

THE ASSISTED REPRODUCTIVE TECHNOLOGY (REGULATION) BILL, 2014 – BIRTH OF A NEW ERA FOR SURROGACY REGULATIONS?

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Abstract

The Assisted Reproductive Technology (Regulation) Bill, 2014 (the Bill) has been under the consideration of the Department of Health Research, Ministry of Health and Family Welfare, Government of India. This Bill is another humble step taken by the Government to deal with the long run hiatus of having an effective legislation to regulate surrogacy and other forms of Assisted Reproductive Technology (ART) in India.

The main object of the Bill is to have a proposed legislation which aims at the proper administration and supervision of Assisted Reproductive Technology (ART) clinics and banks in the country and for prevention of misuse of this technology in India. Further, it aims to curb malpractices of commercial surrogacy and illegal operation of clinics and

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banks in India. While the drafters of this piece of proposed legislation have put in

a laudable effort to achieve the said objectives, a lot of loopholes and lacunae have remained with it.

The authors of this analysis have attempted to dissect the shortcomings of this Bill, and cull out the hits and misses of the drafters. With regards to each and every issue raised pertaining to the Bill, the authors have provided reform or amendment suggestions that can be used to further solidify the bases of this Bill.

I. INTRODUCTION

The Health Ministry of India proposed the Assisted Reproductive Technology (Regulation) Bill, 2014 with the objective of adequate supervision and regulation of ART banks and clinics in the country, prohibiting the misuse of the said technology, including that of surrogacy and promoting safe and ethical procedures for such services in India.

The Bill was drafted by the Indian Council of Medical Research and developed to its present version by the ministry only after numerous years' worth of ministerial and public deliberations. It has been pending for quite a while now, awaiting clearance only from the law department, as the scientific portions have already been determined. This article aims to highlight the general and specific issues surrounding various provisions of the Bill. It further attempts to formulate reformative measures that may aid in remedying the fallacies that are a part of the Bill.

II. GENERAL OBSERVATIONS

A. *Extrapolating the Meaning of “Couple” as per the Bill*

The Bill describes “*couple*” as a relationship between a male person and female person who live together in a shared household through a relationship in the nature of marriage which is legal in India.¹ The pertinent issues to be addressed herein are, *firstly*, the Bill talks about a relationship in the nature of marriage between a male and female person, which excludes persons of same sex from being eligible to qualify as a couple for the purposes of this Bill. *Secondly*, the Bill has restricted its scope to cover couples whose marriage is legal in India. As a result of this limited scope, foreigners in India are excluded from availing ART facilities.

Regarding the first issue, it needs to be noted that there is no recognition of same sex marriage in India and that the clause is ambiguous regarding recognition of persons who pursue live-in relationships.² Not recognising same sex marriage, valid in foreign countries but not in India, would be disadvantageous to those who are PIO (Persons of Indian Origin), NRI (Non-Resident Indian) or OCI (Overseas Citizen of India), and have solemnized same sex marriage.

The said clause also needs to consider the sociological pitfall for those couples who share a household by means of live-in relationship. There is confusion regarding the fact that not all live-in relationships can be termed to be a relationship in the nature of marriage. The Supreme Court³ has held that there are conditions which need to be satisfied before considering a live-in relationship to be “a

¹The Assistive Reproductive Technology (Regulation) Bill, Cl. 2(p) (2014) [hereinafter The Bill].

²Durgesh Nandan Jha, *New Law to Clip Wings of Rent-a-womb Biz*, THE TIMES OF INDIA (Oct. 20, 2015), <http://timesofindia.indiatimes.com/city/delhi/New-law-to-clip-wings-of-rentawombbiz/articleshow/49459639.cms?>

³Indra Sarma v. V.K.V. Sarma, A.I.R. 2014 S.C. 309 (India).

relationship in the nature of marriage”⁴. This issue leads to completely ignoring the social tenets of the class of people who are subject to legal recognition and have to forgo their rights pursuant to strict application of the Bill.

On account of the second issue, there has been debate in recent years regarding whether foreign nationals should be permitted to have children through surrogacies in India. The Bill specifically categorises only foreigners such as PIO, NRI, OCI and those foreigners who are married to an Indian citizen, to be eligible for availing the benefits of ART.⁵ But on the other hand, other foreign nationals are excluded from the scope of this Bill. Hence, the word “couple” needs to be properly defined to take into account all the above-mentioned aspects.

B. Unclear Consequences of Breach of Surrogacy Agreement

A major flaw in the Bill is that it does not provide for the consequences in case of a breach of surrogacy agreement.⁶ Such ambiguity can result in serious and diverse ramifications. Cases may arise where the child’s parents do not pay the surrogate her contractual amount, leading to the grey area as to whether she can retain the child in lieu of the same.

The authors herein suggest that in scenarios regarding a breach of surrogacy agreement, the child’s custody should rest with the commissioning parents (i.e., the infertile married couple in need of a surrogate to have a child), but that the surrogate may file a complaint to a commission established under the proposed legislation or to a criminal/civil Court. Further, clauses should be inserted to prosecute NRIs or foreigners who breach such an agreement, with powers being bestowed upon the police to take cognizance of any complaint by a

⁴The Bill, *supra* note 1, at Cl. 2(p).

⁵*Id.* at Cl. 60(11)(a).

⁶*Id.* at Cl. 60(1).

surrogate mother and prohibit the commissioning parent(s) from fleeing the country.

C. Prejudicial to Single Women

The facility of surrogacy has only been made available to the commissioning couple,⁷ while unmarried women have not been permitted to avail ART services – thereby violating their fundamental right to procreation.⁸ Such a law is contradictory to the prevalent law that allows unmarried women to adopt children.⁹ Even the recently notified Juvenile Justice Bill of 2014 explicitly permits single or divorced persons to adopt a child.¹⁰

Further, an overall view of the Bill indicates that it has laid greater emphasis on the role and significance of the husband than that of the wife. The Bill does not permit single, divorced or widower women to donate oocyte or act as surrogate mothers.¹¹ The same has been reserved for only married women who have proven fertility.¹² However, with respect to semen donation, no such restriction has been imposed on men.

The above-mentioned provisions have propagated the archaic values and beliefs that strengthen the deep-rooted dominance of patriarchy in our society. Such provisions need to be modified to uplift the position of women by allowing them autonomy and freedom with their reproductive choices.

⁷*Id.* at Cl.2(zq).

⁸R. Rajagopal v. State of T.N., A.I.R. 1995 S.C. 264 (India); Javed v. State of Haryana, A.I.R. 2003 S.C. 3057 (India).

⁹The Hindu Adoptions and Maintenance Act, 1956, No.78, Acts of Parliament, 1956 § 8; *See also* The Guardians and Wards Act, 1890, No.08, Acts of Parliament, 1890.

¹⁰The Juvenile Justice (Care and Protection of Children) Bill, 2014, § 58(3).

¹¹The Bill, *supra* note 1, at Cl. 52(8)(a).

¹²*Id.*

D. Eliciting Regulation for Medical Visa

As per the Bill, medical visa means an official authorization/endorsement in a passport or similar document issued by Indian High Commission or Indian Embassy that permits entry and travel within India for availing benefits of ART.¹³ This provision has caused a tumultuous situation regarding the stand taken by the Indian Ministry of Home Affairs, whereby foreigners are not allowed to avail services of ART. The Ministry issued instructions *vide letter no. 25022/74/2011-F-1 (Vol. III)* dated 3rd November, 2015, stipulating that no visa shall be issued by Indian mission or posts to foreign nationals intending to visit India for commissioning surrogacy.¹⁴ The said letter is contrary to the provisions of the Bill as although the Bill provides that medical visa can be provided to OCI,¹⁵ the letter refuses to follow the same.

Furthermore, the Indian Council of Medical Research (ICMR) also issued a notification dated 27th October, 2015– restricting foreign nationals to avail surrogacy services in India as the said services are only available to married couples in India.¹⁶ The said notification has been implemented with immediate effect and resulted in confusion regarding those foreign nationals who are either already availing the facilities of surrogacy in India or are in the middle of the said process. The question arises whether in such cases the foreign nationals would still be allowed to avail the surrogacy services. To address this issue, the above-mentioned letter has allowed foreign couples to complete

¹³*Id.* at Cl. 2(y).

¹⁴Notification No. V. 25011/119/2015-HR, *Department of Health Research, Ministry of Health & Family Welfare*, G.o.I. (Nov. 4, 2015), <http://www.icmr.nic.in/icmrnews/art/DHR%20notification%20on%20Surrogacy.pdf>.

¹⁵The Bill, *supra* note 1, at Cl. 60(12).

¹⁶Notification No: 5/10/8/2008-RHN, *Indian Council of Medical Research, Ministry of Health & Family Welfare*, G.o.I. (Oct. 27, 2015), http://i2.wp.com/blog.indiansurrogacylaw.com/wp-content/uploads/2015/10/1446037332_full.jpeg.

the process if they began using such services prior to issue of the letter, but subject to approval from the State Health Authority. However, the Bill is silent about any duty to be taken by the State Board in order to approve such foreign nationals to use ART services. Thus, the Bill has given rise to an issue which certainly needs to be rectified prior to enactment of the same.

III.SPECIFIC OBSERVATIONS

A. *Exclusion of Genetic Surrogacy*

The definition of surrogacy presented in the Bill is not comprehensive, as it excludes genetic surrogacy and includes only gestational surrogacy.¹⁷ Genetic surrogacy involves the woman bearing the child by means of her egg/oocyte, and the sperm of the donor or commissioning man.¹⁸ Such a definition has been proposed keeping in mind that it will separate the child from the surrogate mother and create an absolute biological ownership for the donor parent. The primary advantage of gestational surrogacy is that the surrogate's role is reduced to that of a mere carrier or host and she is not biologically related to the child.¹⁹

However, not only is genetic surrogacy less expensive, but also it does not affect the surrogate's fertility – thus preventing her from taking fertility medication.²⁰ Therefore, the authors suggest that both gestational and genetic surrogacy should be made permissible.

¹⁷The Bill, *supra* note 1, at Cl. 2(zq).

¹⁸Fiona MacCallum et al., *Surrogacy: The Experience Of Commissioning Couples*, 18(6) HUMAN REPRODUCTION 1334, 1337 (2003).

¹⁹*Id.*

²⁰Olga van den Akker, *The Importance Of A Genetic Link In Mothers Commissioning A Surrogate Baby In The UK*, 15(8) HUMAN REPRODUCTION 1849, 1851 (2000).

B. No Appropriate Insurance of Surrogate

With respect to the rights and duties in relation to surrogacy, the Bill provides that the commissioning couples are to ensure that both the surrogate and child is appropriately insured before being handed over to the commissioning parent(s), and till the surrogate is free of all consequent health complications.²¹

It needs to be noted herein that the Bill has kept the ambit and nature of the type of insurance completely vague and subject to interpretation. The issues pertaining to post delivery and the follow up care of surrogate mothers is left unaddressed. The proposed Bill needs to enunciate clearly the standard of care and amount of compensation to be made available to the surrogate, which should ideally include all her expenses during pregnancy – such as that of doctors and medical checkups. Apart from the said facilities, an option of free legal aid should be provided to take into account legal conflicts, which may arise during a surrogacy arrangement. All these factors are essential for the accountability and transparency of the process and the child's well-being. The proposed Bill has to explicitly mention these details so as to effectively implement its provisions.

C. Lack of Clarity on Payment of Compensation

There exists an ambiguity about the payment of compensation to the surrogate mother. While a provision mentions that “an assisted reproductive technology bank may advertise for gamete donors and surrogates, who may be compensated financially by the bank,”²² another clause provides that “the surrogate may also receive monetary compensation from the commissioning couple... for agreeing to act as surrogate.”²³ Therefore, there exists no clarity on the system of money transactions between the surrogate and the couple/ART banks.

²¹The Bill, *supra* note 1, at Cl. 60(27).

²²*Id.* at Cl. 52(6).

²³The Bill, *supra* note 1, at Cl. 60(3)(a).

Furthermore, since most surrogates hail from a poor social and economic background, it is unreasonable to expect that they will have the capability to sort out complex financial transactions by themselves.

D. Need for Inclusion of Informed Consent

Surrogacy, along with other forms of ARTs, is an extremely invasive procedure that greatly risks the lives of oocyte donors or surrogate mothers. In its present form, the Bill requires procurement of consent²⁴ – that is qualitatively distinguishable from the detailed procedure of informed consent. Therefore, the Bill should make it compulsory for the ART clinics or banks to properly explain and inform oocyte donors or surrogate mothers about the possible harmful consequences in being subjected to ART procedures.

E. Ambit of Acceptable Identification Documents Needs To Be Broadened

The Bill has stated that Aadhar card would be the main identification document for all gamete donors²⁵ or surrogate mothers.²⁶ By narrowing down the options for identification documents to only one document (Aadhar card), the Bill excludes many potential gamete donors and surrogate mothers who do not have an Aadhar card. Further, the Aadhar card cannot be made mandatory as per the recent directives of the Apex Court.²⁷ There exist several identity proofs for official purposes, any of which can be used in the Bill. Therefore, such provisions should either be adequately amended or deleted.

²⁴*Id.* at Cl. 47.

²⁵*Id.* at Cl. 52(15).

²⁶*Id.* at Cl. 60(32).

²⁷Justice K.S. Puttaswamy (Retd.) & Anr. v. Union of India & Ors., (2017) 10 S.C.C. 1 (India).

F. Identifying Rights of Child Born Out Of Surrogacy

Looking at the scope of the Bill, it is essential to understand that there has not been much discussion on the rights of the child born out of surrogacy. The Bill fails to elaborate on the instances which would pose legal hurdles for the couple as well as the child born out of surrogacy.

Firstly, there is no provision regarding the rights of a child who has been abandoned prior to delivery by the couple. The Bill presumes that in such cases of separation or divorce of the couple, the child which is still not born will be considered as legitimate. Also, there arises a problem regarding the custody of the surrogate child in case of the couple being divorced or separated. A similar issue was presented before the Supreme Court in the *Manji Yamada case*,²⁸ where a baby was born of a surrogate mother and the commissioning parents got separated before birth of the child. Both the surrogate mother and the commissioning mother abandoned the child. The Supreme Court held that in these circumstances, custody is to be given to the grandmother and father of the child upon separation of the commissioning couple before its birth. Since the Supreme Court has already delivered a verdict on this issue, the authors opine that the Bill should be in conformity with the aforesaid judgement.

Secondly, there is also a requirement that mandates that the commissioning couple submit a certificate indicating that the surrogate child/children born in India are related to them and they will not involve them in any kind of pornography or paedophilia. Apart from such a certificate, it is important to have a regulatory watchdog that keeps check over such commissioning couples who may happen to indulge the children in any illegal act later.

²⁸*Manji Yamada v. Union of India*, (2008) 13 S.C.C. 518 (India).

IV. CONCLUSION

There exists no doubt that India is witnessing an urgent need for regulation of ART entities. Although absence of Government control and red-tapism has contributed in enhancing investment in this sector and allowed the establishment of several world-class IVF institutions in this country, the same has also lead to the rise of numerous unscrupulous clinics getting created and surrogate mothers being exploited. Therefore, the correct approach in such a scenario would be to propagate just and reasonable ART regulations that portray a humane outlook to this issue and successfully get rid of the adverse elements of the system.