

Surrogacy Bill's missteps

BY AMRITA PANDE

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Is the prohibitory approach, adopted by the Surrogacy (Regulation) Bill 2016, really the best way to protect the rights of surrogates and their children in India?



Celebrity couples using surrogacy services seems to have played a role in the ban on commercial surrogacy in India. (Photo: Wikimedia Commons)

By approving the Surrogacy (Regulation) Bill 2016 in August, the Indian government has effectively banned commercial surrogacy in the country. In essence, the Bill allows only heterosexual Indian couples who have been married for five years, and have a demonstrable history of infertility to become commissioning parents and use surrogacy services. In addition, the commissioning parents cannot pay any woman to become a surrogate but must persuade a close family member to do it altruistically for them. The chain of events, which led to this ban, reveals why the government decided to forgo a billion dollar industry instead of simply regulating it. The Bill's text itself tells us a bit about the present government's assumptions about legitimate parenting and families.

Surrogacy scandals

The year 2015 witnessed a flurry of activities around commercial surrogacy in India. In October 2015, an affidavit was placed before the Supreme Court, which, in a nutshell declared that the Indian government “does not support commercial surrogacy” and the scope of surrogacy would be now limited to “needy Indian married couples only”. This ban on commercial *cross-border* surrogacy fell in line with the government's previous attempts, in 2012 and 2013, to limit the availability of the commercial surrogacy option to married couples of Indian origin. The ban, however, was a complete antithesis of the Regulatory Guidelines laid out over a decade ago by the Indian Council of Medical Research (ICMR), an institution under the Ministry of

Health and Family Welfare (MoHFW) – guidelines that most clinics offering assisted reproductive technologies have been expected to abide by, till now.

The ICMR was the first to suggest a set of guidelines, published in 2005 as the National Guidelines for Accreditation, Supervision and Regulation of ART (assisted reproductive technology) clinics in India. This was later revised and prepared as a Draft ART (Regulation) Bill in 2008 and again in 2010. In all drafts of these guidelines, one thing was consistent – the proposal to legalise commercial gestational surrogacy. However, this reversal in policy does not seem as much in dissonance, once we consider the current government’s ideologies, reflected in its periodic regressive revelations about marriage, sexuality and family. No surprise then that legalisation was abandoned and a ban was proposed. What possibly added fuel to the fire was the spate of ‘surrogacy scandals’ making headlines and the government’s patriarchal quest to protect its women and children.

Surrogacy scandals are not new and commercial surrogacy has been inducing anxiety for decades now. Some are repulsed by the commodification of “acts of love like mothering and pregnancy” and “priceless” children are increasingly entering the market. For instance, dystopic imageries in the form of reproductive brothels, baby machines and baby farms have been associated with this industry much before it reached its current proportions. Of course, one aspect of commercial surrogacy is that it can be and is exploitative of women, when consent is violated. However, this particular anxiety only reached panic levels after the technology and the commerce linked to surrogacy shifted to the global south and the rent for wombs began to accrue to women here. The commissioning parents often get portrayed as “reproductive tourists”, usually from the global north, using their privilege with abandon to fulfil their “right to a child”.

India, labelled by some as the “mother destination” of cross-border surrogacy, has become pivotal in all such debates and scandals: from the much publicised “Baby Manji” case where a single father was not being allowed to adopt his genetic daughter because the Guardian Wards Act of 1890 bans single men from adopting girls in India; to the more recent “surrogacy orphan” case of a boy, one of a pair of twins, being abandoned by his Australian genetic parents because they could not “afford” twins. The cases caused diplomatic crises between countries, with each blaming the other for creating a stateless child. The final scandal, and one that external affairs minister Sushma Swaraj emphasised several times in her justification of the new 2016 Bill is the scandal of Indian celebrities, like Bollywood actors Aamir and Shahrukh Khan, allegedly misusing poor surrogates, so that their wives could avoid labour pains. Scandals make good headlines but should tabloid stories be the driving force behind a country’s surrogacy laws? The problem with such legislations is that they often misdiagnose the root cause of a problem, and hence recommend inadequate and inappropriate remedies.

Prohibitory approach

The popular frame for understanding surrogacy shapes not just public opinion but also the policies devised. If we are convinced that commercial surrogacy is inherently unnatural and immoral, we are likely to propose a ban. In my 2014 book *Wombs in Labour* and all my works since, I have problematised the “inherent immorality” claim. Such arguments seek to naturalise the mother-child bond, further reifying the gendered norms related to reproduction. Burying surrogacy within the usual debates about morality and motherhood also limits our understanding of the critical dynamics of the surrogacy industry, especially the way it has unfolded in India. When we start unpacking the multiple realities of the surrogacy industry in India, we begin to see parallels, not merely with dystopic baby farms, but with other gendered and informal labour markets in India. Unarguably, the women workers in this new kind of labour market are making difficult choices and from a limited and constrained pool of employment opportunities, but does the existence of inequality make all economic choices untenable? Why then are we denying them this particular choice? Once we accept that this is, indeed, a labour market, albeit stigmatised, exploitative, and discomforting to many of us, we can start working towards laws that protect the rights of the labourers involved.

The proposed ban on commercial surrogacy is unlikely to protect the rights of women. Banning surrogacy in India will push the industry underground, further stigmatising the profession and the women involved and undermine their rights as workers. Given that countries like India will most likely lack the resources and the will to effectively implement a ban on surrogacy, the more likely outcome of a ban would be to make surrogates even more vulnerable, shorn of any legal protection from brokers and clients. A 2012 news report on the surrogacy industry in China confirms this prediction. Although there is no specific law regulating the industry in China, in 2001 the ministry of health banned any trade in fertilised eggs and embryos, which in turn forbids hospitals from performing any gestational surrogacy procedures. The ban is regularly flouted by clinics and clients and has driven the industry underground. While there is no official count of this fledgling industry, the *Southern Metropolis Weekly*, a Guangzhou-based newspaper, estimated in 2011 that over 25,000 children had been born in China through surrogacy arrangements in 30 years. The article reported that, in fact, people of higher economic classes used surrogacy practices to bypass the one-child rule. A similar controversy was unearthed in Taiwan, where surrogacy is illegal. A surrogacy company based in Taiwan was charged with human trafficking for allegedly holding Vietnamese women in hostels after confiscating their passports. In Guatemala, surrogacy seems to be replacing the industry of international adoptions, which has been featured in the media because of rampant human rights abuses. According to a 2010 report in the *Washington Times*, surrogacy brokers in Guatemala were also involved in the ‘work’ of arranging international adoptions.

Imposing a ban on surrogacy in India will as likely just shift it to another country in the global south. This claim is not based on mere speculation. The 2013 ban on “gay surrogacy”, for instance, pushed all such cases to Nepal. This industry flourished unnoticed by the media, until it made scandalous headlines during the earthquake. There was uproar around the gay Israeli commissioning fathers allegedly abandoning

the Indian surrogates and rescuing only their babies. What the media failed to report was that most Indian women working as surrogates in Nepal were literally stuck in Kathmandu because the ban had pushed them to make their living, para-legally, outside their country. By banning gay surrogacy within the country, the Indian government effectively made them even more vulnerable by forcing them to migrate.

Heterosexual bias

The Indian government, however, is convinced that the underlying problems with surrogacy will be erased by restricting the clientele to couples who the government deems legitimate – namely heterosexual married couples. In essence, this Bill is another clear indication of the conservative hetero-normative ethics of the current government. Sushma Swaraj's succinct retort to those who are labelling the Bill homophobic is telling: "We do not recognise homosexual or live-in relationships; that is why they are not allowed to commission babies through surrogacy. It is against our ethos." One cannot but wonder, who are these "we" who can lay down the norms, and against *whose* ethos? Swaraj has the same misconception that made the Indian Supreme Court overrule the Delhi High Court's decision to decriminalise homosexuality in the *Suresh Kumar Koushal v. Naz Foundation* 2014 case, where the court verdict portrayed homosexuals as a problematic "minuscule minority" who did not deserve the dignity of identity or personhood. In a nutshell her solution for all those left outside the Bill: "You are free to adopt". I am no champion of people's right to genetic children, but I have to question the glaring dissonance of the government's stance. If homosexuality and unmarried parenting are not our "ethos", allegedly making such parents unfit for raising genetic children, why is the state being so benevolent as to let them adopt?

Keeping such absurdities aside for a moment, in fact, it makes good sense to recognise the intersecting ground between adoption and use of ARTs more broadly, and not just surrogacy. The increasingly complicated processes of adoption become convenient ways to legitimise the use of ARTs. But here too the Bill fails to even start a dialogue. Adoption and other aspects of assisted reproduction are entirely left outside the ambit of the Bill, leaving little scope for critical discussions on gamete donation, the politics of labelling infertility a "disease" and the current obsession with mandatory parenthood and genetic essentialism.

Gendered status quo

Finally, one of the most controversial clauses of the Bill that seems to be escaping much dialogue is one where only "altruistic" surrogacy has been deemed legal, where the woman is willing to bear a child solely for selfless reasons, with no money exchanging hands. Altruistic surrogacy is practiced in several countries, for instance the UK, Canada and South Africa, but it has not escaped criticism. Altruistic surrogacy reinforces the stereotype of women as "naturally" nurturing and selfless and, in essence, oppresses women under the guise of a moral celebration of their altruism. We see that in organ donation where due to gender imbalances and power

inequalities within families and households, women are often ‘encouraged’ to be altruistic donors.

In the US, a study indicated that more than two-thirds of kidney donors are women and another revealed that while more than 30 percent of wives who were able donated to their spouses, whereas fewer than seven percent of husbands eligible to donate did so. This becomes particularly critical in India, where altruism and gendered notions of familial duty, have often been forced onto female relatives, or those in positions of relative vulnerability for instance domestic workers. It is likely that the coercion of patriarchal family ties and the penalty for refusing to be altruistic towards a close family member is as acute as a contract or the inducement of money.

In effect, altruistic surrogacy obliges women to be reproductive gift-givers. By doing away with contracts and payments, a policy mandating altruism in surrogacy formally reifies the age-old belief that women need not be compensated for their reproductive labour. In a surrogacy case, such a clause also fails to consider the reality of the labour involved in gestation, whereby women not only go through immense emotional and bodily pain, but also forgo other forms of livelihood during the months of pregnancy. There seems to be no discussion about such practicalities like maternity leave for surrogates, and at least a payment for loss of income.

The reality is that we cannot resolve or regulate a matter like surrogacy within national borders through restrictive policies. Nor can it be left for state actors to resolve the problems that plague surrogacy practices in India. A more practical step might be to have an open international dialogue on the nature of this industry and to systematically work towards an international regulatory body and national regulatory bodies in each country, which ensure that all signatory countries and registered clinics follow basic minimum standards. Some minimum standards could include: transparency in financial transactions, in the medical process and in the relationships borne out of surrogacy. I expanded on this notion by introducing the concept of “fair trade surrogacy” in *Wombs in Labour*. For many surrogate mothers, a critical move towards fair and equitable surrogacy would not just be an increase in the payments they receive for their labour, but as critically, an affirmation of their dignity as labourers. Almost all the women emphasised the desire that their efforts at forging relationships with the fetus or baby be acknowledged and reciprocated, and not just during the contract period.

This call for an open and transparent exchange is not as idealistic as it may sound. Legislations and policies around national and inter-country adoption have, for long, made this a central concern. The “open” model of adoption can provide a guiding frame for future policies. However, for any policy to actually address the exploitative conditions, it is critical for us to view the surrogates as workers, and not as wombs or breeders or as voiceless victims. Only then can surrogates take control. For now, surrogates are the ones who are discussed but never heard, or ‘saved’ by an anxious patriarchal state but never empowered. Isn’t it time that the Indian state’s policies start reflecting the concerns of the vulnerable among the stakeholders?

~ Amrita Pande is the author of Wombs in Labor: Transnational Commercial Surrogacy in India published by Columbia University Press in 2014. She teaches at the University of Cape Town, South Africa. She is also an educator-performer touring the world with a multi-media theatre production Made in India: Notes from a Baby Farm.

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