

IT'S MY BODY NOT JUST MY WOMB: ADVOCATING RIGHTS FOR SURROGATES

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ABSTRACT

The objective of the paper is to address the rights of the surrogates which by far has been eluded by the law of the country. By taking the Surrogacy 2014 bill into consideration we point out the lacuna in the law and how these gaps have further lead to the alienation of the surrogate-worker. We try to defend commercial surrogacy by enlisting in its vast ambit certain basic rights to the surrogates such as her right to know the complete details of her contract, the payment she may receive and at the same time by pointing out the inordinate delay in making the surrogacy bill a law which has proved to be detrimental for the surrogates. Through this paper we aim to advocate the rights of the surrogates. In spite of the burgeoning reproductive tourism industry in India, till date no cohort legislation has been passed in this regard. As the ministries continue to bicker over the issue of surrogacy and are unable to reach a consensus it's the surrogates who ultimately suffer. As the title of the paper suggests *It's my body not just my womb*, it stresses that so far all efforts have been catered to the protection of the womb and not the surrogate mothers. As the paper progresses we try to elucidate how the surrogate mother continues to be objectified and thus calls for the regulation of the surrogate industry.

INTRODUCTION

The identity of the surrogate mother is lost, for her womb becomes the embodiment of herself which is put up for sale. The need of the hour is to provide the surrogates with a cohesive platform to voice their demands and concerns associated with their work. The unchecked billion dollar industry has spurted in India only because of surrogacy which has benefited the childless infertile couples who now can experience parenthood owing to the advancement of medical technology. This paper endeavours to point out the lacuna in the surrogacy bill specifically focusing on the rights of the surrogate mother. "Surrogate mother is defined as a woman who carries out the gestational function and gives birth to a child for another especially a woman who agrees to provide her uterus to carry an embryo throughout

pregnancy, typically on behalf of an infertile couple and who relinquishes any parental right she may have upon the birth of a child.”¹ In the absence of regulation, surrogacy has transformed into an unfettered, multi-million dollar industry which has turned “women into breeders”.²

CONCERNS PERTAINING TO THE RIGHTS OF THE SURROGATES

The question of choice

Surrogacy has to be seen from the ethical lens of patriarchy and the stigmatisation attached to childlessness and not just a medical problem of infertility. This industry cashes upon the notion to “create one’s own children” in spite of alternatives like adoption available. All these changes that are taking place have to be understood in the political-economic context which is endorsing the liberalising economic policies of the Indian state. Drawing upon the availability of cheap labour in India, it is the mainstay of the billion dollar industry. The women who usually agree to act as surrogates belong to poor and marginalised sections of the society and their reason for choosing to be a surrogate is not through choice but due to economic compulsions. The surrogate industry tactfully cashes upon the vulnerability of these surrogates and the desire of the parents to make their own baby. Feminists have denounced surrogacy as the ultimate form of control over the women’s body, the moment a woman agrees to act as a surrogate her body is put through series of medical interventions and she relinquishes all the rights over her own body which is put under surveillance. Her womb becomes the epicentre of her life through which she shall gain monetary benefits by putting her life at risk. This occupation has been severely criticised for it reins in the economic weakness of those women who agree to become pregnant for money.

The women that enter the surrogate industry are more/less illiterate and are drawn into in the hope of a better livelihood and the need to sustain their families. The provisions of the contract are read out to them, a recent survey in Anand and Surat has shown that on an average only 2% of women actually had a copy of the contract.³ This poses a question as to till what extent can the agreements safeguard the interest of the surrogates. The authors postulate that the surrogate must have a copy of the agreement which could be used as a legal

¹Robert E. Oliphant & Nancy Ver Steegh, Family law (2007)

²Smriti Ramachandran, Regulate Surrogacy, Say Activist, Hindu (2014)

³Sanjay Kaw, "Delhi Now Surrogacy Capital of India.", *Asian Age* (2014)

document in case of any party acting contrary to its provisions. They need to be made aware about their rights and the associated risk involved in undergoing surrogacy.

In the contract only the surrogate mother and the Commissioning couple are the two parties on paper. But in reality the parties are brought together through intermediaries the agent bringing potential surrogate mothers, the head of the ART clinics and the doctors. Either these intermediaries should be done away with by establishing strong link between the surrogate, the doctors and the commissioning couple or they have to be made accountable for their work.

Surveillance

The doctors, agents and the commissioning parents exercise control over the surrogate mother's body through complete surveillance. Many times surrogates mention that the demands made by the commissioning couple are unreasonable for it is not possible for them to completely abandon their earlier lifestyles. The surrogates are often coerced into following a strict diet regime, take innumerable medicines, injections and stop work altogether. Often they are considered unreliable for the commissioning couple and the doctors often feel that the surrogate mother wouldn't take care of the foetus and is more after the money. Thus in order to exercise power over the surrogate mother the threat of non-payment is often used to 'discipline' them.

In areas where surrogacy hostels are available the women are under constant surveillance by the matron wherein her each and every step is monitored. In such areas the identity of being a selfless mother is invoked wherein they are expected to take care of the baby to prove themselves to be worthy mothers who can even sacrifice their lives for the baby. The guiding interests are thus of the commissioning couples and not the surrogates who are sometimes even expected to delay the birth of the baby for the desire of the parents to be present during the delivery. Opening up their entire lives through constant supervision and surveillance also hasn't seem to benefit the interests of the surrogate mother.

Moreover, the bill as a whole has been biased towards the commissioning couple catering to their rights and interests over the surrogate mother. It lays down extensive provisions like appointment of legal guardian by the foreign couple availing surrogacy in India, who would be legally responsible for taking care of the surrogate during and after pregnancy. The surrogates are already under constant surveillance either directly or indirectly by the parties involved in the transaction. Now the law has enunciated another provision to do the same.

The right to privacy which is a fundamental right enshrined by the constitution of India stands hanging fire. Moreover it poses a question about the basic rights of the surrogates over their bodies which is under perpetual scrutiny. Nowhere has the act laid down any provisions for penalizing the commissioning couple in case they default in payment of compensation or refuse to accept the child if born with any deformity, as the chances of children born with some deformity or disease is more if born through Assisted reproductive technology as compared to a child born through the natural process. A case in support is of an Australian couple to whom twins were born and they abandoned one child applying for citizenship and subsequently a passport for only one child.⁴ These issues need to be addressed and stringent provisions ought to be laid down if the rampant unethical practices leading to the exploitation of the surrogates is to be checked.

The invisible worker

It is important to understand how the surrogate mother and the surrogate worker continuously overlap each other. In some areas the altruistic character of motherhood is invoked wherein some cases by clearly establishing that the surrogate worker has no right over the baby, the character of the worker is highlighted. The hospital setting creates an atmosphere of intimidation for the surrogates as they are refrained from asking too many questions, unaware of the procedures involved to prepare the body for the pregnancy, side-effects of the drugs. There is no direct contact between the doctor and the surrogate, all this is mediated through an agent who is present at all times and is the first to receive any issues concerning the surrogates. The agent also has an ulterior motive that the commissioning parents should not be cheated and the commitment to deliver a healthy baby is fulfilled. The agent dismisses the concerns of the surrogates and due to the secrecy involved in this profession, it prevents surrogates from discussing their concerns and gaining information from someone else further leading to their isolation and exploitation.

The health of the surrogate

The surrogate's body goes through series of medications, injections while she herself is unaware of the risks involves in this artificial pregnancy. Due to her lack of education on the subject as mentioned earlier, the surrogate is kept in the dark about the procedures that are

⁴Smriti Ramachandran, Australian couple abandoning surrogate child highlights need for strict laws, Hindu, (2014).

involved and also the possible side-effects of the drugs. Since she is not treated like a parent, all the information is guided towards the commissioning couple who by far has more information on the condition of the foetus than the surrogate mother herself. It is not just the physical health of the mother but also her emotional and mental health that has to be kept into consideration. By refraining her from accessing the information and denying her the right to abort the child, if the surrogate mother feels that she will not be able to carry forward this pregnancy no remedial measure is provided to her thereby affecting her psychological and physical health. So far, all the attention has been given to the health of the baby and little has been talked about the health of the surrogate post-delivery. Therefore this calls for drawing upon a proper contract that adheres to the concerns of the surrogates such as the right to abort the child, insurance in case of death caused due to medical negligence and also the right to information which is not misconstrued in any way by the agent. We need to look at the surrogate mother who is more than just a womb.

The proposed law is silent on the amount to be paid to the surrogate in the case of a miscarriage. In India multiple embryos are transferred to the surrogates in order to achieve a successful outcome as the chance of conceiving through assisted reproductive technique is less as compared to a natural pregnancy. Thereby jeopardizing the health of the surrogate. A minimum compensation needs to be paid after the transfer of the first embryo and before it shows signs of any successful outcome. The contract should furnish provisions for all these unanticipated incidents.

The surrogacy bill should list down the various health risks associated with and adverse outcomes of this technology. The surrogates should not be kept enshrouded and a clear picture should be laid out to them. The authors advocate for the formation of a union that would cater and fight solely for the needs of the surrogates, so far the agents, doctors and the commissioning parents are concerned with just the delivery of a healthy baby with the union in place it would give the surrogates a better platform to fight for their rights and voice their concerns.

Information being biased and misconstrued with regard to surrogates

There is a huge lacuna with regard to the information being passed on to the surrogates. This includes the procedure of the surrogacy, the legal rights of the surrogates and the information being biased towards the commissioning couple further adding to the surrogates woes. Since the majority of the contract is etched out in English it leads to the surrogates losing their

power in the decision making process, wherein they majorly have to rely on the agent or the doctor for the understanding of the contract. The surrogates have minimal information with regard to the commissioning couple wherein their lives are put to abject scrutiny reintegrating the skewed power dynamics in display. An important link between the surrogates and the commissioning couple is the “agent.” The agent facilitates the commissioning couple in looking for the surrogate and acts as a major “information-provider” for the surrogate. By far the agent has neglected all his duties wherein the surrogate is concerned and is working for his own monetary benefits leaving the surrogates more exploited and vulnerable.

Understanding the stigma attached to surrogacy

Motherhood is considered to be of an altruistic nature, the act of getting pregnant for money shatters the ethical and moral foundations on the basis of which this society is build. Commercial surrogacy at the same time challenges the prevalent norms of family wherein with the commercialisation of the women’s reproductive labour, changes its character from being altruistic to a way to earn money and is thus equated with “baby-selling.” It is not a normal pregnancy, this requires the intervention of a third individual who doesn’t necessarily belong to the same family, class, caste but could be in fact the citizen of another nation, thus it visibly changes the way the family is build. Also surrogacy has often been associated with sex-work for it makes use of the physical body for monetary gains and due to the lack of adequate information provided on surrogacy it leads to misconstruction of facts ,wherein people associate surrogacy with ‘the act of sex.’

Surrogates try to counter this stigma by pointing the view that the ideal use of the body and to pass moral and ethical judgements regarding belongs only to the privileged class not to those who are coerced into this profession due to economic compulsions It is due to the stigma attached to this job , that there arises the need for them to invisibilise their work for they are afraid of what other people might think of them due to which the surrogates often change residences or hide the surrogate pregnancy as their own. Thus, this temporary way of earning money comes at the cost of the surrogate’s health, her emotional and mental trauma and also the stigma attached to this vocation. In order to counter the stigma, surrogates resort to the non-altruistic nature of their work, this further diminishes their identity as contractual workers. Many times the surrogates refuse to identify themselves as wage earners but as someone who gives the chance to the childless couple to experience parenthood. This rhetoric often affects the surrogate in a negative way for it reduces their bargaining power to earn

more money and at the same time their profession does not receive the same dignity being tagged as “baby-sellers”.

This can be countered by passing of the ART bill thereby and giving the work of surrogates authentication as surrogacy is already a multi-billion dollar industry in India. The law needs to address the issues pertaining the surrogates in an open platform giving significance to the work they perform. This could be done by bringing into force a codified law which recognises their work. As the law is the portrayal of how the society should function the aforementioned mentioned step would add value to the work of the surrogates removing satins of the stigma attached to it. Moreover it can be tackled by raising awareness on this issue via print or electronic media and other such forums.

The need for the surrogate-worker

In a developing country like India, commercial surrogacy has emerged as new form of labour wherein poor women from India act as surrogates for foreign clients to earn their sustenance. This occupation is India’s hard hitting reality and we need to look into this distinctive form of “sexualised care work”⁵By refraining from maintaining any moral stands it becomes essential to understand the experience of the surrogates, their need to get into this occupation and to understand why this industry continues to flourish in India. In the era of globalisation, India provides cheap labour – surrogate mother, to the demands of the first world needs – the chance to have a baby. Since in gestational surrogacy there is no need for the genes of the surrogate, it has further aided this market to go global for now the need is just for a womb to provide a hospitable environment, through which a couple sitting in another corner of the world can have a baby in a small village of India. The surrogate’s body is now a part of the global market wherein she is providing the services to those who seek her out. A critical relationship develops wherein the surrogate is in the lower strata of hierarchy for she is governed by the demands of those who seek her out. This is a monetary relationship wherein the surrogate mothers are continuously told that they do not have any rights over the baby and will be paid for ‘renting-their-wombs.’ It is a part of the globalised capitalist economy to make these surrogate mother feel ‘disposable’⁶. She is aware of her role as just as vessel and the abrupt ending of the contract as soon as the baby is born.

⁵ Amrita Pandey, ‘Atleast I am Not Sleeping With Anyone’: Resisting The stigma Of Commercial Surrogacy In India, Jstor (2014)

⁶Amrita Pandey, Commercial Surrogacy In India: Manufacturing A perfect Worker-Mother, Jstor(2009)

An important point that keeps on resurfacing is the need for the surrogates to recognise themselves as workers. Surrogacy has to shed its altruistic character and needs to be seen like any other form of work which shall enable the surrogates to get their rights. So far, there tends to be a dichotomy whether the surrogate should be a mother or a worker? It is understood that the women who act as surrogates don't do so for the altruistic nature of the job but due to the economic hardships: by recognising them as workers we give them a better chance to fight for their rights and to get a better pay.

The Surrogacy bill states that the surrogate *may* receive monetary compensation from the commissioning couple for agreeing to act as surrogate. In view of the judgement of the Baby Manji case already discussed in this paper, which legalizes commercial surrogacy in India this should be made a mandatory provision. Moreover a framework should be developed creating a direct link between the commissioning couple, surrogate, doctor and the donor bank weeding out the middlemen in the process. As the expansion and proliferation of the surrogacy industry has been facilitated by economic globalisation terming surrogacy in India to be a billion dollar industry. The surrogate mothers shouldn't be looked as machines for breeding children. The bill is eschewed from taking into account the emotional and psychological needs of the surrogate thereby making it all the more imperative to give her labour a legal sanction and due weightage which it deserves.

The authors advocate for the formation of a union that would cater and fight solely for the needs of the surrogates, so far the agents, doctors and the commissioning parents are concerned with just the delivery of a healthy baby, with the union in place it would give the surrogates a better platform to fight for their rights and voice their concerns.

The care needed post delivery

Surrogate mother is not given the right to breastfeed the baby on the ground that she might develop a bond with the baby and refuse to part with it. However, this comes in contrast with the national campaigns that continuously advocate breast-feeding to be important for the health of the child as well as the mother. The merits of breastfeeding are taken away from the surrogate mother as well as the baby and the focus is given to quick and swift separation as soon as possible. The need for the surrogate is only till the birth of the child, after that she is

rendered useless and no medical or psychological aid is given to the surrogate. Just as any other pregnancy care should be taken pre and post surrogacy and by neglecting the medical and psychological needs of the surrogate it showcases that the absence of a legal framework has proven to be detrimental for the surrogate and her needs.

In a report submitted to the Bombay High Court in 2010, of Sushma Pandey who died two days after she had donated eggs at a leading infertility clinic in Mumbai it was revealed that Sushma had died as a result of brain haemorrhage and pulmonary haemorrhage due to ovarian hyper stimulation.⁷ A healthy woman produces a single ovarian follicle that matures into one egg every month. Doctors give injections to egg donors to stimulate their ovaries to make more eggs. These are retrieved after they mature under anaesthesia, through the vagina, using ultrasound. Unlike sperm donation, this is complicated a high dose of hormones can lead to ovarian hyper stimulation, which can be life threatening. Organs around the ovary can also get injured during retrieval The Surrogacy bill is silent on this it only takes within its ambit the medical insurance cover of the surrogate during the pregnancy and after delivery in case any health complications arise. But it nowhere caters to the health issues of the egg donor in case she dies during or after donation.

In gestational surrogacy a surrogate is injected with multiple injections and has to undergo a lot of pain during the process which sometimes could prove to be lethal. Similarly if the surrogate in question dies before she gets impregnated who would take responsibility for that? In India fertility clinics tend to implant multiple embryos to ensure higher success rate sidelining the health complications that are caused to the surrogate.

“The bill should stipulate the number of cycles a woman can undergo as a surrogate as the number of live births is not equivalent to the number of ART cycles and given the low success rates of ARTs it often implies multiple cycles for successful outcomes, thus posing serious risks to the surrogate’s health”⁸

Surrogate as the third world labourer

In a developing country like India, commercial surrogacy has emerged as new form of labour wherein poor women from India act as surrogates for foreign clients to earn their sustenance. This occupation is India’s hard hitting reality and we need to look into this distinctive form of “sexualised care work”.(Pande,2008). By refraining from maintaining any moral stands it

⁷Chatterjee, Pritha. "The Great Indian Egg Bazar." Indian Express (2014)

⁸ Dhar, Aarti. "Periscope Gaps in Surrogacy Bills." Hindu (2013).

becomes essential to understand the experience of the surrogates, their need to get into this occupation and to understand why this industry continues to flourish in India. In the era of globalisation, India provides cheap labour – surrogate mother, to the demands of the first world needs – the chance to have a baby. Since in gestational surrogacy there is no need for the genes of the surrogate, it has further aided this market to go global for now there is just the need for a womb to provide a hospitable environment, through which a couple sitting in another corner of the world can have a baby in a small village of India. The surrogate's body is now a part of the global market wherein she is providing the services to those who seek her out. A critical relationship develops wherein the surrogate is in the lower strata of hierarchy for she is governed by the demands of those who seek her out. This is a monetary relationship wherein the surrogate mothers are continuously told that they do not have any rights over the baby and will be paid for 'renting-their-wombs.' It is a part of the globalised capitalist economy to make these surrogate mother feel 'disposable' (Pandey, 2009). She is aware of her role as just as vessel and the abrupt ending of the contract as soon as the baby is born.

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LEGAL SYSTEM OMMITED TO ADDRESS CONCERNS OF THE SURROGATES

BabyManji versus Union of Indi & ANR. [2008] INSC 1656 (29 September 2008).

This was the first case decided by the Apex court over the issue of surrogacy in India. Manyi Yamada, was born to an Indian surrogate mother, but the couple who availed surrogacy split up before her birth. The baby girl's father sought parental rights over her. Legal sanction was given to a single male to avail the rights of surrogacy in this case. After this commercial surrogacy received a legal acceptance. Its relevance lies in the fact that it highlighted the

absence of any regulation of surrogacy industry in India, thereby acting as a precursor and paving way for future legislations.⁹

Jan Balaz v. Anand Municipality and Ors., AIR 2010 Guj 21

This case talks about the citizenship rights of twins born to a German father with an Indian egg donor and Indian surrogate. He was denied travel documents for the children by the passport authority of India. In response he filed a petition before the Gujarat high court seeking conferment of Indian citizenship for the children taking into account the citizenship act. The act under citizenship by birth states that if one parent is an Indian national and the other not an illegal migrant at the time of birth of the child, such child shall be granted Indian citizenship.¹⁰ This case fulfilled the condition of the act as both the natural and genetic mother of the child were women of Indian national.

Another point which was highlighted in this case was of dual citizenship. In India dual citizenship is not permitted and therefore if the children are granted German citizenship after adoption in the home country, surrogacy not being legal in Germany, they would be conferred overseas citizenship of India. The law in order to counter this issue has laid a provision in the surrogacy bill that only those foreigners can avail surrogacy in India whose home country legalizes surrogacy so that the child is not rendered stateless. This could prove to be one commendable piece of legislation by the draft committee if passed by the parliament.

Critical Analysis

The first case compels us to ponder over a set of unanswered questions. If the child born out of surrogacy has any deformity or in case if twins or triplets are born when requirement was of only one child who would be responsible for these children. The ART bill lays down that in case of multiple surrogacies on the instruction of the commissioning couple foetal reduction can be carried out. This procedure could have adverse health implications on the surrogates.

The second case highlights the “problem of ‘stateless children’ with disputed questions of citizenship, nationality and parentage”.¹¹ The existential right of the child born out of surrogacy should not be kept in jeopardy. The provision suggested is still a proposal on paper, it needs to see the light of the day and implemented. In the midst surrounding the

⁹Anil Malhotra, Ending Discrimination In Surrogacy Laws, Hindu (2014)

¹⁰ Mahapatra, D. ‘German or Indian? Surrogate twins in legal no-man’s land, Times Of India,(2009)

¹¹Anil Malhotra, “ Designer Babies: Two Mothers And A Father”, *Lawyers Update* (2014)

debates of citizenship and surrogacy , it is imminent that the surrogate mother will continue to be exploited by her home country which has been unsuccessful in guaranteeing her legal rights , at the same time due to this ambiguity citizens of foreign nations shall manipulate her for their personal gains.

LACUNA/ SHORTSIGHTEDNESS OF THE PROPOSED SURROGACY BILL

There has been contradictory views proposed by the respective ministries refusing to reach a consensus which has delayed the process of passing the bill. The ART bill needs to be enforced into a codified law necessary to contain and regulate the burgeoning surrogacy industry in India.

Provisions catering to the surrogate mother are as follows-

- Enter into legally enforceable agreement
- Needs to be declared medically fit to act as a surrogate by the Assisted Reproductive technology (ART) clinic
- May receive monetary compensation from the commissioning couple
- To fall within the age bracket of 21-35 years to act as surrogate
- Should have been married
- Should have procreated not less than two children and prior consent of husband required
- Register at the hospital or the medical center declaring herself to be the surrogate mother, providing names and contact of the commissioning couple
- Relinquish all parental right over the child
- Insurance cover for the duration of pregnancy and delivery till the time she is free of all health complications arising out of surrogacy

Conclusion

Thus the authors through this paper postulate the point that there is a need to identify the surrogate-worker as an entity in herself and not to be only recognized through her womb. A proper mechanism needs to be developed in order to provide the surrogates with a platform to voice their concerns. The labour worker trajectory needs to be buttressed in order to bring their work within the same lens through which work as general is viewed, so that the basic

rights accorded to workers like that of grievance re-dressal forums, fair compensation, union to voice and address their concerns are also conferred on the surrogates. It highlights the loopholes in the bill, reason for its delayed passage, the merits and demerits of the case laws on its applicability as a precedent , the notion of stigma attached with the surrogates work, ways to counter it.

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