

CRITICAL ANALYSIS OF “THE SURROGACY (REGULATION) BILL, 2016”

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ABSTRACT

India’s position as one of the most sought after destinations for medical tourism coupled with availability of potential surrogates has helped the country to become ‘surrogacy capital’ of the world. Modern medical facilities, quality care and low cost treatment are the major factors which attract foreigners from other countries like Bangladesh, Afghanistan, Pakistan, Middle East, etc.¹. Another major reason for the Surrogacy boom was due to the legality of the procedure. There was no law against Commercial Surrogacy in India and it was allowed to be practiced. However, lack of regulation led to a series of complications in the procedure such as exploitation of surrogates, abandoning of the child born and citizenship problems for the child where the country of the intended parents does not recognise surrogacy. Such complex issues made the Indian Government to draft a bill for regulation of Surrogacy in India. Though the government’s move to bring the sector under law is appreciated, the bill is not far from being a flawed one. This paper analyses the Surrogacy Bill that was introduced in the Parliament in August 2016.

Keywords: Altruistic Surrogacy, Commercial Surrogacy, Surrogacy Bill

¹ Neetu Chandra Sharma, ‘Steep rise in Medical visas as India becomes medical tourism hub’, LiveMint News, (Jul 27 2017. 12 48 AM) <https://www.livemint.com/Politics/uZVQVrUTyDNIjLKxiXKRZN/Steep-rise-in-medical-visas-as-India-becomes-medical-tourism.html>

INTRODUCTION

Surrogacy is a medical procedure where a woman agrees to bear a child for another party (couples or individuals) who cannot conceive a child of their own. The woman who agrees to bear the child is called the surrogate and the person for whom the child is borne is called the intended parent. The first child to be born out of surrogacy in India dates back to 1976² and since then the field of ART (Assisted Reproductive Technology) has seen a rapid rise in its adoption. The Surrogacy Industry is touted to be a 2 billion dollars industry.³ The rising infertility issues among not only Indian couples but around the globe, has translated into a huge demand for surrogacy arrangements. It is not only couples but even unmarried individuals who are commissioning surrogacy to grow their family. In some cases, couples also adopt this procedure when the wife doesn't want to bear the child in her womb. As the demand for surrogates increased, complexities arising out of the unregulated practice also gained momentum. When the legality of the procedure was in question, the Supreme Court of India held it to be legal.⁴ In the absence of legislation, the ART guidelines were the only rules that governed the procedure. These guidelines covered majorly the formality aspect of the procedure but it did not deal with sanctions in case of an irregularity. The procedure which was supposed to become a support system to the childless people had become a money-making racket for the middlemen. The rising menace of surrogacy forced the Centre to put a ban on "Commercial Surrogacy" and allow only "Altruistic Surrogacy".⁵ In commercial surrogacy, the surrogate mother is compensated for her services and in altruistic surrogacy, the surrogate is not given any compensation and all the medical expenses relating to the procedure along with insurance coverage of the surrogate is taken care of by the intended parents. The Bill has only made the matters worse by coming up with a ban on commercial surrogacy.

²"Surrogacy Laws India", http://surrogacylawsindia.com/index_inner.php

³ Rajya Sabha Secretariat, New Delhi, 102 Report on Surrogacy (Regulation) Bill 2016, August 2017, <http://www.prsindia.org/uploads/media/Surrogacy/SCR-%20Surrogacy%20Bill,%202016.pdf>

⁴ *Baby Manji Yamada vs. Union of India and Another* (2008) 13 SCC 518

⁵ The Surrogacy (Regulation) Bill, 2016

PROBLEMS ARISING OUT OF SURROGACY

In order to critically analyse the bill, we should know the background of the bill. The bill was introduced to curb the problems associated with surrogacy. Surrogacy is a boon to many of those who want to experience the joy of parenthood but are not in a position to conceive a child but, this medical procedure has ended up becoming a business proposition for many. Apart from this, there are many other problems that arise out of surrogacy-

1. The first and foremost problem is that the surrogates are not compensated adequately for their services. The surrogates in India are predominantly the rural women who are vulnerable to such exploitation.
2. Sometimes, women are forced to become a surrogate by their husbands or their families for the sake of money. In few cases, they are forced not just once but twice or thrice.
3. In certain cases, the surrogate can deliver twins. There are also possibilities where one of them is a biological one of the surrogates.⁶
4. In cases where a child is born with a defect, the intended parents refuse to accept the child. The child is abandoned and is forced to live a life without any parental support.⁷
5. When foreigners commission surrogacy in India, the sperm of the foreign national is used along with the egg of an unidentified donor. This raises nationality issues.⁸
6. The major problem which foreigners face while adopting the procedure is regarding the citizenship and passport of the child when their country doesn't recognise surrogacy. In such a case the child cannot get the citizenship of its parents' country and in India the child born out of surrogacy is not granted Indian citizenship when the parent is a foreign national. Only Indian citizens can apply for Indian passport to leave the country. Thus, it becomes a problem to all the parties in the procedure i.e. the parents, the child and the government of both the countries.⁹

⁶Surrogate mother of twins finds one is hers, BBC News, (November 3, 2017), <https://www.bbc.com/news/health-41858232>

⁷Rod McGuirk, Parents reject surrogate babies with defects, The Star (February 4, 2016) <https://www.thestar.com/news/world/2016/02/04/parents-often-reject-surrogate-babies-with-defects-australian-review-says.html>

⁸ *Baby Manji Yamada vs. Union of India and Another* (2008) 13 SCC 518

⁹ *Jan Balaz v Anand Municipality and Others* AIR 2010 21

7. The surrogate mothers are asked to sign an agreement written in English when they are not in a position to read and write English. The thumb impression is taken to serve the purpose of formality. Thereby giving rise to the problem of uninformed consent because the surrogates here do not understand all the terms in the agreement and the complications involved in the procedure.

8. Many ART clinics were also not registered with ICMR.

These are few problems related to surrogacy and they differ from case to case. Surrogacy doesn't involve only the intended parents and the surrogate but, legal advisors, ART clinics, relative or guardian of the surrogate and the government authorities. It is not always possible to align the interests of the parties involved. It is also subject to criticisms from the society as well. The nature of the procedure is itself a complicated one, not just medically but emotionally as well. Such complications call for a law to be in place to address these issues and secure the interests of the parties. Due to this reason the Supreme Court of India directed the Centre to enact a law on Surrogacy to do away with the problems in future.¹⁰ Thus, there was the birth of the Surrogacy (Regulation) Bill, 2016.

THE SURROGACY BILL, 2016: POSITIVES AND NEGATIVES

The Bill is a welcome move by the Government because it will regulate a sector which has created havoc in the recent years. However, the bill is far from being an ideal one due to certain arbitrary provisions in it. The Surrogacy Bill 2016 was not the first bill to be introduced for regulating ART. In the year 2008, an ART Bill was drafted. It was reviewed in 2010 and later redrafted in 2014. However, it was never passed as a law. The Law Commission in its 228th report recognised the flourishing surrogacy industry in India and suggested a ban on commercial surrogacy while endorsing the idea of altruistic surrogacy. There are both positive and negative aspects to the bill.

¹⁰ *Jan Balaz v Union of India*, (2008) 13 SCC 518

Positive aspects:

The Centre has come down heavily on all irregularities through the provisions of this Bill. It is a solution to the major problems with surrogacy –

1. Section 6 of the Bill provides for informed written consent of the surrogate. This means that the surrogate should be informed everything about the procedure and the consent is taken from her after she makes an informed decision. This ensures that she is aware of the terms of the agreement and the intricacies involved in the procedure.

2. Section 7 of the Bill provides that the intended parents cannot abandon the child born through surrogacy for any reason whatsoever. The contravention of this penalty will attract a fine of five lakh rupees and an imprisonment of not less than 3 years. They shall also be entitled to all the rights of a natural child. This ensures that no child is left without parental support.

3. Section 3 of the Bill requires the ART Clinics to register with the Surrogate Boards in order to carry out the procedure of surrogacy. This ensures that the clinics are under constant monitoring of the Board and there is no irregularity in the procedure. The section also prevents commercialization of human embryo or gametes.

4. The Bill also proposes for formation of Surrogacy Boards both at National and State level. These boards will regulate the surrogacy process being carried out by the clinics across the length and breadth of the country by ensuring that the standard of care is high. These standards are for the physical infrastructure, laboratories, equipment and the experts involved in the procedure. Having a good control over a sensitive process like this is definitely the need of the hour.

These are the positive aspects of the bill but, there are many provisions contained in the bill that raise questions regarding their validity and rationality.

Negative aspects:

The following provisions of the bill create more problems instead of serving the purpose of regulation of surrogacy. For the sake of brevity, the negative aspects are listed as follows and will be dealt in detail under the next sub topic.

1. Section 4 (ii) (b) of the bill states that surrogacy in India should not be commercial in nature. Section 3 (ii) prohibits clinics, gynaecologists and medical practitioners from conducting commercial surrogacy. Such a blanket ban on the practice is a matter of concern to the people at large.
2. Section 4 (iii) (b) (II) of the bill states that only a close relative of the intended parents can become a surrogate. This provision takes away the liberty of the couple to choose a potential surrogate of their choice and their options has been narrowed down drastically.
3. Section 4 (iii) (c) of the bill provides that only married couple can commission surrogacy. Unmarried individuals are barred from commissioning surrogacy. This is an outright discrimination against a particular section of the society based on marital status.
4. Section 4 (iii) (c) also states that a couple should be married for at least 5 years in order to commission surrogacy. This is an arbitrary provision with no rational basis as to why it is 5 years and not 2 or 6 years.

Now we can analyse these provisions by putting them through the test of Constitutionality and other legal principles.

THE BILL AND THE ISSUES INVOLVED

(i) Is ban on commercial surrogacy a justified one?

The main contention with the bill is regarding its ban on Commercial Surrogacy. The legislature has come up with a ban believing that it can prevent exploitation of women by doing away with the commercial aspect of surrogacy. Some also believe that commercial surrogacy as a concept is against ethics as it seems to be like 'selling of babies' and thereby commercializing procreation. It should be understood that a ban on commercial form of surrogacy will not do away with the exploitation of surrogacy. It can restrain monetary exploitation of women to some extent. Exploitation can be both monetary and emotional. Women can be exploited even in altruistic form of surrogacy by their own family members. Sometimes, a ban does not necessarily solve the problem but it can push the practice into black market where things will just become worse. The commercial aspect shouldn't be seen as

commercializing babies and treating them as commodities. The women who agree to become surrogates are generally from financially poor families. They are in desperate need of money to cope up with their financial problems. On the other side, the person commissioning surrogacy is in a desperate need to have a child and experience the joy of parenthood. Surrogacy is a medium through which both parties are in a position to help each other and solve problems of each other. The commissioning parent is able to pull the woman out of financial problem by 'compensating' her for the service she provides and the surrogate helps the intended parent to have a child. Even if a woman wants to be a surrogate for compensation it shouldn't be a matter of concern because men donate sperms in exchange for a price¹¹. If such a practice is not coloured as an unethical one then women agreeing to bear a child should also not be remarked as baby selling or an unethical act. Stress driven infertility is on the rise and advanced medical sciences have always played a vital role in providing solutions to health-related problems and Surrogacy is one such solution.

Restricting women from becoming a surrogate by stipulating conditions of marriage and motherhood takes away the personal liberty of women to decide whether they want to become a surrogate or not. They do not have control over decisions regarding their own body and the State is dictating what one should do with their body and what not. It is violative of Article 21. Though there is a restriction on the right by 'procedure established by law', such a procedure should be just, fair and reasonable.¹² It is just not enough for a legislature to pass any law but, it should conform to the principles of justice, fairness and reasonableness and only then such a law is valid. In the light of the above statement, Section 4 (ii) (b) and Section 4 (iii) (b) do not stand as valid provisions.

Thus, it can be said that a ban on commercial surrogacy is not a solution to surrogacy related issues. It will remain to be in practice in a veiled form even if there is a ban on it. It is better to regulate commercial surrogacy than to ban it and see another black market crop up. It is also essential to give all people the liberty as what they want to do with their body as far as it is not a life-threatening activity. In Surrogacy there is nothing wrong in carrying a child for someone.

¹¹ Neetu Chandra, 'Lure of quick money pulls school boys to sperm donation', India Today, (January 31, 2011 10:24 IST), <https://www.indiatoday.in/india/north/story/money-draws-delhi-schoolboys-to-sperm-donation-127595-2011-01-31>

¹² Maneka Gandhi v. Union of India AIR 1978 SC 597

There is nothing unlawful in being a surrogate in order to help childless people. Therefore, it is not justified to ban commercial surrogacy.

(ii) Is altruistic surrogacy a solution to surrogacy related problems?

It is definitely not. If the legislature thinks that altruistic form of surrogacy can prevent exploitation of women in the absence of commercial element then it is under a misunderstanding. Women can still be pressurised by their family members to become a surrogate for another person in the family. They can be exploited emotionally and may succumb to the family pressure. Relatives will pressurise the female in the family because the law will not permit them to look for a surrogate outside the family. If there was an option for people to search for a surrogate other than a relative, then they wouldn't be forced to pressure the woman. It is the lack of options that will force the family to pressurize one of their relatives to be a surrogate.

Section 4 (iii) (b) creates more problems to the intended parents because it restricts their options of commissioning a surrogate only to their close relatives. There is twofold problem that arises here.

The first problem is that the legislature is working here on an assumption that all intending couples will have a close relative who will volunteer to be a surrogate. This is a faulty provision with no rational backing. What about couples who have no close relatives capable of becoming a surrogate? What about couples whose relatives refuse to become a surrogate for them? Is it justified to deny a person his/her right of parenthood just because his/her relative refused to volunteer or just because they do not have a close relative at all? The provision is against the principles of law because it is unjust and unreasonable. The purpose of law should be to restrict us from doing unlawful acts and not to tell us what to do in our personal sphere.

The second problem is that it takes away the personal liberty of the intending couple to choose the surrogate of their choice. The provisions in the bill force them to take the help of their close relative to become a parent through surrogacy. The reality is that infertility is a taboo in India and people are not comfortable sharing details of infertility with their family members. This is because of the severe criticism and mockery that they are subjected to by their relatives and

other members of the society.¹³ In such a scenario, it will be extremely difficult for the couple to approach a close relative for surrogacy because such an arrangement within the family will be traumatic for the couple due to the open visibility of infertility. Also, it takes away the liberty of the couple from maintaining confidentiality regarding health issues. The couple should be given the freedom as to what they want to reveal to the family and what not. But, the surrogacy arrangement proposed by the bill takes away this basic right of the couple.

It is wrong on the part of the government to assume that a close relative will volunteer to be a surrogate for no compensation in return. And first of all, why would someone volunteer to be a surrogate when there is no compensation? Out of their love for family? It should be understood that very few people will volunteer considering the social stigma attached to surrogacy. Aren't we all aware of the number of cases coming up in Courts across India due to discord between members of the family? The Centre drafting such provisions with an assumption that there are ideal family systems in India is completely irrational.

It should also be noted that when a close relative is a surrogate then the child and the surrogate mother remain in close proximity throughout life. This is against the basic idea of surrogacy agreements. The agreements specify that the surrogate cannot claim any right over the child and they should be separated in order to prevent the surrogate mother from developing any bond with the baby. But in this case the surrogate and the child are in close proximity and there are possibilities of the surrogate developing feelings for the child. This will be another problem for the intended parents who spend their time, money and energy in giving birth to their child. Thus, it can be stated that altruistic surrogacy does not solve the problem but creates more complications for everyone in the procedure i.e. the parents, the surrogate and most importantly the child.

(iii) The Bill and other sections of the society

Section 4 (iii) (c) of the bill provides that only a couple who have been married for 5 years and are Indian citizens will be allowed to commission surrogacy in India.

¹³ 'The Taboo on Infertility & How You Can Break It', Manipal Fertility, (June 5, 2018 10:50 A.M.)
<https://manipalfertility.com/blog/the-taboo-on-infertility-how-you-can-break-it/>

This provision is against Article 14 of the Indian Constitution that provides for equality before law. It discriminates among the citizens on basis of marital status. It is the basic right of the individual to either marry or not. Everyone has a right to parenthood and people should have a right to be a single parent if they want to be. Men and women have a right to grow their family.¹⁴ It is essential to lead a fulfilling and dignified life which is cherished by the Universal Declaration of Human Rights and India is a signatory to it. There are many single parents not only in India but around the World who are capable of raising children. The condition that the couple should have been married for five years is an arbitrary one. This is a burden on the couple who have to bear the pain of childless life for 5 years. The probable intention behind such a condition is to ensure that the couple understands each other well before commissioning surrogacy so that the child is not a victim of marital discords between its parents post surrogacy. However, there have been cases where couple apply for divorce even after being in the marriage for 12 years. Therefore, it is another cause of problem to the couple.

Other criticism against the Bill is that it excludes homosexual couples from commissioning surrogacy in India. It should be noted that India criminalises unnatural sex and is against homosexuality. In such a case, this comes as no surprise. The arguments regarding whether homosexual couples can be like any other normal parents is purely a subjective one. The Government has banned homosexuals from commissioning surrogacy considering the impact on the child in future citing that the child will be subject to severe criticisms due to the stigma attached to homosexuality. LGBTQ rights are still in nascent stage and only time will tell whether they will get their due or not.

CONCLUSION

Surrogacy as a concept is not new to India. It has many mythological references to it starting from Bhagvad Purana to Mahabharatha. The birth of Lord Balrama and Lord Kartikey through surrogacy is an indication of the fact that surrogacy as a concept was very much rooted in our country and is nothing new to us.¹⁵ Ironically, Lord Kartikey is the Lord of Fertility. This shows

¹⁴ Article 16, Universal Declaration of Human Rights, 1948 www.un.org

¹⁵ Kavita Kane, "Surrogacy in Mythology", She the People.TV, (August 3, 2017 06:17 P.M.) <https://www.shethepeople.tv/news/surrogacy-in-mythology>

that surrogacy was not just practiced in India but it also found social acceptance.¹⁶ Therefore, it can be said that there is nothing wrong in commercial surrogacy as far as it is regulated. In fact, the surrogate should decide whether she wants to be a surrogate in return for compensation or not. The legislature shouldn't force a certain form of surrogacy. The Government should also allow unmarried women individuals to decide whether they want to be a surrogate or not instead of allowing only married women to become surrogate. The Centre should also allow unmarried individuals to commission surrogacy as it is a fundamental right of everyone to become a parent through a lawfully accepted practice like surrogacy. Even though these flaws in the Bill are a matter of concern, we should also appreciate the Centre's move to regulate a sector that had created havoc in the society.

¹⁶ Vol.1 No.1 2016 Bharatiya Prajna Journal, Ralla Guha Niyogi, 'May You be The Mother of hundred sons: Social and ethical Impact of Surrogacy in Ancient Indian Myths', <http://www.indianstudies.net/surrogacy-in-ancient-indian-myths/>