

Contract of Surrogacy

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Abstract

This article raises the questions of consent and informed consent in a contract governing a surrogacy agreement. It questions the ban on commercial surrogacy. It further examines whether women should be allowed to choose what to do with their bodies, and whether or not the Indian Contract Act in itself is enough to govern a surrogacy agreement. The paper thus looks at the provisions presently governing surrogacy and their shortcomings, and whether the proposed Surrogacy (Regulation) Bill, 2016 addresses these shortcomings.

Keywords: *Surrogacy, Surrogacy Bill 2016, ART, ART Bill 2013, Contract Act, Informed Consent.*

Paper Type: *Doctrinal research.*

Introduction

The debate around surrogacy never seems to die down. While the question of whether commercial surrogacy should be banned or not was hotly debated until now, the Government has decided to put an end to this debate by banning commercial surrogacy by means of The Surrogacy (Regulation) Bill, 2016, hereinafter referred to as the Surrogacy Bill. While the dust on the debate around the ban on commercial surrogacy is still settling, the Bill, which has been cleared by the Cabinet, has given rise to a new debate regarding the legal, ethical and even moral concerns.

The debate on surrogacy, commercial surrogacy in particular, came into the limelight after the Baby Manji case in 2008 which played itself out in front of the entire nation and had its series of twists and complications just like a Bollywood movie and gripped the interest of the entire nation. Surrogacy throws up a lot of issues. Before the Surrogacy Bill, we were debating the issues of whether surrogacy (traditional, gestational, altruistic, commercial) - should be allowed at all, or banned altogether, the lack of regulations in the Assisted Reproductive Technology (ART) industry (of which surrogacy is a part) and the immediate requirement for addressing the lacunae in the law, the drawbacks of the ART Bill. While the Government of India has done its part of passing a separate Bill focusing solely on surrogacy, and not combined it with the other ART procedures, as it did in the previous drafts of ART Bills, most of these concerns still remain.

The Baby Manji case brought to light the many complications that might arise out of a surrogacy contract, complicated situations that could not be solved and finding solutions to them seems bleak. The Surrogacy Bill, on its part, does seek to address some of these complications, but concerns regarding the welfare of the surrogate, the freedom of choice of both the intending parents, as well as willing surrogates still remain.

Before the proposed surrogacy law comes into operation, an unregulated commercial industry of surrogacy has developed in India. This can be attributed to the lack of proper surrogacy laws combined with advanced medical technology, English-speaking doctors, lower cost of fertility treatments and easy availability of surrogates for a cheaper price than other countries, which provided an environment in India emerging as a “fertility tourism destination”. This meant a thriving business for the ART Clinics in India and poor Indian women willingly becoming surrogates in order to earn some much needed money. While most countries where surrogacy is permitted - whether the surrogacy is commercial or altruistic, have strict laws regulating the practice, India was nowhere close to finalizing a law regulating surrogacy. In fact, surrogacy was part of a larger ART Bill and there was no proposed law by the Government that aims to exclusively address this practice.

A private bill, “The Surrogacy (Regulation) Bill, 2014” was introduced in the Lok Sabha, which only included surrogacy in its ambit. However, the Bill was not passed by the Lok Sabha. A law governing surrogacy was the need of the day as more and more people, not just within India, but also from abroad were seeking surrogacy arrangements in India.

This paper will be looking at a the contract of surrogacy as it existed before the proposed law, that is, the Surrogacy Bill and whether the proposed law addresses the concerns that have been raised in this paper. However, a copy of the draft Bill has not been made available in the public domain, and only the salient features of the Bill are available. The paper will discuss the issue of consent as it exists in contract law and whether or not a surrogate mother was capable of giving an informed consent under the previous law, and whether or not the current Bill is addressing the issue of free consent.

A surrogacy agreement in India, until the Surrogacy Bill is ultimately passed by the Parliament, will continue to be governed by the Indian Contract Act, 1872. (It is unclear as of now whether the agreement between the surrogate and the intending parents will also be governed by the Indian Contract Act in addition to the Surrogacy Bill.) Thus, the question of whether the Contract Act in itself is sufficient to address a surrogacy arrangement is still a valid one. Since the draft of the Surrogacy Bill is not in public domain, it is unclear whether there is a contract, whether express or implied, between the intending parents and the surrogate mother. This paper will first define surrogacy, and the types of surrogacy that are practiced. It will then address the three objectives of this paper -

- Whether the Indian Contract Act should be made applicable to surrogacy agreements
- whether the surrogate is capable of making an informed consent
- and whether commercial surrogacy itself should be banned

It is reiterated that the proposed Surrogacy Bill has no current implications on any surrogacy contract at present unless it is actually passed by the Parliament and thus the concerns raised in this paper are still relevant.

The paper will attempt to look at three main research questions - whether the Indian Contract Act alone should govern a surrogacy arrangement, whether a surrogate mother can make an informed consent, and whether commercial surrogacy should be banned.

Review of Literature

Usha Rengachary Smerdon, examines the problems in international surrogacy, and draws comparisons between surrogacy agreements in the United States of America and India, Imrana E Qadeer and Mary John

who argue that there has been next to no public debate on the ethical, social and medical questions around infertility and surrogacy. In the article, they raise these questions. The Sheela Saravanan study was conducted in Anand in Gujarat, which is a hub for commercial surrogacy and Imrana E Qadeer and Mary John and T V Sekhar and Ritika Mukherjee, conducted studies in Kolkata which bring to light the challenges that any legislation dealing with surrogacy must address.

Methodology

The aim of the paper is to find an answer to whether or not the contract law alone in India is equipped enough to address a surrogacy agreement and whether commercial surrogacy should be banned. It further seeks to look into the concept of informed consent and whether a surrogate mother is or is not capable of making an informed consent. India is one of the “fertility tourism” destinations in the world. The scope for this paper is thus limited to India. The paper will focus on why current contract law is unequipped to deal with a surrogacy agreement. I have used the doctrinal method of research and am adopting a liberal feminist approach to examine the issues at hand.

Limitations

As a researcher, I concede that there are certain limitations to the research. A proper study on surrogacy cannot perhaps be conducted without a good empirical study on the social background of the surrogate mothers, the conditions that they are kept in, the amount that is paid, a sample of the contract that they are made to sign, the actual amounts that they receive and so on. Though I have relied on two empirical studies, they were done on a smaller scale and the data might hence reflect a sampling bias. The actual documents and contracts that are signed and required are not available online. There are sample consent forms that the surrogate mothers, their husbands (if any), and the intending parents are required to sign, as given under the ICMR guidelines are however available. Moreover, a copy of the Surrogacy (Regulation) Bill, 2016 is not available in the public domain.

Main Arguments

Procreation today is not just limited to traditional reproduction. Assisted Reproductive Technology has given single individuals and couples who had little or no hope the opportunity of procreation. One of the methods by which childless individuals and couples seek to have a child of “their own” is surrogacy. In the past few years, India has emerged as a favoured fertility tourism destination for couples and individuals, not just within India, but also from abroad. So what exactly is surrogacy? In simple language, it is when a woman carries another person's baby. There are different types of surrogacy. They are generally identified as Traditional, Gestational, Altruistic, and Commercial.

Traditional surrogacy is when the surrogate uses her own egg and the sperm is either of a donor or that of the intending parent.

Gestational surrogacy is where the embryo is created outside the womb from the egg of a woman, apart from the surrogate (this might be the egg of an intending mother or from a donor), and the sperm of the intending parent or a donor. The embryo is then inserted into the uterus of the surrogate through In Vitro Fertilization (IVF).

Altruistic Surrogacy is when there is no component of money involved in the surrogacy agreement. In the past, surrogacy arrangements were generally confined to kith and kin of close relatives, family, or friends, usually as an altruistic deed. But, with the introduction of financial arrangements in the process, surrogacy

has extended its network beyond families and friends to communities, states, and even across countries. Altruistic Surrogacy is allowed in countries like Britain and Canada – where one can hire the services of the surrogate and reimburse her for the medical expenses.

Commercial Surrogacy is where a surrogate is paid to carry a child in her womb. Commercial surrogacy has been recognized in India by the Supreme Court in 2002 in the Baby Manji Case.

The Government was seeking to regulate surrogacy through a law called the ART Bill which was revised three times. The first draft of the Bill was made in 2008 and it was later revised in the years 2010 and 2013, but the draft of the 2013 Bill. There was speculation that the Bill would be tabled in Parliament in the winter session in the year 2014, but the Bill was ultimately not tabled by the Health Ministry. The Surrogacy Bill, 2014 was tabled in the Lok Sabha. This Bill does not deal with other ART techniques and only deals with surrogacy agreements and arrangements. Ultimately, the cabinet has now approved the Surrogacy (Regulation) Bill, 2016, but this Bill has only been approved by the cabinet and has not been tabled in the Parliament either.

The ART Bill defined surrogacy as “*an arrangement in which a woman agrees to a pregnancy, achieved through assisted reproductive technology, in which neither of the gametes belong to her or her husband, with the intention to carry it and hand over the child to the person or persons for whom she is acting as a surrogate;*”. Thus, the draft Bill only recognized gestational surrogacy. It did not define commercial surrogacy. The ICMR guidelines deal with multiple ART procedures, but also give certain guidelines to be followed for a surrogacy. The ICMR guidelines however are non-binding, and the Bill has still not been passed. While other countries which permit surrogacy have strict laws regulating surrogacy, India has a draft Bill and a set of non-binding guidelines. The draft Bill further goes on to say that the agreement between the surrogate and the intending parent/parents “shall be legally enforceable”. Under the draft of the ART Bill, a surrogacy agreement is thus governed by the Indian Contract Act, 1872.

The present Surrogacy Bill, 2016 defines surrogacy as “*a practice whereby one woman bears and give birth to a child for intending couple with the intention of handing over such child to the intending couple after birth.*” In the ART Bill, surrogacy was defined as “*an arrangement in which a woman agrees to a pregnancy, achieved through assisted reproductive technology, in which neither of the gametes belong to her or her husband, with the intention to carry it and hand over the child to the person or persons for whom she is acting as a surrogate;*”.

The Surrogacy Bill also defines commercial surrogacy. It states that commercial surrogacy “*means commercialisation of surrogacy services or procedures or its component services or procedures including selling or buying of human embryo by way of giving monetary incentive in cash or kind to the surrogate mother or her dependents or representative except the medical expenses incurred and the insurance coverage for the surrogate mother.*”

It defines altruistic surrogacy as “*the surrogacy in which no charges, expenses, fees, remuneration or monetary incentive of whatever nature are given, except the medical expenses incurred on the surrogate mother and the insurance coverage for the surrogate mother.*”

Whether The Indian Contract Act alone is sufficient to be applicable to a Surrogacy Agreement?

The Indian Contract Act was passed in the year 1872. Both the ICMR guidelines and the draft ART Bill make it clear that the agreement between a surrogate and the intending parents is legally enforceable. “An

agreement enforceable by law” as we know is a contract under the Indian Contract Act. So far, the Contract Act has majorly been applicable to business transactions. Nobody in 1872 must have thought that the contract law, would in 2015, be applicable to surrogacy agreements.

Generally, when a contract is being drafted for a business transaction, one can perhaps foresee situations, complications and difficulties that will generally arise from such a transaction. One can more or less comprehend and include in the contract the action to be taken by the parties if any such situation arises. Even if a contract fails to address any situation, the courts can adjudicate on the basis of the existing contract law and the sea of precedents before it. Moreover, in most common law countries, the rules of contract law and the jurisdiction of the court are pretty clear and the scope for confusion is minimal.

On the other hand, in a surrogacy agreement, one cannot possibly think of every kind of situation that might arise. Consequences like the surrogate mother wanting to keep the baby, or the parents refusing to take the baby are something one can perhaps foresee, but can we expect the judges to blindly apply only the law of contracts in surrogacy agreements where emotions and feelings of the parents, surrogate and the life and rights of the child are at play?

Commoditization of the Baby

Questions can be raised on whether babies can be treated like commodities in the market. Just like commodities are sold for a price and if some dispute regarding the same arises, it is adjudicated upon in the appropriate forum; can we do the same with babies born out of surrogacy arrangements? In a surrogacy agreement, a price is agreed upon to be paid to the surrogate - a certain sum when she conceives, medical expenses and a monthly allowance during her pregnancy, and finally the remaining bulk sum when she hands over the baby. When the baby is being handed over, and the intending parents are paying the surrogate the sum agreed upon, aren't they technically buying the baby? If the Contract Act applies, the nature of the transaction looks increasingly commercial and the baby is then comparable to a commodity in such an exchange. When a dispute arises on who gets to keep the commodity, the judges apply the law and decide the same.

A recent case in Thailand which made headlines was the one relating to Baby Gammy. In this case, an Australian couple had come to Thailand seeking a surrogacy agreement. Their surrogate had twins - a boy Baby Gammy and the sister Baby Pipah but Gammy suffered from Down's syndrome. The Australian couple only took Pipah and left Gammy with the surrogate who now cannot afford the cost of the treatment of Gammy. Isn't this a clear case of rejecting the 'defective baby' and keeping the 'good or normal' baby, just like one rejects a defective good and demands another one while taking the delivery of goods. Even the strongest supporters of surrogacy would flinch and agree that this was a clear case of commoditizing the baby. In the aftermath of this case, Thailand has now banned commercial surrogacy for foreign couples. It now only allows altruistic surrogacy agreements between foreign couples and surrogates.

Various Scenarios

The Baby Gammy example is a classic case of how one cannot foresee the various outcomes in a surrogacy agreement. An example of another case at home itself is that of Baby Manji. In this case, a Japanese couple came to India and hired a surrogate in Anand in Gujarat as surrogacy is banned in Japan. The surrogate was implanted with an embryo created from the sperm of the intending father and an

anonymous donor via IVF. However, just a month before the baby was about to be born, the intending parents got divorced, and the intending mother no longer wanted the child. The surrogacy agreement did not cover a situation like this one. At the beginning, efforts were made by the father to get documents from the Japanese Embassy in India, so that the baby could be taken to Japan, but the Embassy refused to grant a Japanese passport or visa to Manji. The complication that arose was that the Civil Code in Japan recognizes only the woman who gives birth to a baby as the mother. The woman who gave birth to Manji was Indian, not Japanese. The Code does not recognize surrogate children. Thus, Manji was not entitled to a Japanese passport. The father then approached the Indian government. Since we know now that Indian laws do not address commercial surrogacy agreements, and the only law is the law of contracts. Answers to the problems that consequently arose couldn't be found in the contract law. In India, the intending parents of surrogate babies have to adopt them. Thus in this case, the father was required to adopt Manji even though he was the genetic father. However, the solution was not this easy. The Guardians and Wards Act, 1890, however, does not allow single men to adopt baby girls. Thus the father couldn't even adopt Manji. Efforts were then made to secure an Indian passport for Manji. However, it requires a birth certificate to be submitted before it can be issued. For a birth certificate to be issued, the names of both the mother and father are required. Although the name of Manji's father was not in doubt, the name of mother in Manji's case was uncertain. There was the name of the intending mother, the surrogate mother or the egg donor. On grounds of uncertainty as to the mother's name, a birth certificate was not granted by the Municipal Council the case was referred to the Central Government for advice. An Indian passport was also refused on the ground that the intending father of the baby was not Indian and due to the uncertainty regarding whether or not to consider Manji's mother as Indian.

The above case illustrates the kind of complications that might be the result of surrogacy agreements. The hardships faced by Baby Manji and her father did not stop there. While a birth certificate and travel document which was valid only to travel to Japan were issued by the Indian government on grounds of humanity later, after the intervention of the Supreme Court. The Supreme Court got involved as an NGO called Satya, filed a habeas corpus petition in the High Court of Rajasthan. It claimed that Manji was a victim of a "child-trafficking racket" run by a for-profit infertility clinic, Akanksha. Satya alleged that Akanksha's aim was "furthering the illegal trade in infants and selling them to foreigners by taking advantage of the lack of proper surrogacy laws." The petition stated that due to the questions of Manji's parentage and citizenship being unclear, Manji should not be handed over to the intending father. The petition called the said surrogacy arrangement "illegitimate conception for money on a commercial basis". It further sought the custody of Manji.

The case illustrates how the surrogate baby may get involved in laws of different countries which provide no clear answers to the umpteen complex problems that might arise out of the surrogate agreements. The answer to these complex problems couldn't be found in full legal systems, leave alone just the Indian Contract Act.

So how then can one say that the Indian Contract Act alone should be applicable to surrogacy agreements? The Indian Contract Act alone is not sufficient to address a surrogacy arrangement. The need of the day is a law that can deal with the problems and complex situations that might arise out of surrogacy agreements and a surrogacy agreement can thus perhaps be adjudicated upon by the Indian Contract Act, read with the law addressing surrogacy.

How does the Surrogacy (Regulation) Bill, 2016 address this problem?

By restricting surrogacy to intending couples in India only, the Bill puts an end to the complex situations that might arise due to conflicting laws of different countries. While the government may be criticized for its decision for a complete ban on foreign couples entering into a surrogacy agreement, it is my view that the decision that the Government has taken in this Bill is a good one.

Freedom here is not the argument. The problem stems from the lack of uniform laws governing surrogacy in various countries. As observed from the above cases, babies are caught in legal systems which expressly ban surrogacy and do not recognize babies born out of surrogacy as children of the intending couples. Same-sex couples are increasingly looking at surrogacy as an option to have a child. These couples come to India and enter into a surrogacy agreement, and later the laws of the country not only refuse to recognize the child, but also a same-sex couple.

There is no easy solution to this complex problem which is intertwined in the intricacies of two or more legal systems and the ban on foreign couples seems to be a good move. While I fully respect the sentiments of the intending foreign couples who want to have a child via surrogacy, I also understand that most of them are looking for a way around the law in their country which either places a complete ban on surrogacy or only recognizes altruistic surrogacy. The draft Surrogacy Bill thus finds a difficult, but necessary solution. The real challenge however, would be the implementation.

After ART, it is however unclear whether the Indian Contract Act will continue governing a surrogacy agreement. Will the Surrogacy Bill completely replace the Indian Contract Act? Or will the Surrogacy Bill prescribe certain rules and regulations, and the agreement between a surrogate and the intending parents in the altruistic surrogacy arrangement continue to be governed by the Contract Act? If it is the latter, does the Government seek to have a standard contract? And if so, can the contract again foresee all the problems that might arise from the surrogacy, even if it is altruistic.

Presently, when a woman is willing to act as a surrogate, she signs a contract and situations like her wanting to keep the baby amount to breach. The press release does tell us that parents who refuse to take the baby attract penal provisions, but details of the agreement between the surrogate and the intending parents is not clear. Having said that, till the Bill is actually brought in public domain and subsequently passed, the Indian Contract Act will continue to govern the agreements between the parties.

Is a Surrogate Mother capable of making an Informed Consent?

As I have already established in my argument above, the law of contracts as it exists in India, is not sufficient on its own to address surrogacy arrangements. I will now examine whether or not a surrogate is giving an informed consent. Under the Indian Contract Act, a contract is valid when they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void. The Indian Council for Medical Research (ICMR) has a set of non-binding guidelines that currently regulate surrogacy in India, and give the surrogate mother the first option to keep the baby in case she changes her mind. However, these guidelines are not binding, and if the surrogate has signed a contract renouncing all rights to the child, the guidelines hold no value at all, and the surrogate will have no rights over the child.

The draft bill heavily favours the intending parents and gives little or no protection to the surrogate. It also fails to address what would amount to consent and merely states that the couple or individual seeking

surrogacy through the use of assisted reproductive technology, and the surrogate mother, shall enter into a surrogacy agreement which shall be legally enforceable. On the other hand, it is pointed out that there have been little or no cases where a surrogate mother has insisted on keeping the baby, and this shows that her consent is free.

Before proceeding further one has to bring out a distinction here between consent and informed consent. Just because the surrogate has given consent, does not mean that it is informed. Let us examine a study that was conducted by TV Sekher and Ritika Mukherjee in Kolkata using the qualitative method. The study interviewed nine surrogate mothers, their husbands and the intending parents. It also interviewed the ART clinics and the brokers. It was found that of the nine women, most were either illiterate or had barely studied until primary school. Only one of the surrogate mothers had studied till class six. All of them belonged to a poor economic background and five of the surrogate's husbands were unemployed. For most women, income was not regular. One of the surrogates was concerned about what would happen to the breast milk which would be produced once the baby is taken away. If the surrogate is not clear about a basic, yet important point like this one, it clearly shows that there has been no informed consent. She has given her consent without the complete knowledge of what would happen to her body. In a gestational surrogacy, the surrogate first has to take injections of hormones so that her own egg is not released. She then takes oestrogen shots to build her uterine lining. Once she is pregnant, since the pregnancy is artificial and the body is not ready on its own, the surrogate must inject progesterone until the body can sustain the artificial pregnancy on its own. Hormone shots and this heavy medication have significant side effects on the body of the surrogate. Another point to be taken into consideration is that the success rate of an IVF procedure is anywhere between 25 - 40%. So even after all the hormone injections and heavy medication, there is no guarantee of the pregnancy. A successful pregnancy often results after a few attempts. If a surrogate undergoes three IVF cycles for attempting a pregnancy per couple which the ART Bill allows, this could easily add up to as many as nine pregnancies. In a study conducted by Sheela Sarvanan, one of the surrogates was carrying triplets. This brings us to the question of foetal reduction. The intending parents under the contract have the right to foetal reduction. This only adds to the health risk of both the mother and foetus. Moreover, the surrogate mothers in the first trimester of the pregnancy experience a lot of bleeding and vomiting. She is neither informed nor has a say in the place of stay during the pregnancy. While a lot of surrogates prefer staying in the homes provided by the ART clinics, there are some surrogates who prefer staying at their own homes, but are not allowed to do so. She is controlled and monitored during the stages of pregnancy and her movement is largely confined to the home provided by the clinic or by the intending parents.

Empirical studies have found that ART clinics though do not explain to the prospective surrogate mothers what exactly their bodies will go through. It has also been found that women willing to act as surrogates mostly do so out of economic necessity. Most of them are not well educated and lack knowledge. It is difficult for them to comprehend the medical procedures and the resulting side effects of these medical procedures and resultant pregnancy. In the study conducted in Kolkata it was found that the counselling provided by the ART clinics only mentions that she will be pregnant with someone else's baby, and how the baby must be kept safe. She is told that the baby needs to be given to the biological parents after its birth, but does not talk explain to the surrogate the health hazards that might affect her. She consents to the agreement without actually understanding the intricacies of the agreement she has entered into. She is not provided with details about the possibility of multiple pregnancies, then foetal reduction, preference of a C-section on the surrogate over a normal delivery by the doctor. How then can we say that she has given

an informed consent? No wonder that all the surrogates in the study conducted in Kolkata called the pregnancy a “punishment” and said that they would never do it again. Their position might have been different if the nuances of the pregnancy had been explained to her.

From the above arguments, one can safely conclude that though the surrogate has given consent, her consent is not informed. What makes the situation worse is the poor bargaining position of the surrogate, not only because of her poor economic background and illiteracy, but also because of the lack of proper knowledge about what her body is going to go through. Sadly, in such a case, the surrogate may consent, but this consent cannot, in any way be called informed. The surrogate mother cannot make an informed consent. Unfortunately, this situation will continue unless there is some transparency in the practice of surrogacy, the ART clinics take more initiative and give proper counselling to the surrogate. Proper counselling and legal assistance to a surrogate at every stage, whether before or after the pregnancy, is the need of the day without which a surrogate mother cannot make a decision with informed consent.

How does the Surrogacy (Regulation) Bill, 2016 address this problem?

Women, who enter into surrogacy agreements, are generally from the lower income bracket. As explained above, they enter into these agreements without gaining full knowledge of the situation they are entering into and the changes that are taking place in the body. By banning commercial surrogacy, the Government has taken away the financial distress leading to exploitation of women argument to an extent. Further, the government has included a provision that only a relative can act as a surrogate.

However, the government seems to have ignored the real problem which is a lack of a compulsory mechanism of counselling the surrogate mothers. Whether the surrogacy is altruistic or commercial, the surrogate has a right to know the changes that her body will experience and the consequences of the contract she enters into. While the provision that only a relative can be a surrogate is controversial, her consent might be a little more informed than a woman who is signing the contract just because she is in need of money. But this places the onus on the surrogate, not on the Government. It is in the interest of public policy that a contract which is entered into must have an informed consent, and the Government must act and set up a mechanism which facilitates this. Adequate investment must be made by the Government irrespective of whether commercial surrogacy is being banned or not. The simple solution is to provide counselling to the intending surrogate and parents about the pregnancy. It is immaterial whether the surrogate is a relative in an altruistic arrangement or a woman is acting as a surrogate for commercial gains. The Bill seems to have completely ignored the responsibility of educating the surrogates of the intricacies of the contract that they are enter into. Just like when one enters into a flight and all passengers are briefed about the safety risks, because it is a compulsory requirement, the same should be made applicable to a surrogacy, where one is briefed about the risks they are undertaking by signing the agreement.

Should Commercial Surrogacy be banned?

Many argue that surrogacy itself is against human dignity. The government has now taken a decision to ban commercial surrogacy in the new bill. People argue that surrogacy amounts to trafficking. Well, I would like to take a liberal feminist argument here. Who are we to decide what is good or not good for a woman's body? As far as her consent is informed, a woman should be free to choose what she chooses to do with her body. A woman should be free to choose what contract she enters into. Even if it is argued that the only reason she is entering into such a contract is purely motivated by monetary incentives, the choice of

making the decision should lie with her. The decision in case of an economic necessity might also make her feel economically independent. The situation is comparable to any other occupation that one undertakes where the occupation has certain hazards. Occupational Hazards may be physical, biological or psychological in nature. Just as a worker who is engaged in the mining industry, undertakes certain health risks, a surrogate too undertakes certain risks when it comes to her health while acting as a surrogate. If the worker employed in a mine or a factory has the right to choose to work in such a mine or a factory, fully knowing the risks he undertakes with respect to not only his health, but also safety, then shouldn't the surrogate be given the same right? Whether or not to let certain medical procedures be done to her body, the psychological impact the artificial pregnancy might have on her, the psychological impact of giving the baby away – if she is fully informed of these things, and she consents to it any way, then she should be free to choose whether she wants to act as a surrogate or not, and surrogacy in India should continue.

The current scenario in India is that the lack of laws is leading to the exploitation of the surrogate mothers. She is not in a position to make an informed choice. As empirical studies have pointed out, she doesn't know what exactly her body will go through. If she is fully informed, and is willing to undergo the risk, she should be free to make such a choice. Her right to choose what happens to her body, whether it is harming her or not, is her choice, and public policy or a law prohibiting her from doing so should not stand in the way of her having the right to make such a choice. It is time to give the woman's right to choice equal importance.

Commercial surrogacy thus, should not be banned. A complete ban has never worked in India. Whether we look at the Dowry Prohibition Act, or Organ trafficking, or even the recent liquor bans. How will the implementation of this proposed bill actually take place? It is only going to give rise to underground practices.

A law to regulate the sector is what is needed so that the surrogate mothers are capable of making an informed consent with respect to their bodies. One cannot dispute that some women may be exploited by agents, but instead of facilitating a mechanism for ease of “transactions” between the surrogate and the intending couples, with compulsory counselling of couples and surrogate, the government chooses an easy way out, a complete ban. While some women are exploited on the one hand, on the other hand, there are many women for whom surrogacy provides economic independence. As quoted in the empirical studies referred to, the money was used to pay off debt and so on. Who are we to limit this choice of the means to the economic independence of these women?

Conclusion

The Indian Contract Act alone is not enough to regulate a surrogacy agreement. Unforeseeable circumstances are more often than not bound to happen in a surrogacy agreement. In such a case, the law cannot be interpreted in the tight compartment created by the contract itself, and by extension, the Indian Contract Act. Either the Indian Contract Act, along with another law regulating surrogacy is needed, or the Indian Contract Act must completely be excluded from the ambit of surrogacy law in India. Whether the Surrogacy Bill seeks to do either is unclear at present.

While ART treatments have given hope to childless couples who want their “own child”, one must spare a thought for the poor surrogate mothers who enter into the agreement without proper knowledge of the intricacies of both the contract, as well as the harm such a pregnancy might cause her. Though there have

not been any reported cases where the surrogate mother has decided to keep the baby, this does not mean that she has freely consented to the surrogacy arrangement. Such consent on her part is generally not an informed one. The Surrogacy Bill falls short of addressing the issue of informed consent. Whether a surrogacy is altruistic or commercial is immaterial. It is of utmost importance and in the interest of public policy, that the contracts that one enters into are made after an informed consent. Commercial Surrogacy should not be banned. A complete ban only will give rise to underground promises. Implementation of the complete ban is another challenge. The argument is whether a woman should have the right to choose what happens to her body? The answer is yes. All we need is a law to regulate the sector which focuses on a mechanism to enable surrogate mothers of making an informed consent with respect to her body.

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References

Acts and Bills

1. The Indian Contract Act, 1872
2. Assisted Reproductive Technologies Bill, 2008
3. Assisted Reproductive Technologies Bill, 2014

Books

Dinshaw Fardunji Mulla, Pollock, The Indian Contract and Specific Relief Acts Updated 14 Edition - Vol. 1 & 2, Hardcover, LexisNexis, 2013

Articles

Centre for Social Research, *“Surrogate Motherhood–Ethical or Commercial”*, New Delhi, 2013

Patterson R. Mark, *“Surrogacy and Slavery: The Problems of Consent in Baby M, Romance of the Republic, and Pudd'nhead”* Wilson, 449-470, Vol. 8, No. 3 (Oxford University Press) (Autumn, 1996)

Saravanan Sheela, *“Transnational Surrogacy and Objectification of Gestational Mothers”*, Economic and Political Weekly, Vol - XLV No. 16, April 17, 2010.

Sekher, T. V. and Mukherjee Ritika, (2015). *“Women at risk in the unregulated Surrogacy “Industry” Evidence from study of Commercial Surrogates in Kolkata”* Vol. L, No. 26-27, Jun 27, 2015

Smerdon Usha Rengachary, *“Crossing Bodies, Crossing Borders: International Surrogacy Between the United States and India”*, 39 Cumb. L.Rev. 15 (2008)

Qadeer Imraan, John E. Mary, *“The Business and Ethics of Surrogacy”*, Economic and Political Weekly, Vol - XLIV No. 2, January, 10, 2009

Websites

1. The Parliament of India - Lok Sabha - <http://loksabha.nic.in/>
2. The Department of Health - www.dhr.gov.in
3. The Hindu - www.thehindu.com
4. The Daily Mail - www.dailymail.co.uk

