

Rethinking the Surrogacy Bill

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The Surrogacy (Regulation) Bill, 2016, introduced ostensibly to provide a legal framework for surrogacy in India, is a regressive legislation that seeks to control women's bodies and reinforces heteronormative notions of what a family is. By limiting surrogacy to "altruistic surrogacy" only, it creates space for women being pressured to bear children for family members. The Rajya Sabha standing committee's report, having heard a wide cross section of society on this matter, has rightly criticised this bill and called for its redrafting.

As regressive legislations go, the Surrogacy (Regulation) Bill, 2016 must surely rank with the worst of them. It is a bill that reinforces every patriarchal and paternalistic notion of what women can and cannot do with their bodies. Far from "regulating" (as the term is properly understood), it is a bill to control women's bodies and what they choose to do with it.

Introduced in the Rajya Sabha on 21 November 2016 by the Ministry of Health and Family Welfare (MoHFW), it was not exactly received with much praise when it was first made public by the government (Gupta 2016). Minister for External Affairs Sushma Swaraj had earlier defended the ban on commercial surrogacy and exclusion of homosexual and transgender persons from having a child through surrogacy in rather spiteful terms (Hindu 2016). Since then, it was referred to a standing committee of the Rajya Sabha, which released its report on 10 August 2017 ripping this bill to shreds (Rajya Sabha 2017).

A Regressive Bill

The bill is ostensibly based on the 228th Report of the Law Commission of India (LCI), which called for the regulation of surrogacy given the absence of a legal framework in India to regulate such activities (LCI 2009). It recommended that surrogacy be allowed as per the contract between the surrogate parents and birth mother, subject to the requirement that there should be no "commercialisation." The LCI does not explicitly state what is objectionable about commercialisation. To be fair, the LCI did recommend that women be fully compensated for the expenses of pregnancy and properly insured by the adopting parents. It recommended that a bill make their rights clear, but the belief that making a profit out of this activity is somehow unacceptable suggests that

some forms of women's labour are clearly less morally acceptable than others. The report clearly favours "altruistic" surrogacy over "commercial" surrogacy. Both these terms need some unpacking.

The term "commercialisation" in the context of surrogacy is somewhat curious. It suggests a distaste of women using their bodies in a particular manner to make a living. The stand of the MoHFW before the standing committee lays a lot of emphasis on the need to prevent commercialisation. Nowhere, however, is there a justification as to why commercialisation of surrogacy is intolerable. One weak defence offered is that a ban is necessary to prevent "misuse." Having never made clear what it sees as the appropriate use of surrogacy for payment, one must assume that the MoHFW thinks that paying women for it is a "misuse" of surrogacy. Not only does this completely devalue the labour and pain that a pregnant woman undergoes, but also the very real economic costs of a pregnancy. This is akin to "invisibilising" labour (Kalpana 2016: 33).

The more obvious instance of misuse of the provisions of the surrogacy bill is correctly pointed out by the standing committee as that of families in a patriarchal society forcing women to suffer the costs and pains of surrogacy with no recompense. It destroys the notion that there is anything inherently "altruistic" about surrogacy simply because the parties are related. It understands that, in a society where deeply unequal power relations exist in families, altruism is far less likely than coercion. Though the bill provides for the payment of medical expenses, insurance coverage, etc, this does not take away from the fact that the woman does not actually get compensated for the labour involved in a pregnancy (Pande 2015). Indeed, as the standing committee rightly points out, "altruistic surrogacy," as defined in Clause 2(b) of the bill, probably amounts to forced labour prohibited under Article 23 of the Constitution.

The standing committee also raised an important issue that I had written

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about in this column on a previous occasion—maternity benefits for women who are surrogate mothers (Kumar 2017). While several judgments of high courts across the country have agreed that women who have children through surrogates are entitled to maternity benefits allowed to them under the law, there is no clarity on whether the same would be available for the surrogates themselves. The standing committee has rightly pointed out this gap and recommended that the law clarify that maternity benefits should be available to both the birth mothers and surrogate mothers.

Other Issues

This is not to say that surrogacy needs no regulation or only minimal regulation. The standing committee too recognises the very real difficulties and problems that can arise with regard to surrogacy. Indian courts have had to face difficult issues regarding what needs to be done when parents who wanted a child through surrogacy no longer want the child, and the birth mother cannot or will not bring up that child. In *Baby Manji Yamada v Union of India* (2008), we see a heartbreaking illustration of the problems that can be caused by the absence of clear demarcation of rights and liabilities of parties. Here, a child born to an Indian surrogate mother was abandoned when her intended Japanese parents divorced and refused to take custody of the child. After the courts stepped in and put the matter before the National Commission for Protection of Child Rights, it was eventually resolved with the grandmother receiving the custody of the baby.

While provisions of the law relating to adoption and childcare can be pressed into use, a law that clearly lays down the rights and obligations of all parties in clear and simple terms is definitely necessary. That said, the extreme reaction of the government since 2012 to try and ban all forms of surrogacy used by foreign couples, including Persons of Indian Origin and Overseas Citizens of India, was probably an overreaction, as the standing committee notes.

The standing committee's report is noteworthy not only because of its content, but also the fact that the content of the report is informed by the wide variety of voices they have chosen to hear on the matter.

Parliamentary Process

The standing committee heard women who had been surrogate mothers for a fee themselves, and who told them in hearings how being a surrogate had helped them in difficult financial times and that it should not be seen as something degrading or immoral. It is quite heartening to see that the parliamentary process actually heard the people directly affected by the law for a change, and not just sat on empyrean heights to pass judgment. It is too often that laws are passed with little or no consultation with those directly affected by them, with little or no debate in Parliament. Whatever the other faults of the parliamentary process in India, the process of parliamentary committees hearing all sides of an issue on this matter is important and should not be treated as a mere sideshow.

If there has to be criticism of the standing committee's report, it is that it tends to use ableist language in the context of differently abled children. While the bill itself uses the appropriate language, it is quite disappointing to see the standing committee's report calling children without disabilities "normal," implying, therefore, that the differently abled are "abnormal." Even though it uses the words "special needs," some sensitivity in choosing words to describe children with disabilities would not have gone amiss.

Even with this caveat, the standing committee should be applauded for its frank and forthright views on the government's bill. Apart from the content of the suggestions, soliciting a wide variety of views on the topic, and actually speaking to those directly affected by this bill and those who have used surrogacy in the past is part and parcel of the parliamentary process that makes democracy meaningful. While some of the work of Parliament, such as debating and passing laws, is more visible and tends to colour perceptions of whether it is really "working," what goes on behind

the scenes, especially in the various committees, should not be minimised. If anything, they should be given just as much importance as the debates on the floor of the two houses.

There is no reason why the hearings in the committees should also not be given wide viewership through live audiovisual recordings, subject, of course, to concerns of privacy, confidentiality and secrecy. This would increase immeasurably the transparency with which committees function, apart from providing a platform for a truly participative democracy.

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