

THE SURROGACY (REGULATION) BILL, 2019: A STEP IN THE RIGHT DIRECTION?

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Abstract—Surrogacy is a widely utilised practice to give a childless couple a chance at parenthood. It has been in practice for long and has taken a commercial facet to it. There is a prominent surrogacy market in India; a pioneer in developing, utilising and exploiting this market. Surrogacy arrangements are particularly of great use for foreign couples who get access to cheap, effective and proper medical care in India. This widespread development of commercial surrogacy markets has been examined and a bill titled, 'The Surrogacy (Regulation) Bill, 2019' was introduced and passed in the Parliament on August 5, 2019. This Bill is one of the many that preceded it which encompasses a fundamental legal framework for banning commercial surrogacy and replacing it with altruistic surrogacy. The surrogacy arrangement envisaged in the Bill is entrapped in technical and administrative latches. The Bill is an attempt by the legislators to control and regulate the commercial exploitation of surrogacy practices by introducing numerous prerequisites and conditions to be eligible for engaging in such practices, both for the surrogate mother and the intended parents. The unique aspect of this Bill is that only a 'close relative' of the intending couple may be a surrogate mother; a feature that may create more issues than resolve any. This paper is a study on the practice of surrogacy, its increasing commercialization and the unique position of India in relation to the market dynamics of surrogacy. The main focus of the paper is to review and point out issues and limitations of the intended law and how it may create more hurdles in the process of regulating it. The paper shall be a socio-legal study of this intricate human experience within the broad spectrum of women rights.

I. INTRODUCTION

Surrogacy is a contemporary medical advancement that provides couples with a chance to have a family. The process of surrogacy essentially involves artificial insemination of the embryo into the womb of a surrogate mother. She is responsible to rear the child to complete term and thereafter deliver the child to the intended parents who had hired her services. This medical procedure has been successfully employed by many globally. It is believed to be estimated to be \$2 billion a year business venture;¹ a successful commercial activity that has somewhat eroded the basic

postulates of human rights and dignity. Commercial surrogacy raises many concerns regarding its regulation and protection of the interested groups, i.e. the surrogate mothers, the children conceived via surrogacy and even the intended parents. Cases of abuse, custody battles, denial and non-compliance with surrogacy arrangements and contracts, exploitation of surrogate mothers by middlemen etc are some of the most prominent concerns. Consequently, due to its complex nature and the difficulty in separating the human rights aspect from the commercial aspect of 'renting a womb', many nations banned the practice of commercial surrogacy, limiting it to primarily only altruistic form of surrogacy. India is one such prominent market for commercial surrogacy, particularly due to its low cost and excellent medical services. However, in 2019, the government introduced the Surrogacy Regulation Bill, after several preceding attempts, to regulate the practice and ban its commercial form in India as well.

II. THE CONCEPT OF SURROGACY

'Surrogatus', the Latin term for surrogacy, means a substitute i.e. a person appointed to act in the place of another.²

The Merriam Webster Dictionary defines it as, "the practice by which a woman (called a surrogate mother) becomes pregnant and gives birth to a baby in order to give it to someone who cannot have children."³

The Surrogacy Regulation Bill, 2019⁴ defines the term as "surrogacy means a practice whereby one woman bears and gives birth to a child for an intending couple with the intention of handing over such child to the intending couple after the birth;"⁵

¹ Shannon Mathew, *The Surrogacy Bill: What it Says and What It Doesn't*, THE YP FOUNDATION (March 24, 2017), available at: <http://www.theypfoundation.org/news-2/2017/3/24/the-problem-with-the-surrogacy-bill> (Last visited on Oct. 18, 2019).

² Online Etymology Dictionary, *Surrogate*, available at: <https://www.etymonline.com/word/surrogate> (Last visited on Oct. 18, 2019).

³ Merriam Webster Dictionary, *Surrogacy* (March 30, 2018) available at: <https://www.merriam-webster.com/dictionary/surrogacy> (Last visited on Oct. 18, 2019).

⁴ The Surrogacy Regulation Bill, 2019, Bill No. 156 of 2019.

⁵ *Id.* sec. 2(zc).

III. MULTI-FACETED ASPECTS OF SURROGACY AND ITS INCREASING COMMERCIALISATION IN INDIA

SOCIAL, ETHICAL AND HUMAN-RIGHTS CONCERNS

There are numerous matters of concern regarding surrogacy, in its commercial or altruistic form. Human rights of many different categories of persons are at stake and this practice may be exploited for the vested interests of a few. The surrogate mothers and the children born through such a process are the most vulnerable. The surrogacy process is such that if it works and achieves the intended purpose without obstacles, it provides the immense joy of giving a child to a childless couple; but if some element goes amiss, the process can be condemned for devaluing the human life.

When one becomes a surrogate mother, she not only gives her physical body, but also her mind and soul to raise a baby within her as her own. She has to be clear that there should be a well-defined separation between her and baby growing inside of her. The bodily exhaustion is one aspect, it is at times, the psychological aspect that becomes an issue. It is an earnest, compassionate and nurturing process and one that creates issues due to the sensitivity and sentimental value attached to the process of childbirth. On the other side, some surrogates perceive this as a pure commercial activity, often undertaken to feed their own children or families as a matter of subsistence to overcome their poverty. For many, this is a source of livelihood that assures that the family gets its basic food, clothing and shelter for survival. It is also the expression of freedom to their bodily integrity and the right to livelihood. It is an alternative whereby they can provide for their family by doing something decent and constructive like that of gifting a child to a couple who desperately wants one. For such women, surrogacy has become a lucrative financial option, one that gives them income and also respect, particularly by the intended parents whom they assist.

Surrogacy is a complicated multi-faceted process, one that affects the lives of many. It raises questions of morality, ethics and social considerations and whether a ban is a solution to the increasing commercialisation of the medical advancement. A complete ban on such transactions may be counter-productive; one that may result in creation of black and underground markets, which may degrade the conditions of these women and reduce them to being perceived as objects and not as humans.

On the other side, the child born out of such arrangements may be subjected to conditions that may be detrimental for him/her. A child born through such surrogate services may suffer in the hands of the surrogate mother or the intended parents if unloved or when they are engaged in legal battles to determine their custody rights. It is observed that, at times, the surrogate mother becomes extremely attached to the baby which results in a change of her mind. She may subsequently

deny giving the child to the intended parents and this creates disputes which often result in legal battles. There are also instances wherein the intended parents have abandoned the child because of some deformity or illness in the child before or after the birth. This creates a difficult situation for the surrogate mother as she may be incapable of raising another child and also feels apprehensive to simply desert it. Such abandoned children then end up in homes or orphanages. This creates an environment wherein the parties simply play with the future of a child who may otherwise not have been born simply to be deserted. The child born out of such arrangements are, at times, overlooked and the psychological damage that such practices may cause to the mental stability of the child is disregarded. The nature and mind of a child is fragile and viewing them as objects in the process of surrogacy is demeaning and unethical.

Surrogacy is enveloped in complex socio-ethical aspects that warrants a humane approach. It is a process that provides many a chance of enjoying the process of rearing a child, nevertheless, it has its limitations. The task is finding the balance between the two while ensuring maximisation of the benefits and restricting the limitations.

COMMERCIALISATION OF SURROGACY IN INDIA

The roots of surrogacy can be traced in history in India as the world's second and India's first IVF baby was born in Kolkata on October 3, 1978.⁶ Surrogacy has been practiced for years in India and globally. This process is a medical advancement which provides childless couples a chance of having a family and enjoying the process of raising a child.

The practice of surrogacy has been prevalent in India for years. Many prominent clinics have been set up pan India that provide quality surrogacy services at cheap costs and with facilities ranging from providing the surrogacy mother; providing special lodging during the period of pregnancy; food and other items including frequent medical check ups all for a cost. The only thing the intended parents need to do is to provide for the financial expenses and everything shall be provided for by these institutions. It is one of the main reasons why international clientele in India is also very strong. India is home to qualified and experienced doctors with a flair in the English language and that reassures many foreign clients into opting for India as a centre for such commercial transactions. Furthermore, compared to other countries, India provides the services at competitive prices which makes it more lucrative for foreigners to select India for such procedures.

In some cases, gametes are also arranged for if the intended parents have some medical problem which prevents them from giving their own gametes. Furthermore, there are many cases of illegal and underground markets in the form of black-market traders who have set up such clinics and have no qualification

⁶Surrogacy Laws India, available at: surrogacylawsindia.com/index_innner.php. (Last visited on Oct. 21, 2019).

and competence to carry out such a complicated procedure. There are also instances of agents and dalals in the market who force women to volunteer for such procedures simply because of the monetary factor. It is an extremely lucrative market that should be utilised for the broader positive purpose of giving a child to a childless couple; but it has been corrupted like most sectors, into a money minded industry rather than a human welfare concept.

IV. THE HISTORICAL LEGAL DEVELOPMENT OF SURROGACY LAWS IN INDIA

Owing to the prominent exploitation of surrogacy arrangements in India and its ever-increasing demand, the legal field has been unable to keep up with the developments in the medical field. The medical advancements have preceded legal enumerations and restrictions and thereby, commercial forms of such arrangements have been mushrooming with each passing day. The laws are in a nascent stage and are still being moulded to suit the changing needs and concerns of this medical process. The concept of surrogacy falls within the broader area of assisted reproduction technology. The concept envelops surrogacy, gamete donations and also embryo freezing within its folds. The Assisted Reproductive Technologies Guidelines was the first legal development in the form of suggestive guidelines drafted under the guidance of the I.C.M.R.⁷. These Guidelines were followed by the ART Bill, 2014⁸ and the same was revised in 2017⁹. This Bill covers the broader spectrum of issues within the meaning of assisted reproduction. This Bill forms the foundation of developing a concrete legal framework for all kinds of assisted reproductive technologies; nevertheless, it remains in the form of a Bill as it was not passed by the Legislature.

The next attempt for a legal framework was the introduction of the Surrogacy (Regulation) Bill, 2016¹⁰. This was the first attempt to draft a concrete specific law to regulate surrogacy arrangements and associated clinics by establishing authorities who shall be empowered to regulate the process and ensure certain safeguards for the parties of such arrangements. The Bill was critiqued by the interested parties and was said to be narrow in scope to the extent wherein it was almost discriminatory. It was by this Bill that the concept of altruistic surrogacy was introduced, and commercial surrogacy was completely banned. The same idea has been extended to the current Bill. The Surrogacy (Regulation) Bill, 2016 was passed in the Lok Sabha but it eventually lapsed owing to the adjournment of the Parliament *sine die* in 2016. Subsequently, the Bill was reintroduced and passed by the Lok Sabha in 2019. It is yet to be passed by the Rajya Sabha to become a law.

⁷The National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India was drafted by the ICMR and it provides the foundational basis of such reproductive technologies.

⁸The Draft Assisted Reproductive Technology (Regulation) Bill, 2014.

⁹The Draft Assisted Reproductive Technology (Regulation) Bill, 2017.

¹⁰The Surrogacy Regulation Bill, 2016, Bill No. 257 of 2016.

V. REVIEW OF THE SURROGACY (REGULATION) BILL, 2019

The Surrogacy (Regulation) Bill, 2019¹¹ aims to control the practice of commercial surrogacy within the legal framework of India. The Bill defines the term as; “*commercialisation of surrogacy services or procedures or its component services or component procedures 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, to the surrogate mother or her dependents or her representative, except the medical expenses incurred on the surrogate mother and the insurance coverage for the surrogate mother*”¹²

The Bill, in its Preamble clearly lays out the purpose for drafting the Bill, i.e. for the regulation of the process by establishing authorities that shall be empowered to decide the future of the intended couple on whether or not they deserve to be parents.¹³ It also provides for numerous rules and compliances for surrogacy clinics, its registration and establishment of authorities for its regulation.

The Bill provides for a total ban on commercial surrogacy and permits only altruistic surrogacy for Indian heterosexual couples, stringent regulations for compliance and enumerates the purpose based on which one may be permitted to avail of such services.¹⁴ The concept of altruistic surrogacy means that there shall be no form of monetary compensation for the surrogate mother and it shall be limited to only the reasonable medical expenses and insurance cover for the surrogate mother. In other words, the surrogate mother shall offer her womb for free and without any form of compensation for it; thus, the bill restricts such surrogate mothers to ‘*close relatives*’ of the intended parents. It may be unreasonable to expect a third party to offer such services for free and thus, close relatives of the intended parents have been made to be eligible only.

While the idea of altruistic surrogacy has been forwarded in the Bill, the legislators however, failed to explain the concept of ‘*close relative*’ and who fall within the meaning of this term. The term is undefined and ambiguous and thus open to interpretation which may lead to different standards.¹⁵ This is

¹¹*Supra* note 4

¹²*Id.* sec. 2(f).

¹³The Preamble to the Bill states, “A Bill to constitute National Surrogacy Board, State Surrogacy Boards and appointment of appropriate authorities for regulation of the practice and process of surrogacy and for matters connected therewith or incidental thereto.”

¹⁴Surrogacy is permitted when it is: (i) for intending couples who suffer from proven infertility; (ii) altruistic; (iii) not for commercial purposes; (iv) not for producing children for sale, prostitution or other forms of exploitation; and (v) for any condition or disease specified through regulations.

¹⁵The Transplantation of Human Organs and Tissues Act, 1994 specifies that a living donor has to be a ‘near relative’. It defines a ‘near relative’ to include spouse, son, daughter, father, mother, brother or sister.

one of the most important aspect of the Bill, yet it has been left without any clear explanation. The problem of using this terminology also extends to situations wherein a close relative may be coerced by the family to become a surrogate mother since it is the only alternative for surrogacy arrangements. In Indian families, a situation may arise wherein a daughter-in-law may be forced to become a surrogate mother for her sister-in-law and this form of duress may result in violence and abuse within the four walls of a home. The limitation herein is extremely narrow and leaves a space for subjectivity, prospective cases of abuse particularly within larger families and may leave out many from utilising this medical advancement for making a family. Instead of prohibiting it for commercial purposes, the Bill should have rather introduced a compensatory form of surrogacy, affording safeguards of human rights protection, guaranteed financial compensation for the services and a proper contractual form of agreement to ensure no person involved in this engagement may suffer.

Another matter related to the altruistic surrogacy is the question of livelihood of the many women who depend on this for their survival. There are many who have access to basic food, clothing and shelter due to the earnings by such arrangements, particularly for foreign couples. Under the Bill, foreign couples have been completely excluded from engaging in surrogacy arrangements in India. These women will have to completely discontinue these activities and that may place them in a challenging situation. Most women who become surrogate mothers in India come from poor backgrounds and denying them this source of income may push them towards a life of destitute. Additionally, this may result in the development of underground markets which may engage services of such women under the radar of the authorities. Such markets, however, shall be more dangerous and may result in both physical and economic abuse in the hands of the agents providing such services.

An extensive list of definitions is enumerated in the Bill¹⁶, along with the eligibility requirements for intended parents¹⁷ and the surrogate¹⁸. The Bill is extended only to childless

¹⁶*Id.* Chapter I, Preliminary, sec. 2

¹⁷*Id.* sec. 4(iii)(c)

The intending couple should have a 'certificate of essentiality' and a 'certificate of eligibility' issued by the appropriate authority.

A certificate of essentiality will be issued upon fulfilment of the following conditions: (i) a certificate of proven infertility of one or both members of the intending couple from a District Medical Board; (ii) an order of parentage and custody of the surrogate child passed by a Magistrate's court; and (iii) insurance coverage for a period of 16 months covering postpartum delivery complications for the surrogate.

The certificate of eligibility to the intending couple is issued upon fulfilment of the following conditions: (i) the couple being Indian citizens and married for at least five years; (ii) between 23 to 50 years old (wife) and 26 to 55 years old (husband); (iii) they do not have any surviving child (biological, adopted or surrogate); this would not include a child who is mentally or physically challenged or suffers from life threatening disorder or fatal illness; and (iv) other conditions that may be specified by regulations.

¹⁸*Id.* sec. 4(iii)(b)

To obtain a certificate of eligibility from the appropriate authority, the surrogate mother has to be: (i) a close relative of the intending couple; (ii) a

heterosexual couples, excluding any who may have adopted a child or conceived through surrogacy before and clearly eliminates homosexuals from using this medical procedure. This is a major issue with the Bill. The surrogacy regime envisaged within the Bill is limited to only to heterosexual couples who have been married for a minimum of five years and who have not adopted any child. This reflects the narrow mindset of the drafters who believe that the right to form a family should be restricted only to heterosexual couples. Single parents, widows, homosexual couples, live-in couples have been specifically excluded within the scope of the Bill. The rationale behind excluding these various categories is unclear. The Supreme Court has given legal recognition to live-in couples and relationships in many cases. Additionally, the Supreme Court removed the archaic Section 377 of the Indian Penal Code which made it a criminal offense to be a homosexual. Where developments in the right forward direction have been taken time and again by the Supreme Court through legal interventions; Bills such as these raises doubts regarding the development in terms of outlook and the acceptance by the community towards such special categories of persons. Such instances are examples blatant discrimination against selected groups, i.e. homosexuals, single parents, widows, live-in partners and denying them the human right to a family as protected under internationally recognised legal instruments.

As far as the surrogate mother is concerned, apart from being a close relative, she is permitted to be a surrogate mother only once in her lifetime. She should be a married woman having a child of her own and between the age of 25 to 35 years on the day of implantation. The provisions of being married and having a child may seem reasonable, however, it may be difficult for the intending couple to find such a 'close relative' who may accept the proposition. Being a surrogate mother and thereafter giving up the child is tough in itself. However, if the surrogate mother is a close relative, she may find it difficult to emotionally disengage from the child if she is a part of the broader family. This may create problems within the family and disturb the dynamics of the intertwined relationships; thereby affecting psychological wellbeing of all three parties of the surrogacy arrangement.

The Bill also grants wide powers to the authorities established under it. The Bill grants excessive delegated powers to authorities under the Bill. For instance, the National Surrogacy Board is entitled to prescribe, if it may deem fit, additional conditions to be conformed to by the intended parents to be eligible for surrogacy. Similarly, the National Surrogacy Board is empowered to declare through the regulations any other conditions or disease which may entitle one to opt for surrogacy. This is a broad power which has been undefined. The use of the term, 'any other condition' is wide and it is

married woman having a child of her own; (iii) 25 to 35 years old; (iv) a surrogate only once in her lifetime; and (v) possess a certificate of medical and psychological fitness for surrogacy. Further, the surrogate mother cannot provide her own gametes for surrogacy.

unclear whether it pertains to only medical issues or others as well. It is also unclear why such a board is empowered to dictate the same within the Bill. There are many regulations which need compliance within the Bill and there is an extensive intrusion by the authorities established under the Bill in matters of childbirth and family. This may violate fundamental human right of privacy and amount to state interference in personal matters. The right to have or not have a family is a subjective one; but empowering certain specific authorities with the powers to deny select categories is an overstep. Another issue correlated to the power regime under the Bill is the absence of any provision to raise objections if a surrogacy application is rejected. The Bill does not enumerate any method of review or appeal if the applications by the intended parents or the surrogate mother are rejected by the authorities. This is a major overlook and it seems as if the authorities do not need to be answerable for the decisions, once it is taken. There is no scope for holding them responsible and thus, have no accountability for decisions taken by them.

VI. CONCLUSION

The Bill in its current form shall fail miserably if passed without addressing the many concerns and limitations. Viewing surrogacy from a moral high position is not the solution. It is a reality in the world today and must be accepted with its imperfections. However, instead of regulating the practice itself, it should rather be attuned to protect the human rights of the persons involved. The legislators should not turn a blind eye to the widespread practice of commercial surrogacy in India and have the false hope that it shall all vanish overnight with the passing of the Bill. Surrogacy and its laws should be drafted with a human rights-based approach and the focus needs to shift to averting discernment and exploitation and ensuring that the surrogacy contracts are made properly by the concerned parties and is implemented in the appropriate manner. Moreover, there is a need for greater collaboration with different sectors and stakeholders to address the numerous issues of this complex concept. Surrogacy should not be seen from a black and white perspective, it is a grey zone that requires empathetic and practical solutions, not a myopic moralizing legislation.

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