

RGICS

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RGICS LEGISLATIVE BRIEF (September 19, 2016)

The Surrogacy (Regulation) Bill, 2016

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KEY MESSAGES

- The proposed draft by banning commercial surrogacy has neglected the rights of homosexual couples, live in partners and single parents
- Alternate to commercial surrogacy, the draft of the Bill has proposed altruistic surrogacy. However it is not easy to find a blood relative who would agree for surrogacy
- The Bill allows only infertile Indian couples (Husband 26-55 years and Wife: 23-50 years) to go in for surrogacy and in the process discriminates on the basis of sexual orientation, age and nationality
- Most of the women acting as surrogate mothers were poverty stricken. Banning commercial surrogacy will take away a part of their livelihood. The Bill does not suggest employment alternatives for the surrogate mothers and hence does not address the root cause of the issue.
- The Bill proposes to establish a National Surrogacy Board at the central level headed by the Health Minister as well as State Surrogacy Boards which will regulate the activities of all hospitals and clinics that offer surrogacy in India. The clinics will have to show a case record of 25 years and in case they fail to do so they will face imprisonment of 10 years and/or a fine of Rs10 lakhs.

PART I. BACKGROUND

In the last couple of years surrogacy has become a common practice among urban families in India. In this brief the aim is to understand the rise of surrogacy and the implications of the recent Draft of the Surrogacy (Regulation) Bill which was passed by the Indian government. Post liberalization in the year 1990, India as a nation has witnessed rapid development in various sectors such as manufacturing, agriculture, exports, health care and the gradual rise of the market (Pallattiyal et al, 2010). The urban Indian family system has adapted to this change and witnessed several shifts such as rise of nuclear families, delayed marriages as women are focusing on education and entry into the workforce (Lamb, 2009). Due to the transition of the family system in India, the country is also witnessing high rates of infertility. Late marriages, postponing parenthood and change in lifestyles are being cited as the major reasons for the rising incidences of infertility (Sarkar and Gupta, 2016). As a result surrogacy has become a viable option for many couples. In fact even though surrogacy is being discussed recently, it is not unknown to the Indian tradition. In epics such as the Mahabharata there is a supposed reference to surrogacy with regard to the birth of Krishna. Those familiar with the text know that Lord Krishna was born to Devaki but raised by Rohini. A popular version says that the act of transferring the foetus from Devaki to Rohini takes place in order to prevent the foetus from being killed (Pande, 2010; Deshmukh, 2015; Jacob, 2015). Looking at the demand for surrogate mothers not only in India but also in other countries India made commercial surrogacy legal in the year 2002 (Deonandan et al, 2012). As per the regulations in India the child born through surrogacy would be considered the legal child of the commissioning parents (Law Commission of India, 2002). Since then surrogacy in India has expanded rapidly and a UN study in 2012 highlighted that the surrogacy business stands at \$400 million a year, with over 3,000 fertility clinics across India (United Nations, 2012). Recent media reports have highlighted India to be a ‘surrogacy hub’¹. India is a preferred destination of surrogacy for a lot of foreigners (Bhattacharjee, 2016). For those from developed countries the low costs of surrogacy in India makes it an attractive proposition. This is because women who chose to be surrogate mothers due to financial reasons are usually below the poverty line. Anand a small town in Gujarat, known as the milk cooperative centre, has now emerged as a surrogacy centre where the maximum number of surrogacy is conducted (Pande, 2010). Akanksha clinic in Anand (Gujarat) under the supervision of Dr Nayna Patel came to limelight and became the epicenter of commercial surrogacy services after a Gujarati women gave birth to her own daughters’ twins in 2004. The daughter was incidentally a British citizen (Points, 2009). Even though surrogacy is considered to be a booming industry in India, nonetheless with most countries banning commercial surrogacy, India’s policy on making commercial surrogacy legal has often been questioned by women groups, public health experts and doctors. In particular media reports have criticized India for becoming a ‘rent a womb’ industry (Pande, 2010) and risking the lives of poor women who are neglecting their health to earn money.

¹ <http://indianexpress.com/article/lifestyle/health/draft-surrogacy-bill-2016-what-is-surrogacy-all-you-need-to-know-2994140/>

PART II. INTRODUCTION

Ever since India opened its doors to commercial surrogacy in 2002, many ethical and moral questions regarding the surrogate mother's health and ownership of the child being born have been raised. In particular women groups have criticized India's surrogacy industry as 'baby factories' where poor and uneducated mothers are exploited by signing contracts which they do not fully understand². In November 2015 when the government had proposed to impose a ban on commercial surrogacy foreigners accounted for around 80% of surrogacy births in India.³ Since majority of the surrogate mothers from India come from economically poor backgrounds with low education levels, it becomes easier for foreigners to hire a surrogate mother in India (Qadeer, 2010). The charge of surrogacy in India ranges from Rs60, 000 to Rs1.2lakhs⁴. The charges highlight the fact that surrogacy is a demand which caters to the needs of the urban upper class of India. However to meet the needs of the local elite, the neoliberal market exploits poor women who render their services to support their families (Parry, 2015). The process involved in surrogacy has often been questioned and criticized by the Indian media on several instances. However the debate surrounding surrogacy in India began and came to limelight in 2008 when a Japanese couple commissioned a surrogate mother in Gujarat. Post the delivery the couple separated and the child could not obtain citizenship because Japan does not permit surrogacy⁵. This incident resulted in the then UPA Government to construct the first draft of the Assisted Reproduction Technology (ART) Bill to regulate the ART market in 2008.⁶ Though the topic of surrogacy was covered in the Bill, it was not the sole focus of the bill. Post the BJP government winning the elections in 2014, surrogacy has been under discussion for the last two years and on 24th August 2016, the Indian Cabinet introduced and cleared the draft of the Surrogacy (Regulatory) Bill 2016⁷. The Bill proposes to protect the rights of the surrogate mother, child and the needs of the infertile couple. The Bill has already been criticized by the Opposition and indicated that the Bill is not inclusive in nature.

² <http://in.reuters.com/article/india-surrogacy-ivf-anand-idINDEE98T06520130930>

³ <http://www.thehindu.com/opinion/op-ed/why-the-surrogacy-bill-is-necessary/article9040755.ece>

⁴ <http://timesofindia.indiatimes.com/life-style/health-fitness/health-news/Mummy-for-a-fair-price/articleshow/11029552.cms>

⁵ <https://web.duke.edu/kenanethics/casestudies/babymanji.pdf>

⁶ <http://www.orfonline.org/expert-speaks/surrogacy-bill-2016-disappointing-to-say-the-least/>

⁷ <http://thediplomat.com/2016/08/understanding-indias-complex-commercial-surrogacy-debate/>

PART III: KEY ISSUES

- **Commercial Surrogacy Banned:** A woman cannot carry a child legally for someone else for the purpose of earning money or for any other monetary favors. The sale and purchase of human embryo and gametes will also be prohibited.
- **Foreign Nationals banned from getting Indian Surrogate Mothers:** The bill bans foreigners from seeking an Indian surrogate mother and this includes Non-Resident Indians as well.
- **Bill is restrictive:** The Bill allows infertile heterosexual Indian couples married for five years and who have proven their infertility to legally seek surrogacy. The husband must be 26 to 55 years of age and the wife must be between 23 to 50 years of age. Hence the Bill is discriminating on the basis of age, sexual orientation and marital status.
- **Altruistic Surrogacy Allowed:** Only a married blood relative of the heterosexual infertile couple who herself has borne a child can be the surrogate mother. The couple can only pay for the medical bills of the surrogate mother.
- **Surrogacy allowed only once:** If a couple already has a biological or adopted child/children, then they cannot opt for surrogacy anymore. Similarly a surrogate mother cannot be approached for the second time.

PART IV. CRITIQUE OF THE BILL

- **The Bill is not Inclusive:** By restricting surrogacy only to infertile heterosexual Indian couples, the Bill does not take into account the case of homosexual couples, live-in partners and single parents.
- **The Bill violates Constitutional provisions:** Article 14 of the Constitution guarantees “equality before the law and equal protection of laws to all persons”. Article 21 guarantees “protection of life and personal liberty of all persons”.⁸ By allowing only infertile Indian heterosexual couples in a particular age group and married for a certain amount of time to avail surrogacy, the government is disqualifying/excluding a large number of people on the basis of nationality, age, marital status and sexual orientation from exercising this choice.
- **Altruistic Surrogacy not always an option:** Banning commercial surrogacy completely and only allowing altruistic surrogacy may not be the solution. Often infertile couples may not find a close blood relative who would agree for surrogacy. Hence the Bill also does not address the concern of the needy infertile heterosexual couples as well.
- **Indian couples with children cannot opt for surrogacy:** The Bill also does not take into account the choices of Indians couples who have biological or adopted children and may want to opt for surrogacy. In particular the Bill does not consider the case of couples with special needs children and might wish to resort to surrogacy for a second child.
- **The government might open a black market for surrogacy:** Mostly poverty stricken women would act as surrogate mothers.⁹ By allowing altruistic surrogacy the government is paving the way for an underground black market of wombs that will lead to greater exploitation of the surrogate mother.

⁸<http://indianexpress.com/article/opinion/columns/surrogacy-bill-ban-commercial-2998128/>

⁹<http://www.firstpost.com/living/regulating-surrogacy-bill-instead-of-killing-it-govt-should-free-the-industry-from-malpractices-2979096.html>

PART V. SURROGACY ACROSS THE WORLD

The reason for a large number of foreigners to seek Indian surrogate mothers was because most countries except Russia, Ukraine and a few states in the United States of America have prohibited surrogacy completely. Most European countries have banned surrogacy to protect the health of the surrogate mother and the newborn child³. For instance countries such as Germany, France, Italy, Spain, Portugal and Bulgaria do not allow surrogacy in any form. In countries such as UK, Denmark, Belgium and Ireland permit surrogacy provided the surrogate mother is paid only for her medical expenses¹⁰. The Table below explains the laws of surrogacy in different countries:

Sr No	Country/Continent	Law	Year	Reasons behind the ban
1	United States of America	States 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
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

¹⁰ http://www.familylaw.com.ua/index.php?option=com_content&view=article&id=69

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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

Surrogacy has been a contentious issue and there have been strong arguments both for and against the idea. It cannot be denied that both sides have very compelling arguments. We make an attempt here to present both sides of the story

Both Sides of the Debate

For	Against
The Bill will stop the growth of the surrogacy industry which was risking the lives of several marginalized women. By introducing altruistic surrogacy it will also prevent the commodification of the mother-child relationship which is a bond of emotions and ties. By allowing only heterosexual couples it will pave the way for adoption as an option of parenthood.	The Bill is not inclusive and excludes homosexuals, live-in partners and single partners. It is not easy to find a blood relative who would agree to pose as a surrogate mother. While adoption will open as an option, however given the complex procedures involved with adoption in India, it might prevent couples from availing that option.

The main purpose to ban commercial surrogacy is to protect the health of the surrogate mother and to prevent the surrogate child from being abandoned. In cases where the surrogate child has been diagnosed with some disability or syndrome, the child has been abandoned by the commissioning parents (Pande, 2010). Hence a ban on commercial surrogacy will prevent the exploitation of surrogate mothers and children born through surrogacy. However as mentioned majority of the women opting to act as surrogate mothers were poverty stricken and entered this profession only to support their own families (Pande, 2014). Hence banning commercial surrogacy will not prevent individuals from resorting to surrogacy, instead it will further violate the rights of women acting as surrogate mothers and pose a risk to their health. Since poverty is the main cause for marginalized women to act as surrogate mothers, they will be victims of middlemen who will lure them into the underground black market of surrogacy. Regulations and regulatory mechanisms are necessary in the light of the increasing number of surrogate mothers.

PART VI. CONCLUSION

The Bill if and when implemented will leave adoption as the only option for parenthood. Many couples in India do not opt for adoption because of the lengthy and complicated procedures involved. As an alternate means of parenthood the government should also consider relaxing the norms surrounding adoption. In fact adoption as an alternative to parenthood does not discriminate on the grounds of age, sexual orientation and nationality. Only recently the process of adoption has witnessed technological advancement. Last year the government made it mandatory for all adoption agencies to upload their details on the website of Central Adoption Resource Authority (CARA). The software on the CARA website matches the preferences of the adopting parents and the child to be adopted and hence reduces the time for the adoption process (Roy et al, 2012). Though this process reduces the time, nonetheless costs and conditions for adoption also need to be modified to cultivate the practice of adoption among urban families of India. While adoption is important as an alternate means to parenthood, it is also important to understand that majority of the surrogate mothers are women from lower income families. Post the ban of commercial surrogacy the government should open other means of income for them. For instance in 2012 a woman in Chennai decided to act as a surrogate mother to support her family and open a shop. However post the delivery she received only Rs75000 because the rest of the amount was taken by an auto rickshaw driver who acted as a middleman³. This instance highlights how important it is to regulate the surrogacy market and provide better health care access to surrogate mothers and prevent them from being exploited by middlemen and agents of surrogacy clinics. In fact to prevent this sort of exploitation, the government needs to address poverty which is the main cause for marginalized women to pose as surrogate mothers at the cost of their health. To avoid commercial surrogacy being transgressed into a black market, the economic needs of these women should be addressed with priority.

PART VII. REFERENCE DOCUMENTS

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