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RAJIV GANDHI INSTITUTE FOR CONTEMPORARY STUDIES
JAWAHAR BHAWAN, DR. RAJENDRA PRASAD ROAD, NEW DELHI-110001

RGICS
LEGISLATIVE BRIEF

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The Surrogacy (Regulation) Bill, 2016

Prepared By:

Niharika Bapna
(Under the guidance of Ms. Barkha Deva)

KEY MESSAGES

- **Creates backdoor for commercial surrogacy:** By legalising surrogacy in part the government is not being true to its objective of preventing exploitation of women. Rather, the government has created a backdoor for commercial surrogacy to exist with this partial ban on the industry.
- **Ban of *only* commercial surrogacy not feasible:** Many states in the United States of America, the Nordic countries, European countries such as Germany, France, Italy and closer home countries like Thailand and China have banned all surrogacy arrangements precisely because legislation has not proven to be the perfect tool for intervention for practical purposes and will not be competent to prevent the exploitation of women.
- **Coercion of economically/socially powerless women**: To benefit from altruistic surrogacy women who do not have a sizeable bargaining power in the family or are economically dependent – for instance daughter-in-laws or widows or unmarried single women - could be coerced to be surrogate mothers by the other family members.
- **Similar legal framework as PC-PNDT Act, 1994:** There is precedent for inadequate implementation of the legal framework envisaged by this present Bill – the failure of the Pre-Conception Post-Natal Diagnostic Techniques Act, 1994. The present Bill adopts a similar implementation framework as under PC-PNDT Act, 1994 without rectification of the policy gaps faced in the erstwhile legislation.

As has been discussed the main objective of the Surrogacy (Regulation) Bill, 2016 is to regulate the surrogacy "market" in India and to prohibit exploitation of women who may be considered as "baby making machines." However, this objective of the Bill cannot be achieved under the present legislative framework.

There is no reason for allowing altruistic but not commercial surrogacy in our society if the objectives of this Bill are to be achieved**. It is very plausible that to benefit from altruistic surrogacy women who do not have a sizeable bargaining power in the family or are economically dependent – for instance daughter-in-laws or widows or unmarried single women - could be coerced to be surrogate mothers by the other family members.** Clearly, altruistic surrogacy is not capable of preventing the exploitation of women and therefore there is no reason why this form of surrogacy must be allowed while commercial surrogacy is not.

There is a reason why many states in the United States of America, the Nordic countries, European countries such as Germany, France, Italy and closer home countries like Thailand and China have banned all surrogacy arrangements. **The reason is that legislation is not the perfect tool for intervention for practical purposes and will not be competent to prevent the exploitation of women. There is precedent for the failure of the legal framework envisaged by this Bill.** The Pre-Conception Post-Natal Diagnostic Techniques Act, 1994 too conceived under Section 17A of an appropriate authority with powers same as the authority under the Surrogacy (Regulation) Bill, 2016. This authority now is allegedly misusing its powers to practice extortion and harass medical professionals possessing ultrasound machines in their clinics rather than preventing exploitation of pregnant women and female foeticide.

By legalising surrogacy in part the government is not being true to its objective of preventing exploitation of women. Rather, the government has created a backdoor for commercial surrogacy to exist with this partial ban on the industry. The Surrogacy (Regulation) Bill, 2016 by allowing altruistic surrogacy is defeating the purpose for which it was enacted. Further the only way to regulate the surrogacy industry in India and prevent exploitation of women is by not making an exception for any form of surrogacy.

PART I. INTRODUCTION

The statement of objects and reasons for drafting the Surrogacy (Regulation) Bill, 2016 had been circulated last month but the actual text of this Bill was only introduced in the Lok Sabha on November 21, 2016.

Object of the Bill

In light of the fact that India has become an international destination for couples to have surrogate babies, the present government drafted this Bill with the following objectives:

(i) To regulate surrogacy services in the country
(ii) To prohibit the potential exploitation of surrogate mothers
(iii) To protect rights of children born through surrogacy

Criticism of the Bill

The Bill has been widely criticised for its exclusionary nature as the only persons eligible to avail the benefit of surrogacy are infertile, heterosexual couples married for five years. It has also received flak for allowing altruistic surrogacy under which no charges, expenses, fees, remuneration or monetary incentive of any nature except medical expenses and insurance coverage will be given to the surrogate mother.

Critics have said that exploitation of women will not necessarily be curtailed under altruistic surrogacy as there is no evidence to suggest that family members abstain from them. A case in point for this is the recent NCRB data pointing of the total 34,651 rape cases reported in 2015 in 3,167 cases the rape was committed by family members, refuting the blanket assumption that families are not capable of exploiting women who opt for altruistic surrogacy.[i]

Following is a table enlisting why bans against surrogacy have been advocated by countries around the world.[1]

	Country/ Continent	Law	Year	Reasons behind the ban
1	United States of America	Countries such as New York, Indiana and Michigan have banned surrogacy completely	1989	Case of Baby M: Post surrogacy the surrogate mother claimed she was the legal mother. Surrogacy was banned because the legal status of the child was under the scanner
2	Germany	Any form of surrogacy is banned	1991	Given their history of Eugenics in the Nazi era, the German Constitution does not allow the human body to be under contract and allow a third party's body for reproduction
3	France	Surrogacy in any manner is prohibited	1991	The French law believes that surrogacy violates the principle of alienability of the human body and the individual status
4	Japan	Surrogacy is illegal in Japan	2003	Surrogacy harms the identity of the child, causes mental and physical risk to the surrogate mother and complicates family ties
5	China	Surrogacy in all forms is banned in China	2001	As per Chinese history in Confucianism surrogacy is considered as reproductive dysfunction. Post the boom in the surrogacy industry, the Chinese government had faced several questions regarding commodification of the mother-child relationship and hence in 2001 surrogacy was banned in China

[1] Jagriti Gangopadhyay, RGICS Legislative Brief on Surrogacy Regulation Bill, 2016, September 19, 2016

6	Italy	All surrogacy arrangements are banned	2004	Prior to the ban Italy was a surrogacy centre. However protests from the Catholic Church finally banned it in 2004
7	Thailand	Commercial Surrogacy is not legal	2015	Post Baby Gammy Case: One of the twins were abandoned because of being born with Down syndrome
8	Nordic Countries (Iceland, Sweden, Denmark, Finland)	Surrogacy arrangements are banned	1989	Protests from the Christian Democratic Party that technological developments often pose serious risks to society.
9	Hungary	Surrogacy in any form is banned	1997	To use technology to have a child goes against nature and the belief of Christianity

PART II: THE POLITICAL CONTEXT

The need for law to regulate the surrogacy industry given the ethical and moral concerns has been felt since a long time. However, many believe that this legislation in essence is a tool for the present government to further its "socially conservative agenda".[ii] Explaining the rationale for excluding certain categories of persons – homosexuals, couples married for less than five years, single individuals, live-in couples etc - the Union External Affairs Minister Sushma Swaraj, who headed the Group of Ministers that drafted the bill, states that their inclusion "doesn't go with our ethos." She also states that foreigners, NRIs and PIOs who hold Overseas Citizens of India cards have been barred from opting for surrogacy as "divorces are very common in foreign countries."[iii]

The Congress party has strongly opposed the new draft surrogacy Bill as "retrogressive" as it reflected "Stone Age" mentality, completely "out of sync with the times"[iv] that aims at "injecting all kinds of value judgment in a paternalistic manner."[v] Congress spokesperson Mr. Abhishek Manu Singhvi said that this Bill follows an anti-liberal approach which is not in line with current times. He accepts that homosexuals were an excluded category even in the UPA proposed Bill but this requires a re-think considering the present socio-cultural climate.[vi]

PART III: KEY ISSUES

- **Notification of 'appropriate authority' prior to making a complaint to court**
- **'Eligible couples' to undergo exacting procedures**
- **Payment of medical expense and insurance coverage not to be made *exclusively* to the surrogate mother**

In addition to the criticism against the exclusionary scheme of this Bill as well as its favouring altruistic surrogacy, there are the following issues in the bill text that need to be addressed.

1. **The 'appropriate authority' constituted through this Bill has to be approached before the Court in order to report an offence under this law.**

As per Section 32(1) and (2), the Central and State Government will have to appoint an appropriate authority for each of the Union Territories and for the whole or part of the States, respectively. Section 32(3)(a) states that the appropriate authority for whole of the State or Union Territory will comprise of:

(i) an officer of or above the rank of the Joint Director of Health and Family Welfare Department as the Chairperson;
(ii) an eminent woman representing women's organisation as a Member;
(iii) an officer of Law Department of the State or the Union territory concerned not below the rank of a Deputy Secretary as a Member; and
(iv) an eminent registered medical practitioner as a Member

As for any part of the State or the Union territory Section 32(3)(b) states that the appropriate authority will be constituted by officers of such other rank as the State Government or the Central Government, may deem fit.

Among the many powers of the appropriate authority under this Bill such as - allowing it to search any place on the basis of suspicion of violation of this Bill or rules and regulations made there under - there is also Section 41 according to which no court can take cognizance of an offence punishable under this Bill without a written complaint made by the appropriate authority. Even if a person including a social organisation wants to report an offence punishable under this Bill they will have to give a notice of not less than fifteen days to the appropriate authority of- (i) the alleged offence (ii) their intention to make a complaint to the court.

This provision is an important cause of concern. Here the government is transgressing its executive powers by restricting persons from having an unqualified access to justice. The intention of this Bill to make the appropriate authority a threshold for approaching the courts is dubious. For what reason must the appropriate authority - comprising largely of bureaucrats - be informed about contravention of the law before approaching the court? Did the government envisage a possibility where the appropriate authority misuses its powers on being notified of an offence to influence the case maliciously – possibly by preventing filing of complaint in the court? On what grounds the unfettered right of a person to approach the Courts has been taken away by the lawmakers through this Bill remains unexplained. An unscrupulous authority can defeat the objective of this Bill to prevent exploitation of women, especially those who do not have agency and now do not have an unqualified legal recourse with the mandatory notice to the authority.

With access to justice becoming contingent on notification to the largely bureaucratic appropriate authority we are witnessing a clear travesty of justice and a serious threat to separation of powers envisaged by the constitution between the executive, legislature and the judiciary.

2. **The 'eligible' couples under this Bill will also have to go through an exacting procedure to avail the benefits of surrogacy.**

While the exempted categories of persons under this Bill cannot benefit of having a child through surrogacy, the eligible couples will have to pass many procedural hurdles to prove that they are eligible under this Bill. Section 4 lists regulations for surrogacy and surrogacy procedures. The 'intending couple' in order to qualify to have a surrogate child must have a 'certificate of essentiality' from the appropriate authority. To obtain this certificate of essentiality:

- the intending couple must have- a 'certificate of proven infertility' issued by a District Medical Board, 'an order concerning the parentage and custody of the child to be born through surrogacy' by a court of Magistrate of the first class or above and an insurance coverage in favour of the surrogate mother from an insurance company or an agent recognised by the Insurance Regulatory and Development Authority

- the surrogate mother must have- an 'eligibility certificate' certifying that she is between 25-35 years of age, is married and has a child of her own, is a close relative of the intending couple, will undertake surrogacy only once and a certificate of medical and psychological fitness for surrogacy and surrogacy procedures from a registered medical practitioner

- In addition to a certificate of essentiality the appropriate authority also issues a 'certificate for eligibility' to the intending couple certifying that they adhere to the mandated age criteria, have been married for the last five years, are Indian citizens and have no surviving child biological, adopted or surrogate.

Considering the aim of this Bill was to regulate the unregulated, burgeoning profiteering surrogacy industry in India, these stringent regulations are serving their purpose. However there are two concerns that we need to wary of:

(i) Allowing surrogacy procedure to be undertaken by women only once could be an important step to prevent their exploitation provided implementation of this provision was not such a huge challenge. The Bill does not elucidate how the appropriate authority will ascertain under Section 4(iii)(b)(III) that a woman has not gone through a surrogacy procedure before. The only truly efficient way to ensure this would be through the creation of a central database where all the registered surrogacy clinics would be required to submit details of women undergoing surrogacy procedures. The presumption here of course is that all surrogacy procedures will be undertaken in the registered surrogacy clinics. But there are other key questions that come to mind too – Who will maintain and secure this central database? Who all will be allowed to access this database - considering there would be privacy concerns in case families do not want such information to be publicly available?

That the appropriate authority will ensure women can only endure surrogacy procedure once in their life time presently is nothing but a tall claim of this government; especially since central databases of such kind in the past - mandated by legislation in the field of women and law like the Sexual Harassment of Women at Workplace Act, 2013 as well as the Pre-Conception Post-Natal Diagnostic Techniques Act, 1994 – have not been successfully maintained/implemented.

(ii) Another reality that the government should be aware of is that the more stringent the regulations in case of a profiteering industry the more likely it is to go underground, as in the case of the organ trade. There is always the risk that banning commercial surrogacy will create a black market for surrogacy.

This is not to say that there should be lenient regulations under the Bill. But if a top-down approach of strict regulations and procedures is the only alternative for ensuring that altruistic surrogacy procedures adhere to the provisions of this Bill, and these same regulations and procedures are also the biggest reason for the likelihood of the entire industry to go underground, then the government must wisely choose what its mandate must be.

While the intention of the government to regulate the surrogacy industry is laudable the exacting natures of these procedures not only run the risk of facing serious implementation challenges and encouraging a thriving black market for surrogacy but will also make surrogacy an unviable option for eligible childless couples as one reason cited by couples for not choosing to adopt children is the lengthy and tedious process of completing all the necessary procedural requirements.

3. **This Bill does not mandate that the payment of medical expense and insurance coverage be *exclusively* made to the surrogate mother.**

Section 2(b) of the Bill defines altruistic surrogacy and also lays down that the medical expenses an insurance coverage, the only payment allowed under the altruistic form of surrogacy, can be made to the dependents or representative of the surrogate mother as well.

The provisions of this Bill indicate that the object of this law is to strictly regulate the surrogacy industry and that it is dedicated to prohibit any exploitation of women for this purpose. If that is the general scheme that this Bill intends to follow then even the slightest deviation will manifest into betraying its ultimate objective. Just like an intending couple cannot benefit of surrogacy without obtaining certification from the appropriate authority after following strict procedures, the surrogate mother should have been the only recipient of the medical expense and insurance coverage payment. Thus, obviating the possibility of the surrogate mother being taken advantage of by anyone who has the capacity to coerce her into surrogacy or misappropriate her fee for these services.

PART IV. BACKGROUND INFORMATION/REFERENCE DOCUMENTS

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[ii] "India Must Tread Cautiously on Surrogacy Law", The Diplomat, August 31, 2016 Available at: http://thediplomat.com/2016/09/india-must-tread-cautiously-on-surrogacy-law/ Accessed on 1.12.2016

[iii] "New Surrogacy Bill Bars Married Couples with Kids, NRIs, Gays, Live-Ins, Foreigners", The Indian Express, August 25, 2016 Available at: http://indianexpress.com/article/india/india-news-india/surrogacy-bill-sushma-swaraj-married-couples-can-now-opt-homosexuals/ Accessed on 1.12.2016

[iv] "Congress Lambasts Surrogacy Bill", The New Indian Express, August 27, 2016 Available at: http://www.newindianexpress.com/nation/2016/aug/27/Congress-lambasts-surrogacy-Bill-calls-it-an-unscientific-Stone-Age-draft-1513391.html Accessed on 1.12.2016

[v] "Surrogacy Bill Draft From Stone Age: Congress", The Economic Times, August 27, 2016 Available at: http://economictimes.indiatimes.com/news/politics-and-nation/-surrogacy-bill-draft-from-stone-age-congress/articleshow/53881631.cms Accessed on 1.12.2016

[vi] See FN 5