), <https://scroll.in/pulse/876910/is-a-fertility-treatment-test-being-misused-to-select-male-embryos-yes-alleges-one-mumbai-woman>; see also Liesl Goecker, *Complaint to Child Rights Commission Puts Spotlight on Sex-Selective IVF*, The Swaddle (May 1, 2018), <https://theswaddle.com/shubhangi-bhostekar-complaint-maharashtra-child-rights-commission-spotlight-on-sex-selective-ivf-sex-selection/>.

¹⁰⁶ RAJYA SABHA REP. NO. 102, *supra* note 93, at 44-45

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 45-46, pts. 5.149-5.152.

¹⁰⁹ *Id.* at 40, pt. 5.131.

¹¹⁰ *Id.*

¹¹¹ *Passage of Legislative Proposals in Parliament*, Parliament of India Lok Sabha, <http://164.100.47.194/Loksabha/Legislation/Legislation.aspx>.

¹¹² IANS, *Cabinet Approves Amendments to Surrogacy Bill*, INDIA WEST (Mar. 21, 2018), https://www.indiawest.com/news/india/cabinet-approves-amendments-to-surrogacy-bill/article_47ca521e-2d48-11e8-9102-c7e671461a1c.html; see also *Union Cabinet Approves Surrogacy Amendments, Proposes National Surrogacy*, INDIA LEGAL (Mar. 22, 2018), <http://www.indialegallive.com/top-news-of-the-day/news/union-cabinet-approves-surrogacy-bill-amendments-proposes-national-surrogacy-board-45731>.

¹¹³ *Passage of Legislative Proposals in Parliament*, *supra* note 111.

failed to vote on it before Lok Sabha adjourned.¹¹⁴

G. 2019: Surrogacy (Regulation) Bill, 2019 Introduced and Passed in Lower House of Parliament

On July 15, 2019, Union Health Minister Harsh Vardhan reintroduced the Bill as Surrogacy (Regulation) Bill, 2019.¹¹⁵ Although largely similar to the earlier Bill, the 2019 Bill defines “sex selection,”¹¹⁶ prohibits “sex selection for surrogacy,”¹¹⁷ modifies several criminal penalties to possible sentences rather than minimum sentences,¹¹⁸ and notably, allows surrogate mothers the option to withdraw their consent for surrogacy before embryo implantation.¹¹⁹ Lok Sabha passed the 2019 Bill on August 5, 2019.¹²⁰ Instead of voting on the bill, the Rajya Sabha House of Parliament referred it to a special committee to consider certain provisions of the Bill including allowing only close relatives to act as surrogates for couples.¹²¹ The committee will submit a report to the Rajya Sabha by the last day of the the last week of the next legislative session.¹²² If the Rajya Sabha approves the Bill during its next session, the Bill will be submitted to the President of India for his assent.¹²³ If the Bill receives the President’s assent, it will become law.¹²⁴

¹¹⁴ Abantika Ghosh, *Rajya Sabha pendency dips as 22 bills lapse after Lok Sabha nod*, THE INDIAN EXPRESS (February 15, 2019, 5:45 AM), <https://indianexpress.com/article/india/rajya-sabha-pendency-dips-as-22-bills-lapse-after-lok-sabha-nod-5584757/>.

¹¹⁵ Surrogacy (Regulation) Bill, 2019, Gazette of India, pt. II sec. 2 (July 15, 2019); *Lok Sabha passes bill that bans commercial surrogacy*, HINDUSTAN TIMES (Aug. 5, 2019, 7:49 PM), <https://www.hindustantimes.com/india-news/lok-sabha-passes-bill-that-bans-commercial-surrogacy/story-xqrMiwWWsUFvGFTAsZr2SN.html>.

¹¹⁶ Surrogacy (Regulation) Bill, 2019, *supra* note 115, at Ch. I, sec. 2(z). Sex selection is defined by reference to the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994.

¹¹⁷ *Id.* at Ch. II, sec. 3(viii).

¹¹⁸ *See generally id.* at Ch. VII. While the 2016 version of the Surrogacy (Regulation) Bill stated violations of the Bill will be punishable by minimum ten-year, five-year, or three-year penalties, the “Offences and Penalties” chapter of the 2019 Bill is modified to state that terms of imprisonment “may extend” to ten, five, or three years.

¹¹⁹ Surrogacy (Regulation) Bill, 2019, *supra* note 115, at Ch. III, sec. 6(ii).

¹²⁰ Chaitanya Mallapur, *Almost Final: Surrogacy Ban for Single Parents, Homosexuals, Live-In Couples*, BLOOMBERG QUINT (August 28, 2019, 1:24 PM), <https://www.bloombergquint.com/law-and-policy/almost-final-surrogacy-ban-for-single-parents-homosexuals-live-in-couples>.

¹²¹ *Parliament Winter Session to be shorter this year*, THE INDIAN EXPRESS (Oct. 21, 2019, 12:35 PM), <https://indianexpress.com/article/india/parliament-winter-session-to-commence-from-november-18-6080079/>; *see also* PTI, *Govt Refers Surrogacy Bill to Select Committee of Rajya Sabha*, THE ECONOMIC TIMES (Nov. 21, 2019, 8:38 PM), <https://economictimes.indiatimes.com/news/politics-and-nation/govt-refers-surrogacy-bill-to-select-committee-of-rajya-sabha/articleshow/72168260.cms>. The committee is composed of 23 members. The Union Health Minister who moved the motion to refer the Bill to the committee did not name the chairman of the committee.

¹²² PTI, *Govt Refers Surrogacy Bill*, *supra* note 121.

¹²³ *Passage of Legislative Proposals in Parliament*, *supra* note 111.

¹²⁴ *Id.*

III. Statement of the Issues

The Indian government has yet to affirmatively regulate the commercial surrogacy industry in India. The industry has developed from providing Indian women an additional avenue for income in 2002 through commercial surrogacy, to causing increased exploitation of the same women and recent, horrific abandonment of unwanted children born to surrogate mothers, leaving the children stateless. This paper will critically evaluate the 2019 Bill, and the Parliamentary Standing Committee on Health and Family Welfare's findings and recommendations for amendments to the Bill. Specifically, this paper will discuss the following issues:

- A. What are the social and economic implications of banning international surrogacy in India?
- B. What are the social implications of allowing surrogacy only for infertile, married, heterosexual, "altruistic" couples?

IV. Analysis

A. Banning International Surrogacy May Slow Reproductive Tourism, Give Rise to an "Underground" Market for Reproductive Labor, and Increase Exploitation of Surrogates

1. Reproductive Tourism Will Slow as Result of Banning International Surrogacy

Reproductive tourism is the industry of people traveling internationally to pursue reproductive opportunities, including the opportunity to have children via surrogate mothers.¹²⁵ Many countries ban commercial surrogacy, in which the surrogate mother is paid for her reproductive labor above and beyond medical expenses incurred during pregnancy.¹²⁶ Due to foreign bans on commercial surrogacy, it is no surprise that heterosexual couples, homosexual couples, and single persons sought the opportunity to have children via surrogate mothers in India where in-

¹²⁵ Raywat Deonandan, *Recent Trends in Reproductive Tourism and International Surrogacy: Ethical Considerations and Challenges for Policy*, 8 RISK MGMT. AND HEALTHCARE POL'Y 111 (2015).

¹²⁶ Surrogacy contracts are banned in Germany, France, Italy and Spain. Emily Stehr, *International Surrogacy Contract Regulation: National Governments' and International Bodies' Misguided Quests to Prevent Exploitation*, 35 HASTINGS INT'L & COMP. L. REV. 253, 264 (2012); and G. Seetharaman, *Ban on Surrogacy for Foreigners: How Govt's Recent Decision Will Push a Booming Industry Into Black Market*, THE ECONOMIC TIMES (Nov. 8, 2015, 6:11 AM), <https://economictimes.indiatimes.com/news/politics-and-nation/ban-on-surrogacy-for-foreigners-how-govts-recent-decision-will-push-a-booming-industry-into-black-market/articleshow/49703554.cms>. Surrogacy is banned in Japan and China, Thailand banned international surrogacy, Saudi Arabian religious authorities do not allow the use of a surrogate to reproduce. Deonandan, *supra* note 125, at 115.

ternational surrogacy was previously allowed and commercial surrogacy is still allowed.¹²⁷

In addition to avoiding foreign prohibitions on commercial surrogacy, intending couples seeking surrogate mothers in India avoided high prices in other countries for obtaining a surrogate.¹²⁸ Despite the numerous links in the supply chain who provide services to surrogates and commissioning couples, including, but not limited to, airlines, hotels, and fertility clinics, costs remain low for intending couples. The cost of funding a surrogate pregnancy in the United States or Europe far exceeds the cost of receiving the same service from an Indian surrogate mother.¹²⁹ This may be due to little to no regulation of the surrogacy industry, and few overhead costs for clinics who are approached by vulnerable women seeking financial support by becoming surrogates.

Banning commercial surrogacy in India would negatively economically impact fertility clinics in India, especially clinics typically accepting foreign couples as candidates for surrogacy.¹³⁰ Since the 2015 warning from the Indian government to fertility clinics to stop accepting foreign couples as candidates, clinics have reported seeing less than half of their typical demand for surrogates.¹³¹ Couples seeking surrogate mothers turned to Ukraine, one of the few countries where international surrogacy is legal and can be arranged at a lower cost than in the United States.¹³²

Lower demand for Indian surrogates could lead to increased social stigma surrounding the women who choose to act as surrogates for couples domestically. The 2019 Bill seeks to limit surrogacy between couples and their relatives.¹³³ Indian women have acknowledged India's so-

¹²⁷ Chhavi Sachdev, *Once the Go-To Place for Surrogacy, India Tightens Control Over its Baby Industry*, PRI (July 4, 2018, 9:00 AM), <https://www.pri.org/stories/2018-07-04/once-go-place-surrogacy-india-tightens-control-over-its-baby-industry>. See also Sharmila Rudrappa, *How India's Surrogacy Ban is Fueling the Baby Trade in Other Countries*, QUARTZ INDIA (Oct. 23, 2017), <https://qz.com/india/1109531/surrogate-mothers-at-risk-in-india-after-the-commercial-surrogacy-ban-is-extended/>.

¹²⁸ See Rudrappa, *Surrogacy Ban is Fueling the Baby Trade*, *supra* note 127.

¹²⁹ Roy, *supra* note 1.

¹³⁰ Sarah Huber, MSW, MPA, Ohio State Univ., Presentation on Examining the Impact of the Ban on International Surrogacy on the Livelihood of Surrogate Mothers in India at the Society for Social Work and Research 22nd Annual Conference (Jan. 11, 2018) (abstract available at <https://sswr.confex.com/sswr/2018/webprogram/Paper30812.html>).

¹³¹ Sachdev, *supra* note 127.

¹³² Kevin Ponniah, *In Search of Surrogates, Foreign Couples Descend on Ukraine*, BBC (Feb. 13, 2018), <https://www.bbc.com/news/world-europe-42845602>.

¹³³ Surrogacy (Regulation) Bill, 2016, *supra* note 79, at Ch. III, sec. 4(iii)(b)(I-IV).

cio-cultural sensitivity to them acting as surrogates.¹³⁴ The stigma will worsen if women can only act as surrogates for relatives. Logically, a couple seeking the wife's cousin, sister, or niece as their surrogate mother would find it difficult to shield their family from the medical process and the financial burden of infertility. Thus, the couples they assist would have to bear their burden of infertility in the open and be shamed for having to resort to surrogacy rather than sexual reproduction to acquire a child. Meanwhile, the surrogate mother may also receive criticism for becoming pregnant without having sexual intercourse with her husband.¹³⁵

Surrogate mothers under the 2019 Bill must already have a child of their own.¹³⁶ Surrogate housing often restricts surrogate mothers' daily activities unless they have medical appointments or permission to visit their families.¹³⁷ Surrogates may have to miss their children's school functions, religious ceremonies, and social events as a result of pregnancy, especially in her third trimester. In addition, although relatives may visit surrogates, travel may be cost prohibitive.¹³⁸ Thus, the surrogate mother may face criticism for prioritizing one branch of her family tree—the intending couple—over caring for her own child.

In sum, bans on foreign and commercial surrogacy will curb financial gain to industries in India that support international surrogacy, and expose intending couples and surrogates to further negative stigma from their families. As a natural consequence, the industry may go “underground.”

2. Black Market Will Emerge if International Surrogacy is Banned, and Exploitation of Vulnerable Populations Will Rise

Desperate impoverished Indian women may be drawn to becoming black-market surrogates for foreign couples if the practice is banned in India for the same reasons they were drawn

¹³⁴ Rina Chandran, *As Crisis Bites, Indian Women Turn to Surrogacy*, REUTERS (Apr. 7, 2009, 6:21 PM), <https://www.reuters.com/article/us-india-surrogate/as-crisis-bites-indian-women-turn-to-surrogacy-idUSTRE53705T20090408>. One surrogate mother reported, “I don't think I can ever tell [my two older daughters or in-laws]” about her surrogate work. “I don't think they'll understand.” See also Gautam & Yadav, *supra* note 9, at 36. Clinics advertise surrogate houses as “a safe haven for surrogate mothers,” well aware of the choice many surrogates make to keep their surrogate work a secret.

¹³⁵ Sachdev, *supra* note 127 (referring to a surrogate mother who did not tell non-relatives about her second surrogate pregnancy for fear they would not believe she had not cheated on her husband, but would “only imagine the worst”).

¹³⁶ Surrogacy (Regulation) Bill, 2016, *supra* note 79, at Ch. III, sec. 4(iii)(b)(I).

¹³⁷ Seema Mohapatra, *Stateless Babies & Adoption Scams: A Bioethical Analysis of International Commercial Surrogacy*, 30 BERKELEY J. INT'L L. 412, 436 (2012).

¹³⁸ *Id.*

to the practice when commercial surrogacy was first legalized. For example, women were able to fund construction of their homes and the beginnings of small businesses, and healthcare for their families from surrogacy compensation payments.¹³⁹ In at least one case, a surrogate mother reported she was slated to receive over eleven times her husband's yearly earnings through surrogacy, or approximately fifteen times more if she bore twins.¹⁴⁰

If most surrogacy is made illegal, surrogates will grow desperate for possibilities of large compensation that have a history of making a significant impact on the surrogate's quality of life.¹⁴¹ They may compromise their safety by agreeing to undergo medical procedures in unregulated, ill-equipped facilities by potentially untrained medical personnel, who will also take advantage of the possibility of black-market compensation. Furthermore, surrogates may be misled by those standing to gain from the black-market surrogacy, including but not limited to, hospital-ity and medical professionals, corrupt municipal governments, and even high-level government officials complicit to the practice.

Stated in economic terms, a ban on commercial surrogacy will decrease the supply of in-expensive surrogate services to foreign intending couples, and thus, the demand for alternatives will rise in India and abroad.¹⁴² Although surrogates would not be allowed to provide surrogacy services in India for commissioning parents from foreign countries, surrogates may be transported to other countries, such as Kenya and Nepal, to provide surrogacy services.¹⁴³ Surrogates be-

¹³⁹ See, e.g., Sachdev, *supra* note 127 (surrogate to make \$8,000 per baby where husband earns \$60 per month as a tailor); Nayna Patel & Mohan Rao, *Is Surrogacy a Legitimate Way Out of Poverty*, NEW INTERNATIONALIST (Nov. 1, 2014), <https://newint.org/sections/argument/2014/11/01/argument-surrogacy-poverty> (Akanksha clinic founder Nayna Patel avers “[m]ost of our surrogates have been able to use the money to support their children into higher education, buy a house for their family, start a small business, and pay off debts. They never see themselves as reproductive slaves!”); RAJYA SABHA REP. NO. 102, *supra* note 93, at pt. V. (referring to stakeholder reports of “impoverished women” funding education for their children, constructing homes, and starting small businesses).

¹⁴⁰ See Sachdev, *supra* note 127.

¹⁴¹ Mohapatra, *supra* note 137, at 436. See also Usha Rengachary Smerdon, *Crossing Bodies, Crossing Borders: International Surrogacy Between the United States and India*, 39 CUMBERLAND L. REV. 15, 54 (2009) (noting the possibility of desperate women opting to become surrogates for financial gain when other options for financial gain are limited).

¹⁴² See, e.g., Ponniah, *supra* note 132 (referring to Ukraine as the new reproductive tourist destination as a result of Indian, Nepal, and Thailand banning international surrogacy); Iris Leibowitz-Dori, *Womb for Rent: The Future of International Trade in Surrogacy*, 6 MINN. J. GLOBAL TRADE 329, 331-335 (1997) (describing how babies are subject to the law of supply and demand due to significant market incentives for providing and pursuing surrogacy services).

¹⁴³ Rudrappa, *India's Ban on Commercial Surrogacy Bad for Women*, *supra* note 85, at 82-83. See also Sachdev, *supra* note 127.

come entirely dependent on agents who provide for their living conditions, food, salaries, and their ability to return to India.¹⁴⁴ After giving birth, they are promised that the commissioning parents will come to Kenya, Nepal, or the birthing country to pick up the child, putting them entirely under the control of the commissioning parents and agents.¹⁴⁵ Commissioning a surrogate mother from India and sending her to another country with an unregulated surrogacy industry to receive surrogate services would still cost foreign intending couples less than the process would cost in the United States.¹⁴⁶

Second, surrogates will also compromise their social status whether they divulge the truth behind their pregnancy to their families, or carry on in privacy to avoid social stigma, absent a plausible explanation for their pregnancy not resulting in new additions to their families.¹⁴⁷ Third, surrogates may expose themselves to violence in the home for unexplainable pregnancies, and the possibility of human trafficking by agreeing to foreign travel arrangements with an eye on compensation.¹⁴⁸

The surrogacy industry in India is valued at approximately \$2 billion, a large portion of which can be attributed to foreign couples commissioning surrogates.¹⁴⁹ The loss of a large portion of the industry has already driven intending parents to other inexpensive markets, whether or not those markets present legal, regulated surrogacy options.¹⁵⁰ Countries such as Ukraine, Mexico, Kenya, and Thailand contribute to the strength of reproductive tourism, and not surprisingly, exploitation of their vulnerable populations.¹⁵¹ Thus, a black market may arise in other countries when intending parents are turned away from India.¹⁵²

Furthermore, exploited populations include the children born to surrogate mothers. If born in countries that do not recognize surrogacy, or born in India where international surrogacy

¹⁴⁴ Rudrappa, *India's Ban on Commercial Surrogacy Bad for Women*, *supra* note 85, at 83.

¹⁴⁵ *Id.* at 82.

¹⁴⁶ See Sheffer, *supra* note 11 and *How Much Does Surrogacy Cost?*, *supra* note 12.

¹⁴⁷ Chandran, *supra* note 134.

¹⁴⁸ Sachdev, *supra* note 127.

¹⁴⁹ *Commercial Surrogacy Has Become \$2 Billion Illegal Industry: Government*, *supra* note 21. As of 2016, eighty percent of the total number of children born to Indian surrogate mothers were commissioned by foreigners, according to the Indian Minister of State for Health Anupriya Patel.

¹⁵⁰ See generally Rudrappa, *India's Ban on Commercial Surrogacy Bad for Women*, *supra* note 85.

¹⁵¹ Rudrappa, *India's Ban on Commercial Surrogacy Bad for Women*, *supra* note 85, at 71. See also Sachdev, *supra* note 109.

¹⁵² Smerdon, *supra* note 141, at 82 (arguing an international surrogacy ban in India will move the black market to other countries).

is illegal, these children will become stateless like Baby Manji or the Bazan baby.¹⁵³ The babies may be abandoned as a result, left to the devices of surrogacy agents or surrogate mothers without resources.¹⁵⁴

B. Restricting Surrogacy to Infertile, Heterosexual, Married, Altruistic Couples Imposes an Unreasonably Long Waiting Period, and Moralistic and Paternalistic Law

In addition to banning international surrogacy, the 2019 Bill carefully defines who is eligible for surrogacy and for what purpose. Only infertile, legally married Indian heterosexual couples may seek surrogacy after five years of unprotected sex not resulting in pregnancy. The 2019 Bill severely limits the type and number of persons eligible for surrogacy through Indian surrogates. Socially, these limitations will deepen stigma towards prospective parents, surrogates and children born from surrogates.

1. Definition of “Infertile” Includes Unreasonably Long Waiting Period

First, the 2019 Bill limits availability of surrogacy to infertile couples who have practiced unprotected sex for five years without getting pregnant.¹⁵⁵ Notably, the 2019 Bill’s definition of “infertility” does not limit surrogacy to couples who are not able to conceive for unexplained reasons. The 2019 Bill differs from the ICMR’s Guidelines published in 2005, which prioritize use of surrogacy for couples with one person presenting a single defect or multiple defects in either partner over couples where both couples present unexplained defects.¹⁵⁶

The social implications of limiting surrogacy to infertile couples and requiring a five-year waiting period could further stigmatize infertile couples, and place pressure on them to conceive through sexual reproduction. For example, the 2019 Bill requires couples to obtain a “certificate” stating they meet the criteria for surrogacy, including their status as an “infertile couple.”¹⁵⁷ This certification could be shared among communities if confidences are broken, and couples may face criticism from their families for being unable to conceive for five-years. Without a waiting period, couples would be able to shield their fertility status from curious parties and return home

¹⁵³ See *supra* Section II. C.

¹⁵⁴ *Id.*

¹⁵⁵ Surrogacy (Regulation) Bill, 2016, *supra* note 79, at Ch. I, secs. 2(p), 2(r).

¹⁵⁶ INDIAN COUNCIL OF MED. RESEARCH, *supra* note 27, at 42 (flowchart outlining management protocol of infertile couples divided into three categories).

¹⁵⁷ Surrogacy (Regulation) Bill, 2016, *supra* note 79, at Ch. III, sec. 4(iii)(a), Ch. I, sec. 2(r).

with a child within a socially acceptable span of time.

Furthermore, the definition of “intending couple” would not allow any homosexual couple to qualify as an infertile couple.¹⁵⁸ However, the Indian Supreme Court recently invalidated a law prohibiting homosexual conduct.¹⁵⁹ Thus, allowing homosexual couples to reproduce via surrogate may promote social acceptance of and legislative policy supporting homosexual Indian persons.¹⁶⁰ As social acceptance increases, policy initiatives likely will follow.

2. Limiting Surrogacy to Married Couples Raises Issue of Hetero-centric Surrogacy Again

The 2019 Bill limits surrogacy to married couples.¹⁶¹ Non-heterosexual couples may not legally marry in India. The 2019 Bill thus excludes non-heterosexual couples from surrogacy, as well as single men and women seeking to have children via surrogacy, and cohabiting unmarried couples.

Despite arguments in favor of homosexual couples being able to use surrogacy, primarily due to their inability to reproduce naturally, they do not qualify for surrogacy under the ICMR Guidelines, the 2019 Bill, nor the Parliamentary Standing Committee’s recommendations for amendments to the 2019 Bill. Twelve years passed between publication of the ICMR Guidelines and the Standing Committee’s Report. None of the documents mentions gay, lesbian, bisexual, homosexual, or transgender persons or couples.

When asked about the exclusion of these persons from the 2019 Bill, the Indian Department of Health Research raised concerns about “misuse of such facilities and it would be difficult to ensure better future of the child born through surrogacy.” They also explained the Department’s concern that homosexual couples could separate or marry at any point, complicating the surrogacy process if undertaken simultaneously. In fact, neither homosexual marriages nor

¹⁵⁸ *Id.* at Ch. I, sec. 2(r).

¹⁵⁹ Manveena Suri, *India’s Top Court Decriminalizes Gay Sex in Landmark Ruling*, CNN (Sep. 6, 2018, 9:05 AM), <https://www.cnn.com/2018/09/06/asia/india-gay-sex-ruling-intl/index.html>.

¹⁶⁰ Several bills are pending in the Lok Sabha House of Parliament to protect the rights and welfare of transgender persons, and provide them social security. *See, e.g., Parliamentary Bills Information System*, Parliament of India Lok Sabha, <http://164.100.47.194/loksabha/Legislation/NewAdvsearch.aspx>.

¹⁶¹ Surrogacy (Regulation) Bill, 2019, *supra* note 115, at Ch. I, sec. 2(g).

domestic partnerships are legally recognized in India.¹⁶²

On single parents, the Department of Health Research explained single parents may not be able to handle the responsibility of single-parenthood:

[U]pbringing of a child is a big responsibility equally shared between a father and mother and is a lifelong commitment. A single parent might not be able to fulfil his/her responsibility completely. In Indian context, both parents, a mother and a father should be there to raise a child. Since, *[sic]* there is no legal liability for gay couples and live-in couples as they can get separated or get married whenever they decide to. But complication arises when such decisions are taken in middle of surrogacy procedure.¹⁶³

The Department of Health Research espouses a paternalistic view of who should be able to be opt into surrogacy by assuming single parents may not be able to fulfill parenting duties. The Standing Committee disagreed, suggesting divorced women and widows, and cohabiting unmarried couples should be eligible for surrogacy.¹⁶⁴ However, the Standing Committee did not address the Department's arguments against inclusion of homosexual couples. Technically, divorced women and widows who are lesbians or transgender would be eligible for surrogacy despite their sexual orientation. Unfortunately, like the ICMR and authors of the Bill, the Standing Committee is complicit in excluding homosexual couples from the text of the Bill.

The social implications of allowing divorced lesbians to adopt include increased stigma against non-heterosexual persons and their children. However, India is making steady progress toward legislation supporting non-heterosexual persons, as analyzed above in Section IV. B. 1.

3. Altruistic Surrogacy Requirement is Paternalistic and Overly Narrow

The 2019 Bill allows surrogacy only for “altruistic” purposes, meaning “no charges, expenses, fees, remuneration or monetary incentive of whatever nature, except the medical expenses,

¹⁶² Same sex marriages are illegal in India. However, one lesbian couple believed they were married when they signed an affidavit before a public notary in their home village a week prior to running away from the village. Subsequent to running away, the couple sought court-ordered police protection. A court granted protection without indicating to the couple that their marriage was illegal. Thus, the court recognized their marriage in the name of legal precedent directing judges to “ensure help and assistance to runaway couples.” Another lesbian couple from the same region in India reportedly awaited a judgment in this case before deciding whether to marry. Dipak Kumar Dash & Sanjay Yadav, *In a First, Gurgaon Court Recognizes Lesbian Marriage*, THE TIMES OF INDIA (Jul. 28, 2011, 12:03 PM), <https://timesofindia.indiatimes.com/city/gurgaon/In-a-first-Gurgaon-court-recognizes-lesbian-marriage/articleshow/9401421.cms>.

¹⁶³ RAJYA SABHA REP. NO. 102, *supra* note 93, at 17-18, pt. 5.37.

¹⁶⁴ *Id.* at 18-19.

es incurred on surrogate mother and the insurance coverage for the surrogate mother, are given to the surrogate mother or her dependents or her representative.”¹⁶⁵ The consequences of allowing only altruistic surrogacy include increased financial burden on surrogates, decreased control over the surrogacy process for couples, and an increased likelihood of child abandonment.

Indian surrogates are commonly cited as using commercial surrogacy payments to fund higher education for their children, improve their homes, open small businesses, and access healthcare for their families.¹⁶⁶ Impoverished women who resort to surrogacy can earn anywhere from \$5,000 to \$11,000 per pregnancy and use the money to significantly better their quality of life.¹⁶⁷ Thus, commercial surrogacy allows vulnerable populations to escape poverty in a developing subcontinent. This argument weighs heavily in favor of abandoning the altruistic limitation on surrogacy.

On the other hand, American surrogates can make anywhere from \$25,000 to \$50,000 per pregnancy.¹⁶⁸ Indian surrogates are paid nearly one fifth what American surrogates are paid for performing the same reproductive labor. A study focused on surrogate mothers in Gujarat, India concluded that surrogates became dependent on the significant payments from surrogate agreements.¹⁶⁹ Thus, the altruistic surrogacy requirement prevents foreign couples from outsourcing pregnancy to Indian women and using them for “cheap labor.”

Intending couples relinquish some control over the surrogacy process if commercial surrogacy is banned. Commercial surrogacy allows surrogate mothers to enter into specific contractual agreements that satisfy both parties. Intending couples can contract for the surrogate to reside in surrogate housing, receive certain pregnancy treatments, eat certain foods, and generally lead a desirable lifestyle during pregnancy to benefit the mother and unborn baby.¹⁷⁰ Freedom of contract means surrogate mothers can agree to complex terms and bargain for higher compensa-

¹⁶⁵ Surrogacy (Regulation) Bill, 2016, *supra* note 79, at Ch. I, sec. 2(a).

¹⁶⁶ See *Parliament Winter Session to be shorter this year*, *supra* note 121.

¹⁶⁷ Sachdev, *supra* note 127.

¹⁶⁸ Sheffer, *supra* note 11.

¹⁶⁹ Huber, *supra* note 130.

¹⁷⁰ See, e.g., Sachdev, *supra* note 127 (Surrogates are able to “relax, watch television, take vocational classes and hang out with other surrogates” in surrogate housing.); Lucy Wallis, *Living Inside the House of Surrogates*, BBC NEWS (Oct. 1, 2013), <https://www.bbc.com/news/magazine-24275373> (Surrogates “are taught new skills such as embroidery so that they can earn a living after they leave.”); Mohapatra, *supra* note 137, at 436 (“Because women are often the last to eat in traditional Indian households and might have limited access to food, these residential arrangements ensure that surrogates enjoy proper meals and nutrition.”)

tion. Altruistic surrogacy removes the ability of either party to bargain for these complex terms and suitable monetary consideration. At its extreme, altruistic surrogacy will drive the market for commercial surrogacy underground, as analyzed above. In order for surrogates to receive the payments they deserve after fulfilling their end of the contract, surrogates will be forced to bargain in the dark with less knowledge about societal standards for compensation, and thus, exercise less bargaining power.

Commercial surrogacy agreements commodify humans. Reproductive labor is reduced to a service and payment, albeit lower than in developed countries.¹⁷¹ Babies are reduced to a good until claimed by one of the parties to the contract, or stateless if rejected entirely. Thus, altruistic surrogacy may potentially level the bargaining power of the parties by decreasing the financial incentives associated with “cheap labor,” thereby decreasing commodification. However, freedom of contract will persist underground, resulting in secret payments to surrogates despite altruistic motives for surrogacy. Commercial surrogacy also promotes exploitation of uneducated, impoverished women who are blind to appropriate terms of surrogacy and their obligations if the child is abandoned or presents defects, physical or otherwise, at birth for which neither party bargained.¹⁷²

Perhaps the most significant impact of altruistic surrogacy is an increased likelihood of child abandonment. Payments to the surrogate serve as monetary consideration for a binding contract. If altruistic surrogacy was enacted, the Indian government would eliminate the opportunity for monetary consideration to bind the parties to the contract. Surrogates would lose their “bargaining chip.”¹⁷³ Intending parents will not have a monetary incentive to accept the “good,” which could lead to more abandoned and stateless children.

¹⁷¹ Leibowitz-Dori, *supra* note 142, at 331-335.

¹⁷² Mohapatra, *supra* note 137, at 445-446; *see* Smerdon, *supra* note 141, at 54. Surrogates lack of free choice is exploited when they are desperate for surrogacy payments. It is unclear whether surrogates are fully counseled about the health risks associated with surrogacy. *See also* Yehezkel Margalit, *In Defense of Surrogacy Agreements: A Modern Contract Law Prospective*, 20 WM. & MARY J. OF WOMEN AND THE L. 423, 449 (describing opportunities for procedural exploitation in cases of inequality of bargaining power, inability to read or understand the contract, fraud, and significant gaps in intelligence or education).

¹⁷³ Rudrappa, *India's Ban on Commercial Surrogacy Bad for Women*, *supra* note 85, at 91.

V. Proposed Solution

A. National Surrogacy Board Must Regulate Surrogacy in India

The surrogacy industry in India is currently robust at best, and exploitative at worst. To address the issues of exploitation,¹⁷⁴ possibility of a black market emerging,¹⁷⁵ and availability of surrogacy to a limited population,¹⁷⁶ the Indian government must establish a national regulatory board to regulate surrogacy in India. The National Surrogacy Board which was proposed in the 2016 and 2019 Surrogacy (Regulation) Bills should advise the government on relevant policy matters, implement the rules and regulations made under the Bill, and set the minimum standards for physical infrastructure, laboratory, diagnostic equipment, and employees of these surrogacy clinics.¹⁷⁷ The Board is composed of twenty-four diverse members, including ten industry experts and fourteen government officials.¹⁷⁸

In addition, the Guidelines suggest only intending parents and potential surrogates should be involved when forming surrogacy contracts to the exclusion of ART clinics.¹⁷⁹ However, the Guidelines fail to adequately address inequality of bargaining power between the surrogate and intending parents.¹⁸⁰ Legal experts should be available to describe the legal implications of surrogacy agreements to contracting parties and the medical risks associated with surrogacy before and after agreements are drafted. Independent legal counsel from lawyers who are learned in writing and interpreting contracts may mitigate the impacts of unequal bargaining power from illiteracy, significant gaps in age and education, and undue influence by ensuring both parties enter into informed agreements and are able to negotiate fairly.¹⁸¹ Thus, potential surrogates should be required to seek independent legal counsel from agents not associated with intending parents or clinics facilitating surrogacies for profit.

¹⁷⁴ See *supra* Section IV. A.

¹⁷⁵ See *supra* Section IV. A. 2.

¹⁷⁶ See *supra* Section IV. B. 2, 3, and C.

¹⁷⁷ Surrogacy (Regulation) Bill, 2016, *supra* note 79, at Ch. V, sec. 22.

¹⁷⁸ *Id.* at Ch. V, sec. 14.

¹⁷⁹ INDIAN COUNCIL OF MED. RESEARCH, *supra* note 27, at 68.

¹⁸⁰ ANAND, *supra* note 8. See also Pragna Paramita Mondal & Achin Chakraborty, *In Search of Non-tangential Premises: The Surrogacy (Regulation) Bill, 2016*, 53 ECON. & POLITICAL WKLY. (ISSUE 14) 1, 4 (2018); D.S. Bhullar et al., *supra* note 16, at 77.

¹⁸¹ See Mohapatra, *supra* note 137, at 445-446; Smerdon, *supra* note 141, at 54; Margalit, *supra* note 172, at 449. See also Leibowitz-Dori, *supra* note 142, at 464 (suggesting adherence to enforceable, administrative mechanisms “employed as early as the contract negotiation period”).

Although the Parliamentary Standing Committee suggests the Board include a Registrar who can provide independent legal counsel,¹⁸² a Registrar may be geographically inaccessible to ordinary contracting parties,¹⁸³ and unavailable to individually counsel parties. Furthermore, seeking legal counsel may be cost prohibitive to potential surrogates. Thus, the National Surrogacy Board should maintain a list of lawyers and organizations in India willing to provide free consultations to potential surrogates.

Lastly, the National Surrogacy Board must enforce criminal penalties against persons and clinics performing illegal surrogacy services.¹⁸⁴ Threat of criminal penalties may deter illegal services.¹⁸⁵ Thus, enforcement is crucial to preventing a black market from emerging domestically, and allowing avenues for permissive surrogacy in India to flourish.

B. International Surrogacy Should be Banned Until Further Notice

Banning international surrogacy has already shown to slow the reproductive tourism industry in India.¹⁸⁶ Although the 2015 ban on international surrogacy drove reproductive tourists to other countries that offer inexpensive surrogacy services,¹⁸⁷ it is in India's best interest to maintain the ban until sufficient international regulations are in place. One author suggests an international surrogacy convention that takes citizenship issues, adoption laws, and appropriate compensation to surrogates into consideration.¹⁸⁸ Countries that negotiate and adopt the convention would be subject to its terms and penalties.¹⁸⁹ Until a well-rounded international solution is in place, India's National Surrogacy Board can regulate surrogacy domestically.¹⁹⁰

C. Surrogacy Should be Available to All Single Persons and Couples Regardless of Sexual Preference

All Indian couples, single persons, cohabiting unmarried couples, and non-heterosexual persons should be eligible to commission a surrogate pregnancy. Paternalistic laws should not

¹⁸² RAJYA SABHA REP. NO. 102, *supra* note 93, at 40, pt. 5.131.

¹⁸³ Mohapatra, *supra* note 137, at 436.

¹⁸⁴ Surrogacy (Regulation) Bill, 2016, *supra* note 79, at Ch. VIII.

¹⁸⁵ See Leibowitz-Dori, *supra* note 142, at 334 n.30 (arguing black markets emerge in countries with the least regulation, not where surrogacy is banned).

¹⁸⁶ Sachdev, *supra* note 127.

¹⁸⁷ Ponniah, *supra* note 132.

¹⁸⁸ Mohapatra, *supra* note 137, at 448-450.

¹⁸⁹ *Id.*

¹⁹⁰ See *supra* Section V. A.

prevent non-heterosexual, unmarried persons from procreating.¹⁹¹ Surrogacy is but one avenue marginalized members of society can use to have kids. Although non-heterosexual persons face much stigma in Indian society, Indian culture is trending toward acceptance of non-heterosexual persons, non-heteronormative gender identities, and their lifestyles by decriminalizing homosexual conduct and entertaining bills in Parliament that protect the rights of transgender persons.¹⁹² Any law enacted to regulate surrogacy should continue this trend toward acceptance, leveling India with developed countries. The Indian government should take this opportunity to protect the rights of marginalized populations, bringing them into the fold instead of continuing to exclude them.

D. Commercial Surrogacy Should be Permitted but Heavily Regulated

Commercial surrogacy should be permitted. Limiting surrogacy to altruistic couples removes surrogates' bargaining chip.¹⁹³ Although exploitation of impoverished surrogates through compensatory payments is a major concern, opportunities for exploitation will decrease with increased regulation by the National Surrogacy Board.¹⁹⁴ Furthermore, only limited circumstances will justify commercial surrogacy: all intending parents and surrogates shall be required to prove the potential surrogate sought independent legal counsel before executing the contract,¹⁹⁵ and submit to India's jurisdiction if a dispute arises over the contract and its terms. Lastly, intending parents and surrogates shall be required to work with clinics that are subject to the physical infrastructure, laboratory, diagnostic equipment, and employee restrictions imposed by the National Surrogacy Board pursuant to the Surrogacy (Regulation) Bill, 2019.¹⁹⁶

VI. Conclusion

The Indian surrogacy industry poses issues of exploitation, social stigma, and concerns of child abandonment for surrogate mothers, children born to them, and intending couples. India's efforts to control the industry are well-intended but ineffective. In order to rein in the industry, a National Surrogacy Board must be established to regulate the surrogacy industry domestically.

¹⁹¹ See *supra* Section IV. B.

¹⁹² See Sachdev, *supra* note 127; Patel & Rao, *supra* note 139; RAJYA SABHA REP. NO. 102, *supra* note 93, at pt. V.

¹⁹³ Rudrappa, *India's Ban on Commercial Surrogacy Bad for Women*, *supra* note 85, at 91.

¹⁹⁴ See Mohapatra, *supra* note 137, at 445-446; Smerdon, *supra* note 141, at 54; Margalit, *supra* note 172, at 449; Leibowitz-Dori, *supra* note 142, at 464.

¹⁹⁵ See *supra* Section V. A.

¹⁹⁶ Surrogacy (Regulation) Bill, 2016, *supra* note 79, at Ch. V, sec. 22.

Commercial surrogacy must be permitted but heavily regulated by the Board. Potential surrogates must be required to seek independent legal counsel and prove they did so before entering into surrogacy agreements. However, international surrogacy must be banned until international regulations are put in place in some form. Furthermore, surrogacy should not be limited to married, infertile, heterosexual couples of India. With sufficient domestic regulation, the industry can flourish, help Indian women safely escape poverty, and provide safe solutions to families seeking surrogate mothers.