



## The Surrogacy (Regulation) Bill, 2016: A critical appraisal

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### Introduction

The dust is yet to settle on the widely-reported “surrogacy rackets” that were uncovered first in Hyderabad and then in Bhongir in June this year, where close to 50 women acting as surrogates were being “illegally confined” for the duration of their pregnancy. The women ‘rescued’ are from across the country, including a few from the Northeast and one from Nepal. Reportedly, they were gestating the fetuses as part of commercial surrogacy agreements with commissioning parents, who were non-resident Indians or foreign nationals. Media reports have highlighted that the Hyderabad clinic received Rs 15-30 lakh for each surrogacy arrangement, of which only about Rs 3 lakh was given to the surrogate mother. This episode highlighted the pressing need for regulation of fertility clinics. More importantly, the Hyderabad case also merits discussion on how banning commercial surrogacy – which has hitherto operated as an industry with deeply-entrenched networks – runs the risk of giving rise to a black market much like that of human organs.

This is a priority that has been ignored by the Surrogacy (Regulation) Bill, 2016<sup>[5, 6]</sup>, which is silent on the regulation these assisted reproductive technology (ART) clinics. The Bill, on the other hand, hinges on the paternalistic imperative to protect the surrogate mother against exploitation envisaged through proposed non payment to surrogates and by permitting only “near relatives” of the intended couple to be involved as surrogates. This has attracted much criticism and raised fundamental questions on whether “altruism” within patriarchal familial contexts can be free of coercion, given the social premium placed on motherhood, and why reproductive labour should be so undervalued.

### Traditional surrogacy or gestational surrogacy?

One of the biggest and most prominent drawbacks is the contradiction in the Bill with respect to whether traditional surrogacy is allowed or gestational surrogacy. Traditional surrogacy is one where the egg of the surrogate mother and the intended father's sperm is used to conceive the child with the help of IVF technology. It is the most widely practised forms of surrogacy.

However, it has been widely criticised due to the genetic link with the surrogate mother, which can lead to several emotional complications for the parents. On the other hand, gestational surrogacy – also referred to as “full surrogacy” – is the case where the egg and sperm are of the commissioning parents and the surrogate mother carries the fertilised egg of

the intended parents. Thus, all of the genetic material involved originates either from the intended parents or donors.

The Surrogacy Regulation Bill, 2016, under Section 4 (iii) (b) (III) lays down: “No women shall act as a surrogate mother or help in surrogacy in any way, by providing gametes or by carrying the pregnancy, more than once in her lifetime.”

The effect of this provision under the bill is that the surrogate mother can provide her gametes and be a surrogate as well. On this, the Standing Committee opined that, “... on the one hand the Department asserts that only Gestational surrogacy is permitted under the Bill, whereas clause 4(iii) (b)(III) advocates the concept of Traditional Surrogacy. Thus, there is an apparent contradiction between the Department assertions and provisions of clause 4(iii) (b) (III). The Committee, therefore, recommends that the infirmity in clause 4(iii) (b) (III) be rectified and the clause be amended suitably so as to spell out in unambiguous terms that the surrogate mother will not donate her eggs for the surrogacy.”

The object of the Bill is to prevent exploitation, however, this very basic provision if not rectified can lead to the opening of a Pandora's box, especially since the current Bill provides that surrogacy can only be performed by a “close relative”. The emotional stress and complications of having a close relative as a surrogate, on the life of the surrogate child, surrogate mother and the commissioning parents, is immeasurable.

### Close relative as a surrogate

The Committee has very beautifully dealt with the issue of “close relative” being a surrogate. The object of this provision was to curtail exploitation of the surrogate, however, it would be unrealistic and very complex. The provision can be analysed from two perspectives. First and foremost, infertility is a taboo in India and for couples to come forward and undergo Artificial Reproductive Technique (‘ART’) procedures and surrogacy procedures is frowned upon. In such a situation, to force couples to only be able to have close relatives as surrogates is arbitrary and violative of their basic reproductive rights. Second, in the context of the surrogate mother, it would be unfair for her to have to see the child repeatedly, and the effect the same would have on the child is a different matter of concern altogether. The Committee has recognised these factors and suggested that “limiting the practice of surrogacy to close relatives is not only non-pragmatic and unworkable but also has no connection with the object to stop the exploitation of surrogates envisaged in the proposed legislation.

"The Committee, therefore, recommends that this clause of "close relative" should be removed to widen the scope of getting surrogate mothers from outside the close confines of the family of the intending couple. In fact, both related and unrelated women should be permitted to become a surrogate."

### **Infertility a taboo**

ART and surrogacy procedures have emerged essentially due to increasing infertility in the society. The current Bill defines infertility as the inability to conceive after five years whereas the previous draft Bills, of 2008 and 2014, defined it as the inability to conceive after one year.

The Committee has compared this definition of infertility with that given by the WHO and suggested that "since conception has many interplay functions, a five-year time bar would add to the misery of already distressed intending couples. The five-year waiting period is therefore arbitrary, discriminatory and without any definable logic. The Committee, therefore, recommends that the definition of infertility should be made commensurate with the definition given by WHO. The words 'five years' in clause 2(p) and 4 (iii) (c) II, be therefore, replaced with 'one year' and consequential changes be made in other relevant clauses of the Bill."

This suggestion by the Committee is based on the basic fundamental Right to Reproduction and the Right to Privacy. How and when individuals wish to reproduce is their own personal discretion. The government can impose limitations and set criteria, however, the same should be rational and not arbitrary.

### **Other suggestions**

The Committee makes several other laudable suggestions, some of which take root from the previous ART Bills and some which are based on reasonable analysis of the current social-medical scenario. It suggested that 'compensated surrogacy' should be allowed and that single parents and live-in partners should be allowed to commission surrogacy.

The Committee also recommended that there should be a provision of breast milk banks for the surrogate child, and a tripartite surrogacy agreement should be entered into between the parties instead of separate agreements, to make the process easier.

The Committee has analysed the bill in a very comprehensive manner and put forward suggestions which if not incorporated would have a domino effect and push the entire surrogacy industry underground, which in turn could lead to the exploitation of the all the members of the surrogacy arrangement. Surrogacy is undertaken by individuals to procreate and to found a family; the essence of that needs to be understood and retained.

- Surrogacy is an arrangement whereby an intending couple commissions a surrogate mother to carry their child.
- The intending couple must be Indian citizens and married for at least five years with at least one of them being infertile. The surrogate mother has to be a close relative who has been married and has had a child of her own.
- No payment other than reasonable medical expenses can be made to the surrogate mother. The surrogate child will

be deemed to be the biological child of the intending couple.

- Central and state governments will appoint appropriate authorities to grant eligibility certificates to the intending couple and the surrogate mother. These authorities will also regulate surrogacy clinics.
- Undertaking surrogacy for a fee, advertising it or exploiting the surrogate mother will be punishable with imprisonment for 10 years and a fine of up to Rs 10 lakh.

### **Key Issues and Analysis**

- The Bill permits surrogacy only for couples who cannot conceive a child. This procedure is not allowed in case of any other medical conditions which could prevent a woman from giving birth to a child.
- The Bill specifies eligibility conditions that need to be fulfilled by the intending couple in order to commission surrogacy. Further, it allows additional conditions to be prescribed by regulations. This may be excessive delegation of legislative powers.
- The surrogate mother and the intending couple need eligibility certificates from the appropriate authority. The Bill does not specify a time limit within which such certificates will be granted. It also does not specify an appeal process in case the application is rejected.
- The surrogate mother must be a 'close relative' of the intending couple. The Bill does not define the term 'close relative'. Further, the surrogate mother (close relative) may donate her own egg for the pregnancy. This may lead to negative health consequences for the surrogate baby.
- For an abortion, in addition to complying with the Medical Termination of Pregnancy Act, 1971, the approval of the appropriate authority and the consent of the surrogate mother is required. The Bill does not specify a time limit for granting such an approval. Further, the intending couple has no say in the consent to abort.

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