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The new surrogacy law in India fails to balance regulation and rights

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India has a thriving surrogacy market with an estimated [valuation of over 2 billion USD](#). However, the industry – which has been largely unregulated until now – is expected to witness an extensive overhaul with the proposed [Surrogacy \(Regulation\) Bill, 2016](#). The watershed provisions of the new Bill seek to impose a blanket ban on commercial surrogacy primarily to check the exploitation of poor women, while permitting altruistic surrogacy in the country.

The Bill, however, comes with two caveats while allowing altruistic surrogacy: first, it outlaws altruistic surrogacy for unmarried couples, foreigners, single parents, live-in partners, and homosexuals; and second, only Indian couples who have been legally married for a minimum of five years can avail its benefits.

The proposed law is not only legally unsound but also highly divorced from the Indian social reality. By banning, rather than regulating, the market, the government cannot ameliorate the exploitation of poor women who are coerced into surrogacy. It is a regressive law embedded with overtones of Indian patriarchal mindset, which is bound to push the surrogacy market underground and escalate the oppression faced by Indian women.

Constitutional invalidity of the proposed law

The Surrogacy Bill fails to adhere to the “[Golden Triangle](#)” test devised by the Indian Supreme Court to inspect the constitutional validity of the laws enacted by the Government. This test of reading equality, liberty, and freedom of rights conjunctively aims to ensure that the basic fundamental rights of individuals are not encroached upon by the State.

Firstly, the proposed law infringes [Article 14 of the Indian Constitution](#), which guarantees “equality before the law and equal protection of laws to all persons.” Restricting altruistic surrogacy to only married Indian couples and disqualifying others on the grounds of nationality, marital status, and sexuality impinges upon the right to equality for being an unreasonable classification. Given that the Bill is motivated by a desire to shield women from exploitation and prevent commodification of the birth process, the restriction also fails to bear any nexus with the intended objectives of the legislation.

Further, by disallowing the right to choice vis-à-vis surrogacy for homosexuals and unmarried couples, the Bill reinforces the majoritarian Indian morality that stigmatizes the idea of homosexuality and unmarried people living together. Here, it is pertinent to note that [being a homosexual](#) or [residing in a live-in relationship](#) is not illegal *per se* in the country, and limiting the access of altruistic surrogacy is a clear instance of discrimination against these minorities.

Secondly, the Bill violates the “[right of livelihood](#)” and “[right to reproductive autonomy](#)” enshrined under the broad framework of [Article 21 of the Constitution](#). The ban on commercial surrogacy threatens the livelihood of many poor women in the country who have been able to educate their children, establish businesses, and financially support their families through surrogacy. [The number of such women](#), many of whom are sole breadwinners, is estimated to be more than 100,000.

Further, the Indian Supreme Court has interpreted the [right to reproductive autonomy](#) to mean that the parents have the prerogative to choose the mode of parenthood, either naturally or through surrogacy in this case. Normatively and constitutionally, the method of procreation and parenthood lies outside the domain of the State, and any interference in this choice will warrant an infringement of this Fundamental Right.

Thirdly, the proposed law is foul of [Article 19](#) in general, and Article 19(1)(g) specifically, which guarantees the “freedom of trade and profession” in India. The surrogacy industry is the source of bread and butter for not only the surrogate mothers but also the numerous surrogacy clinics in the country. A blanket ban on commercial surrogacy cannot be justified as a reasonable restriction because it jeopardizes the interests of multiple stakeholders in this multi-billion-dollar industry.

Infringement of international covenants and obligations

The Surrogacy Bill also contravenes several safeguards to human life, health” and dignity enshrined in the various international covenants ratified by India. By interfering with the reproductive rights of the individual, the proposed law infringes upon the “right to found a family” enshrined in Article 16 of the [Universal Declaration of Human Rights](#). An additional challenge to the Bill also arises from Article 16(1)(e) of the [Convention on the Elimination of All Forms of Discrimination against Women](#), which requires state parties to ensure equality of rights for men and women “to decide freely and responsibly on the number and spacing of their children.”

The [UN Special Rapporteur on the Right to Health](#) has also highlighted the importance of freedoms and entitlements pertaining to reproductive, maternal, and sexual right, including the right to family planning services for the attainment of the highest possible standard of physical and mental health. The Bill further violates the state's core obligation to ensure equal treatment and non-discrimination in access to reproductive health service by restricting the access to altruistic surrogacy.

Unanswered questions and the way forward

In its present form the Surrogacy (Regulation) Bill 2016 seeks to achieve the twin goals of: (1) preventing the exploitation of poor women; and (2) preventing the equating of the surrogacy process with renting a womb. While the legislators' intentions are well placed, their provisions aren't. Yes, the State must intervene to check the exploitation of poor Indian woman who are coerced into surrogacy, but it should not be done in a manner which is inimical to other individuals who are well within their legal and human rights to avail surrogacy services.

Instead of imposing a ban, the commercial surrogacy market should be regulated for the protection of the vulnerable in the surrogacy contract. A balanced path by the Government would be the adoption of a rights-based approach addressing the concerns of the surrogate mother, children born out of surrogacy, and other stakeholders in the surrogacy market. India needs a centralized system that could regulate the surrogacy market by addition of supplementary checks and balances, transparency, and registration of surrogacy contracts. This would also eliminate the middleman, ensuring that the entire compensation reaches the surrogate mother.

The proposed law is a clear case of homophobia, majoritarian enforcement of cultural norms, and discrimination against non-heteronormative relationships. By limiting the access to surrogacy on fallible and exclusionary grounds, the government will also provide impetus to a rising black market for wombs. Lessons have not been learnt from the ban on sex-determination tests and organ donations, which have previously pushed the entire market underground and left it completely unregulated.

Works Cited

1. Law Commission of India, Government of India, "[Need for Legislation to Regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of parties to a Surrogacy](#)," Report Number 228 (August 2009).
2. Department of Health Research, Government of India, "[The Surrogacy \(Regulation\) Bill, 2016](#)" (August 2016).
3. UN General Assembly, "[Convention on the Elimination of All Forms of Discrimination Against Women](#)", 18 December 1979, United Nations, Treaty Series, vol. 1249.
4. UN General Assembly, "[Universal Declaration of Human Rights](#)", 10 December 1948, 217 A (III).
5. UN Human Rights Council, "[Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Dainius Pūras](#)," 2 April 2015, A/HRC/29/33.
6. The Constitution of India, Republic of India, 1950.
7. *Minerva Mills Ltd. v. Union of India*, AIR 1980 SC 1789.
8. *Suresh Kumar Koushal v. Naz Foundation*, (2014) 1 SCC 1.
9. *Indra Sarma vs V.K.V.Sarma*, 2013 (14) SCALE 448.
10. *Olga Tellis v. Bombay Municipal Corporation*, AIR 1986 SC 180.
11. *Suchita Srivastava v. Chandigarh Administration*, AIR 2010 SC 235.

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