

DEALING WITH SURROGACY IN INDIA: NEED FOR A COMPREHENSIVE LEGISLATION

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ABSTRACT

To highlight the need for an all-embracing law dealing with surrogacy. The article first discusses how highly commercialised surrogacy has become and the ill-effects of such commercialization primarily, the exploitation of surrogates. Second, it goes on to explain another side of the 'exploitation' discourse which views surrogates as independent choice makers rather than mere sufferers. Third, it analyses the mismatch of problem and solution in dealing with infertility and surrogacy which gives rise to other complications. The last part stresses on the necessity to pass a law promptly to prevent any further distress. Throughout the paper, a constant attempt has been made to engage with the legal implications of the issues discussed.

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Introduction

In India, commercial surrogacy has been going on for almost two decades without the legislature passing a comprehensive law on it. The lawmakers have only been formulating, discussing and revising the Assisted Reproductive Technology Bill, (hereafter referred to as ART) introduced first in 2008. However, in August 2016 this issue re-emerged as the ‘Draft Surrogacy Bill’ was announced.

The recent bill proposes to ban commercial surrogacy and allow only altruistic surrogacy, a step in complete contrast with the earlier bills which allowed it. Thus, the article will present the expanse of commercial surrogacy in India and discuss the change in the approach of law .It will analyse whether the anticipated law will address the problem of exploitation of surrogates and moreover critically examine the ‘exploitation’¹ discourse. The next issue discusses where the law lacks in recognising the needs, choices, rights of the people involved , the focus of the law being diverted from the actual issue .There will be an emphasis on the surrogate’s role, function and rights, though other parties will be focused on sufficiently.

¹ AMRITA PANDE , WOMBS IN LABOR: TRANSNATIONAL COMMERCIAL SURROGACY IN INDIA 6-9 (2014)

SHARMILA RUDRAPPA, INDIA'S REPRODUCTIVE ASSEMBLY LINE, VOL. 11, NO. 2, FROM SWEATSHOPS TO SURROGACY 22,27 (2012)

AMRITA BANERJEE , REORIENTING THE ETHICS OF TRANSNATIONAL SURROGACY AS A FEMINIST PRAGMATIST , VOL.5, NO.3 THE PLURALIST 107,127 (2010)

Analysis

Ongoing Commercial Practices and Changing Approach of Laws

Surrogacy in India is a transnational industry, valued in billions of dollars.² It is commercially viable due to its low costs, lesser waiting time, no legal hassles, availability of surrogates and donors, developed medical infrastructure and expertise, and the encouragement for medical tourism in India.³ This industry has created a ‘market in life or bio-economies’⁴ by providing for buying and selling of the reproductive abilities of persons and their commodification. This activity is not merely medico-scientific in nature but has larger socio-economic and legal ramifications. Its maximum impact is on the working class women. This industry’s labour can be classified as ‘intimate labour’⁵ which is meant for caregiving, nourishment, maintaining health and hygiene or sexual indulgences. It is so commercialised, that the hospitals provide packages to parents, right from getting the donors and surrogate to making hotel and visa arrangements for the parents and the child.⁶

The surrogacy contracts are kept strictly commercial and emotionally detached. Given the lack of bargaining power with the surrogate, the terms of the contract are usually decided upon by the doctors and hospitals.⁷ Further, there exists no standard law or guideline for the inclusion of compulsory provisions in the contract for minimum compensation, insurance covers, rights and duties of each party or free and informed consent. As a result, the balance tilts heavily in favour of hospitals and parents. So far, no attempt has been made through the draft bills to remedy this difficulty. In fact, the previous ART bills only shielded the parents and doctors from any responsibilities.⁸

² *Surrogacy redefined*, TIMES OF INDIA, Oct 20, 2015, <http://timesofindia.indiatimes.com/city/delhi/Surrogacy-redefined/articleshow/49465294.cms> (last visited on 13/09/16)

³ GLOBALISATION AND TRANSNATIONAL SURROGACY IN INDIA: OUTSOURCING LIFE 3 (Sayantani DasGupta & Shamita Das Dasgupta eds., 2014)

⁴ SHARMILA RUDRAPPA, DISCOUNTED LIFE: THE PRICE OF GLOBAL SURROGACY IN INDIA (2015)

⁵ *Id*

⁶ <http://www.surrogacyindia.com/Fees-Structure.html> last visited on 28/08/16

⁷ (n 3)

⁸ SAMA –RESOURCE GROUP FOR WOMEN AND HEALTH, THE ASSISTED REPRODUCTIVE TECHNOLOGY (REGULATION) BILL & RULES (DRAFT)- 2010 ISSUES AND CONCERN available on <http://www.samawomenshealth.org/publication/art-policy-brief-bill-and-rules>

Even though the contracts are kept strictly commercial, surrogates are expected to treat the foetus as their own and nurture it. Her own motherhood is evaluated before appointing her as a surrogate. The relation between the commissioning parents and the surrogate can go beyond contracts and form bonds between complete strangers.⁹ Such informal elements exist along with the formal ones.

Though surrogacy has been practised for at least two decades, no law has been passed on this issue. In 2005 Indian Council for Medical Research (ICMR), passed non-binding guidelines. But they have done little good, as they lack clarity, don't provide for the protection of surrogates rights or checks on the doctors or parents. However, the judiciary recognised the validity of commercial surrogacy agreements in the decision of Supreme Court in the case of *Baby Manji Yamada v Union of India*¹⁰. Usually, these agreements figure under the Indian Contract Act, 1872¹¹ and the legal proceedings are governed under The Civil Procedure Code, 1908.¹²

However, the laissez-faire policy of the Government has seen declining trends since 2012 where the eligibility criteria for applying to surrogacy has gradually excluded foreigners, homosexual couples, unmarried couples or single parents¹³ without providing any reasonable grounds.¹⁴ In 2016, only Indian heterosexual couples married for at least 5 years with proven infertility are allowed and that too for altruistic surrogacy only.¹⁵ Seeing the trend of the decisions, if the government is planning to shut down the industry it should,

⁹ AMRITA PANDE, COMMERCIAL SURROGACY IN INDIA: MANUFACTURING A PERFECT MOTHER-WORKER, 35 SIGNS: JOURNAL OF WOMEN IN CULTURE AND SOCIETY 969-992 (2010)

¹⁰ [2008] INSC 1656, JT 2008 (11) SC 150 (29 September 2008)

¹¹ The contracts have to satisfy S.10 of the Indian Contract Act, 1872 which provides that 'All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.

¹² PAULA GERBER & KATIE O'BYRNE, SURROGACY, LAW AND HUMAN RIGHTS 168-175 (2016)

¹³ Anil Malhotra, *Ending discrimination in surrogacy laws*, May 3, 2014, <http://www.thehindu.com/opinion/op-ed/ending-discrimination-in-surrogacy-laws/article5970609.ece> visited last on 29/06/16

¹⁴ The reasons that provided by the government to prohibit homosexuals, unmarried, foreign couples were to prevent unethical practices in surrogacy and to avoid exploitation of poor women. No reasonable nexus between preventing exploitation and allowing only a selected pool of people to have surrogacy is established. To read more - <http://www.thehindu.com/opinion/op-ed/ending-discrimination-in-surrogacy-laws/article5970609.ece> visited last on 28/09/16

¹⁵ *New surrogacy Bill bars married couples with kids, NRIs, gays, live-ins, foreigners*, Indian Express, August 25, 2016, <http://indianexpress.com/article/india/india-news-india/surrogacy-bill-sushma-swaraj-married-couples-can-now-opt-homosexuals/>

first, do it systematically by taking into account all the shareholders and the consequences to their interests given its highly commercialised nature and make sure it does not backfire by going underground. Second, remedy the existing problems in the ongoing practices rather than just banning the whole process, as it will result in having no redressal mechanisms for grievances.

The Exploitation Problem

Surrogacy is an industry largely unregulated by law. It thus increases possibilities of exploitation of the surrogate given her socioeconomic status, illiteracy, lack of resources and access to redressal mechanisms.

Physical risks that the surrogate faces include long-term side-effects of drugs administered for artificially preparing body for pregnancy, undergoing compulsory c-section which is risky for the surrogate but helps a controlled birth desired by parents,¹⁶miscarriages, physical pain and complications faced post-delivery, and any other long or short term effects that pregnancy usually causes to women. In addition, psychological stress resulting from the strenuous process is also common. Further, the whole exercise is not always economically viable for the surrogate. She may end up getting up only a small fraction of the whole payment, the larger portion being taken by middlemen and hospitals. There are no measures for paying compensation in case of complications, though the 2014 draft bill included compensation to be received in the case of death of surrogate.

Exploitation happens due to knowledge disparity between the surrogate and the medical practitioners as to what is done with her body, what is administered and what effects it has. This usually happens in the case of oocyte donation, where the donors are unaware of the number of eggs recovered and thus do not get adequate consideration. Her autonomy in decision making gets drastically affected when she cannot negotiate the contract or get legal aid in case her rights are violated. Her privacy is curtailed and

¹⁶ (n 3)

subjected to constant surveillance to manufacture the perfect baby, thus undermining her independent agency.¹⁷

In the capacity of a surrogate, her position, in the hierarchy she is the lowest thus, and the distribution of power is inequitable. Neither the contracts nor the proposed law makes any provisions to deal with the complications or risks the surrogate faces or to address this inequality.

If the aim of the legislations is to stop the exploitation, then it is not reflected in any of the draft legislations they have framed. The legislation first, needs to remove the idea of banning the victim being the solution for the problem of exploitation. This action only provides legitimization to the inequitable positions between classes and genders and portrays the activity as intrinsically oppressive, robbing off women of any independent agency. Rather, surrogacy could be considered as a form of labour. It would be subject to exploitation like any other labour form, but it could project the surrogate as an active one making a choice to participate in the market, rather than a passive agent.¹⁸ This perspective will let the woman decide whether working in a garment factory, subject to sexual harassment, hardships and low wages is exploitation or whether working as a surrogate, getting a decent sum, without losing self-respect, contributing to the family pool or relieving monetary distress and providing emotionally satisfactory work is.¹⁹

The woman's choice to participate in surrogacy is a signifier of empowerment. The First World woman who is economically well-off compared to the surrogate is making a consumer choice which she would not be able to do unless the third world surrogate agrees to become one. The surrogate's power can thus be highlighted through this. Their financial contribution makes them relevant in making family decisions and they assume positions of authority. The surrogate experiences hyper medicalisation of the whole pregnancy process which was absent for her own maternity, which in itself is a burden, now is as a tool for her growth. The same experience can be understood differently as a burden or as

¹⁷ *Id.*

¹⁸ (n 9)

¹⁹ (n 4)

empowerment. But the irony is that this could again confine her again to the role a 'mother'.²⁰

However, this discourse can exist only if the patriarchal attitude of the legislature is discarded. If coming up with a comprehensive legislation is the aim, then including all the practices (donation and surrogacy) in the reproductive markets are necessary.

The Problematic Focus of Law

Infertility in India is a major and an independent problem affecting around 30 million couples or the 10% of total population of couples.²¹ In India, unlike European or western countries where infertility is limited to the pain of being childless and inability to form a family, infertility has many more connotations and consequences. It is not merely a private matter for the close members of the family, but it becomes a topic of social ridicule and stigmatisation. It becomes a reason for marital disputes and gendered connotations especially for married women.²² Usually, this problem attempted to be solved by using costly, time-consuming and psychologically distressing medical technological interventions like In Vitro Fertilisation, Artificial Insemination or Surrogacy methods offered by private sector entities.²³

It is necessary to look at how has the Government dealt with this issue. It has not taken any concrete measures to overcome infertility issues for the couples, including providing subsidised infertility treatments in public health sector. It often quotes the argument of less availability of health services overall and the fact that it cannot afford to provide fertility treatment to an already booming population. In effect, the only recourse

²⁰ AMRITA BANERJEE , REORIENTING THE ETHICS OF TRANSNATIONAL SURROGACY AS A FEMINIST-PRAGMATIST , VOL.5, NO.3 THE PLURALIST 107,127 (2010)

²¹ Indileb Farazi , *The price of life: Treating infertility* , Aljazeera , June 3 2016 , <http://www.aljazeera.com/indepth/features/2016/05/price-life-treating-infertility-160524081956257.html> (last visited on 18/09/16)

²² TULSI PATEL, ASSISTED REPRODUCTIVE TECHNOLOGIES (ARTS) AND PUBLIC HEALTH: EXPLORING THE OXYMORON VOL. 43, NO. 1, SPECIAL ISSUE ON ANTHROPOLOGY AND PUBLIC HEALTH (2013)

²³ Gita Aravamudan , *Embryos in limbo: Proposed surrogacy bill remains silent on the fate of these nuclear life forms* , Sep 24, 2016 , <http://www.firstpost.com/living/embryos-in-limbo-proposed-surrogacy-bill-remains-silent-on-the-fate-of-these-nuclear-life-forms-3018092.html> last visited on 29/09/16

for childless parents is to approach private medical sector.²⁴ However, this attitude of government seems to be changing. In the preamble of the 2010 ART Bill surrogacy has been put forth as a solution to childlessness and infertility. In the 2016 surrogacy bill too, the scope of parents opting for surrogacy is limited to infertile couples. The government fails to adequately look at the issue of infertility and is trying to provide surrogacy as an answer to that issue. This becomes problematic. First, treating surrogacy as an answer to the issue of, discourages adoption. Further, it prevents any many other people desirous of becoming a parent, to commission a surrogate.

Addressing infertility with surrogacy emphasises the necessity of a biological link between the parent and the child.²⁵ It changes the focus of problem from childlessness to having a child with a biological connect. The draft bills on surrogacy do not mention opting for adoption as an equitable option, rather treat it as a last resort measure to childless couples. Adoption in Indian society though not an alien concept is largely not acceptable. Though laws of succession provide for an equal treatment of a biological and adopted child, the willingness to accept the child as one's own, by the parents and the society has not developed yet

However, adoption processes internationally or nationally are not easy. In India, adoption laws vary under various statutes and no uniform process exists. There are personal laws which govern adoption according to religious tenants and beliefs of the specific community²⁶. Along with those, there are other laws which apply universally to all , but in specific contexts like inter-country adoptions are governed Guardianship and Wards Act, 1890, the Juvenile Justice (Care and Protection of Children) 2000 for adoption of orphaned, abandoned children or the guidelines under Central Adoption Resource Agency (CARA) for in-country adoption.²⁷ Adoption processes are usually characterised by long waiting

²⁴ TULSI PATEL, ASSISTED REPRODUCTIVE TECHNOLOGIES (ARTS) AND PUBLIC HEALTH: EXPLORING THE OXYMORON VOL. 43, NO. 1, SPECIAL ISSUE ON ANTHROPOLOGY AND PUBLIC HEALTH (2013)

²⁵ (n 8) SAMA –RESOURCE GROUP FOR WOMEN AND HEALTH , THE ASSISTED REPRODUCTIVE TECHNOLOGY (REGULATION) BILL & RULES (DRAFT)- 2010 ISSUES AND CONCERN available on <http://www.samawomenshealth.org/publication/art-policy-brief-bill-and-rules>

²⁶ PARENTHOOD IN MODERN SOCIETY: LEGAL AND SOCIAL ISSUES FOR THE TWENTY-FIRST CENTURY (John M. Eekelaar & Petar Sarcevic eds. , 1993)

²⁷ STILL OUT OF FOCUS: STATUS OF INDIA'S CHILDREN (HAQ CENTRE FOR CHILD RIGHTS , 2008)

periods and bureaucratisation, due to which parents prefer surrogacy, covered only by patchy laws or no regulation at all.²⁸

Since the law is looking at excluding everyone other than infertile couples to opt for surrogacy procedure (that too only in altruistic form, which is again highly impractical) there is a necessity to correct the drawbacks of these adoption laws to provide a chance at parenthood for others.

As mentioned earlier, the proposed law is seeking to exclude anyone who is not an Indian infertile married couple for 5 years. This excludes foreigners, homosexual couples, single men or women.²⁹

Discrimination based on sexual orientation of homosexuals only reflects the Indian parliament's resistance and unwillingness to accept homosexuality, legalise and allow them the freedom to have a family. Again the discrimination based on marital status is unfounded as single parents either a male or female are eligible to adopt under the existing laws. Does the legislation want to reflect an attitude of treating adoption inequitably to the choice of surrogacy (with or without biological links with the child)? Also, limiting the pool of applicants for infertile couples it actually limits the choice of fertile singles who would not want the institution of marriage and raise kids born through surrogacy. By imposing this necessity of marriage the state is trying to impose its own orthodox notions of family and parenting on the citizens.

What is even more abhorrent, is that the proposed law is even talking of disallowing surrogacy for parents if they already have a healthy child. Only in the case they have a mentally/physically challenged or terminally ill child they will be allowed. This throws open the entire debate of whether the state has the right to interfere in the family organisation of its citizens, by deciding the options available for procreation and placing restrictions on how and when such options may be availed. Also, it makes the situation problematic for parents with differently-abled children. Does the legislation propose to

²⁸ LAW AND GLOBAL HEALTH: CURRENT LEGAL ISSUES
(Michael Freeman, Michael D. A. Freeman, Sarah Hawkes, Belinda Bennet eds., 2014)

²⁹ (n 15)

compare the joys of parenthood acquired by having a differently abled or terminally ill child to that of a normal child? This proposition raises serious questions regarding rights and dignity of children in general and specifically for children with special needs.

All of these discriminations without any justifications should be necessarily removed before the legislation is passed.

Disadvantages of Delay in Passing the Law & Continuing without a Legislation

The practice of surrogacy was recognised by the Government first in 2005 by passing ICMR guidelines and later in 2008 judiciary recognised its validity³⁰. This was followed by passing the draft bill in 2008 which has been revised several times and several changes and developments have taken place. Yet there have been no specific efforts to discuss the bill and pass the law. For more than a decade this industry has been running unregulated. This situation can be contrasted best with Israel's legislations on surrogacy.

In 1996, Israel put in place a law to regulate surrogacy which is compliant with its culture and traditions, its state's *pro-natalist* policy and a practical approach to the *social importance* of a family. Its laws aim at giving the state power to regulate this activity and also, provide autonomy and privacy to the individuals involved. It has instituted committees to approve the agreements, protect the interest of all parties, provide transparency and has also made provisions as to what should be done in the case of marriages breaking down or any such contingent events. Recently from 2012 onwards it allowed even gay couples to opt for surrogacy.³¹ This model can be emulated by India in the formulation of an effective legislation with requisite modulations.

The lackadaisical attitude of the legislature is harmful to the stakeholders involved in the process- especially the surrogate and the commissioning parents. The absence of law restricts the parties from placing their grievances before a proper redressal forum and obtaining adequate remedies. At present, only the legality of contracts has been recognised,

³⁰ *Baby Manji Yamada v Union of India* [2008] INSC 1656, JT 2008 (11) SC 150 (29 September 2008)

³¹ LAW AND GLOBAL HEALTH: CURRENT LEGAL ISSUES
(Michael Freeman, Michael D. A. Freeman, Sarah Hawkes, Belinda Bennet eds., 2014)

yet many other issues like rights of the parties, duties of the medical practitioners involved, an imposition of punishment or fine for any misconduct cannot be decided upon by the court as is not permitted to legislate.

Unfortunate events and legal battles have taken place due to a lack of a law. Internationally, the *Baby M* case in New Jersey USA³² happened where the surrogate refused to give up the child born through artificial insemination and was allowed by the courts to keep it, taking it away from the parents.³³ Or a more recent case where an Australian couple abandoned a boy born through a surrogate in Thailand while adopting his twin sister.³⁴ Though these cases haven't happened in India, we should be only warned about the consequences of working without laws. Closer home, other than *Baby Manji case*, in the *Jan Balaz*³⁵ case a German couple had to fight a two-year long legal battle to take their twin sons born through surrogacy home. The children were stateless citizens, neither belonging to Germany nor India, as Indian Government as refusing to grant them Indian citizenship.³⁶

In light of the above-discussed issues, it is of utmost importance that a sensitive legislative framework is developed promptly.

³² 'Baby M', 109 NJ 396, 537 A.2d 1227.

³³ Dhananjay Mahapatra , *Baby Manji's case throws up need for law on surrogacy* , TIMES OF INDIA , Aug 25, 2008, 02.38 AM IST <http://timesofindia.indiatimes.com/india/Baby-Manjis-case-throws-up-need-for-law-on-surrogacy/articleshow/3400842.cms> last accessed on 15/09/16

³⁴ Kathy Marks , *Down's syndrome baby: Thai surrogate mother of 'abandoned' twin Gammy will keep him – and says she doesn't blame Australian couple* , Sunday 3 August 2014 <http://www.independent.co.uk/news/world/australasia/thai-surrogate-mother-of-abandoned-downs-twin-gammy-will-keep-him-and-says-she-doesnt-blame-9644626.html> last accessed on 15/09/16

³⁵ Jan Balaz v. Anand Municipality & 6 – Respondent(s) , Gujarat HC at Ahmedabad <http://blog.indiansurrogacylaw.com/gujarat-high-court-rules-on-surrogacy-case/>

³⁶ Dhananjay Mahapatra , *German surrogate twins to go home* , May 27, 2010, 02.57 AM IST <http://timesofindia.indiatimes.com/india/German-surrogate-twins-to-go-home/articleshow/5978925.cms> (last accessed on 18/09/16)

Conclusion

Surrogacy has the capability to defy the gendered and oppressive notions of motherhood imposed on women, their assumed passivity and responsibility to rear children, the private non-interfered domain of a family and the sacred of the mother-child relation. It crushes the naturalised idea of motherhood and patriarchal division of labour—where it could mean both production and reproduction.³⁷

This is an important socio-legal and commercial issue which needs to be legislated on. If the legislature is trying to change the nature of this activity from commercial to strictly altruistic, it should do so only after taking care of the interests of all the stakeholders, consulting them directly and discussing it sufficiently in the public sphere. This situation itself provides an excellent opportunity to the state to review its stand on the private matters of family like parenthood, childbirth, infertility, adoption and take a crucial step can be taken towards empowerment of women.

³⁷ (n 9)