Denying Choice, Defying Precedent

The Surrogacy (Regulation) Bill, 2019

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In trying to "regulate the practice and process" of surrogacy through the Surrogacy (Regulation) Bill, 2019, the imagination of a "family" is limited to strict heteronormative, patriarchal definitions. This definition excludes the never married, the widowed, the divorced, lesbian, gay, bisexual, transgender and queer couples and numerous other classes of people who do not seem to fit within the rigid patriarchal norms outlined in this bill. Such exclusion is in the teeth of established jurisprudence of the Supreme Court and an affront to constitutional values.

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After a failed attempt to pass legislation regulating surrogacy with the Surrogacy (Regulation) Bill, 2016 (Sonak and Bhatia 2021), the union government looks set to succeed at the second attempt during the ongoing monsoon session. The Surrogacy (Regulation) Bill, 2021 ("the 2021 bill"),[1] which was earlier cleared by the Lok Sabha and has now been passed by the Rajya Sabha, is on its way back to the Lok Sabha for ratification of the changes made by the Rajya Sabha (Roy 2021). I have, in the past, critiqued the 2016 version of the bill (Kumar 2017) pointing out the regressive aspects of it. The then Standing Committee of the Rajya Sabha had also pointed out the massive problems with the draft bill, highlighting the problematic ways in which the bill approaches the very definition of surrogacy (Rajya Sabha 2017).

However, the 2021 version of the bill accounts for little of the criticisms levelled against it. What aggravates the matter further is that between 2016 and 2021, the jurisprudence around the right to equality, women's livelihood, and choice have changed dramatically, yet the present bill does not take them into account.

In this column, I will first briefly outline the problematic parts of the 2021 bill, then summarise the recent judgments of the Supreme Court on the right of livelihood of women, the right to privacy and choice, and finally conclude with my assessment of the constitutionality of the bill.

As on date of writing, the bill has not yet been placed before the Lok Sabha for final passage but it is unlikely that its content will change very much. While there may be other problems with the 2021 bill, this column will focus only on the aspects of who it permits to undertake and avail of surrogacy and who it excludes. I may add here that it is doubtful whether the Surrogacy (Regulation) Bill, 2021, in its present form is even within the legislative competence of the Parliament to pass, given that it is largely focused on regulating the institutions, which undertake surrogacy—that is to say, hospitals, which are within the purview of the state legislatures to pass laws on.[2]

A Regressive View

Although framed as "regulation," the 2021 bill once again seeks to outlaw the practice of surrogacy in all but a limited set of circumstances. This it does by limiting who can be a surrogate mother and who can approach a surrogate mother to have their child.

According to clause 4(iii)(b) of the 2021 bill, only an ever married woman, who is a close relative of the intending couple, who is between the age of 25 and 35 as on date of implantation, and who already has a child of her own is permitted to be a "surrogate mother."

Only an "intending woman" (a divorced or widowed woman between 35 and 45 years of age)[3] or an "intending couple" are entitled to seek to have a child through surrogacy. The term "intending couple" is defined narrowly—only a legally married man and woman above the age of 21 and 18 years of age, respectively, who have been medically certified to infertile, that is, one or both of the couple are suffering from "proven infertility."[4] In addition, intending couples have to have been married for at least five years, not have any children through adoption, natural birth or surrogacy and be between the ages of 26 and 55 for the men, and 23 and 50 for the women.[5]

The 2021 bill further limits the grounds on which a surrogate mother and intending couple can avail of surrogacy—it can only be availed on "altruistic grounds," that is the intending couple gives nothing more than medical expenses and insurance coverage to the surrogate mother.

While there are criminal sanctions (imprisonment and fine) on institutions,

which offer commercial surrogacy, even intending couples or anyone who seek to have a child through any means that are not "altruistic surrogacy" are subject to criminal sanctions under Chapter VII of the bill.[6]

The effect of these provisions is that even if a surrogacy clinic and a surrogate mother (who meet the conditions of the bill) were to be willing, they cannot lawfully offer surrogacy services, even altruistic surrogacy, to single people, those in a live in relationship or lesbian, gay, bisexual, transgender and queer (LGBTQ) couples, due to criminal sanction.

This naturally raises questions of constitutional validity given the harsh measures being imposed by the bill if and when it becomes law in this shape.

The Evolving Right to Choice

When assessing the constitutional validity of the 2021 bill, I intend to examine the question both from the perspective of the exclusion of certain categories of persons, both from being a surrogate mother and from having a child through surrogacy. Simply, whether the provisions outlined in the previous section violate the fundamental rights of those who have been excluded from the purview of being eligible to lawfully avail of and offer surrogacy.

The issues relating to the exclusion of various groups of people from availing surrogacy were raised by the Select Committee of the Rajya Sabha in its report.[7] However, the committee has more or less accepted the thin justifications offered by the Department of Health and Family Welfare, which has drafted this legislation.[8] There is very little analysis of the constitutional problems with the 2021 bill and in my view, three recent judgments have an important bearing on the issues with the law.

On the question of what sort of work women can and cannot be permitted to do, the Supreme Court's judgment in *Indian Hotels and Restaurants Association and Others v State of Maharashtra* (2019) in the context of bar dancers in Maharashtra would be appropriate to consider. Reiterating an earlier judgment delivered in 2013 (*State of Maharashtra and Anr v Indian Hotels and Restaurants Association and Ors,* 2013) the Supreme Court held that any ban on a woman's right to livelihood cannot be imposed purely on the basis of moral disapproval of the same, if there is no objective material to show how the activity causes harm to women. In the earlier judgment, the Court had struck down the total ban on bar dancing by women and in this judgment, found that the Maharashtra legislature's attempt to "regulate" it fell afoul of the constitutional guarantees of equality (under Article 14), freedom of expression (Article 19[1][a]) and freedom of occupation (Article 19[1][g]).

Similarly, the notions of right to privacy and the right to choose have expanded dramatically since the judgment of the nine-judge bench of the Supreme Court in *Justice K S Puttaswamy (Retd) and Anr v Union of India and Ors* (2017). While affirming that the right to privacy is a fundamental right, the Court held that it had three aspects, the one most relevant for the present discussion being "decisional autonomy."[9] Decisional autonomy meaning the freedom to make intimate personal choices relating to having children, marriage, dress, food, faith, etc. While there are some tensions within the judgment (Chandra 2017), any law that seeks to limit the right of women to control their own bodies would have to meet the threefold test laid down to justify why the restriction would be justified under the Constitution. While the 2021 bill would trivially pass the requirement of "legality," it would still have to show that its provisions are necessary and proportionate in the terms of the test laid down in the judgment.

Finally, in the specific context of the rights of LGBTQ persons, the Supreme Court in *Navtej Singh Johar v Union of India* (2018), while striking down Section 377 of the Indian Penal Code which criminalised homosexual acts, also held that the laws, which deprive those in same sex relationships equal status would also be discriminatory and violative of Article 14.[10] While this has not yet translated into striking down family laws, which do not recognise same sex relationships, courts have cited Navtej Johar to prevent discrimination in employment against LGBTQ persons (*Pramod Kumar Sharma v State of UP and Ors,* 2021), to protect same sex relationships from interference by parents and police (*Chinmayee Jena v State of Odisha & Others,* 2020), among other such interventions.

Conclusions on Constitutionality

From an analysis of the Supreme Court's jurisprudence, it would seem that the 2021 bill falls afoul of Articles 14, 19, and 21 of the Constitution.

If the Supreme Court's approach in the International Human Rights Association (IHRA) case is any guidance, it is quite likely that the clauses limiting who can legally undertake being a surrogate mother and for what purposes are contrary to the constitutional guarantee of equal protection of the law and the right to earn a livelihood. While there is some justification being offered for the age limit—25 to 35 years—and while it may not be possible constitutionally to say that any woman of childbearing age should be permitted to undertake the risk, irrespective of the consequences on the woman's health or the child's, the requirement that surrogacy must never be for profit or earning an income seems dubious. A ban based on a particular idea of what is morally permissible, stands on shaky constitutional grounds as has been articulated in the IHRA case.

The 2021 bill also seems to violate the right to privacy guaranteed under Article 21. As articulated in the Puttaswamy judgment, decisional autonomy can only be limited by a law which meets the requirement that it is proportionate and serves a legitimate purpose. At no point is there a clear articulation why only married heterosexual couples should be permitted to have a child through surrogacy. In effect, the 2021 bill infringes not only the right to bodily autonomy of women but also the right of non-heterosexual married couples to have a family life. Applying the principles laid down by the Supreme Court in Puttaswamy and Navtej Johar, the constitutional validity of limiting surrogacy only to heterosexual couples in a marriage for specific reasons seems constitutionally suspect.

While it is necessary for the state to regulate surrogacy ensuring that there is no exploitation of vulnerable women and give clarity on thorny questions of

parentage, the approach adopted by the union government with the 2021 bill seems to be one that seeks to reinforce heteronormative patriarchal norms and deny the benefits of surrogacy to all but a select few. Such law not only violates constitutional norms but also seeks to brush away the desires of people to seek better lives for themselves and build families in their own ways.

NOTES

1 Bill text available at https://prsindia.org/files/bills_acts/bills_parliament/2019/Select%20Comm%20Report-%20Surrogacy%20Bill.pdf, viewed on 14 December 2021. While this is referred to as the Surrogacy (Regulation) Bill, 2020, it has been passed with a few more amendments by the Rajya Sabha as the Surrogacy (Regulation) Bill, 2021 and for the purposes of this column, only the 2021 version of this bill will be referred to avoid confusion.

2 See List II Entry 6, Seventh Schedule of the Constitution.

3 Clause 2(s) of the 2021 bill.

4 Clauses 2(g) and 2(r) of the 2021 bill.

5 Clause 4(c) of the 2021 bill.

6 Clause 38 of the 2021 bill.

7 See Rajya Sabha Report of the Select Committee on Surrogacy (Regulation) Bill, 2019, viewed on 15 December 2021, https://prsindia.org/files/bills_acts/bills_parliament/2019/Select%20Comm%20Report-%20Surrogacy%20Bill.pdf.

8 The Select Committee did suggest that the scope of who can avail surrogacy be expanded to include divorced or widowed women between the ages of 35 and 45 and also that altruistic pregnancy include such other expenses that the union government think fit.

9 Puttaswamy (para 248).

10 Navtej Johar (para 618).

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