

THE SURROGACY CONUNDRUM

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The surrogacy controversy that was under discussion for quite sometime came to the forefront recently for some decision of our Indian government. Very recently the Union cabinet approved the Surrogacy (Regulation) Bill, 2016. By its approval the Union cabinet intends to usher in a new era to regulate the uncontrolled growth of an industry that is expanding at a breakneck speed. The chief features of the Bill are establishment of a National Surrogacy Board in the Center and State Surrogacy Boards at the state level. The Bill does not ban surrogacy completely rather makes attempt to effectively regulate it. It prohibits commercial surrogacy; which is at present practised without let or hindrance, however it allows Indian infertile couple to take recourse to altruistic surrogacy after at least five years of their marriage subject to fulfilment of certain other conditions. The Bill claims to protect the *rights* of the surrogate mothers and the children born out of this method. Other claims made in the Bill are: it will control ‘unethical practices of surrogacy’, ‘prevent commercialization of surrogacy’, thwart exploitation of substitute mothers and children born out of them. This initiative sparked off a debate that we intend to delve deep.

The genesis of surrogacy debate is shrouded in mystery. It is sometimes claimed that the advent of in vitro fertilization (IVF) method, popularly known as ‘test tube baby’, and the subsequent birth of Louise Joy Brown in 1978 with the usage of this procedure (IVF) ensued present-day gestational surrogacy controversy. Another opinion traces it back to Biblical times. From the *Book of Genesis* we come to know the story of Sarah, wife of Abraham, who was unable to bear a child and, therefore, availed the services of Hagar, Sarah’s servant, to beget a baby. It is also claimed that *Mahabharata* has reference of this process. Dronacharya was born, it is contended, out of artificial insemination. Here the donor was sage Bhardwaj.

Though it is a matter of debate if the above instances are really proper cases of surrogacy, some recent controversies regarding the modern surrogacy method kept wrangling over the issue alive. What stoked the debate further is the recent initiative of the government to give concrete shape to some regulatory framework for curbing indiscriminate practice of this proxy motherhood.

The Surrogacy Bill mainly harps on unethicity of this practice. In this connection we need to remember that India is not trailblazer in regulating the

practice of surrogacy. There are countries such as USA, UK, Belgium, Netherlands, Germany, France, Australia and some other countries which have regulations for better monitoring this practice, though the regulations may vary from country to country. In order to find out whether our Government is treading on a right direction by laying down such regulations a few words are necessitated to find out what prompted government to do so.

There is no gainsaying the fact outsourcing of baby- making industry is growing in India at a very quick pace and as per one statistics currently it is an industry of 2.3 billion US dollar. Some prominent centres which facilitate surrogacy are found in Hyderabad, Anand and in almost in all metropolitan cities. Day by day such centres/clinics are mushrooming in almost all cities as this is considered as a mode of earning quick bucks.

India has become a hub for this renting-out-the-womb industry for various reasons. Out of these causes absence of proper monitoring mechanism, availability of surrogate mothers at a very cheaper rate, proliferation of IVF clinics and advanced medical facilities at affordable rate, India's integration to the process of globalization are noteworthy. The growth of this industry is also embroiled in controversies. Some such controversies are Baby Manji Yamada case where the commissioning parents were a Japanese couple and the case went to the Supreme Court; Harihara Varma vs Girija Menon, dealt by the Kerala High Court; Rama Pandey vs Union Of India & Ors, dealt by the Delhi High Court. In one such case the Gujarat High Court in 2008 called for extreme urgency for legislation which is capable of addressing issues arising out of surrogacy. Even the Supreme Court of India previously in one related case underscored the need of bringing about regulatory framework for restricting rampant use of this process. The 228th report of Law Commission of India urged the government to prohibit commercial surrogacy and only selectively allow altruistic surrogacy.

It is evident that the problem was brewing for quite sometime. Hence, governmental effort for framing regulatory framework was not out of place. This unchecked growth, unethical practices, legal disputes are some of the causes that prompted government to bring about such a bill. The bill intends to put a brake on unethical practices, exploitation of poor surrogate mothers, abandonment of children

in some cases after birth and intricate racket of intermediaries. A government sitting idle in such a situation will be charged with dereliction of its duty.

A close perusal of the aforesaid reasons will make it evident that ethical issues are at the core of all the reasons cited. Ethical principles actually provide the bedrock for any legal framework. Therefore, let us explore the ethical controversies surrounding the issue in question. Some of the ethical issues that marred the controversy are: exploitation of surrogate mothers, children born out of this method and infertile couples . Argument is also put forward to show that in this practice buying and selling of babies take place which detract from their dignity. Dehumanization of reproduction and commodification of women body are further allegations against this practice. Identity problem of the child and sometimes complications about custodial rights are some moot points. Privacy rights, disputes relating to disposal of organic/genetic materials when they exist outside the bodies of either of the originator are also causes of concern.

Exploitation issue is the leitmotif of most of the arguments given against allowing surrogacy. Among usually exploited are surrogate mothers and children born out of them. Let us begin with the exploitation of surrogate mothers. Prohibition of surrogacy in the name of exploitation of surrogate mothers has resemblance with the prohibition of child labour. It evokes in our mind the dilemma between poverty and exploitation. When the question of exploitation comes to the fore a question that arises are who are these women who work as surrogate mother. Why do they come to this profession? Do they come voluntarily? Let us try to search for answers to these questions.

A survey conducted by the Centre for Social Research in collaboration with the WCD Ministry in 2013 is an eye opener in this regard to question who work as surrogate mother. The survey revealed that 68% of surrogate mothers in Delhi and 78% in Mumbai come from a background of housemaids. Thus the answer is: it is poor women who come forward for volunteering this service for various reasons. These poor women who eke out on meagre earning, it is a source for earning money for their family, for their livelihood, for better upbringing of their own children. It is hardly conceivable that a poor infertile women will be able to get the service of a women from a well off family for a carrying a child for her. Hence, pecuniary benefit lures poor women to this profession. And if they do not have problem, why should

society interfere, a society which is shrinking its budget in social security sector for more than one reason and unable to ensure these poor women a decent living. It is not surprising that hailing from this background they will consider any regulatory framework to curb surrogacy repugnant and will consider governmental action as foul play. They also contend that they are doing a 'noble job'. Arguably they are right. "Motherhood and the ability to have children is a gift that nature has given to lucky women... I don't think there is anything wrong in 'gifting' and 'sharing' this divine power and engaging in something that is mutually beneficial to all the parties involved," aptly argues one surrogate mother.

Surrogate mothers are actually a victim of existing unfair lopsided social order. Given a choice between exploitation and poverty, umpteen people will choose the former. These women are coerced into this role by unjust social order, they are exploited by the intermediaries, on account of their utter cupidity (as we have evidence that surrogates are sometimes given one fifth of the sum given by commissioning parents), by the commissioning parents in various ways, but the moot question is where else these surrogates could have looked for an alternative source of income? A menial household work with a mere pittance which is very much insufficient for their livelihood, for decent education of their own children? If it is incident to poverty, is it wrong to aspire a decent living for them, better education for their children? Libertarians opine that if liberty of individuals is maximized, society is served best. Following this line proponent of surrogacy favour giving increased opportunity of choice to surrogates which is beneficial for society as a whole. Successful surrogacy arrangement brings opportunity coupled with jubilation for intended parents - they happily take home a child with unbounded joy, surrogate mother in turn receives pecuniary reward that she badly needs. If her contribution is appreciated by the commissioning parents, it gives immense satisfaction to her knowing that she could help someone in realizing a priceless goal. Champions of surrogacy also consider it as a humane solution to the problem of infertility. It is expected that demand for surrogate mothers will grow in the coming days as the infertility rate is going up for various reasons and increasing number of women are joining the workforce and deferring childbirth to a later stage. Issuance of circulars by two conglomerates, Microsoft and Face book, almost two years back to their women

employees for deferring childbirth by means of cryopreservation is worth recalling in this regard.

The opinion of Justice Harvey R. Sorkow given during hearing of celebrated Baby M case may be recalled here incidentally. Emphasizing the sanctity of the contract he says in surrogacy contract neither party is in a superior bargaining position. A surrogate mother is on an equal footing with the commission parents. Each party has what the other party wants. Hence a deal is entered and a bargain reached. None of these sides has the expertise that leaves the other party at a weaker position. Thus the question: can a society interfere with the *voluntary* decision of a surrogate mother which society countenances unfair social order? Though the issue of the voluntariness of the decision of a surrogate mother is an unsettled one as is evident from the judgement of the Supreme Court of New Jersey in the same case. There are subtler reasons for not regarding the decision of a poor woman to choose a career of a surrogate mother as voluntary.

Exploitation of children is another contentious issue cited for curbing the practice of commercial surrogacy. It is a multifaceted problem as exploitation takes various forms. One such problem is that the child is not allowed to be nourished naturally. It is imperative for health reasons that the child after birth should be nourished by breast-feeding, however, this opportunity is missed by children in most of the cases as commissioning foreign parents take them away without giving them ample time to be nourished. We also find instances when a commissioning parent is reluctant to take the responsibility of the child if born with deformities. The surrogate mother's life style (such as smoking, drinking, leading a reckless life) may also jeopardize the interest of the conceived child.

It is hotly debated that having a child in this process amounts to buying and selling of babies. This creates a lot of problem for the baby born out of a substitute mother. The irresolvable identity problem that they face has been beautifully portrayed in a popular TV serial a couple of years back. They are, it is held, regarded as commodities, to be bought and sold. Justice Sorkow, however, rejects the argument that surrogacy amounts to buying and selling of babies. If in most of the cases the child is genetically related to the commissioning father, how can he buy? he asks. The payment made to the surrogate mother is for the *service* she rendered and not for the *product*, i. e., the child, contended the judge. This indeed is a very

complex issue. As the Supreme Court of New Jersey observed in the aforesaid case when it said that in a civilized society there is something that money cannot/ should not buy. It emphatically stated that commercial surrogacy involves baby selling. It is a case of baby selling since as per contract the payment is made only upon the surrender of custody of the child and termination of surrogate mother's parental right. Thus this amounts to sale of a baby also the sale of a mother's right that she naturally acquires over her child. The primary motivating force of intermediaries are profit making. This profit motive pervades and predominates the arrangement at every level and ultimately it is this factor that rules the entire deal. An exploration of the core of this controversy reveals that it actually hinges on two lines of thinking: one group subscriber of utilitarian line and another family of deontological line.

When it is argued that in a civilized society everything cannot be bought and sold the protagonists here have in mind women's reproductive capacities and babies begot using the process of surrogacy. The assumption behind this is that if it is allowed, they are treated as commodities fit for buying and selling and by doing this we *degrade* them and fail to value them appropriately. The advocacy of such a view underscores the point that in a civilized society we adopt different modes of valuation. Hence it will be wrong to value everything using a single mode. One mode of valuation may be appropriate for certain goods and practices, this same mode may be out of place for other goods and practices. For instance, proper way of valuing material commodities is to judge their utility which is definitely not the case in case of a human being. A human being is not a commodity and hence their mode of valuation will be different. He/she is worthy of respect, not an object to be used. Thus it is not the *use* mode of valuation that is fitting for surrogate mothers and children they produce; rather *respect* mode will be befitting for them. Elizabeth Anderson, a professor of the University of Michigan, strongly espouses this view and argues that surrogacy degrades children by viewing them as commodities. It uses children as tool for profit making rather than as beings worthy of love and care.

In commercial surrogacy women bodies are treated as factories. This is demeaning. A surrogate mother is paid not to form natural relationship with the child she brings to term. Here antagonists of this process discern a paradigm shift - there is an effort here, as Anderson shows, to replace parental norm (which is at the core of ordinary reproduction) with economic norms (in case of contractual parenthood). By

repressing natural parental love of a surrogate mother, it degenerates a surrogate mother's labour into a form of alienated labour. It is a form of alienation as she is foisted on to forgo parent-child relationship, an emotional bond with the gestated child, which social practices of pregnancy promote and cherish so fondly.

Theological concerns on this issue also reinforce the view that it amounts to dehumanization of reproduction. The main reason they cite for disapproval is that conception outside sexuality is unnatural. Procreation not resulting from bodily love is not in conformity with God's plan and hence dehumanizing. They express disquiets and disapprove demoting reproduction to a scientific exercise in the process of renting the womb.

Feminists also voice their concerns by saying that it is a form of exploitation of women and children. They refuse to accept the view that this is merely a personal matter of surrogate mothers and invoke the slogan all personal issues are actually political issues. It also has the potentiality of promoting trafficking in human being.

In the beginning it has been said that the controversy is predominantly a moral controversy. Had there been only one criterion, one ethical standard, for judging rightness or wrongness of an action, it would have been a very easy job for deciding whether commercial surrogacy was right or wrong. However, ethical principles are diverse and intricate which makes deciding ethicality of an issue very difficult. The arguments stated above pose a serious challenge to popular ethical theory of utilitarianism. Jeremy Bentham's view that justice is merely a matter of maximizing pleasure over pain faces a severe jolt. Everything cannot be judged by its utility as it will degrade those goods and practices that call for valuing according to higher norms. Deontologist Immanuel Kant would have argued in favour of a different mode of valuation. Traditional pregnancy, resulting from union of a male and female partner, promote an emotional bond between parent and the child but in a contractual pregnancy that requires a mother not to form that bond is degrading and hence is an anathema to a deontologist.

Further question that comes to the fore is about the restrictions posed which allow only those couple to have access to the services of a surrogate who for medical causes are unable to bear a child. There is plethora of instances when women physically capable of bearing child take recourse to surrogacy as sometimes they are too busy to keep confined themselves for a long period during pre and post

pregnancy. It might also be the case that sometimes aesthetic standard requirement of the career that they pursue hinders them to carry a child. Again, when this service is denied to homosexuals, the question that comes to the fore: are we trying to indoctrinate heterosexual norms on them that they find repugnant?

Decision not to allow foreign commissioning parents is another facet of the problem. A country that has opened its market to the global community in almost every area, it is difficult to justify putting a complete ban in surrogacy to foreign parents who look for taking advantage of Indian market for having baby through Indian women who is gifted with high fertility but cursed with poverty. Thus it is feared that the proposed Bill by putting a blanket ban on foreign nationals to take advantage of this burgeoning industry could cause a huge loss to the surrogate mothers as these are the people who are best paying customers. As per one statistics 48 per cent commissioning couples come from abroad. On account of this it is possible that the proposed legislation may be challenged in the court. The comity of nations might be at loggerheads with this ban.

As an alternative to surrogacy the draft Bill talks about adoption. It is understandable in a world when population pressure is increasingly putting strains there is little logic in creating new babies with the help of surrogate mothers. It will be prudent to divert scarce medical resources for researches which facilitate saving lives and improve quality of existing lives instead of spending on the development of reproductive technologies. Adoption brings an opportunity for rehabilitation of these unlucky children. But it will not be out of context to remind that we live in a country where infertility is regarded as a curse and is considered as stigma for a couple. Only an affected person can realize how personally devastating it is. It is indeed not easy to get rid of this stigma. That is why information about artificial insemination is kept concealed to protect the male partner from the stigma of infertility. The celebrated movie *Chori Chori Chupke Chupke* depicted this social issue very deftly. People therefore fall back upon surrogacy for fulfilling their dreams of parenthood which nature rudely thwarted. In Indian ethos the concept of *pitri rna* which has to be repaid by procreating a child underscores this point. Infertile couples harbour an indomitable desire to bring into being a child who represents an extension of their own bodies, who is genetically related to them. Their desires represent a quest for transcendence, a desire for creativity. Challenging this eternal verity of life is bound to be spurned. It is

also true that there is a mismatch between infertile couples and available infants for adoption. The process of adoption is also very complicated and lingering? In such a situation: Is it right to put a ban on such a quest?

Government proposes in the Bill to allow only altruistic surrogacy and in such cases a surrogate mother need to be a close relative. Altruistic surrogacy might have been practised in the past. But a modicum of intelligence tells us that at current time it will not be an easy proposition, given the current social structure, to find a close relation who will be forthcoming to help out her infertile relatives.

What is found that in the present dispensation the Bill is an indiscreet one. Instead of putting too rigid a ban, the situation calls for effecting better regulation with a humane face. The current one may not be enough to address all ethical and legal niceties. More moderation and incorporation of soft teeth may be required. Intransigence on the part of the government may snowball into a major controversy.