

SURROGACY BILL, 2016: CONSTITUTIONAL ANALYSIS UNDER ARTICLES 14 & 21

Written by Shubham Sharma

BA LLB Graduate, NALSAR University of Law

INTRODUCTION

Surrogacy, is the practice of inseminating the host, the Surrogate, with whom the contract is made to "rents" her womb so as the unborn child can be cultured in the surrogate mother. This practice is highly controversial due to Legal issues and Ethical and Social stigmas that surround surrogacy. Most countries have either highly regulated the practice or entirely ban it, there exists only a handful of countries such as Ukraine and Russia which allow for unregulated surrogacy.

The position in India has dramatically changed from 2002 where commercial surrogacy was legalized to the 2016 Draft of the Artificial Reproductive Technology Bill (ART Bill), which seeks to put a permanent ban on commercial Surrogacy, this shift is in lieu of cases such 2008 Baby Manjiⁱ case and the exploitation of poor women in India, the government of India also seeks to curb the human trafficking problem which as gain considerable momentumⁱⁱ due to the practice of surrogacy in India. The draft of 2016 proposes to ban all forms of surrogacy, with the exception of infertile heterosexual couples who after five years of marriage are unable to have children can avail the services of an altruistic surrogacy, where the surrogate is a close relative. For the purpose of this article, focus of this paper will be on two folds, firstly the constitutional validity of the proposed bill and secondly the protection provided by the bill to the surrogate mother and child post birth. The focus of the paper will not however be the ethical and moral debate surrounding the issue nor will it be a comparative analysis of the bill with its international counterpart. This project will also not enter into the debate of, if surrogacy as commercial practice is valid, for this project the researcher will only analysis the current bill through the constitutional lenses.

Constitutional Analysis

In accordance to the 2016 ART Bill, infertile heterosexual couples who after five years of marriage are unable to have children can avail the services of surrogacy. This means that any single parent, widowed, singles sex couple, divorcees, live-in relationship partners and others who don't fall within the narrow definition of the bill, their right to parenthood is negated. meaning which that this clause is an exclusionary rule, hence the major contention are that of fundamental rights, mainly article 14; Equality before law and article 21; Protection of life and personal liberty.

Equality Before law

Article 14 provides a protection against class based legislation but it does not forbid reasonable classification as long as the classification is not "arbitrary, artificial or evasive."ⁱⁱⁱ

Firstly there must be an intelligible differentia in the classification which distinguishes persons or thing that are grouped together from others left out of the group. Secondly there must be a reasonable nexus, a rational relation to the object sought to be achieved by the act, meaning that a legislation can only be declared discriminatory when there is no reasonable basis for a classification. The current draft of the ART 2016, does provide for an intelligible differentia however it doesn't provide for a rational nexus with the clause of the act and the objective of the act. The purpose of the act is to prevent the exploitation of a women body and to protect the child who was born subsequently.

By barring those who are non-heterosexual and married couples, the purpose of the act is not being archived, because it can be argued that divorcees, widowed individuals and others can all fulfill the proviso of altruistic surrogacy by "close relatives" in order to protect the exploitation of women's body by following the guidelines of the 2016 ART Bill. Secondly, If the argument is that only those who are in a marriage that is recognized by Indian law then the bar in live in relationship doesn't hold true as live in -relationships are recognized as natural marriages following the decision of Indra Sarma^{iv} where Court stated that "a live-in relationship will fall within the expression "relationship in the nature of marriage" under Section 2(f) of the Protection of women Against Domestic Violence Act, 2005"^v

Finally, if the reason as to the proviso banning non-heterosexual married couple is to protect the interest of the child born subsequent, then the entire line of reasoning falls in the realm of arbitrary legislation, this is owing to the fact that the legislative branch doesn't hold the power

to decided what class of people are capable of raising a child and providing for a suitable home and nurture, only on a case by case, situation specific and individual specific study can it be determined who is cable of raising a child. So, any decision in the same would be arbitrary. Therefore the proviso of the act attacks the lifestyle, sexual orientation, and life choices, of those who wish to opt for surrogacy hence the bill would violate a citizens fundamental rights under Article 14.

The clause which prohibits foreigners from availing surrogacy services in India, is not hit by Article 14 of the constitution because if it is discriminatory, the probation is hitting the object of the act, which is mainly the protection of the child after it is born. Since most countries don't recognize children born out of surrogacy as the child of the contracting individual(s) the status of these children remain in question once they reach their parents homeland. when the German government^{vi}, refused to grand a visa to a baby born in Gujarat because the government of Germany doesn't recognize surrogacy. On the Supreme Court had to grant Indian citizenship to the baby and then have the German parents adopt the same child. Even if the embryo and the sperm was donated by the respective parent and the child is a genetic match of the respective parent, most countries like Germany won't recognize the child as the offspring of the donating mother and father, hence in order to allow the new born to travel it would have to be adopted, This kind of limbo status of the child, due to conflicting laws of different countries leave the child as an adopted child and never a "natural child". the title of adopted child can have varying effects of the Childs legal claims and status depending on the country which it would go to, therefore in order to protect the child form.

Article 14, the purpose of the article is to prevent treating persons in similar circumstance differently and preventing those in different circumstances being treating similarly, hence treating equals as unequals and unequals as equals. The proviso against foreigners from adopting is not a circumstance where equals are being treated as unequals, therefore the proviso is sound.

Right of Reproductive Autonomy

Moreover, the right to life Under article 21 also provides for right of reproductive autonomy which includes the right of procreation and parenthood. The state cannot decide the modes of parenthood furthermore the state cannot interfere in the personal choice of an individual(s) to have a child nor its means, whether it is naturally or through surrogacy and Infertility cannot be a condition for surrogacy to be an option.

The ability to be a parent and the ability to raise a child are an individual choice, the state cannot predetermine who is capable of being a parent and moreover the state cannot decide how they can be a parent, whether it is through adoption, traditional or artificial surrogacy. By only allowing infertile women to opt for surrogacy the state is neglecting the choice or the reason as to the choice of the women to opt for surrogacy, to better understand let us say there is a carrier orientated women who opts for surrogacy however she is medically fit and healthy to have a child, now as per this bill, she would have to place her carrier on hold in order to have a biological child. The Infertility clause is a burden solely women and against the ideals of equality in the workplace and carrier. The 2016 ART bill is for the prevention of exploitation and protection of children born subsequent; however, this cannot be achieved by depriving citizens of rights and liberty, rather this is a matter of good policy and governance. Instead of banning surrogacy, controlling the environment in which surrogacy takes place would be more appropriate measure to protect the interests of the parties involve, with added formalization of the institution under heavy scrutiny of the law.

The clause which allows only close relative to be surrogates who are altruistic, isn't a for the purpose of taking the lively- hood of surrogates but it is to insure that the surrogacy if formed in good faith, to allow the birthing mother access to the child to remove post separation anxiety, and secondly and more importantly because of the clause that makes surrogacy a onetime ordeal for the surrogate mother the concept of "pimping" and exploitation is reduced, firstly since the surrogate is a family member there is no middle man who can take advantage of the surrogate and secondly by removing the finical incentive the idea of exploitation is removed, but there still exists the danger of pressure from family member, causing the women to become a surrogate which the 2016 draft bill does not address.

For those who make the argument that, surrogacy is a means of lively-hood, the argument in itself flawed because one cannot be a surrogate as a carrier because a woman can only give births so many times before it becomes a physical hazard on her body. so the idea that surrogacy is a form of lively-hood is not a valid argument because surrogacy offer quick money to remedy for financial troubles, hence surrogacy is not a means of lively-hood.

CONCLUSION

The Draft bill of 2016, is aimed at protecting the exploitation of women, specifically poor women who are pimped or forced in to the trade of surrogacy and secondly to protect the interest of the unborn child. However, the means adopted in the draft are do not pass the test of constitutionalism. the aim of the bill is to remove commercial surrogacy but still keep the option of surrogacy available to those who opt for it in a private sphere, however the means they have adopted to exclude all those who are not "infertile heterosexual couples who after five years of marriage are unable to have children can avail the services of an altruistic surrogacy, where the surrogate is a close relative" is arbitrary and has no reasonable locus standi, therefore taking a cue from the draft bill of 2008, 2010 which did not pose restriction on who could avail surrogacy would be more in line with the idea of equality, with the added exception of foreign national not being able to opt for surrogacy in India. The current bill as it stands is highly problematic in the constitutional sense and needs to be reviewed before it can be good law.

REFERENCES

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- ⁱ BABY MANJI YAMADA v. UNION OF INDIA & ANR. [2008] INSC 1656 (29 September 2008)
- ⁱⁱ Human trafficking for the purpose of the removal of organs and forced commercial surrogacy. (2012). 1st ed. [ebook] Hague: Bureau of the Dutch National Rapporteur on Trafficking in Human Beings. [Accessed 10 Sep. 2016].
- ⁱⁱⁱ Singh, Shiksha. "Reasonable Classification Under Article 14". *Legal Services India*. N.p., 2012. Web. 12 Sept. 2016.
- ^{iv} Indra Sarma v. V.K.V. Sarma, CrI. App. No. 2009 of 2013; Decided on 26-11-2013 (SC): 2013 (14) SCALE 448 [K.S. Radhakrishnan and Pinaki Chandra Ghose, JJ.]
- ^v Supra 3
- ^{vi} "From Abandonment to Abuse, 18 Cases That Helped Draft Surrogacy Bill". *The Indian Express*. N.p., 2016. Web. 11 Sept. 2016.