



## A Legal Examination of the Surrogacy Bill and Regulatory Framework in India

**Gourav Kumar Sharma**

Corporate Lawyer Infinity Services (Founder), An Accounts Outsourcing Firm, Indore (M.P)

Mail Id- [Gourav.Sharma008989@Gmail.Com](mailto:Gourav.Sharma008989@Gmail.Com)

### **ABSTRACT**

The analysis highlights the shortcomings of the Surrogacy (Regulation) Bill, 2019 by examining both Indian and international perspectives, and suggests practical reforms to develop a more inclusive and effective legal framework. The Bill aims to protect vulnerable individuals by clearly defining the rights of all parties involved in surrogacy arrangements. However, it is imperative that all dimensions of surrogacy in India are thoroughly debated, so the legislation can serve as a tool for social progress rather than restriction. Crucial concerns raised by the Bill include the potential emergence of a grey market if commercial surrogacy is entirely prohibited, and the risk of subtle coercion—where women may be pressured by matrimonial families into altruistic surrogacy against their will. Additionally, the rights and welfare of children born through surrogacy must be considered, especially in cases where legal provisions are breached. Addressing these issues is essential to ensure that the law promotes fairness, autonomy, and protection for all stakeholders.

**Keywords:** - ART, surrogacy, historical background, Surrogate, surrogation evaluation, Surrogacy Regulation Bill.

### **INTRODUCTION**

This word surrogate is shortened as surrogatus which is a Latin word referring to a substitute or replacement. A surrogate mother is one that bears the child and delivers it to another person or couple in the spirit of reproduction. Commonly viewed as either a scientific miracle or a blessing, a typical incidence of surrogacy is whereby an embryo conceived through either or both gametes of the intended parents or through donor gametes is implanted into another. The intended parents take custody of the child and usually sign a form of contract that involves genetic disassociation with the child, and the surrogate mother accepts to release the child to the intended parents, often in exchange of the financial reward. Surrogacy medically speaks of a process when a surrogate gives birth to a child on behalf of a person who cannot give birth to a child by themselves. This may include that of the surrogate (traditional or partial surrogacy) or of that of a donor (gestational surrogacy). Further than its general concept, surrogacy has been differently defined both in national laws and international legislation. As an example, India has an Assisted Reproductive Technologies (ART) Bill, 2010 that permits a woman to "be the surrogate mother to the child of another person." The Surrogacy (Regulation) Bill, 2016 describes surrogacy as procedure where a woman carries a child and the child is delivered on



behalf of a person or a couple. On the same note, the Surrogacy Arrangements Act of 1985 in the UK defines a surrogacy agreement as that one in which a woman extends the offer to become a surrogate mother of a child that is going to be conceived and carried out based on the agreed terms.

With the Embryo Carrying Agreement Act of 1996 (Authorization Agreement and Status of Newborn Child) surrogacy in Israel consists of transferring a fertilized embryo into a surrogate in order to hand off custody of the ensuing child to the expectant parents. The law further requires a written agreement that is accepted by an approval committee; it would require the surrogate and the intended parents to be of at least 18 years and be residents of Israel. All these different definitions bring out the differences in legal definitions of surrogacy. In this circumstance, surrogacy is mainly considered in most jurisdictions as a category of Assisted Reproductive Technology (ART) whereas in others it can be referred to as either social or contractual agreement that captures different stakeholders such as intended parents, donors, surrogate mothers, fertility clinics and physicians. In essence, surrogacy involves a written understanding inclusive of concerns mainly dealing with health practices, genetic donations, custody exchange, and remunerations and costs all on the basis of informed consent of all parties concerned. Therefore a legal definition of surrogacy is not standardized and there is a great difference between the interpretation of surrogacy amongst the countries and legal systems based on the variation of cultures, ethical and medical surroundings.

## **HISTORICAL BACKGROUND**

Surrogacy is one of the oldest practices in all human civilization, and one can find the mention of the same in many ancient civilizations such as India. Surrogacy was an open social or cultural practice in many of the early societies such as men Kate Daniels half of atrocities sea? civic Mediterranean, Mesopotamia, Rome as well as Egypt, the central aim of which was continuity of lineages, heirs and male bloodstream- especially in situations where women were unable to conceive in a natural way. By as early as the 1st century BCE, an inscription called Laudatio Turiae ("In Praise of Turia") narrates the tale of a childless widow that urgently requested her female family members to make children in her place, hinting at the fact that surrogate matters were not all that unheard of in Roman culture. Pharaohs in ancient Egypt were said to have used their concubines as alternative baby makers when their wives could not give birth to babies. Likewise, in Rome, females slaves used to be pushed to act as surrogates to their masters, which is also reasoned thoroughly in historical evidence. The methods pioneered by ancient Indian epics are also to be found- one of the Mahabharata compositions is about king Pandu and king Dhritarashtra being sterile and the system of niyoga was used, i.e., a woman would conceive a child by a specified male, which is in somewhat similar to the artificial reproductive processes that are used today. The other incidence in the Mahabharata is the queen Gandhari, who according to the epic was carrying a pregnancy that lasted more than two years and finally she brought forth a piece of flesh. It was dissected by Sage Vyasa in 101



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pieces that were developed in nutritious grounds into 100 Kauravas and 1 sister, Duhsheela-a symbolic and artificial kind of incubation as described in the myth.

Bhagavad Gita cites the birth of Lord Krishna, which also symbolizes surrogacy. Devaki is the biological mother of Krishna who was in prison due to the assassination of her first 6 kids by her brother Kans who had a prophecy that one of her sons will assassinate him. When she conceived her seventh son, a miracle took place, when god Lord Vishnu intervened to make goddess Yogamaya exchange the foetus in Devaki to another wife of Vasudeva, who was living in the village of Gokul, and her name was Rohini. This heavenly conveyance of the mind is a theological allegory to the embryo transfer, and it agrees that India has been initially abreast to surrogate practices. Old writings and jurisprudence systems related to surrogacy are found as well across the globe. The birth of Ishmael, to Hagar, servant of Sarah, the wife of Abraham is mentioned in the Old Testament, possibly one of the first references to surrogacy to be recorded. Recent The Hammurabi Code (18 th century BCE, Babylon) supported surrogacy and stipulated transparent legal rights of the wife and the surrogate. It even made the law of succession where the noble said that a child born to them could only assume the throne should in case there is no legitimate heir. Although surrogacy practices were common in ancient Greece, Rome, and Egypt, in the European legal tradition it has never been turned to and acknowledged the practice in the European legal traditions is only the informal kind. Under the family law, surrogacy is forbidden in Islam, whereas under the contract law, the matter is also forbidden in Islam. The womb (Rahim), which is regarded as sacred and which is linked to one of the attributes of Allah, is considered as a divine trust. It is therefore only in a lawful marriage that the act of procreation is allowed thus securing legitimacy and right to inheritance. Islam has moral limits that are meant to safeguard family life, possession of lineage and religion.

Goodwill surrogacy has existed in other native societies. Generally, as in case of traditional Hawaiian tribes, and Kqatla peoples of Bechuanaland (South Africa) surrogate motherhood was considered an act of charity and solidarity in the community. This is because the first publicly reported surrogacy in Australia involved birth of Alice Kirkman, the first IVF surrogate baby in country, in 1988. Maggie Kirkman was the natural mother of Alice and Linda Kirkman, the genetic female uncle, carried her pregnancy, turning it into gestational surrogacy with donor embryo. Awareness and implementation of assisted reproductive technologies (ART) started in India following the foundation of the Indian Society of Promoting Assisted Reproduction (ISAR) in 1991 under the leadership of Mumbai-based practitioners of gynecology. The Indian government came up with the national health policy (NHP) in 2002 also referred to as the Medical Tourism Policy which boosted India as a world destination of reproductive health services. This policy gave a boost to fertility tourism with a surge in commercial surrogacy and it now gets domestic as well as international clients. In 2002, commercial surrogacy was made official in India and this saw an increase in the number of international surrogacy contracts. But in 2015, due to the increasing ethical concerns, child



abandonment, exploitation of the economically compelled women, commercial surrogacy was prohibited. One of the most landmark cases that made international surrogacy in India come under the limelight is the case of Baby Manji Yamada vs. Union of India which was decided on 29 th September, 2008. Dr. Patel facilitated Ikufumi and Yuki Yamada, the Japanese couple who had a baby, through surrogate Pritiben Mehta, at Akanksha Infertility Clinic. Embryo was made with the sperm of Yamada and an egg given by the donor. Nevertheless, Yamadas requested divorced shortly after, and this led to raising complicated legal issues regarding parenthood, custody and the rights of the surrogate. Indian law did not have any regulations at that time to solve any such cases which created a serious legal and moral conflict. Child trafficking charges were later leveled against Dr. Patel, showing once again the gaping regulatory hole in the Indian surrogacy industry. The case was resolved eventually where the custody of Baby Manji was given to her grandmother but the impact of that incident was that it highlighted the necessity of legislation urgently. The misuse of women, absence of supervision, and the availability of an easy way to abandon the children carried by the surrogates prompted the need to come up with elaborate legislations which culminated in the Surrogacy (Regulation) Bill. This legal act aims to reduce the unethical conducts, provide security to the surrogate women and instill transparency and responsibility to the surrogacy in India.

## **SURROGATION EVOLUTION IN INDIA**

In India, surrogacy and assisted reproductive technologies (ART) have a history that goes back several decades ago. On October 3, 1978, Kanupriya alias Durga, the first IVF (in vitro fertilization) baby born in the country was born in Kolkata at West Bengal. India has made huge progress in the sphere of ART since that period. However, one of the first legal confrontation regarding surrogacy in India was witnessed in the year 1986 when a conventional surrogate mother was unwilling to hand over the child even after the birth of the baby. This was a controversial case and was popularly known as the Kid Manji case that gave rise to a few legal and ethical issues surrounding surrogacy. Through extended legal battles the intended parents finally came to be accorded custody. Nevertheless, the case demonstrated the absence of bright legal frameworks, since the legislation dealing with surrogacy in India was at an early stage of development. The earliest known instance of surrogacy in India happened in Chennai in the year 1994 whereas the earliest reported event of commercial surrogacy transpired in the year 1997 when a woman offered to assist a Chandigarh based couple in surrogacy at a fee since she was unable to make both ends meet. This heralded a controversial argument of the legality and morality of commercial surrogacy in the country. To calm the mounting fears, the Indian Council of Medical research (ICMR) started passing out ethics codes of conduct. In the year 2000, the ICMR published Ethical Guidelines on Biomedical Research involving Human Participants which also gave some clauses regarding ART. In 2005, it published the more specific ethical guidelines, the focus of clear contractual agreement among commissioning



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parents, fertility clinics, and the surrogate mother was reinforced along with informed permission, anonymity and vulnerability to exploitation.

Although many more people are practicing it, it was widely believed (and still is in the literature and the media) that commercial surrogacy in India was legalized officially in 2002. Nonetheless, the absence of the strong legal framework contributed to deepening the concerns of its abuse and misuse of the surrogate mothers. In the year 2010, a panel of experts in the fields of ICMR and the Ministry of Health and Family Welfare have drafted the Assisted Reproductive Technology (Regulation) Bill. It was a step that intended to introduce regulation and oversight into practices of ART. In 2012, the Union Home Ministry offered to change an existing legislation to prohibit foreigners, especially single parents and gay partnerships, to commission surrogacy in India. The Law Commission of India in the 228 th Report also provided major reforms. It suggested prohibition of commercial surrogacy but instead encouraged only altruistic surrogacy, mentioning that there should be forethought in regard to oppression of other countries, ambiguity in law, and financial dependency of surrogate mothers who can be forced into surrogacy because of poverty and lack of education.

To this effect the Surrogacy (Regulation) Bill, 2016 was presented in parliament. The Bill also suggested the formation of National and State Surrogacy Boards to be involved in the surveillance of the practice of surrogacy. It limited surrogacy to partnered heterosexual couples in India, which legally married at least 5 years and had certifiable infertility. But the bill has failed in the Lok Sabha because of the procedural and structural inadequacies. This reintroduced the Surrogacy (Regulation) Bill, 2019, which was then passed in the Lok Sabha, referred to a Rajya Sabha Select Committee to consider. Based on the suggestions of the committee, the new version found acceptance by the Union Cabinet in 2020, and it was called the Surrogacy (Regulation) Bill, 2020. The present legislation is indicative of a long-standing endeavor of the Indian government to regulate the field of surrogacy, to protect all parties involved and guarantee the ethical aspects in light of social-economic vulnerabilities related to surrogate motherhood.

Within the strong socio-cultural context of India, childlessness tends to have a gendered connotation since it is the female who are considered to be the most responsible part of the body in this situation. Such individuals who cannot bear children often are subjected to social discrimination, verbal harassment, and shut out leading them to fall prey to acts of domestic violence, desertion or even divorce. It is a tremendous effect of pressure in society in regard to motherhood and infertility usually results in emotional distress and social isolation. According to a recent study, infertility has severe social implications in India as the society associates a lot of shame with infertility. With the traditional Indian society, child-bearing is not only regarded as an individual achievement, but it also serves as an insurance of the later stage, especially to women. In the aspect of religious and cultural beliefs in India, procreation is considered a religious responsibility. Hinduism Reproduction is a samskara (sacrament) and a



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religious duty in Hinduism. Pre-historic texts confirm such a belief. As an illustration Narada in Narada Smriti XII-19 says, women have only been made to bear another and when they fail to give a birth they are not in a position to be a spouse. On the same lines, Manu Smriti IX-8 focuses, "Children, rites and faithful service, and marital felicity" as the main ingredients of a successful marriage. In Indian families the family lineage is extremely important, purity of descent, and continuation of patriarchal family are held in highest insignificance. Therefore, reproductive technologies and infertility therapies that help people have children are of cultural and emotional importance in the condition of India since they not only help people get the medical support they need, but also provide them with a source of social confirmation and recognition.

Interests and roles of stakeholders participating in the process of surrogacy are vaguely discussed in all existing legislative initiatives such as the ART Bill 2010, the Surrogacy Bill 2014, and the subsequent Surrogacy Bills. According to the ART Bill, a surrogate mother is a citizen and resident Indian woman who agrees to receive an embryo (conceived through the use of sperm belonging to a man who is not her husband and the oocyte of another woman) into their body to get with child with the intention of carrying out the pregnancy to term and giving birth to the child on behalf of the commissioning couple who offered to have the surrogacy performed. The foetus in the legislative texts means the product of conception though as far as conception birth or abortion. The Surrogacy Law refers to the conditions according to which the term of the type of a human organism is found in between the day of fertilization or creation (the day of the fifty-seventh) and birth as following by the definition the so-called fetus. Nevertheless, none of the bills contain an explicit biological definition of the term surrogate child, as much as the following have on offer. Such failure to do so points out a great shortcoming in terms of legal acceptance of the child status and rights under the surrogacy process. Consequently, whereas the functions of some stakeholders are partially explained, there has not been a comparable and uniform legal framework that defines all those involved in the process of surrogacy and, in particular, the child.

With altruistic surrogacy, a surrogate mother will not be financially recompensed in being a gestational carrier of a child - this is a condition of pregnancy, delivery and/or relinquishment of the child to the intended parents. She rather prefers to keep the baby to follow her heart, or to help an infertile couple, no reward is monetary at all. Selfless surrogacy largely dates back to the religious and mythological works. As an example, The Book of Genesis Chapter 16, story of Abraham, Sarai, Rachel, and Jacob, ends up with birth of Ismail in 910 B.C., one of the oldest mention of surrogate child. Altruistic surrogacy is approved in modern laws in a number of some countries in which commercial purpose is forbidden. As an example, the Human Fertilisation and Embryology Act, 2000 passed by UK permits altruistic surrogacy and criminalises commercial surrogacy. On the same note, the Assisted Human Reproduction Act, 2004 of Canada authorizes altruistic surrogacy within defined circumstances, and prohibits



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commercial compensation. In addition to Australian Surrogacy act 2010, there are New South Wales provisions that also allow altruistic surrogacy expressly prohibiting commercial surrogacy. Such jurisprudences denote a universal tendency at promoting ethical and willful surrogacy, which is motivated by a caring and humanitarian rather than a business purpose. Surrogate mother compensation is a type of surrogacy where the surrogate mother is paid in order to accept to become the gestational carrier of the prospective parents. This pay is usually inclusive of implantation, pregnancy and childbirth, but most importantly and entailed in the compensation is the giving away of the child to the commissioning parents. In 2002, India was one of the first nations worldwide to legalize commercial surrogacy as its National Medical Tourism Policy. This project was to receive foreign exchange and economic income by enabling foreigners to receive infertility services with the help of Indian surrogate mothers through the clinics in the country. A milestone was marked in the history of India surrogacy jurisdiction when the Supreme Court conducted an unprecedented ruling in Baby Manji Yamada v. Union of India & Anr. case. The Gujarat High Court subsequently affirmed this point in the Jan Balaz case, in which a child was born as a result of a surrogacy procedure by a German couple and the court held that surrogacy is legal where there is a commercial arrangement between separate parties.

In the ART Bills of 2008 and 2010, the rights of the surrogate mother to be compensated financially was further affirmed besides the entitlement to medical costs and surrogacy related insurances. Other nations that have legalized commercial surrogacy include Israel, California (USA) and Russia besides India. Among the first and the most controversial commercial surrogacy cases was a case of Baby M, which was ruled by the New Jersey Supreme Court. The Sterns, (the intended parents), made a surrogacy agreement with Mary Beth Whitehead who was inseminated by the sperm of Mr. Stern and contributed her own eggs. This has been done in exchange of the promise of 10,000 dollars, as well as, the covering of medical costs. Nevertheless, the court declared the contract as unenforceable, claiming that commercial surrogacy was equivalent to selling babies, which was against the policy of the society. Commercial surrogacy is concerned with ethical suspicion and it is usually banned in most laws around the world. Critics complain that it is the sale of human body, has stood against the human dignity and physical integrity and has the potential to transform children into an object of bargain and hence against the set standards of public morality and legal ethics.

## **THE SURROGACY (REGULATION) BILL, 2019**

To amend its previous Surrogacy (Regulation) Bill, 2016 that the Indian Parliament never adopted, the Surrogacy (Regulation) Bill, 2019 was proposed. This law will present an entire legal framework that shall govern surrogacy in India and have a clear distinction between an altruistic and commercial surrogacy. In the 2019 Bill, surrogacy is known as a practice involving a woman getting pregnant and delivering a child to another person or couple, out of the aim of transferring the child to the other party upon birth. The Bill does not allow the idea



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of commercial surrogacy so no amount of the monetary nature can be provided to the surrogate mother after paying out the medical costs and covering insurance. The altruistic form of surrogacy is the only one that is condoned; the surrogate voluntarily offers their services due to a spirit of compassion, and not in exchange of a certain amount of money.

The Bill prescribes that the conduction of surrogacy-related procedures is allowed only in the case of registered surrogacy clinics. These clinics must be highly regulated and must be registered by law and they cannot hire personnel who are not qualified and also they cannot advertise or use inducement methods to acquire surrogate mothers. In addition, no form of termination of the pregnancy in such arrangement is permitted without the agreement of the surrogate mother and application of the relevant authority. The Bill also prohibits sex-selective surrogacy, storage of human gametes and embryos with the purpose to use in commerce and genetic manipulation with the purpose of selection, which is also the case with the countries such as the United States. According to this flax, to qualify as a surrogate mother, a woman should be a relative with close links with the targeted partner, married, aged between 25 to 35 years, and should possess at least one child of her own. A woman can become a surrogate even once in all her life and has to be provided with the medical and psychological fitness certificates. Notably, she cannot entrust her own gametes in the process, that is only gestational (not traditional) surrogacy is an option. The couple to be married need to have two official pieces of paper: A certificate of essentiality, which they got only under the circumstances when infertility was medically established, etc. A "Certificate of Eligibility" - where both the parties must be the Indian citizens and married at least 5 years and the age between 23-25 years (woman) and 26-35 years (man). The Bill also puts in place permissive surrogacy when the couple will have a mentally or physically challenged child or one with a life-threatening disorder.

Bio-ethically speaking, a surrogacy-born child shall be accepted to be the biological child of the intended parents. Notably, surrogate parents under no circumstances can renounce or give up a child without consent, whether it is a health challenge, birth defect or twin birth, birth by an Indian or an overseas commissioning couple. In the 2019 Bill as well the use of surrogacy to gain a commercial interest to allow sale or prostitution of children or other forms of exploitation is explicitly criminalized. Moreover the commercialization and advertising surrogacy, use of surrogate mothers, abandonment or abuse on the surrogate children, sale or importation of embryo and gametes to be used as surrogates are all named criminal offence and thus punishable by law. On the whole, Surrogacy (Regulation) Bill, 2019 is aimed at the definition of ethical boundaries, the safety of surrogate mothers and children, the prevention of the illegal use of surrogacy practices in India.

## **CONCLUSION**

The surrogacy law may be a very recent phenomenon in India and India, as well as the rest of the world, has been practicing surrogacy since thousands of years but the official legislation of



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surrogacy is a new phenomenon. The popularity of surrogacy as a reproductive solution is on the rise because in recent years the infertility rates among the younger, older, and other groups have been growing, and so have been the medical issues that complicate the reproductive process. Surrogacy became an option of obtaining a child with genetic closeness, and this aspect makes it the most desirable method of receiving a child compared to adoption by many couples due to the development of medical science. Surrogacy is as well the only available option to parent hood to a large group of people namely the live-in partners, divorced or widowed and separated people and also the singles. The fact that in India recently the LGBTQ+ community acquired its rights and its decriminalization only increases the need to have surrogates and develop new legislation and control bodies. The right to health as applied to many legal jurisdictions all over the world means the right to reproductive health, to medical treatment, and to make a family. Based on this, surrogacy is considered as a viable means of achieving what can be termed as these basic rights and in particular to an individual and couple when they are medically challenged. Consequently, there is an increasing legal importance that is being given to surrogacy. The history of surrogacy in India lies in the permissibility of surrogacy in India without any major legislative support or official coverage under national health policy, thus giving an opportunity to receiving surrogacy services to both the Indian citizens and the foreign nationality, notably the NRI and the PIO, who goes to India on medical visas. To a great extent, the attempts of the Indian government to make surrogacy legal and regulated are reactive in nature and have been formed as an outcome of increasing rates of surrogacy and its commercialization.

It has resulted in enactment of a whole series of regulatory tools, the Assisted Reproductive Technologies (ART) Bill, 2010, the Surrogacy (Regulation) Bill, 2016 and a series of guidelines, circulars and notifications of the Ministry of Health and Family Welfare. The ART Bill 2010 allowed both commercial and foreign surrogacy whereas the ART bill 2014 restricted it to only the foreign residents who had NRI, OCI or PIO status. However, the Surrogacy Bill 2016 limited the practice of surrogacy to such that were done on altruistic grounds and which are domestic in nature and that explicitly barred the practice of commercial surrogacy. Interestingly, there was no demand of paid surrogacy by both the Law Commission of India and the Parliamentary Standing Committee, but neither of the two bodies openly condemned surrogacy by foreign nationals. Such changing and even contradicting legal actions have not really taken as much holistic coverage of the medical and psychological, social and legal complexities of surrogacy or also not really safeguarding the genuine interests of all the sides in the effort. Today there are laws on surrogacy in a good number of countries, and India is at a determining moment of deciding its regulation model. The Surrogacy (Regulation) Bill, 2019 (SRB 2019) represents the chosen direction of India - a controlled interfering approach which borders on both the benefits and restrictions. With the results of the present paper, one must admit that a number of clauses of the SRB 2019 could be revised and clarified.



The major areas of concern are that there are no clear legal provisions that will govern the custody of a child born out of unlawful surrogacy. Permanent custody is meant to be allocated by the state in this kind of scenario. Moreover, such discrimination by not providing same-sex couples and single people with access to surrogacy is considered discriminative, and changes should be undertaken to make surrogacy become more inclusive. The prohibition of a paid surrogacy, in spite of the good intentions, can bear undesired consequences, especially to economically deprived women who can otherwise readily be involved in surrogacy in an ethical and controlled environment of their own choosing. Artificial restrictions like that the surrogate should be a close relative to the intended parents or should be a married woman also should be examined and taken out. Furthermore, the definition of infertility, as is currently formulated in the legislation must correspond to that discussed in a 2009 recommendation by ICMART and WHO which provides a standard definition of the term within the international context across the world. In order to proceed with the enactment of the SRB 2019 it is important that a comprehensive and more open public debate be conducted considering the socio-cultural and financial profile of India. With no such a process, the country is likely to come up with another legislation that become impractical, have poor enforcement, or get disapproved by the people whom the legislation targets.

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