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The New Surrogacy Bill 2016: Is exclusion the only form of effective regulation?



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ABSTRACT

In this paper we discuss some of the features of the New Surrogacy (Regulation) Bill 2016 in India and ask whether the extreme step of a complete ban on commercial surrogacy is an appropriate response to the underlying issue of exploitation of surrogate mothers and children. The paper asserts that the negative externality associated with commercial surrogacy is low. Appropriate regulations can ensure that the rights of surrogate mothers are protected and both the parties to the process are equipped to understand the consequences of their choices. The non-availability of even altruistic surrogacy for certain groups of people has been criticized.

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In August 2016 the Union Cabinet cleared the recently introduced Surrogacy Regulation Bill by the Ministry of Health.¹ In the aftermath of the introduction, there has been an avalanche of strong opinions on both sides, covering a number of physiological, legal, ethical, social and economic issues. In this article, I look at some of the core issues related to commercial surrogacy specifically in relation to India. This also an attempt to understand whether the stated objective of the bill matches the core concerns of the Government and whether the chosen path of banning commercial surrogacy is the only way to address those concerns.

Here I look at the following three core issues at the heart of commercial surrogacy:

1. The economics of surrogacy,
2. Freedom of choice and informed consent of the parties involved and its relation to existing power structures, both social and economic,
3. Discrimination in the eligibility criteria.

1. Surrogacy: economics perspective

A whole range of economic issues can be raised with respect to surrogacy. Here I am going to focus on two: externality associated with surrogacy and opportunity cost of surrogate mothers. An action by an individual agent has (negative) externality if the benefit of that action accrues to the decision-maker but the same

action harms others who are not directly participating in that market. Pollution is the most prominent example. As we speak, the air quality in Delhi-NCR is taking a nosedive and the usual blame-game is on. One of the big contributors to this particular kind of pollution, at this particular time of the year, is the practice of the burning crop-stubbles by farmers in the nearby states. Farmers undertake this particular activity because it benefits them economically (cleaning up the field quickly in the cheapest possible way). But this creates negative externality because of the obvious harm it causes others who are neither directly taking the decision of burning nor are they receiving any direct economic benefits. Presence of an externality is a reason why regulators would want to intervene in the working of a market (restrict, if there is negative externality; supply more, if there is positive externality). This is when the efficiency argument, of allowing markets to operate without any interventions, can be overturned.

The New Bill is severely restrictive – it bans commercial surrogacy and only allows altruistic surrogacy. That means the regulators are of the opinion that this market should not exist; only altruistic surrogacy is allowed which, by definition, is driven by non-market forces. This would imply that the social or economic cost of continuing commercial surrogacy is so great that the cumulative utility derived for some is not enough to merit its existence. What are these insurmountable high costs? In terms of just the amount of money exchanged, commercial surrogacy costs anywhere between 20 and 25 lakhs.² Out of this, around 3–4 lakhs go to the surrogate mother for her services. In most cases surrogate mothers also receive some monthly payments for ongoing medical care associated with the pregnancy as well as insurance

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for the entire duration of pregnancy. For the service-providing clinics and doctors, therefore, the monetary benefits are clear and substantial. For the surrogate mother it is not so clear, given the exact amount that actually reaches her can be lower than the above mentioned numbers. However, there is also substantial anecdotal evidence to suggest that women who decide to become surrogate mothers value the monetary compensations and often use the money for children's education and health and acquiring durable goods (like, home). This source of income is particularly important for poor families whose opportunity cost is low due to inadequate access to appropriate income opportunities (which also creates favorable condition for economic and emotional exploitation). What are the economic and social costs to the society at large? Nothing, in the ideal situation, but of course realities are not ideal. Two kinds of costs have been discussed. First, inadequate health care for the surrogate mothers during the pregnancy and post delivery complications both of which, if aggravated, can give rise to economic costs in future. The surrogate mother might not be able to look after her own children during the process and depending on how many times this activity is undertaken by the same individual, there might be negative impact on the up-bringing of children which can have a wider societal impact. The emotional burden of going through (multiple) pregnancies can also have wider ramifications for the affected person and her family. This is particularly true for communities where a large number of women choose to be surrogate mothers, often induced by local surrogacy clinics. The second cost is the economic, psychological and social cost of an abandoned child, of which we have seen some unfortunate examples in the recent past.

Are these enough grounds to completely remove this market? All of these look like regulatory issues that can be monitored and regulated at varied levels of success, given the intrinsic problem of implementation that plagues every major regulation in India. On the issue of how to provide more economic benefits and support to the surrogate mothers, is it really that hard to come up with a regulatory framework where the surrogate mothers are guaranteed certain (higher) payments, broad medical benefits during the process (and emergency provisions) and life-long health insurance that are verifiable? This can potentially take care of the future health costs of the surrogate as well as health issues following an unsuccessful surrogacy. As India is strengthening its Aadhaar system of identification this kind of regulations, that has to be periodically monitored, look feasible. There should be a discussion about who should bear the cost of some of these future cost-components and the service-providing agencies must be part of the solution.

The issue of abandonment of children born out of surrogacy is an emotional one. The recent cases, of abandonment of an autistic child by a couple in Thailand and that of an Australian couple who had twins by surrogacy but chose to take only one of the babies, leaving one baby stateless in India, have send shockwaves creating urgency for the Government to act.³ The case of Baby Manji Yamada vs. Union of India also points to social and legal costs associated with determining who is ultimately responsible for a child obtained through surrogacy.⁴ But a majority of these cases are examples of anomalies that arose from a lack of comprehensive surrogacy laws and lax implementation of existing laws. The case concerning the Australian couple is a relatively straightforward case of violation of Australian law and inadequacy in Indian law concerning surrogacy. Granted that no law can cover all contingencies and implementation remains a challenge, a stronger set of rules and strict implementation can probably deal with most of these cases of abandonment.

Advocates of the new bill have highlighted some of the above cases to argue that the lack of sensitivity and care toward surrogate

mothers and the children are the main reasons why commercial surrogacy should be controlled.⁵ The call for better surrogacy laws and effective controls is sensible and there is no reason why there should not be a full-fledged debate on this, keeping in mind all the recent cases of exploitative and anomalous behaviors. But is it absolutely necessary to be so restrictive?

On the other hand, there are real economic and psychological benefits from surrogacy. There are anecdotal evidences to suggest that most individuals who decide to be surrogate mothers do benefit economically and often the economic gain is used for productive activities. The benefit to those who have children through surrogacy is obvious. The focus, therefore, should be on how to increase these benefits for all the parties concerned, in particular for the surrogate mothers.

2. Freedom of choice and informed consent

A recent article titled "Chimera of Choice" has criticized the freedom of choice argument.⁶ It is a fantastic title to summarize the various facets of choice, particularly with respect to reproductive choices in India. Two different groups of people are involved in the process of surrogacy – couples/individuals choosing a mode of parenthood and potential surrogate mothers choosing to go through the process. Since the Ministry has explicitly mentioned that addressing exploitation of women is a prime concern, let us start with the choice problem of potential surrogate mothers. Surrogacy is expensive. Hence the familiar pattern is that the couples who opt for surrogacy are relatively prosperous economically than the surrogate mothers. Economic hierarchy may also coincide with social hierarchy. Hence exploitation is a concern. The hugely profitable business of surrogacy (Gujarat is a prime example) has created a situation where women from poor families "choose" to be surrogate mothers as other avenues of achieving economic well being are not accessible to these families.^{7–10} This is a valid criticism, showing that the over-used concept of choice has little meaning for people whose position within the society and even inside the family is pre-determined at the lowest possible level. There are anecdotes to suggest that fertility clinics often brainwash potential candidates to become surrogate mothers and then provide inadequate support.¹¹ However, as Ghatak (2016) has pointed out surrogate mothers providing the service for money "is a symptom and not the cause of the underlying deprivation". Lots of inequitable transactions that impact the well being of the buyer differently than sellers exist, but we do not invoke that to completely stop those transactions.¹² Once again, the focus should be on implementable regulations and not an outright ban.

Making informed choice also requires access to information and the capacity to process information. This is where regulation can play a big role. The decision (of whether to be a surrogate mother) should involve evaluating the costs and benefits of the whole process, including possible medical complications before, during and after delivery as well as possible psychological impacts. Government's role as information provider can play a major role in creating an environment where the surrogate mothers understand the consequence of the action in terms of costs and benefits. This will dampen, if not eliminate, the exploitation of vulnerable surrogate mothers and the families.

The argument, that the poor are often unable to choose activities that benefit them the most, is not without caveats. For a perfectly rational agent, the choice made is the optimum one given his/her circumstances even though it might look unattractive to others. Creation of a hierarchy of choice based on social and economic position of individuals smack of elitism. Also people choose localized decisions based on opportunity costs that are localized too. To say that, by accepting a payment that is less than a fraction of what is offered to a surrogate mother elsewhere the Indian

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