

*The Indian Surrogacy (Regulation) Bill 2020: Enforcing
Gender Binarism?*

Swati Gola

Introduction

Having earned the reputation of being the ‘global baby factory,’ [1] the Indian government in 2015 prohibited commercial surrogacy for foreign nationals including non-resident Indians [2]. The government subsequently introduced the Surrogacy (Regulation) Bill (in 2016 and again in 2019) to regulate surrogacy practices, the role played by medical intermediaries, and the arrangements between the intending parents and the surrogate mother. Following the Select Committee’s proposals [3] in the upper house of the Parliament, the government of India amended provisions on eligibility (of intending parents and surrogate mothers) in the soon to be tabled Surrogacy (Regulation) Bill 2020. This article reviews in particular the amended criterion for eligible intending parents. It argues that by continuing to exclude Lesbians, Gays, Bisexuals, Transgendered, Queer and related (LGBTQ+) community, the 2020 Bill not only perpetuates the discrimination against this community but reinstates the gender binary entrenched in patriarchal hegemony. The Bill claims to uphold the ‘traditional’ heteronormative family yet contradicts India’s historical and social acceptance for liberal values on gender diversity. The paper will conclude by recommending further amendment to the eligibility criterion for the intending parent with a view to remove the discriminatory provisions the 2020 Bill contains.

Eligible Parent under the Surrogacy (Regulation) Bill 2020?

The 2020 Bill continues to outlaw the commercial surrogacy, i.e., where one woman bears and gives birth to a child for an intending couple with the intention of handing over such child to the intending couple after the birth for monetary incentive in any form as well as sale and purchase of human embryos and gametes. However, the ambit of altruistic surrogacy, i.e., where ‘no charges, expenses, fees, remuneration or monetary incentive of whatever nature, except the medical expenses incurred on surrogate mother and the insurance coverage for the surrogate mother, are given to the surrogate mother or her dependents or her representative,’ is extended in terms of who can now avail these services. As per the 2019 Bill, only Indian married couples of a certain age (woman between 23 – 50 years and man between 26 – 55 years), married for at least five years could enter into a surrogacy arrangement. Now, an ‘Indian Origin Married Couple’ or an ‘Indian Single Woman’ (only widow or divorcee between the age of 35 and 45 years) will also be allowed the benefits of altruistic surrogacy on the fulfilment of certain conditions [4].

Gender Binarism and inconsistencies with India’s social values

Despite broadening the eligibility criteria to include single women (widow and divorcee), single men and persons of LGBTQ+ community remain ineligible to access surrogacy services. The requirement of marriage further excludes live-in couples from the purview of the surrogacy services. While the amendments in the 2019 Bill are hailed as liberal by the government, these changes are nothing more than cosmetic. As I have argued elsewhere, the eligibility criteria of the Indian Surrogacy legislation promotes and perpetuates the patriarchal heteronormative family [5]. Following the Supreme Court’s decision in *National Legal Service Authority v Union of India* [6], India now officially recognises third gender. *Navtej Singh Johar V. Union of India* decriminalised homosexual sex [7] and it was held in *Madan Mohan Singh v. Rajni Kant* that live-in relationships are equal to marriage [8]. Yet, the government seems to have taken a step back when it comes to defining ‘family’ and cannot move beyond the narrow social perceptions entrenched in the patriarchal gendered norms.

Rooted in gender binary, which traditionally describes ‘two alternative sets of socially constructed behaviours and expectations’ [9], the 2020 Bill reinforces social stigmas, stereotypes and dichotomies. As Sanger noted, gender is still understood ‘both theoretically and culturally, as adhering to the dualism of male/female’ [10]. Gender binarism views non-conforming gender identities as unnatural/deviant and target persons who self-identify or are categorised as transgender, e.g., hijras (term that also includes transsexuals, cross-dressers, eunuchs and

transvestites) [11, 12]. Gender binarism is encouraged by patriarchal forces that socially and structurally reinforce the distinction between male and female [13] regardless of the fact that ‘sex, gender, gender identity and sexual orientation are more fluid, both among and within individuals, than generally acknowledged’ [9]. Gender binarism privileges ‘cisgender persons who conform to the society’s dominant gender norms’ supported by explicit or implicit unjust laws that socially harm the targeted group [12]. This normative binary understanding of gender that is displayed in the 2020 Bill is indicative of the broader state perspective that reinforces the idea of abnormality, excludes those who do not fulfil the heteronormative gendered expectations, further marginalises the LGBTQ+ community, and ignore those who defy gender normativity such as non-binary and inter-sex people deeming them invisible and non-existent.

India is a country with rich history and tradition of gender diversity [14], where in ancient time there was no social bias against transgendered people [15] and it is claimed that the same-sex relationships are not barred by the Hindu scriptures [16]. Criminalization of homosexuality in India was introduced by the British through the India Penal Code (IPC) in 1860, as the eunuch community posed ‘threat to colonial political authority’ and ‘public morals’ [17]. It is time for the government of India to reject its colonial legacy and embrace the gender pluralism and diversity of its ancients/ancestors.

Conclusion - The Surrogacy (Regulation) Bill 2020: Progressive or Retrogressive?

The 2020 Bill still propagates the outdated family values through blanket exclusion of LGBTQ+ community in a country with a long social history of third sex/gender [18]. Instead of keeping the momentum on social changes towards liberalism, inclusion and cohesion following the Apex court’s decisions in the aforementioned cases. In fact, research showed increased social acceptance and self-acceptance of sexual minorities following the decriminalisation of homosexuality in India [19]. It is evident that the Indian society is more tolerant, both socially and culturally, contrary to the government’s perception of traditional Indian society, which in fact portrays/perpetuates colonial ‘morals’. Instead of preserving gender binarism through institutional discrimination prolonging the structural injustices against the LGBTQ+ community, the government must amend the eligibility criteria for intending parent(s) to include any willing person who is unable to have a biological child (irrespective of their gender or sexuality). The 2020 Bill is yet to be tabled in the Parliament. The Indian government still has time not to let this opportunity to make an inclusive and progressive law slip.

/newpage

References

1. Twine F W (2015) 'Chapter VI: India: A Global Baby Factory' in *Outsourcing the Womb: Race, Class and Gestational Surrogacy in a Global Market*. Routledge, 54-61.
2. Government of India, Answer to the Parliament Question number 3395, 4 August 2017.
3. Parliamentary Standing Committee on Health and Family Welfare (2017) *One Hundred Second Report: The Surrogacy (Regulation) Bill, 2016*. New Delhi: Parliament of India
4. Press Information Bureau, 'Cabinet approves the Assisted Reproductive Technology Regulation Bill 2020: Path breaking measures taken to protect women's reproductive rights' (19 February 2020) available at <https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1603649> (accessed 13 February 2021).
5. Gola S, 'One Step Forward or One Step Back? Autonomy, Agency and Surrogates in the Indian Surrogacy (Regulation) Bill 2019,' *Int'l J. Law in Context*, Forthcoming.
6. *National Legal Service Authority v. Union of India* (2014) 5 SCC 438.
7. *Navtej Singh Johar v. Union of India*, W. P. (Crl.) No. 76 of 2016 D. No. 14961/2016
8. *Madan Mohan Singh v. Rajni Kant* (2010) 9 SCC 209 : (2010) 3 SCC (Civ) 655, 13-08-2010
9. Sitton JA (2000) 'Introduction to the Symposium, (De)Constructing Sex: Transgenderism, Intersexuality, Gender Identity and the Law,' *7 Wm. & Mary J. Women & L.* 1, <https://scholarship.law.wm.edu/wmjowl/vol7/iss1/2>
10. Sanger T (2008) 'Trans* governmentality: The production and regulation of gendered subjectivities,' *Journal of Gender Studies* 17(1): 51–53.
11. BBC News, Transgender women in India: 'This is how we survive' 20.11.2018 <https://www.bbc.co.uk/news/av/business-46031653>
12. Krieger N (2020) 'Measures of Racism, Sexism, Heterosexism, and Gender Binarism for Health Equity Research: From Structural Injustice to Embodied Harm—An Ecosocial Analysis,' *Annu. Rev. Public Health* 41:37–62
13. Monro S and Van Der Ros J (2018) 'Trans* and gender variant citizenship and the state in Norway,' *Critical Social Policy* 38(1): 57–78

14. Christie E, 'Indian Supreme Court recognises third gender' Human Rights Law Centre, 15.04.2014, <https://www.hrlc.org.au/human-rights-case-summaries/indian-supreme-court-recognises-third-gender>
15. Zeeshan N (Undated) 'Transgender people as a third gender – social recognition,' *Women Now* <https://womennow.in/transgender-people-third-gender-social-recognition/>
16. Safi M, 'Campaigners celebrate as India decriminalises homosexuality,' *The Guardian*. 6.09.2018, <https://www.theguardian.com/world/2018/sep/06/indian-supreme-court-decriminalises-homosexuality>
17. Biswas S, 'How Britain tried to 'erase' India's third gender,' 31.05.2019, <https://www.bbc.co.uk/news/world-asia-india-48442934>
18. Gayatri R (2005) *With Respect to Sex: Negotiating Hijra Identity in South India* Chicago: University of Chicago Press.
19. Jain D. (2013) 'Impact of the Decriminalization of Homosexuality in Delhi: An Empirical Study', *The Arkansas Journal of Social Change and Public Service*, <https://ualr.edu/socialchange/2013/01/13/impact-of-the-decriminalization-of-homosexuality-in-delhi-an-empirical-study>