

TOO LITTLE ALTRUISM TO START WITH: GOVERNMENT'S OVER OPTIMISTIC VIEW OF PEOPLE CREATES A PESSIMISTIC SITUATION FOR SURROGATES

*Written by **Pranita Gupta***

3rd Year BA LLB Student, O.P. Jindal Global University, Sonipat, India

The word 'surrogacy' has been derived from the Latin term 'surrogatus' meaning substitution, and hence refers to a practice whereby a woman gives birth to a child for another couple, substituting the intended mother's womb. If the woman agrees to act as a surrogate in return of some payment other than medical expenses, it is termed as commercial surrogacy and altruistic surrogacy otherwise; that is, in case of no monetary incentive. Surrogacy also differs based on the procedure. In gestational surrogacy, the woman only provides her womb and is not genetically related to the child whereas in case of traditional surrogacy, the woman provides her womb along with eggs and is the genetic mother of the child. The act of carrying a child for nine long months has special and sacred connotations attached to it and is perceived as an immensely emotional and momentous phenomenon. Therefore, such a practice wherein the defining act of a mother is substituted, the practice itself becomes a matter of debate in terms of morality, swinging between the reduction of a female body to merely bearing children and the right to do whatever with one's body. The aspect of putting a monetary value in cases of commercial surrogacy does not make it any less controversial. In India, surrogacy is greatly stigmatized and forming laws to regulate it efficiently and justly is a complex duty.

India, until January 25th, 2022, did not have an act incorporating distinct rules and regulations in order to supervise surrogacy, fertility clinics were merely guided by guidelines issued by the Indian Council of Medical Research (ICMR); several bills had been passed regarding the same in 2008, 2013, 2016 and 2019, none of which developed into an act. Until 2015, transnational surrogacy boomed in India as it was the most favored market for surrogates because of the "willingness of women to rent their wombs at a cheaper cost and the availability of good medical facility," the largescale business of which hyper exploited Indian working-class women. Such exploitation of renting wombs at cheap prices by the rich whites reiterated the

narrative of global hierarchies of class and race and therefore, the Supreme Court of India imposed a ban on transnational surrogacy in India in 2015 claiming that “it led to exploitation of poor women from India by the rich white clients from the west.” While the monetary benefit received from abroad transactions had been substantial, they were not significant enough to neglect complications pertaining to race, distance, and money.

The complications in the practice of surrogacy within the country are not any less. There exists strong arguments both in favor and against surrogacy. The recently implemented Surrogacy Act seeks to curb such complications by putting a complete ban on commercial surrogacy. The Act states that “no surrogacy clinic, pediatrician, gynecologist, embryologist, registered medical practitioner or any person shall conduct, offer, undertake, promote or associate with or avail of commercial surrogacy in any form” (Surrogacy Regulation Act); thereby prohibiting commercial surrogacy and implementing guidelines for altruistic surrogacy, wherein except for the medical and insurance expenses of the surrogate, no other expenses are covered by the intending parents. This clause is problematic since the main incentive is discarded. As put by a surrogate woman – “I don’t think there is anything wrong with surrogacy. We need the money, and they need the child,” commercial surrogacy is viewed as a mutually beneficial arrangement between two women. It can be safely said that most of the women enter into such an arrangement solely because of the monetary benefit and while it can be argued that such a practice only perpetuates inequality between the rich and the poor, and it is not the exercise of free will but mere economic desperation that causes women to indulge in it, outright banning of commercial surrogacy will not put an end to its exploitative nature. The surrogates face exploitation in terms of adequacy of economical returns, care during and after the treatment, bona fide communication, and knowledge, etc. and provisions regarding the same should be formed to reduce exploitation. Prohibition of commercial surrogacy will result in shifting these activities underground, resulting in no supervision and hence, more exploitation.

The Act, with the objective to regulate altruistic surrogacy, has established a National Surrogacy Board at the central level, and State surrogacy boards. While this is beneficial to keep a record and track of related activities, resulting in creating a healthy environment for the unborn child and the surrogate mother, curbing of commercial surrogacy has been termed as ‘restrictive’ by various doctors, which can promote “unscrupulous activities as it doesn’t allow commercial surrogacy and surrogate has to be relative of the couple. Finding a relative/ known

person to do surrogacy is going to be a tough path for couples. It decreases the horizon of the people who can undergo surrogacy program.” There have been progressive provisions introduced like the right to withdraw to the procedure any time before the implantation of embryo in the womb and the intending couple cannot abandon the surrogate the child; however, the majority of the provisions seek to restrict the scope of surrogacy. Along with prohibiting commercial surrogacy, the pre-requisites listed for a surrogate mother remain confined and ambiguous. In case of altruistic surrogacy, the surrogate has to be a ‘close relative’ of the intended parents where the definition of the same is not clarified, and also excludes single parents and homosexuals to avail surrogacy services. The Act has been termed as discriminatory towards the members of the LGBTQ+ community and unmarried couples by making the Act a ‘needs-based’ rather than a ‘right-based’ legislation; thereby contravening the ‘right to reproductive choices’ under Article 21. In the words of Rajya Sabha MP from Assam, “The ban on commercial surrogacy is another example of how out of touch lawmakers are with ground realities. You say this is an attempt to curb exploitation, but in fact you are curtailing the rights of woman surrogates by removing the commercial component. Is she meant to provide these services free of cost?” Considering the stigma around fertility, women already face immense pressure of producing children, and given the lack of agency women possess over their bodies, the commercial activities surrounding surrogacy are likely to go underground rather than being discontinued.

It can be argued that such restrictions are necessary since increase in the commercialization of the process inflamed unethical practices, abandonment of the new-born after the process, importation of human embryo and gametes, and mistreatment of the surrogates. The commercial aspect also tends to “reiterate the transient role and disposability of the women,” and also objectifies them, reducing them to mere vessels. The physical, economic, and social toll on women surrogates cannot be neglected. The process requires the surrogates to consume a lot of medicines, vitamins, injections, steroid shots and undergo a number of tests and screenings resulting in immense discomfort and pain. However, debarring the practice altogether will only augment the complications, further stigmatize the surrogates, forcing it to go underground, thereby increasing risks of misuse. Hence, it is necessary to enforce laws and regulate it in a way that takes care of everyone involved – the intended parents, the surrogates, and the agencies. Moreover, the Act in question has left the medical practitioners seeking clarity regarding multiple clauses. The Act states that no medical clinic/practitioner is allowed

to perform any surrogacy unless registration has been completed, however, no authorities for registration have been appointed yet. The Act also lays out punishment for exploitation against the “surrogate mother or the child born through surrogacy in any manner whatsoever” (Surrogacy Regulation Act) but omits what passes as exploitation.

While there are multiple forms of exploitation; with the delivery of the child, the surrogate mother is often disregarded. With no post-delivery counselling or care to deal with the physical distress, such exploitation is less likely to occur if one’s close relative is involved. However, in a developing country like India where “surrogacy is fast emerging as a survival strategy,” termination of commercial surrogacy is unfeasible. Rather, laws should focus on ridding exploitation by increased supervision and holding surrogacy agencies responsible. Laws should be formulated on the modus operandi of these agencies and list their obligations towards their clients as well as surrogates. Surrogates are drawn to participate because of economic incentives and the same should be adequate, proper counselling should be held before, during and after the treatment, steps should be taken for a more systematic, organized, and reliable structure regulating the act of surrogacy.