**Call for Inputs - Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material**

**Submitted by**

**Sama Resource Group for Women and Health, New Delhi, India**

The concerns flagged by the Special Rapporteur in her report, which equate surrogacy to the “Sale of Children” are problematic. We submit that the principles of sale of children are instead applicable only to illegal adoption or trafficking in the garb of adoption, to protect rights of vulnerable birth parents and children. The right to procreate through surrogacy should not be perceived as sale. The decision to enter a surrogacy arrangement by the intending parents is founded on reproductive autonomy. The “sale of the child” principle cannot be applied to surrogacy.

The Supreme Court of India in Suchita Srivastava vs Chandigarh Administration [(2009) 9 SCC 1] has upheld that a woman's right to make reproductive choices is an integral facet of personal liberty and right to life, and categorically held that this right includes the right to have children and the right to abstain from procreation. This right to reproductive choices emanates from the right to dignity, privacy and bodily integrity. This has been further strengthened in the landmark decision on right to privacy by the Supreme Court in 2017 (Justice K.S. Puttaswamy vs Union of India (2017) 10 SCC 1), where it held that privacy necessarily incorporates decisional autonomy, which one exercises in intimate personal choices like reproduction. The decision to procreate using surrogacy, and the decision of the surrogate mother to engage in the process is thus a facet of reproductive autonomy and rights. Courts have held that when the concept of privacy is extended to matters of procreation, state’s interference or restrictions on procreation amount to a direct encroachment on one’s privacy.

The right to pursue treatment/options for the management of infertility is especially important in patriarchal societies like India, where infertility is accompanied by emotional abuse and marginalization and stigmatization of women experiencing infertility within the family and in society at large. As the Law Commission of India has noted in its report on surrogacy [2009], infertility is "a huge impediment in the overall well-being of couples”.

Moreover, the popular imagination of the surrogate mother as always being coerced into a surrogacy arrangement and merely as an "incubator" is a limited one that does not take into account the lived and complex realities of women who exercise informed agency, and their right to self-determination over their bodies, and choose to be surrogates in pursuance of their right to provide reproductive labour for remuneration.

Surrogacy arrangements are not devoid of exploitation and unethical practices especially by the fertility centres providing in-vitro fertilization (IVF) techniques and surrogacy, as well as some intended parents, or the intermediaries. However, privileging rights of children over the fundamental rights of surrogate mothers and intending parents to procreate, militates against the indivisibility of human rights. Framing of surrogacy as "child vs surrogate mother" or "child vs intending parent" has the effect of invisibilizing and negating the fundamental rights of surrogate mothers and intending parents. The correct approach would be to promote a regulatory system that respects, protects and fulfills the rights of all concerned- intending parents, surrogate mothers, sperm/egg donors and children born out of surrogacy.

We acknowledge that surrogacy arrangements have the potential to expose children born out of surrogacy to abuse, abandonment and exploitation, as documented cases have shown. But for the majority of the cases, surrogacy arrangements are initiated by persons or couples who are deeply motivated and interested in providing a loving and supportive home to a child that they are unable to have otherwise. Abuse, abandonment and exploitation of children as is well established is not uncommon and not limited to surrogacy arrangements alone. Conflicts between the surrogate mother and the intended parents rarely arise, as most surrogate mothers are not motivated to be part of the surrogacy arrangement to have a child/ren and hence usually in agreement with the intended parents, that they, and not the surrogate mother, are the child’s parents.

There is no law pertaining to surrogacy in India currently. Directions from the Government of India have banned foreigners from commissioning surrogacy in India (Ministry of Home Affairs circular no. 25022/74/2011-F.1(Vol. III) dated 3 Nov. 2015). But apart from that, surrogacy operates in a legal vacuum.

The Surrogacy (Regulation) Bill 2018 is pending in the Parliament. The Bill prohibits foreigners from commissioning surrogacy in India. Statelessness and citizenship issues are thus precluded from occurring in the context of foreign nationals in the Bill. Previous attempts to prevent statelessness and citizenship issues included the provision of a letter from the foreign national from the country of origin attesting that the child/ren born out of surrogacy will be granted citizenship [2012].

The Surrogacy Regulation Bill 2018 prohibits commercial surrogacy, allows altruistic surrogacy and specifies criteria for the intending couple and surrogate mother. According to the Bill, only heterosexual, married couples are to be permitted to seek commercial surrogacy and denies surrogacy to single, queer and couples in a live-in relationship and allows only altruistic surrogacy by a close relative but does not define who a close relative is. It excludes several persons on the basis of their marital status, sexuality and gender identity and orientation. Thus, those who may be single, couples in diverse arrangements including live-in couples, as well as queer persons are all denied access to surrogacy. Such restrictions placed on most persons, with the exception of heterosexual marriages having completed a duration of five years, is extremely arbitrary.

The preference of non-commercial/altruistic surrogacy over commercial surrogacy raises concerns since it obscures the gravity or precariousness of the conditions in which women may enter into such arrangements, being pressured by relationships of power and the lack of autonomy to make certain choices regarding reproduction and childbearing. Further upholding the rights of the surrogate women is paramount to any legislation on surrogacy. Surrogacy has to be addressed from an equity and reproductive justice perspective.

**Identity, origins and parentage**

* Describe safeguards protecting identity rights (CRC art. 7 and 8) that are currently being implemented in your State. Safeguards include laws, judicial and administrative procedures, enforcement actions, and other practices intended to prevent or remedy violations of human rights norms. Note whether and how such general safeguards protecting identity rights apply in the context of surrogacy arrangements.
* Describe safeguards protecting the access to origins (CRC art. 7 and 8) that are currently being implemented in your State. Note whether and how such general safeguards protecting the access to origins apply in the context of surrogacy arrangements.
* Describe how the right to access origins is balanced with the right to privacy of parents and gamete donors. Indicate specifically how the best interests of the child are factored in.
* (Answering the three questions above)

Law and jurisprudence on a child's right to identity and origins in India can be seen in the context of adoption. While the laws on adoption and guardianship (Hindu Adoptions and Maintenance Act 1956, Guardians and Wards Act 1890, and Juvenile Justice (Care and Protection of Children) Act 2015 do not have provisions for a child to access information about his biological parentage, the Supreme Court of India in Laxmikant Pandey vs Union of India had looked into the question of a child's right to know his biological origins in the case of inter-country adoption. Before every inter-country adoption, the adoption agency would have to prepare a child study report containing information on the child's biological parents. This child study report would be shared with the foreign adoptive parents, and it would entirely be at the discretion of the adoptive parents whether and when to share information with the child on his/her biological parents. Right to access to origin and identity was thus a qualified right, and the qualification was based on the child's best interest determination. The Court held that disclosing to the child information about his/her biological parents when the child was still minor and had become accustomed to his/her adoptive family and the new social circumstances might result in harm to the child and hinder his integration into his/her new family and society. The adoptive parents thus, keeping the best interests of the child in mind, could choose whether to disclose such information or not.

This has further been elaborated on in the Guidelines Governing Adoption of Children 2015. As per the guidelines, an adopted child can initiate a "root search" and the concerned agencies would have to facilitate this search. But the age and maturity of the child would have to be considered, as well as the right to privacy of the biological parents. The Guidelines clearly state that the right of an adopted child shall not infringe the biological parents' right to privacy. If the biological parents wish to remain anonymous and do not want their identity disclosed, then the child would only receive information on the reason and circumstances of his/her surrender.

* Describe safeguards protecting the family environment (CRC art. 7, 8, 9, 10, 20) that are currently being implemented in your State. Note whether and how such general safeguards protecting the family environment apply in the context of surrogacy arrangements. Indicate specifically how the best interests of the child are factored in.
* Provide information on existing laws, regulations or practices for the establishment, recognition and contestation of legal parentage. Indicate specifically how the best interests of the child are factored in.
* Specify how the establishment of parentage occurs in the context of surrogacy arrangements. Indicate specifically how the best interests of the child are factored in.

The Surrogacy (Regulation) Bill 2018 which is expected to be passed by the Parliament in 2019 establishes a system of determining parentage before the child is born. The Surrogacy (Regulation) 2018 Bill says that any child born out of surrogacy procedures shall be deemed to be the biological child of the intending parents. It makes it a prerequisite for the intending parents, along with the surrogate mother, to get an order concerning the parentage and custody of the child from a Magistrate, before commencing with surrogacy procedures. The court order vests parentage in the intended parents. This ensures legal certainty of the status of the child and its parentage immediately after he or she is born and eliminates the possibility of any delay in judicial case processing. It thus acts in the best interest of the child. The Bill prohibits the intending couples to abandon a child born out of surrogacy, in India or abroad, for any reason whatsoever. It is also a punishable offence for anyone, including surrogacy clinics and clinical establishments, to abandon or exploit a child born out of surrogacy.

**Sale of children**

In the majority of surrogacy cases, there is no conflict between the intending parents and the surrogate mother. The intending parents are ready and willing to take legal and parental responsibility of the child, and the surrogate mother is also ready to transfer custody and parental rights and responsibilities to the intending parents. Therefore, for the majority of cases, getting the court to undertake investigations into parental fitness and best interests of the child, is counter-productive and ultimately unnecessary.

Submitted by:

Sama Resource Group for Women and Health

B-45, 2nd Floor, Main Road Shivalik,  
Malviya Nagar,  
New Delhi-110017

Ph: 011 - 26692730/ 40666255  
Website: [www.samawomenshealth.in](http://www.samawomenshealth.in/)

Facebook Page: [Sama - Resource Group for Women and Health](https://www.facebook.com/Sama-Resource-Group-for-Women-and-Health-1788040081415430/" \t "_blank)

Twitter: @WeAreSama

**Annexures**

Sama: Critique of Surrogacy Regulation Bill 2018