

## CRITICAL EVALUATION OF DRAFT SURROGACY (REGULATION) BILL, 2016

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### 1. Introduction

Ever since commercial surrogacy was legalized in India it has grown to become a big industry since 2002 and is often called the 'surrogacy capital' of the world with the 228<sup>th</sup> report of Law Commission of India claiming it to have become a Rs. 25,000 Crore industry.<sup>1</sup> After the successive developments in the field of restricting the illegality aspect through various Assisted Reproductive Technology (Regulation) Bills, the Cabinet has now put approved the introduction of Surrogacy (Regulation) Bill, 2016.<sup>2</sup> However, this Bill has some systematic flaws, which may rather make the problem worse. This paper discusses these problems under five chapters. The first chapter argues that Commercial surrogacy needs to be regulated and not banned. The second chapter checks the legality of the draft Bill by employing the test of Constitutionality. While the third chapter discusses the issues related to Altruistic Surrogacy the related exploitation, the next chapter claims that Surrogacy rights should be extended to Live-in relationship and unmarried couples. In the end, the paper contends that Surrogacy rights be extended to the Homosexual community.

### 2. Analysis of the Draft Surrogacy (Regulation) Bill, 2016

#### *Commercial Surrogacy Should Be Regulated and Not Banned*

The Draft Surrogacy (Regulation) Bill, 2016 aims to ban commercial surrogacy.<sup>3</sup> If ban is imposed, the surrogate mothers in desperate need for money will be at a further disadvantage than what they will be in case regulation is carried out. The rationale behind banning surrogacy has been to prevent the women from 'selling their wombs'. However, the enactment of the proposed Bill will rather lead to women 'giving away their wombs' under harsh and prejudiced conditions to the seedy clinics, the Bill seeks to register.<sup>4</sup>

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<sup>1</sup>Law Commission of India, 288<sup>th</sup> Report on Need For Legislation to Regulate Assisted Reproductive Technology Clinics as Well as Rights and Obligations Of Parties To A Surrogacy (August, 2009).

<sup>2</sup>Cabinet approves introduction of the Surrogacy (Regulation) Bill, 2016, Press Information Bureau, *available at*: [www.pib.nic.in/newsite/PrintRelease.aspx?relid=149186](http://www.pib.nic.in/newsite/PrintRelease.aspx?relid=149186) (Last visited on 26 September 2016)

<sup>3</sup> Vishnu Sharma, "Surrogacy bill gets the Cabinet nod", *The Hindu*, Aug. 24 2016.

<sup>4</sup>Katherine B. Lieber, "Selling the Womb: Can the Feminist Critique of Surrogacy Be Answered", 68 *IND LJ* 112 (1992).

### *Draft Surrogacy (Regulation) Bill, 2016*

Even if it is agreed that adoption is a better option and should be encouraged, still a blanket ban should not be imposed by banning modes of Assisted Reproductive Technology. The fundamental right to choose the mode of parenthood must be supreme and absolute, as long as it does not violate others' rights. As long as commercial surrogacy is practiced in line with the proposed Assisted Reproductive Technology bill, 2014, it is not a legally invalid option.<sup>5</sup>

Economic theories have held that bans do not necessarily stop the act but serve the purpose of pushing things into the black market.<sup>6</sup> For example, even after stringent laws restricting pre-birth sex determination of a child, such practices still exist in India. If commercial surrogacy is banned, the position of rights of the surrogate mothers will be worse. Moreover, the Government also needs to consider that the high demand for surrogacy still exists in India. Post ban, surrogacy will continue, but only through the black market of exploitation. The black market will make ways to present fertile couples as infertile and surrogates as their relatives, since altruistic surrogacy is still not banned. Also, the surrogates may be impregnated in India and shifted to another country for delivery. Such practices will not provide the government with any data relating to surrogacy and lead to inability of the government to regulate it.<sup>7</sup>

The reason why majority of surrogate mothers opt to be in this field is due to the existence of extreme poverty and even if the ban is imposed, social and economic insecurities will continue. Banning will further take away the right to livelihood of such women. Thus, education and awareness in this respect should be the agenda, instead of banning commercial surrogacy. On the financial aspect, the regulated commercial surrogacy can further generate huge revenues through medical tourism, prove to be a support system for numerous childless couples and at the same time help surrogate mothers with a considerable source of income.<sup>8</sup>

### *The Draft Bill Fails the Test of Constitutionality*

Even if the proposed Surrogacy (Regulation) Bill, 2016 is passed, it will fail the test of legality. In case a law treats equals unequally, it should justify the same to hold the test of constitutionality. The recent Surrogacy provisions imposed violate Article 14

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<sup>5</sup>Regulation (or Lack Thereof) of Assisted Reproductive Technologies in the U.S. and Abroad, The Center for Bioethics & Human Dignity, *available at*: <http://cbhd.org/content/regulation-or-lack-thereof-assisted-reproductive-technologies-us-and-abroad> (last visited on Sept. 29 2016).

<sup>6</sup>Cooter, Robert, and Thomas Ulen, *et.al.*, *Law and Economics*, (Pearson Addison Wesley, Boston, 2004).

<sup>7</sup>Indrani Basu, "Things you should know about the proposed surrogacy bill in India", *Huffington Post India*, Aug. 24 2016.

<sup>8</sup>Sayantani Das Gupta and Shamita Das Dasgupta, *Globalization and Transnational Surrogacy in India: Outsourcing Life* (Lexington Books, New Delhi, 2014).

of the Constitution of India. The Bill seeks to discriminate on the basis of marital status, age, sexual orientation and nationality. A rational nexus needs to exist between the object of such law and the actions employed through the means of such discrimination.<sup>9</sup> There appears no rational nexus between preventing a specific class of couple from exercising their surrogacy rights and prevention of exploitation of women. Thus, the nexus being unreasonable, the constitutionality is at stake.

Further, the Right to Life under Article 21 of the Constitution also includes the right to procreation and parenthood under the right reproductive autonomy.<sup>10</sup> The government cannot interfere in the prerogative of people to choose the mode of parenthood and infertility cannot be a made precondition to surrogacy.<sup>11</sup>

Moreover, qualifications like the requirement of five years of marriage before invoking surrogacy are arbitrary.<sup>12</sup> What significance does only five year limitation hold and why it is not four or six years is a question that needs answers. The case of *Maneka Gandhi v. Union of India*<sup>13</sup> strikes out any room for arbitrariness in laws. This arbitrariness goes against the very principle of Rule of law enshrined under Article 14.<sup>14</sup>

The proposed Bill at the same time contradicts the policies imposed by the Union ministry of Women And Child Development since it contradict the legislative intentions of Juvenile Justice (Care and Protection) Act, 2015, which allows foreign parents to adopt a child, irrespective of they being married or not.<sup>15</sup> If a person is found capable of adopting a child, why he is found incapable of bearing a child through surrogacy is another question that the Bill needs to be answer.<sup>16</sup>

#### *Altruistic Surrogacy and the Related Exploitation*

The Draft Surrogacy (Regulation) Bill, 2016 tabled by the Union cabinet involves a host of serious ethical and legality concerns which are majorly in accordance with comparable laws in other countries and Law Commission of India's 228th report. By allowing only altruistic surrogacy through a close relative, who must have given birth to a child; the draft law imposes a blanket ban on commercial type of surrogacy.<sup>17</sup>

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<sup>9</sup>Suchita Srivastava & Anr v. Chandigarh Administration, (2009) 9 SCC 1.

<sup>10</sup>*Ibid.*

<sup>11</sup>*Supra* note 7.

<sup>12</sup>*Supra* note 2.

<sup>13</sup>*Maneka Gandhi v. Union of India*, 1978 SCR (2) 621.

<sup>14</sup>*Bachan Sher Singh and Anr. v. State of Punjab and Ors.*, AIR 1982 SC 1325.

<sup>15</sup>Anil Malhotra, "Draft Surrogacy Bill violates fundamental right of people to choose modes of parenthood" *The Indian Express*, Aug. 27, 2016.

<sup>16</sup>*Ibid.*

<sup>17</sup>*Supra* note 2.

In case, the object of the bill was protecting women from instances of exploitation arising from such surrogacy arrangements, it needs to be answered how non-payment for the same result in non-exploitation. Defining exploitation subject to exchange of money is a myopic way of looking at the social reality. There is no guarantee that altruistic surrogate mother will not be forced and coerced into bearing a child.<sup>18</sup>

The advantage of the present situation is the fact that once surrogate mother is paid dues and the baby is delivered, the commissioning parents can keep her out of their lives for good. There will never be any question of bonding between the child and its birth mother since they hardly get any time together. However, this Bill proposes insistence on altruistic surrogacy only through close relatives which will ensure that the child and its birth mother remain in close proximity and in the same sphere all their lives. This will create a complex situation fraught with emotional and ethical dilemmas. Thus, it is better if there is a certain amount of anonymity in such procedures.<sup>19</sup>

The concept of altruistic surrogacy proposed in the Bill greatly limits potential surrogate mothers as well as couples wanting children: since women can become surrogates only once and because couples who cannot discover willing relatives have only one way out, which is adoption. If compared to a host of other nations, altruistic surrogacy is permitted however it is not constrained to close relatives and one-time pregnancy. Moreover, constraining a woman's surrogacy decision to only one time is largely restricting the salary of the woman who survive on this business. Eventually, it comes down to the issue of consent. In the event that a lady wilfully agrees to being a surrogate mother, is given assurance of safe delivery; and the baby is guaranteed of a safe home, why should she be limited to only one surrogacy? Post surrogacy-industry boom, a lot of women were dependent on the same, which is not ethically and morally wrong. The issue Bill seeks to address here is that the woman will be 'exploited' for her body. However, in case she is already consenting and is being paid the proper amount, then the issue does not arise. Through the draft Bill, rather than regulating the ways and policies to prevent women's exploitation, the Bill eradicated the idea to its entirety.<sup>20</sup>

In addition, the Bill appears to have been framed without addressing the actual concerns of surrogacy arrangements in India and the proposal could do more harm than good by leading to the exploitation. In addition, the donations of eggs are also banned for curbing child trafficking and illegal surrogacy rackets. But, it must be

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<sup>18</sup>Pikee Saxena, Archana Mishra, Sonia Malik, 'Surrogacy: Ethical and Legal Issues' 37 *IJCM* 211,213 (2012)

<sup>19</sup>*Supra* note 15.

<sup>20</sup>Pawan Kumar, "Surrogacy and Women's right to health in India: Issues and Perspective" 65 *IJPH* 57(2013).

realised that such practices will still exist post-ban and policies need to be structured in such a way that the issue is resolved without censoring the entire industry itself.<sup>21</sup>

The exploitation which results has another dimension attached to it. It can be emotional, arise from the factors relating to informed consent, the dignity of reproductive labour and psychological well-being of parties involved in the process.<sup>22</sup> From this stance, the overarching structure of commercial surrogacy has been anything but satisfactory in India. Likewise, aspects like surrogate mothers not knowing of the number of embryos inserted or aborted, not being allowed to meet or even see the baby, not knowing the nationality of intending parents and the lack of psychological counselling are factors which are tantamount to exploitation. When these aspects are considering, intervention on the level of policy making is a welcome step.<sup>23</sup> However, banning commercial surrogacy will not provide a solution to the problems which exist.

If seen from monetary standpoint, the usage of phrases 'selling a womb' or 'buying a baby' raise many questions on ethical grounds. While the draft Bill allows altruistic surrogacy, in this case surrogate mothers do not receive any financial incentive over and above and the basic expenses of bearing a child.<sup>24</sup>

Moreover, there is no guarantee that altruistic surrogacy will not involve exploitation by rich infertile couples of the poor fertile women. Secondly, various research have suggested that receiving payment creates a sort of psychological detachment of the surrogate from the growing foetus. Therefore, possibilities of developing a bond with the foetus would be higher in cases of altruistic form of surrogacy. Thirdly, it is almost impossible for any officiating authority to track 'gifts' being exchanged between the parties in the name of paying 'compensation'. Lastly, altruistic surrogacy will put voiceless and oppressed women under highly vulnerable position, which will only disempowering them further.<sup>25</sup>

#### *Surrogacy Rights Should Be Extended to Live-In Relationship and Unmarried Couples*

The Surrogacy (Regulation) Bill 2016 denies the right of surrogacy to couples in a 'live-in relationship'. The Supreme Court of India, very recently ruled that, "*In the modern time, live-in relationship has become an acceptable norm. It is not a crime.*"<sup>26</sup> Even the

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<sup>21</sup> *Ibid.*

<sup>22</sup> *Supra* note 3.

<sup>23</sup> *Supra* note 18.

<sup>24</sup> *Supra* note 15.

<sup>25</sup> *Supra* note 20.

<sup>26</sup> *Devidas Ramachandra Tuljapurkar v. State Of Maharashtra & Ors*, 2015 Indlaw SC 361.

children that are born to such couples are accepted as legitimate under the law. The female partner in relationships is entitled to the same rights as a spouse in marriage is. Still, the live-in partners are denied surrogacy rights.<sup>27</sup>

If the concern is for proper parenting of children in case of break-up, this is a misplaced concern.<sup>28</sup> The solution is to employ the same mechanism that determines child custodial issue for married couple in cases of live-in relationships also. If the concern is the probability of live-in relationships to be short-lived, even marriages have such probability of being short lived and this is no ground to deny surrogacy rights<sup>29</sup>. The same test which is employed for judging the eligibility of married couples can be deployed to judging the eligibility of couples in live-in relationships as well and thus, live-in relationship couples should be granted surrogacy rights. In fact, since the law anyways allows a single woman the surrogacy rights, the same logical extension of the argument should give such rights to unmarried couples too.<sup>30</sup>

It is true that a child needs a responsible father and a mother. However, it is not true that they necessarily should be married to be responsible.<sup>31</sup> Even non-genetic parents can be responsible enough to take good care of the child. Not getting married is a personal choice of a person. If this so much goes against the 'Indian ethos', the children from widows should be taken away on the ground of there being only one surviving parent alive. The death of mother suddenly does not make the father an incapable father to take care of his child. The ethics, in fact, lay much higher stress on quality parenting rather than just giving birth to a child and then not performing parental duties.<sup>32</sup>

#### *Surrogacy Rights Should Be Extended to the Homosexual Community*

Another controversial implication of the Surrogacy (Regulation) Bill 2016 has been blanket ban on surrogacy rights to homosexuals.<sup>33</sup> The transparent homophobia of the government is demonstrated by terming homosexual surrogacy as against "Indian ethos"<sup>34</sup>, though homosexuality has gained growing recognition with time by the Indian texts and the judiciary. Even if the ban is imposed as a follow-up to the

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<sup>27</sup> *Supra* note 3.

<sup>28</sup> *Supra* note 15.

<sup>29</sup> ART Clinics in India, ICMR, India, *available at*: [http://www.icmr.nic.in/art/art\\_clinics.htm](http://www.icmr.nic.in/art/art_clinics.htm) (last visited on Oct 7, 2016).

<sup>30</sup> *Ibid.*

<sup>31</sup> *Supra* note 4.

<sup>32</sup> *Supra* note 15.

<sup>33</sup> Surrogacy for Gay Couples is Against Our Ethos: Sushma Swaraj, *The Quint*, *available at*: <https://www.thequint.com/india/2016/08/24/union-cabinet-surrogacy-regulation-bill-2016-sushma-swaraj-against-our-ethos-commercial-surrogacy> (last visited on 20 September 2016).

<sup>34</sup> *Ibid.*

Section 377 of the Indian Penal Code, 1860(hereinafter referred to as "IPC") against 'unnatural' intercourse, the ban would only be justified if even the heterosexual couples who violate Section 377 of the IPC are also banned from exercising surrogacy.<sup>35</sup>But, this is not the case and because there exists no conclusive way to find out, the Surrogacy (Regulation) Bill, 2016 results in gross injustice to the homosexual community.

Moreover, the Indian laws allow only heterosexuals to get married. The strict ban on surrogacy means a further denial of human rights to the community to the right of parenthood. For the first time, a law has come up which explicitly mentions the word 'homosexuality' and this sadly shows that the government is not even open to the debate. Secondly, the cultural and moral policing prejudices are apparent and it appears government does not care for the community's rights and the community might as well cease to exist in its eyes, since they have no rights in regard to their unnatural sexuality.<sup>36</sup>

Recently, Sushma Swaraj, Minister for External Affairs reiterated the Government stance that homosexual surrogacy is against our 'ethos'. Child bearing cannot be made subjected to moral judgments of society and politics. Thus, a few people cannot decide the ethics of people since ethics are a very subjective and personal thing. Several arguments both for and against have been raised in this regard and different criteria have been adopted to support the arguments. However, no criteria should dictate this policy more than the 'welfare of the children'.<sup>37</sup>The two primary reasons which can be traced governing the adoption rights to homosexuals are: First, the ability to parent a child cannot be determined from what the sexual orientation of the parents is. The familial setups have seen considerable instances of bad parenting even among heterosexual couples to not generalize the ability. Both the parenting and sexual capabilities to give birth could be seen at different levels.<sup>38</sup> Therefore, right to parenthood of homosexual couples is in jeopardy. Secondly, relating more to the social aspect, a large number of children lack a home and since there is no relation of parenting abilities to sexual orientation, homosexual surrogacy should be allowed.<sup>39</sup>The homosexual surrogacy inquiry is incomplete without involving that scientific research.

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<sup>35</sup>*Supra* note 15.

<sup>36</sup>*Supra* note 7.

<sup>37</sup> T.S. Sreenivasa Raghavan, 'ICMR rules to allow gays to become parents' (New Delhi, 12 July 2008)

<sup>38</sup>*Ibid.*

<sup>39</sup> Mike Allen, Nancy Burrell, 'Comparing the Impact of Homosexual and Heterosexual Parents on Children: Meta-Analysis of Existing Research' (1997) 32 JFH 19, 35.

Research consistently has proved that homosexuals are equally fit and equally capable parents as heterosexual parents.<sup>40</sup>

### **3. Conclusion**

Surrogacy has exceedingly complex implications in social, biological, cultural and psychological forms. Presently, there exists no unanimity upon an ideal surrogacy arrangement and loopholes exist in both commercial and altruistic forms. While both of these practices require extraordinarily immense regulation, the plausibility of implementing the cumbersome regulations need a healthy dose of realism in the Indian context. Imposing a blanket ban does not address the actual need of the time and will create high possibilities driving the surrogacy market underground through black marketing, thus making it worse for all the stakeholders involved in the process. Surrogacy as a mode of bearing children cannot be denied from the homosexual community and unrest in the homosexual community is evident. In the end, the draft Bill clearly violates Article 14 and Article 21 of the Constitution of India and fails both the tests of Constitutionality and rule of law.

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<sup>40</sup>*Ibid.*