ANALYZING SOCIO-ECONOMIC & LEGAL ASPECTS OF COMMERCIAL SURROGACY IN INDIA

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ABSTRACT

Ever since 1978, when the first test tube baby was born using Artificial Reproductive Technology (ART), the underground market of commercial surrogacy has been ever-flourishing. Due to absence of any substantive laws on the issue, the rights of women acting as surrogates have been abused at different levels. From being under-paid for their services to suffering the loss of a child born out of their own womb, the pain and suffering endured by surrogate mothers extends beyond all social, economic and legal bounds. Given the blatant exploitation of surrogate mothers and given the flagrant violation of their fundamental rights, the Government of India finally decided to sabotage these atrocities by chipping in the Surrogacy (Regulation) Bill, 2016 back in August, 2016. The Bill has received Union Cabinet’s assent and is on the verge of becoming a law. However, what appears to be a benign initiative of the government and what has been unveiled as an anecdote to a national predicament, might just prove to be counterproductive due to copious shortcomings that are inherent in the Bill. With commercial surrogacy an extant flourishing business, the author tries to probe, whether the Government’s decision to put a blanket ban on commercial surrogacy and the modus operandi to implement it is exemplary, or whether this seemingly revolutionary decision is nugatory and incapable of reigning in the prevailing exploitation of surrogate mothers.

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INTRODUCTION

“Surrogacy contracts alienate a woman from her love for the child and frequently involve exploitation. Surrogacy leads to the weakening of the link between parent and child”.

-Elizabeth Anderson

Over the years, the exploitation of surrogate women and other unsanctioned practices associated with surrogacy have taken center stage in India. Surrogacy is a contractual undertaking whereby a woman, known as a surrogate, bears a child for a couple, who being biologically or medically inept is inhibited from giving birth to a child. There are two different kinds of surrogacy procedures, gestational and traditional, where the child born is genetically independent of the surrogate in the former, and genetically related to the surrogate in the later. There has been an unprecedented and unrestrained growth of assisted reproductive technologies (ARTs) in India following the first instance of surrogate delivery in the United Kingdom in 1978

In the past few years, the process of surrogacy has become a commercial business for many. Thanks to the sparing legal restrictions and an inexpensive procedure, India has become a surrogacy hub for people from across the world to get children in a low-costing, hassle-free manner. In India, a surrogate woman receives approximately ₹10,00,000 for each surrogacy birth she gives. Women from the poor strata of the society find this incentive immensely tempting with surrogacy being a sizeable source of livelihood for a majority of them. This price has not failed to appeal to women from urban areas either, with some of the women volunteering for both gestational and traditional surrogacies.

The nonexistence of well-defined laws on surrogacy has made sure that this commercial industry thrives to its full potential. Recently, in an attempt to regulate this blatant racketeering, the Union Cabinet approved the Surrogacy (Regulation) Bill, 2016 passed by the Health Ministry, and the Bill would soon be tabled in the Parliament. However, as much as a bare reading of the draft would reveal various shortcomings of the Health Ministry in doing justice to the matter in hand.

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The author tries to delve deep into the study of commercial surrogacy with an overarching objective of determining its legal legitimacy and moral righteousness in the Indian context.

1. COMMERCIAL SURROGACY IN INDIA

The advent of Artificial Reproductive Technology (ART) in India can be traced back to 1978 when Kanupriya Agarwal alias Durga was born by IVF (in vitro fertilization) Technique. It was India’s first IVF baby, and the second in the world, the first being born in the United Kingdom in the same year. It followed an unprecedented & uncontrolled growth of ART clinics in India leading to a massive surge in the use of artificial reproductive technologies by infertile intending couples to attain a child. Couples from both India and foreign lands began to seek the assistance of surrogate mothers to deliver their progeny. This marked the dawn of commercial surrogacy in India and soon India began to be dubbed as the ‘surrogacy capital of the world’. The researcher takes a closer look into how commercial surrogacy has been altering the social and economic setting of this country.

1.2 Bearing of Surrogacy on the Social Life of Surrogate Mothers

Sociological considerations cannot be ignored while analyzing commercial surrogacy because it has a far reaching effect on the primary unit of society, i.e., the family. The vulnerability of poor women serving as surrogates to exploitation at the hands of couples seeking surrogacy or the society at large needs no elucidation.

Infertile couples look down upon them as petty laborers providing cheap services in consideration for their money. They are inconsiderate of a surrogate’s eminence in giving birth to their progeny and her involvement in the creation of a human life. In the process, a surrogate is reduced to a mere means (carrier) to an end (baby). What is even more unfortunate is that this exploitation is compounded by the fact that a majority of surrogate mothers are illiterate and therefore impotent in gauging ahead of time, the trials and tribulations of being a surrogate mother. They perceive

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surrogacy as only a means of earning income for themselves and turn a blind eye to everything else concomitant to surrogacy.

Given the oppressed status of women in our society and the expectations of subservience to men of the household in the Indian patriarchal system, a majority of times, women are cajoled or in some cases pressurized against their will into surrogate motherhood. Furthermore, they often do not even have a say in the decision on how the money they’ve earned from their work as surrogate is to be used. It is the elder members or the head of the household who choose where the money is spent, irrespective of the surrogate’s wishes.

Their predicaments do not end there. After having carried a baby in their body for 9 months, feeling a modicum of emotional attachment is connatural and reasonably inevitable. In situations as these, the least surrogate mothers expect of intending couples is to keep in touch. However, surveys have revealed that an affirmative response by the intending couples in the pre-birth stages to the idea of staying in touch is followed by a complete boycott of the surrogate mothers after the baby is born.\(^4\) The intending couples completely fail to appreciate that surrogacy is a ‘job of the heart’ and reduce the value of the surrogate mother’s ‘labor of love’ to mere ‘baby production’.

**1.3 Economic Impact of Commercial Surrogacy in India**

The international surrogacy business in India is escalating to new heights every passing year. The Indian Council of Medical Research (ICMR) has estimated the commercial surrogacy in India to be a US $6 billion-per-year industry. India as a hub of commercial surrogacy mainly attracts foreign intending couples due to its financial feasibility. Surrogacy costs $70,000 in the US, whereas in India the estimated cost comes out to be around one-seventh of that price including the medical treatment involved.\(^5\)

When we pass over sociological and moral panic about the ramifications of commercial surrogacy, the debate on a surrogate’s motive to be pregnant for others draws our attention. While some psychological studies have revealed that the motives of most surrogates are altruistic and not

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\(^5\) Supra at 2.
commercial, contemporary market societies hold a conflicting opinion. According to them, these motives are largely personal and pecuniary.Legal scholarship asserts that both the intending party and the surrogate mother mutually profit from each other. According to them, for the intending couple the baby is more worthy than any payment made to the surrogate mother, while on the other hand, the payment received by the surrogate is dearer to her than any kind of risk involved in the procedure.

It would become a lot easier to gauge the economic impact of surrogacy on India when we probe surrogacy arrangements of ‘Akanksha Infertility Clinic’. Akanksha Clinic is an infertility clinic in Anand, Gujarat and is the biggest surrogacy hub in India. Akanksha Clinic’s Dr. Nayana Patel runs a roaring commercial surrogacy business and claims to have 45 surrogate mothers under her wings. She is building the world’s first surrogacy factory, which would house hundreds of surrogate mothers who would deliver children for intending couples. Dr. Nayana Patel’s clinic has already delivered more than thousand surrogate children and the numbers are ever surging. Her story is case in point and reveals how elephantine is the business of surrogacy in India.

However, economic exploitation of women is well conspicuous at various levels in this gargantuan surrogacy industry. To begin with, the Indian surrogates are paid half the price than what is paid in the West for surrogate delivery. The cause is simple, women taking up the job of surrogates are generally poor women from the deprived bands of our society. Their economic conditions being humble, they find no better option than accepting the price being quoted for their ‘labor’. Moreover, the price in almost all cases is more than the average income of their household which leads them to believe that the money being offered is worth their work. Next, given the amount being paid to surrogates is prima facie high for a poor Indian household, their husbands and families often force them to continue bearing children for others, being ignorant of how her body and health are deteriorated. In some cases, due to a regular flowing income courtesy the surrogate,

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7 *Id* at pg. 9.
8 Amrita Pande, *Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker*, Signs, Vol. 35, No. 4 (Summer 2010), pp. 969-992
their husbands often stop working, shifting the burden of earning bread and butter for the family on the surrogate.\textsuperscript{11}

\subsection*{1.4 Comparison of India’s stance on surrogacy with other countries}

A complete discernment and critical evaluation of India’s position on surrogacy is only possible when it is compared with how surrogacy is structured in other countries. For this purpose, the stance of some developed and developing countries vis-à-vis surrogacy has been analyzed to get a fair idea on how different is India’s attitude towards surrogacy.

Commercial surrogacy in \textit{United Kingdom} is banned, although it is authorized under the British law if the intending couple pays considerable expenses to the surrogate mother. In most states of America, commercial surrogacy is either illegal or unenforceable. Even in Australia, some states have declared commercial surrogacy a criminal offence. \textit{Canada, New Zealand} and \textit{Spain} allow altruistic surrogacy; however, commercial surrogacy is unauthorized there. In \textit{France, Italy}, and \textit{Germany}, any kind of surrogacy is illegal.\textsuperscript{12}

\textit{India} on the other hand, allows commercial surrogacy, however, it does not have any laws or statutes governing it. Among the developing nations, apart from India, \textit{Thailand} is one of the few countries that allow commercial surrogacy and is one of the leading surrogacy hubs in Asia.\textsuperscript{13} Commercial surrogacy on the other hand is banned in \textit{China}, and it only has room for altruistic surrogacy.

The surrogacy laws in the developed and developing countries mentioned above are framed with the interest of surrogate mothers being paramount for the lawmakers. Legislations have been passed and measures have been taken to preclude the possibility of exploitation of surrogate mothers at the hand of the intending couples. India, where women have been brazenly exploited and where commercial surrogacy has been rampant for more than 35 years now, has done nothing to bridle the unfortunate state of affairs.

\begin{itemize}
  \item \textsuperscript{11} \textit{Ibid} at pg. 12.
  \item \textsuperscript{12} Anil Malhotra & Ranjit Malhotra, \textit{Surrogacy in India: A Law in the Making}, Universal Law Publishing Co., 2013 (1\superscript{st} Ed.)
  \item \textsuperscript{13} Andrea Whittaker, \textit{Cross-border assisted reproduction care in Asia: implications for access, equity and regulations}, Reproductive Health Matters, Vol. 19, No. 37, Privatization (May 2011), pp. 107-116
\end{itemize}
2. LEGAL STATUS OF SURROGACY IN INDIA

Despite legal, social, and ethical intricacies that cloak surrogacy in India, nothing has stopped people from exploring this option of attaining a baby. With the absence of proper laws on the subject, let us look at how India has grappled with the ordeal of governing the practice of surrogacy.

2.1 POSITION OF INDIAN LAW ON SURROGACY ARRANGEMENTS

Surrogacy in India was first declared legal under the guidelines issued by the Indian Council for Medical Research (ICMR) in 2002. However, there is no statute at the moment that governs surrogacy in India. It is an unregulated grey area in law, and has remained the same for years. In the absence of any formal statute administrating surrogacy in India, 2005 ICMR Guidelines govern surrogacy practices in India. The same being non-statutory, are not enforceable in the courts of law. Surrogacy agreements, at present, are governed by the Indian Contract Act, 1872 and the same are enforced under the provisions of the Indian Code of Civil Procedure, 1908. In order to statutorily regulate Surrogacy in India, the Assisted Reproductive Technology (Regulation) Bill and Rules, 2010 was drafted by a 12-member committee including ICMR, Health & Family Welfare experts, among others. However, it never got passed in the parliament and thus, never became a law.

2.2 SURROGACY (REGULATION) BILL, 2016: A CRITICAL ANALYSIS

The above narration shows that there has been a grave urgency for statutory and regulatory intervention in the field of surrogacy in India for decades now. The need for a bill such as the Surrogacy (Regulation) Bill, 2016 was, inter alia, bolstered by Baby Manji Yamada v. Union of India & Anr., a 2008 case which brought to fore the limitations of Indian laws in governing questions of foreign surrogacy. The 228th Report of the Law Commission of India also recommended major reforms in the surrogacy arrangements of India including an out-and-out shift from commercial to altruistic surrogacy. In addition, the Supreme Court was inundated with...

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15 Baby Manji Yamada v. Union Of India & Anr., [2008] INSC 1656
complaints of exploitations in commercial surrogacy as numerous Public Interest Litigations (PILs) were filed by lawyers and social activists.\footnote{Soumya Swaminathan, \textit{Why the Surrogacy Bill is necessary}, The Hindu, August 28, 2016, Last accessed at: http://www.thehindu.com/opinion/op-ed/why-the-surrogacy-bill-is-necessary/article9040755.ece (on September 17\textsuperscript{th}, 2017)}

\subsection*{2.2.1 \textbf{Salient Features of the Bill}}

All the factors mentioned above triggered the Health Ministry to propose the draft Surrogacy (Regulation) Bill, 2016. The same got the assent of the Union Cabinet on August 24, 2016 and is all set to be introduced in the parliament.\footnote{\textit{Supra} at 6} The proposed bill forbids surrogacy for homosexual couples, single parents, couples in live-in relationships, foreigners, couples with children, and couples not married for at least 5 years with an overarching aim to completely outlaw the unauthorized market of commercial surrogacy. According to the recommended stipulations for a couple to now undertake surrogacy procedure, either of the two must have proven infertility, intending couple must be an Indian citizen, and the females must be aged 23-50 years while 26-55 years is the age determined for males. Women can be surrogates only once and a couple can only have one surrogate child. The couple should employ an \textquotedblleft altruistic relative\textquotedblright, i.e., the surrogate mother should be a relative who is sympathetic to the situation. No women other than a relative would be allowed to take up surrogacy for a couple if the proposed Bill becomes a law. Among other things, donation of eggs would also be banned. In the following section, the author tries to ascertain the progressive and regressive aspects of the Bill and thereafter expresses his stance on Surrogacy in India.

\subsection*{2.2.2 \textbf{Critical Analysis of the Bill}}

The surrogacy Bill can be called a progressive and a regressive measure of the Government of India in the same breath. One may call it either of the two, depending on one’s biological predispositions and mindset, among other things. If for someone, the rights of single parents, divorcees, widows, gays, etc. are important, he will brandish the Bill as \textquotedblleft regressive\textquotedblright; however, if someone believes that an offspring shall come out of a wedlock only, and the question of surrogacy
surfaces only after the couple fails to yield a child by themselves, then he would agree with the measure of the Government, dubbing the same as “progressive”.

2.2.2.1 How the Surrogacy (Regulation) Bill, 2016 is Progressive

The Bill undoubtedly promotes the value system of our Indian Society. The Government of India has made it clear by way of this legislation that the child’s well-being, its legal rights, its personal/social identity at the time of its birth, are more valuable factors than just bringing the child in this world, without any family/social background to mention when it comes of age. The parentage of a legally wedded couple has also been given due weightage in this Bill, which is why the criteria for the surrogate mother to be in close relations with the intending couple has been laid down. The Bill tries to restore the sacredness of the womb of a woman and bans import or export of human embryo for surrogacy. It duly recognizes the rights of a child born out of surrogacy and places his rights at par with the rights of the biological children.

The Bill allows altruistic ethical surrogacy only to the needy Indian-infertile-childless couples. The bill is completely against the commercialization of the womb, as it restricts a female from donning surrogate motherhood more than once, and only for close relatives. The Govt. puts a blanket ban on selling of human embryo or importing embryo for the purpose of surrogacy.

The Bill is progressive because it tends to regulate the activities of the surrogacy clinics by seeking to get them mandatorily registered with the Appropriate Authority. It tends to keep a close eye on the services such clinics provide and the standards of service they maintain. Such a measure would bridle the surrogacy clinics from exploiting non-warranted gains from both the intending couple and the surrogate mother as they would now be accountable directly to the government machinery.

The inclusion of the clause that guarantees a reasonable and adequate amount of insurance cover to the surrogate mothers is a great relief and will have a far reaching impact in helping women opt for surrogate motherhood. Earlier, due to the absence of any such prior insurance, the surrogates were prone to being cheated at the hands of intending couple who could’ve denied responsibility in the event of the surrogate confronting any medical contingency and she would’ve had to foot her medical bills by herself in such a scenario.
Scores of other guidelines such as proscription on forsaking the child born out of surrogacy, desideratum of an order passed by a court of Magistrate of the first class for parentage and custody of the child, and requirement of surrogacy clinics to be registered under the provisions of the proposed Surrogacy (Regulation) Bill, 2016 Act after the Appropriate Authority, among other provisions, have made sure that the Bill prima facie appears to be a well deliberated measure, taken in the best interest of not only the surrogate mothers, but the surrogate children born and the intending couples. However, it must be pointed out that the bill has multifarious legal, social and economic ramifications concomitant to itself which are notable enough to jeopardize the very existence of this bill. The author has critically analyzed the contents of the said bill and fathomed that the advantages of the bill are outweighed by the detriments of the same.

2.2.2.2 How the Surrogacy (Regulation) Bill, 2016 is Regressive

By way of this Bill, the Government of India has denied to the willing parents (except couples married for 5 years), such as the single parents, divorcees, widows, etc., the Right to Equality before law under Article 14\(^\text{18}\), Right to Freedom under Article 19\(^\text{19}\), and the Right to Life and Personal Liberty under Article 21\(^\text{20}\) as is guaranteed under the Constitution of India. The Bill puts a blanket ban on the rights of the LGBT members, live-in-relationship couples to opt for surrogacy child. The bill in essence is discriminatory and inequitable. It completely excludes from the purview of surrogacy the homosexuals, transgender, foreigners and even Indian heterosexuals, and those married for less than 5 years, denying them their right to equality and social justice.

A couple's choice to choose a surrogate mother for themselves is also gravely curtailed by the Bill, as provisions of the Bill have restricted it to close relatives only. Nowadays, the families being nuclear by their very nature and the concept of joint families almost no longer extant, it becomes very difficult or, in fact, close to impossible for the intending couple to find a suitable close relative who is willing to volunteer to be a surrogate mother for their child. By incorporating “close relatives only” clause, the Govt. has been totally tactless in dealing with such a sensitive issue. For an infertile couple who can find no close relative to bear a child for them, the Government has left

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\(^{18}\) Article 14, The Constitution of India.  
\(^{19}\) Article 19, The Constitution of India.  
\(^{20}\) Article 21, The Constitution of India.
no other option than to forgo the idea of having a genetically related child.

The option of surrogacy under the Bill is made available to a limited few and the punctilious provisions will also cause inordinate delays in finding surrogate mothers qualifying the criteria laid down in the Bill. Therefore, the same is most likely to result in the bypass of law by not only those who intend to contract surrogacy, but also by the authorities who would be responsible for implementing the law. The intending couples are more likely to be ready for payment of a higher fee to a non-related woman who is willing to bear a child for them than wait for an indefinite time to find a willing closely related surrogate mother. As for the authorities responsible to implement the law, this Bill can turn out to be a great mechanism to churn out extra money from the intending couples given the emotional sentiment associated with giving birth to a child which would not impede the couple from paying additional money. Consequently, according to the author, this Bill is highly unlikely to preclude intending couples from going a step further and skirting the law to get a surrogate for bearing their progeny.

In the draft Bill that got the Union Cabinet’s assent, no provision has been formulated for monitory compensation to the surrogates for bearing a child for someone else. The Bill is supposedly based on a false assumption that close relatives, only by virtue of being emotionally attached to the intending couple, would have an incentive to bear the trials and tribulations of carrying a child for 9 months. The Bill also opens the door for the intending couples to be in an advantageous situation and pressurize and emotionally blackmail their close relatives to undertake surrogate motherhood. The government in addition, fails to foresee and address the issue of opportunity cost of the productive time of the closely related surrogate wasted during pregnancy and the loss of any alternate employment. This only shows disregard to women’s right to livelihood, and to a greater extent, the blatant ignorance of women’s monetary rights.

The single parents are now the order of the day and are no more considered socially unacceptable. This class of people are most affected by this measure of the Government because by way of this bill, they have been denied equal right to parenthood. It is also worth pointing out that the Bill runs contrary to the precedents laid down by the Supreme Court of India in the past. In re Kesavananda Bharati v. State of Kerala21, the country’s Apex Court ruled that the parliament cannot alter basic

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21 Kesavananda Bharati Sripadagalvaru and Ors. v. State of Kerala and Anr., (1973) 4 SCC 225
structure of the Constitution of India or be in conflict with any of the Fundamental Rights mentioned in Part IV of the Constitution of India. However, the proposed Bill is conspicuously in violation of the letter of this law as it bridges infertile people’s fundamental Right to Equality before law under Article 14\textsuperscript{22}, Right to Freedom under Article 19\textsuperscript{23}, and the Right to Life and Personal Liberty under Article 21\textsuperscript{24} by depriving them of an opportunity to have genetically related children.

From the economic perspective, an absolute ban on commercial surrogacy would mean loss of considerable foreign currency influx in India. Every year approximately £65 million worth of foreign currency flows into the country from foreigner couples, NRIs and POIs who solicit services of surrogate mothers in India.\textsuperscript{25} Such an absolute prohibition as has been proposed, would also escalate the chances of commercial surrogacy industry going underground with scores of lives at present being exclusively contingent on this vocation. In the absence of any monetary consideration, and surrogacy having been restricted only for altruistic purposes, poor women totally dependent on commercial surrogacy would have to fend for themselves.

2.2.2.3 Overall reasonability of the Surrogacy (Regulation) Bill, 2016

Being heedful of all the regressive and progressive facets of the Bill discussed above, it can be concluded that the Surrogacy (Regulation) Bill, 2016 requires modifications in myriad aspects before it can be introduced in the parliament. The Bill in its present form, would do more harm than good to not only the surrogate mothers, but to everyone and everything related to surrogacy. It appears the Bill would fall short of putting an end to exploitations at various levels in commercial surrogacy industry, the overarching purpose why it was formulated in the first place. The Bill entails certain inherent fallacies which have the potential to create a black market for surrogacy procedure.

\textsuperscript{22} Supra at 17.
\textsuperscript{23} Supra at 15.
\textsuperscript{24} Supra at 17.
CONCLUSION

The industry of commercial surrogacy in India has been rampantly flourishing. Without the existence of formal laws and statutory authorities on the issue, the business of surrogacy has been thriving unregulated. This commercial industry has an expansive impact on the economic and social lives of the surrogate mothers. Sociologically, the surrogates have to prevail over different stages of emotional alterations; from circumventing the possibility of getting emotionally attached to the baby, to turning a blind eye to the surrogate-prostitute comparisons by society. In some cases, women don surrogate motherhood against their free will, for the sake of their family’s well-being. Economically, while surrogacy prima facie seems to improve their fiscal position, exploitations in the form of non-payment of their fees, low compensations, inter alia, are not notional. To curb these exploitations of women, and to rein the unfettered market of commercial surrogacy, the Health Ministry has come out with the Surrogacy (Regulation) Bill, 2016. It is the right move towards the endeavor of bridling the exploitation of surrogate women. However, while the Bill successfully comes to grips with some vital issues like that of regulation of surrogacy clinics or the provision of insurance cover to the surrogate mothers, given the manifest lacunae and loopholes the Bill has, it requires course correction to comprehensively address the dilemmas of all the stakeholders. Overall, it can be concluded that after the first surrogate child was born in 1978, the Union of India is still bereft of appropriate laws and statutes to attend to the plight of surrogate mothers.