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SURROGACY: ENABLEMENT OR EXPLOITATION?Aishwarya Gupta¹**Introduction**

The word surrogate has been derived from the Latin word “surrogatus” which denotes ‘chosen to act on behalf of’ or a ‘substitute’. The Supreme Court of India has defined surrogacy as “a method of reproduction, whereby a woman agrees to become pregnant for the purpose of gestating and giving birth to a child she will not raise but hand over to a contracting party” (Baby Manji Yamada case 2009). Surrogacy is the condition in which a surrogate mother agrees to bear an offspring for someone who is willing but incapable or unwilling of bearing a child on their own. Such a scenario has been known to arise due to various factors like the wife might be infertile or physically incapable of carrying an evolving foetus. When such a situation arises, the surrogate mother acts like the biological mother and provides the foetus, which has been conceived through artificial insemination with the sperm that has been donated from the intending couple, the required care and nutrition. This is known as Traditional Surrogacy (Sharma 2007). Alternatively, there are situations when the wife despite being fertile is unable to carry a developing foetus because of conditions like multiple sclerosis that might endanger her life if she happens to become pregnant. In such scenarios, an embryo is implanted in the surrogate mother’s uterus which is the culmination of the infusion of the wife’s eggs and her husband’s sperm conceived by in vitro fertilisation (Rothman 1990). This is known as Gestational Surrogacy. With the growth of surrogacy and the gradual understanding of it, more and more legal and moral issues have come to the surface. Now, from the human rights perspective, ‘Surrogacy’ is seen to involve the rights of three parties that are, the commissioning parents, the surrogate mother, and the surrogate child. Thus, this has emerged as a topic of speculation and debates worldwide with an urgent need to form appropriate laws regarding this untouched domain.

Despite the backlash due to several ethical concerns, surrogacy seems like a revolutionary idea in the procreative medical field and has grown rapidly in popularity

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and demand ever since, as it seems to be a boon for the ones who are unable or unwilling to reproduce themselves.

Theoretical Approaches

The theoretical literature and the feminist philosophy behind surrogacy have mostly been seen to pertain to ethical grounds. These ethical dilemmas have been pierced through to give rise to two contrary models, the reproductive liberalism (Coveney and Kay 1987) model and the exploitation model (Daunt 1991), one to argue in favour of surrogacy and the other to condemn it on moral grounds.

The predominating Western reasoning in favour of surrogacy seems to rise from the notions of ‘choice’ and ‘autonomy’ based on the premise that every individual should have the right to make their own decisions regarding their reproductive activities. Liberal feminists promote equal treatment in matters concerning their own body, as any special treatment would only undermine their democratic and reproductive freedom. Their contention is that, not giving them autonomy would only cast surrogacy as something no different than any other wage labour contract. Though advocating this view, they also believe that such practice should be regulated to avoid any abuse and confusion that are deemed to arise.

In contrast, the dominant Western argument against surrogacy is based on the exploitation criterion that is two-fold, reflection of exploitation of class and commodification. The argument is that surrogacy arrangements would enable upper-class individuals to use their influence and power over poor women of colour and from Third World nations thus resulting in exploitative and racist implications. This would potentially serve the opposite of giving women control over their bodies, as in this sphere the ‘autonomy’ is an idealistic myth which would only be possible in similarly situated people. This paradigm also highlights the fact that choice does not arise in a socio-cultural vacuum. A purely rational decision would require both the ‘means’ and ‘ends’ aspects to be rational. However, in today’s scenario where poor women and women of Third World nations have spent endless years in physically and economically exploitative and hazardous work conditions where the pay was also low, the decision to become a surrogate mother seems less exploitative option (Bannerjee 2010) but not a decision she would make, had it not been the only way to feed her children. This ‘choice’ of women to choose surrogacy over other wage labour is as free as a chained bird. As for the commodification argument, these feminists argue that surrogacy is merely reinforcing inequalities between men and women. This practice shall allow

infertile couples to seek arrangements that maximise the value of their babies (Birnbaum 1997) and reduce the role of women to only ‘breeders’.

However, it can be said that both these arguments seem to have incomplete understanding as they fall on two ends of a spectrum. The reality remains that, even if surrogacy is ethically condemned and legally prohibited, the economic inequalities and the practice shall not discontinue. This should not lead to the understanding that mere existence confers legitimacy but it demands us to look into the ‘intention’ and the ‘effect’ of surrogacy (Spar 2005). The ‘intent’ behind producing children is almost definitely good, despite the argument that it may be to exploit and belittle women. Statistically majority of the surrogate mothers are either unaffected or happy by their contribution, and in certain exceptional scenarios there has been deviant behaviour by these mothers against the practice. Hence, denying women this right shall seem more harmful than productive.

Understandably, a third group of feminists recognise both liberating and oppressive potentials of surrogacy and new reproductive technologies including making parenthood possible for homosexual couples and single parents and call for a less critical approach to redefine family and parenthood thus, advocating for surrogacy regulation so that its worst aspects are eliminated and its best ones are retained.

What can be concluded after taking into account the varying approaches is that, even within the feminist discourse the surrogate’s autonomy and choice are given significance and the debate revolves around this. Some view this practice as a means to empower women professionally and economically by granting women the freedom to better their living conditions and by granting them this choice. However, it should also be understood that regardless of all the efforts in making this practice fair and respectable, the limitations in the form of power gaps between the intended parents and the surrogate mother shall continue to exist.

Worldwide Developments

History

The earliest mention of Traditional Surrogacy can be traced back in the form of regulations in the famous Code of Hammurabi which dates back to 1800 BC. It is found to be mentioned quite a number of times in the Hebrew bible as well. In fact, traditional surrogacy has even been illustrated in the Bible where Hagar, Sarah’s handmaiden had borne her husband, Abraham’s child as she herself was infertile.

While traditional surrogacy has been in practice for thousands of years, gestational Surrogacy is a recent development. The first in-vitro fertilization (IVF) baby was born in 1979. The emergence of the first baby from an egg donation was found a mere five years later and the amalgamation of these two innovative technologies finally ensued in the arrival of gestational surrogacy, which was first performed in 1985. It has grown rapidly in popularity and demand ever since.

Current Scenario

Surrogacy faced its first real legal controversy in 1986 where the issue arose when the traditional surrogate refused to part with the child (In Re. Baby M 1988). After a lengthy and tedious legal struggle which went on for two years, it was finally settled that the intended parents shall be retaining custody, as the ‘intention’ of creating the child was seen as the criteria. As surrogacy has only grown over the years, more and more legal and moral issues have emerged and thus it has been a controversial topic of speculation worldwide.

Germany² presently forbids surrogacy arrangements, and though the status of surrogate Parents has been ruled as legal, it treats activities such as donation of eggs, embryo donation and artificial insemination to be criminally prosecuted (Vaughn 2014). The ruling that paved way for the legalization of children born via surrogacy outside Germany involved a homosexual couple. This baby, born in California in 2010 via a surrogate, was registered as of these two men in the United States. However, back in home despite the baby having lived with the fathers in Berlin for three and a half years, was declined recognition as their child by the German authorities. The Supreme Court adjudged that the decision of the foreign authorities should be respected as “part of a child’s welfare to be able to rely on the parents to have continuous responsibility for its well-being.” A similar situation is seen to be prevalent in England where though under the Surrogacy Arrangement Act, 1985 the surrogacy arrangements are legal, advertising and other commercial aspects are prohibited (Parliament of UK 1985). Initiating and involving oneself in commercial Surrogacy agreements is considered to be a criminal offence (Ryznar 2010).

In countries of Italy, Sweden and Norway, the above-mentioned procedures are not recognised and are treated as criminal offences whereas a little more liberal approach is taken in Belgium and Netherlands which allow altruistic Surrogacy but ban commercial surrogacy.

² See German Embryo Protection Act 1990 and Section 14b, Adoption Placement Act Sec. 1(1) No. 7.

The legality of surrogacy across the fifty U.S. states can only be described as remarked by Richard F. Storrow has as, “a microcosm of the rest of the world, with the whole range of global attitudes towards surrogacy subsumed within its borders” (Gerber and O’Byrne 2016). There are some states with no legislation on surrogacy, but nearly half of the states have some regulations in place. There are also some states that are being governed only by the precedents set by case laws. For example, the right to marriage, family, abortion, child rearing, procreation and education was recognised in the case of *Eisenstadt vs Baird* (Eisenstadt case 1979) by the Federal Supreme Court of U.S. which laid the foundation of the broadening of constitutional protection given to both a married couple and a single individual to procreate. In *Johnson v. Calvert* (Johnson case 1993), the Californian Supreme Court extended this protection to surrogacy contracts and held them to be legal and valid on the grounds of public policy.

The majority of the states seem to show a very liberal and favourable approach towards surrogacy. However in state of Indiana, surrogacy contracts are “void and unenforceable” and in Michigan and New York, compensated surrogacy is forbidden, fined and even criminally prosecuted. The Assisted Human Reproduction Act, 2004 in Canada prohibits surrogacy, whereas France deems any kind of surrogacy arrangement, irrespective of being altruistic or commercial, prohibited.

In contrast to the abovementioned countries, commercial surrogacy continues to be legal in India merely due to the lacuna in its laws. Therefore, understandably India has become the hub and a favourite for the couples seeking surrogacy. There is an exodus attracted to India every year because the procedure costs less than one third of what is in the United States and United Kingdom and the agreements are inherently biased towards the Intended Parents as they enjoy a position of financial power and the lack of any regulating system (Nair 2016).

Indian Scenario

Early Developments

India itself is no stranger to surrogacy and its roots can be found in Indian history as well. The world’s second and India’s first In Vitro Fertilization (IVF) baby Kanupriya alias Durga was born in Kolkata on Oct. 3, 1978. Since then, the field of Assisted Reproductive Technology (ART) has grown exponentially.

In India, the right to life is said to include the ‘Right to Privacy’ which protects not only a citizen’s privacy but also matters concerning his marriage, procreation and family

among others (R. Rajgopal case 1994). Along with that the ‘Right to Privacy’ has also specifically been held to include within its ambit the ‘Right to Reproductive Autonomy’ (B. K. Parthasarathi case 2000). The problem that arises now is that reproduction today would also extend to resorting to different methods such as that of Adoption, the IVF Technique, or even the ART. Thus, the State’s interference or imposed restrictions on such procreative activities shall amount to a direct violation of one’s Fundamental Right. At the same time, the lack of a strict legal regime is doing more harm than good. An absence of a codified legislation in this regard has led to problems like unethical surrogacy practices; rackets dealing with human embryos and gametes, and the exploitation of surrogate mothers. As inhumane as it may sound, even cases of abandonment of children born out of surrogacy are rampant, mainly because there are no consequences to be faced by the wrong doers (Nair 2016). India is viewed as the surrogacy-hub with a phenomenal exodus of infertile couples avoiding adoption and looking for cost-effective methods to bear children. The recourse of adoption, in addition to being time consuming, is also not the foremost choice for the couples, as the child is not a ‘part’ of them and has no biological connection to either of the parents, unlike gestational surrogacy where one of the parents preferably donates either sperms or oocytes, or both. The need of the hour is to drive home a legislation crafted in such a manner so as to cater to the needs of infertile couples looking for child-bearing methods, keeping in mind the societal, cultural as well as moral ramifications of such procedures, in a society like ours, whilst also keeping it open as an option for those seeking recourse. The law should act as a defender of liberty and rights of the people and therefore, requirement for legislation is a necessity (Government of India 2017).

Current Scenario

The 228th Law Commission Report in August 2009 had proposed for a ban on Commercial Surrogacy and to allow Ethical Surrogacy so that commercialization and possible exploitation of surrogate mothers and children is prohibited. It stated that an upsurge of ART methods in India clearly gives the picture to the fact that infertility is a problem that requires some solution, as it hinders one of the most fundamental processes that form basis of a society- reproduction. This is all the more important here because in the Indian society, the inability to bear a child is seen as a flaw in a woman who is married and she is held responsible for not being able to continue the family legacy leading to the stigmatisation of the woman. Thus, infertility has strong social and psychological consequences. In such scenarios, surrogacy comes as a supreme saviour (Government of India 2009).

However, the legislative framework related to surrogacy is still stuck at the premature stage. At present the agreement between the parties is based on the 'Indian Council of Medical Research (ICMR) Guidelines' which are the only regulating source and often flouted as they hold no binding value in the eyes of law. The codified law is yet to be enforced, but with The Surrogacy (Regulation) Bill, 2016 pending at the Lok Sabha, it does not seem like a distant dream anymore.

Analysis of the Surrogacy Regulation Bill, 2016

The clearance of the Surrogacy (Regulation) Bill, 2016 by Union Cabinet in India can be seen as a welcome step towards the country accepting more unconventional methods of reproduction. The Bill seeks to bring about a more regulated mechanism for Surrogacy by proposing to establish a Surrogacy Board at the Central (Sec. 14) and State (Sec. 23) levels, and other appropriate authorities. It further proposes to put a complete ban on Commercial Surrogacy (The Surrogacy (Regulation) Bill 2016: Sec. 35), including the sale and purchase of human embryo and gametes, and to only allow Altruistic Surrogacy for 'infertile' couples. Additionally, the Bill also proposes the mandatory registration of the All Assisted Reproductive Technology (ART) clinics (The Surrogacy (Regulation) Bill 2016: Sec. 10). The surrogacy clinics will be allowed to charge for the services rendered in the course of surrogacy, but the surrogate mother cannot be paid anything in addition to the medical expenses as a fee or incentive as the Bill prohibits any such remuneration. This ensures that the concerns regarding women and babies being treated as commodities in such procedure are put to rest because commercial surrogacy has been argued to convert surrogacy into a business activity which seemingly falls foul of Article 23 of the Constitution of India, where the word 'traffic' which involves 'buying' and 'selling' connotes an element of trade. Along with that, the Bill ensures that the child born through surrogacy is not abandoned (Sec. 7), and is taken proper care of, like a biological child. It shall also be granted all the rights that a biological child of the intending couple would have had as that is a major cause of concern in the Indian society. The Bill also provides that the surrogate mother should be a relative of the intending couple (Sec. 2-ze). This is due to the legislators' belief that altruistic surrogacy approach is better suited because the baby is nourished by their relative ensuring a better probability of lesser complications arising between the intending parties as they shall not be complete strangers. The Bill only allows married women with a child of their own to be allowed to carry a surrogate child (Sec. 4(b)(I)). This ensures that the surrogate mother is not socially ostracised for her decision to bear a child for someone else, as an unmarried pregnant woman in this country is stigmatised and faces shame along with her family. In a society like ours, where pregnancies before or without marriage are stigmatized to the extent of raising questions regarding the

woman's character, this Bill indeed puts forward a welcoming proposal. A woman who already has been through nine months of pregnancy would be in a better position to do what is best, for her own health and that of the prospective child. She would be free from the scrutiny of the society and thus would be able to undergo the process more willingly and without any mental or psychological duress, whatsoever. Such provisions show the ingenuity of the legislators as they have tackled the complicated problems in a diligent manner which when approved shall act as a beacon of light to bring about a change in the mind-set of India regarding the surrogacy.

Criticism and Suggestions

“Surrogacy is a complex relationship involving the transfer of custody of a child born out of an artificial reproductive technique, as against the order of nature or the conventional mode of reproduction, making it difficult for the parties to validly complete the transaction” (Kumar 2016). Therefore, despite the commendable effort to bring such a powerful legislation into force to curb such a vastly growing and uncharted phenomenon, there are a lot of loopholes and deficiencies in the Bill that should be addressed.

Firstly, a mechanism where all surrogacy agreements are pre-approved should be set up so as to diminish the evil affects and the abuse through unjust contractual terms and to safeguard the rights of the surrogate mother as well as the child. The Family Courts already in place can authorise such contracts and supervise them.

Secondly, no provision has been included which deals with the counselling aspect. Mandatory psychological counselling, legal assistance as well as healthcare insurance before the procedure is conducted should be resorted to, in order to inform her of all the pros and cons and thus, make her consent and decision voluntary and free. Such counselling should also be followed up after the child has been born so as to ease the process of giving away the surrogate child to the intended parents.

Thirdly, with respect to the criteria to determine the eligibility of the intending couple seems to be unreasonably restrictive on certain aspects, such as the age should be between 25 years to 50 years in case of female and between 26 years to 55 years in case of male. Also, the limitation that the intending couple should be married for at least five years, is socially constructed rather than based on self-evident or empirical evaluations, and render a vast portion of the society ineligible. Such restrictions, especially based on the marital status of a person violates the right to family under Article 21 of Indian

Constitution as it rules out the LGBT community and single persons from adopting this method to have a child. A 2013 survey by the Centre for Social Research along with the Ministry of Women and Child Development (WCD) suggested that the law should allow LGBT, single parents and unmarried couples to opt for a surrogate child; however the Bill has ignored this recommendation (Kar 2016). The Bill also specifies that surrogacy shall be available only when 'either or both members of the couple are suffering from proven infertility'. This fails to take into consideration the scenario where a woman is fertile but for whom child bearing can be life threatening. Another issue with the abovementioned rules are that they are absent in the adoption laws. The differential treatment between the eligibility criteria for those who want to adopt and those who want to pursue surrogacy methods seems to have no sensible justification and are merely unreasonable. The surrogate mother and the intending couple also require to obtain eligibility certificates from the appropriate authorities but no prescribed time limit has been provided within which these should be granted. Additionally, there seems to be no provision of an appeal process in the circumstances where the application has been rejected. This provision of a set time limit is also absent when an approval is sought from an appropriate authority to abort the child. These loopholes shall create complexities and hindrances and should be addressed.

Fourthly, the present scenario lacks any international agreement or convention to regulate surrogacy. This creates complexities when foreign parties travel for Surrogacy services and enter into surrogacy agreements outside their residing countries, as the home country may refuse to grant recognition to the child and thus, the issue of the child's citizenship and legal status shall arise. This brings forth the issue of the transnational surrogacy. In India, the first reported case on the issue of a child born out of surrogacy being abandoned was *Baby Manji Yamada vs Union of India* (2008). Another case which involved the issue of citizenship of two twin children was *Jan Balaz vs Anand Municipality & Ors* (2010). Here, the Gujarat High Court had to adjudicate upon the statelessness of these children as Germany, the home country of the intended parents, had refused to provide them the legal status. Such instances support the government's objective of barring other countries from the surrogate procedures of our country and can be justified on two grounds, first to stray away from complexities arising with respect to nationality and the like and second, to prevent the exploitation of Indian women. Both of these can be seen to ensure protection of the interests and rights of the surrogate mother and the unborn child. This seems like a reasonable decision at the moment because the world at large has not yet reached a consensus on the issue of surrogacy. This disparity in the laws in different nations and the lack of any international agreement along with India's poor economic conditions where there is a

dearth of work, make India an easy target for exploitation.

Lastly, no appropriate alternative is provided for the couples who cannot find a volunteer surrogate within their family which brings us to the need of commercial surrogacy, as the ultimate purpose behind surrogacy shall remain unfulfilled if it is banned. This provision though crafted wisely by keeping in mind the social scenario and balancing the need for reform without drastically changing the social fabric of the Indian society is also very short-sighted. As far as women 'renting their wombs' (Chang 2009) and converting their bodies into 'mere baby making machines' is concerned, what should be done instead of completely wiping out commercial surrogacy is that a cap should be put on the number of children that the women can give birth to and heavily regulate the practice, which would inevitably decrease the harmfulness. Another suggestion presented in the PRS Report was that '*compensated surrogacy*' should be permitted which should be viewed as a form of labour that requires adequate labour protection by granting minimum conditions of work. Smt. Lalitha Kumaramagalam, Chairperson of National Commission for Women also had a valid suggestion that more focus should be on providing skill development training, educational services and jobs in order to empower such women from the poor strata of society who are lured into commercial surrogacy agreements (Government of India 2017).

The reality is that while we struggle with the ethics of this practice, economically disadvantaged women undertake equally risky and exploitative occupations where there is an equal if not more risk of physical and psychological trauma. Banning commercial surrogacy and regulating altruistic surrogacy in India is a lost opportunity and an exercise of moral crusading.

The fact remains that demand for surrogacy exists and the Bill shall merely drive the entire industry underground. It is imperative for the Legislation to address the loopholes and re-look into the provisions to ensure that the Legislation is such to benefit all; surrogate mothers, prospective parents and the children born out of this process. The Bill should also reflect the liberal approach of the legislators and their attempt to break conservative stereotypes, as it is only then that the society shall progress.

Conclusion

The practice of surrogacy, be it Altruistic or Commercial, Traditional or Gestational, in any part of the world is not without controversies and loopholes. Therefore, intense regulation is the dire need of the country to provide a mechanism that regulates and

keeps a check on it. Also, once the society has accepted altruistic surrogacy, the legislation in place should be modified to include laws on commercial surrogacy as well because a blanket ban shall only drive the commercial surrogacy market underground, thus making it worse for all concerned. The example of the contraceptive methods which can be taken as birth control was seen for centuries as an abhorrent and profane method, and that is just how surrogacy is viewed in the present times by many societies. However, birth control is a flourishing market today which is also highly regulated and accepted. Surrogacy can also be seen to take a similar path. The demand for surrogacy services, and to satisfy this demand, a thriving supply of providers, is ever-growing. The only thing that lacks is a mechanism, which needs to be enforced through legislation, and a strict surveillance of these activities which can only be ensured by the States. This is crucial to check the prevalent abuse and exploitation (Spar 2005).

Comparing Surrogacy to other unethical, immoral practices is due to various social constructs that mostly emerge due to religion. However, surrogacy differs in its objective and the consequence of its practice. A worthy mention should be made to the example of contraceptives. In 1938, contraception was viewed as notorious and repugnant as many critics today view surrogate motherhood. It was seen as an aberration of nature, an ill-fated attempt by humans to interfere in what God had wrought and to rob women of one of their most precious functions. As with assisted reproduction, the demand for contraception was ultimately too strong to prohibit and is now seen to be gradually gaining acceptance in all countries, in fact even being propagated. Similarly, in the future it might be possible to realise that the exploitation or the abuse is not due to the concept of surrogacy in itself but due to the vacuum in laws to regulate this practise and the absence of a proper mechanism.

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Critique

Narco Analysis and Blood Test: A Mandate of Fair Investigation

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