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Surrogacy Biomarkets in India: Troubling Stories from before the 2021 Act

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Inadequate governance and widespread unethical medical practices had made India one of the top global destinations for surrogate parenting till the Surrogacy (Regulation) Act was passed in 2021. Though this law prohibits commercial surrogacy, the proof of its efficacy will be in its implementation.

Until 2021, it was easy to find women to act as surrogate mothers in India. There were excellent medical facilities, and it was all available at a much lower cost than in developed countries. The factors that attracted potential parents to India included flexible rules, the control they could have over other women's bodies to suit their wishes, and loopholes in the law. Inadequate governance over the process of surrogacy and widespread unethical medical practices made the country one of the top global destinations for surrogate parenting.

As reports emerged of the deaths of surrogate mothers and egg donors, custody battles over children, abandoned or stranded (disabled) children, and trafficking and exploitation of women and girls, India prohibited commercial surrogacy with the enactment of the Surrogacy (Regulation) Act, 2021. The law now only permits altruistic surrogacy and allows non-resident Indians (NRIs) to use surrogacy in India.

After Thailand, Nepal, India, Mexico, and Cambodia have banned commercial surrogacy, the practice has moved to countries such as Ukraine, Georgia, Laos, Malaysia, Argentina, Columbia, Nigeria, Kenya, and South Africa. This movement of the surrogacy market clearly follows the post-colonial pattern of racial and economic inequalities. Feminists had earlier cautioned that the commercial surrogacy market would move to poor countries in the Third World as women there would be willing to do it for less money (Corea 1985; Dworkin 1983). This has happened.

The surveys

I conducted a study on 45 surrogate mothers in Gujarat, potential or intended parents, and medical practitioners in 2009 (Saravanan 2018), and did a follow-up study in 2019 (Saravanan 2020). In my follow-up study, 41% of the intended parents came from abroad, 10% were non-resident Indians (NRIs), and the remaining were well-off Indians, thus representing both post-colonialism and neo-colonisation of women's bodies.

> Many babies were born pre-term and underweight and needed intensive care because surrogate mothers in India were unable to carry them to term.

When field work for my first study was conducted, there was no regulation on surrogacy in India. The Assisted Reproductive Technology (ART) (Regulation) Draft Bill was formulated in 2010 and surrogacy was a section within the ART Bill. The Surrogacy (Regulation) Bill in 2016 focused specifically on surrogacy and it was passed by the Lok Sabha in August 2019. A select committee of the Rajya Sabha, chaired by Bhupender Yadav, submitted its report on the bill in February 2020 (Rajya Sabha Secretariat, 2020), and the Surrogacy (Regulation) Act was enacted in December 2021 (Ministry of Law and Justice, 2021).

When I conducted my follow-up study in 2019, the Surrogacy (Regulation) Bill was being processed. But its effect was already evident. There was a lull in the surrogacy business in Anand and Ahmedabad. Foreigners had stopped coming to India for surrogacy. That was a big blow for all involved in the business because the money had stopped pouring in. In particular, those willing to be surrogate mothers felt that the remuneration had to be worth the risk that they were taking. The follow-up study of women who had become surrogate mothers between 2009 and 2019 found that intended parents from abroad paid more for surrogacy than those from India. The cases mentioned here are mainly from the 2019 study, though there are some references to the previous study as well. Nine of the cases are repeat interviews with surrogate mothers; Ujwala, Nargisa, Dimpy and others participated in the 2009 study and were interviewed again in 2019. (All names are pseudonyms.)

This was a time of booming business. Just as real estate agents sell garden-view, east-facing properties for a higher price; surrogate mothers from a high caste, a specific religion, with attributes such as fair skin and higher body weight were preferred by the intended parents and hence came at an additional 'price'. The characteristics of the child (or children) such as sex, weight, and skin colour determined the final payment to the surrogate mother. Twins fetched a higher 'price'. Children born through surrogacy were thus commodified and treated like products. The distribution of benefits was extremely uneven and unfair: the surrogate mothers received a very small share (15% to 25%) in the surrogacy contract compared to the clinic. One clinic in Gujarat had turned from a small building unit into a huge building complex self-contained with the IVF clinic, boarding facility for intended parents, shopping area, neonatal intensive care unit, newborn nursery care, and the surrogate hostel was located in the basement of this new building.

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A neonatal intensive-care unit was a necessity since many babies were born pre-term and underweight and needed intensive care because surrogate mothers in India were unable to carry them to term. The mortality rate of infants born through surrogacy in India is unknown. Disabled children were treated like defective products and left in orphanages or even on the street. In the case of miscarriages, the surrogate mothers were only given a token amount and nothing else.

Individual stories

Some intended parents preferred “chubby” over “skinny” women. Surrogate mothers were made to stand in a row in front of the intended parents so that they could choose who they wanted and “beautiful, fair-skinned” women were preferred, said Madhu. She was in high demand as an egg donor and surrogate mother because of her fair complexion. But when she gave birth to twins with a darker complexion, the intended parents refused to pay her the full amount. Women claimed to be “Patel” even if they were not because a high caste fetched them more remuneration. Christians were preferred by intended parents who came from abroad, but these women were often forced to undergo sex selective abortions in the womb and experienced severe depression.

Muslims were not preferred as surrogate mothers in Gujarat. Madeeha and Rabina were transferred from there to Aluva in Kerala. There was a demand for Muslims from intended parents who visited Kerala from the Arabian Gulf countries to vitro fertilisation (IVF) clinics. Madeeha was carrying twins but the intended parents wanted only one baby boy. Her agent told her that she should abort the other child. She refused to do so and gave birth to twins, but her friend Rabina was not so lucky—one of the foetuses in her womb was aborted. Madeeha pleaded but she was not allowed to see the babies—even a photo of them was not shown to her. She said, “I was treated like a machine, they didn’t even show me the faces of the children.”

Multiple embryos are transferred into a surrogate mother’s womb to enhance the success rate, though legally only three embryos can be transferred. If more than two survive, the clinic performs selective abortions and it is invariably female foetuses that are aborted.

After her first surrogacy, Ujwala fell short of Rs. 50,000 to buy a house, and the clinic asked her to become a surrogate mother again. This time, she was carrying three foetuses (two females and one male) but the intended parents did not want the second female. An in-utero selective abortion was performed, much to Ujwala’s disappointment. This is known to be a risky procedure that may cause the miscarriage of all babies. Ujwala began bleeding profusely and was admitted to an intensive care unit (ICU). She remembered her sobbing son standing outside the ICU, watching her through a glass door, thinking she was going to die. She lost all the babies and was paid Rs. 50,000. Ujwala could not buy her house due to the cost of her post-surrogacy medical treatment. She felt exploited and betrayed and said that the clinic had played around with her life. She added that the surrogate pregnancies had made it impossible for her to work like before.

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Many of the surrogate mothers left their children behind at home, to be looked after by someone else. Lactating women were given medicines to dry up their breast milk to make their bodies ready to become mothers again and they had to physically move away from their own children to stay in surrogacy hostels. The same breast milk became very valuable after the birth of the surrogate children as it had to be extracted through a breast pump and fed to the babies. A surrogate mother’s interaction with the child she had carried was restricted—she was sometimes allowed to see the child through a glass window but not permitted to touch or hold it.

Madhuri said, “They didn’t allow any sort of bonding after birth. Our duty was only to provide breast milk using pumps.” Parul cried to see the baby at least once. Her entire delivery was video recorded but they refused to show her the baby. Eventually, it was the person recording the video who took pity on her and returned to her bedside to show her a picture of the baby. Some surrogate mothers looked after their babies as nannies and bonded intensely with them, but they were then suddenly separated with no hope of further contact.

Surrogate mothers, mostly the poorest of the poor, experienced several health problems that ultimately affected their capacity to earn a livelihood. They suffered from thyroid diseases, high blood pressure, diabetes, cancer, and even HIV. The hormones that surrogate mothers were given to prepare their body for pregnancy and keep the baby in their womb played havoc with their health.

Radha was “poor” and went into surrogacy to release the land her in-laws had retained on lease. She repeated surrogacy to pay back the loan her in-laws had taken for her marriage. The household now owns a house, but she said, “My life is over, I have become weak after two surrogate pregnancies. But I sacrificed my life for the sake of my children.” One woman (Dimpy) from a well-settled agricultural household was made a surrogate mother so that the household could buy two buffaloes.

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“An endless saga of medicines and injections” is how Gracy described the surrogacy process. She said, “It is extremely risky and has a serious impact on the surrogate mother`s physical health. All the medicines, medical interventions, and injections are unbearable. My body exists only on the outside; inside, it has become hollow. I can’t work as I used to work before the surrogacy. I face so many physical problems now.”

Surrogate pregnancies are riskier than normal ones (Woo et al. 2017). Several surrogate mothers have had near-death experiences, which have included hemorrhages and having their uteruses removed. Gracy witnessed the death of a surrogate mother in the clinic while she was in a surrogate hostel and became very depressed. “Sangeeta’s image was in front of my mind all the while. Whenever I opened my room door, I saw her bed and I could imagine Sangeeta lying there and talking to me. I remember that always, even now.” She was terrified that she too would die.

> Most of the ‘very poor’ households remained very poor even after surrogacy.

It was alcoholism and indebtedness among the poor and poorest households that drove most women into surrogacy. Emotionally, all surrogate mothers were affected; however, the poorest were the most affected. Women who missed their family and children at a surrogate hostel, experienced/witnessed frightful near-death incidents or unpleasant and risky medical intrusions, and women who saw their household monetary situation worsen were more depressed than others. Sneha searched her cupboard for the photo of a baby girl and began weeping while speaking about her. Her two children watched her cry. The teenage children of another surrogate mother asked why their mother was not given rights to the child even though she was their birth mother.

The poorest surrogate mothers were able to escape poverty only if they carried babies for others two or three times. Most of the “very poor” households remained very poor even after surrogacy. The bulk of the monetary compensation received by them after the first surrogacy was quickly spent on buying consumer goods such as TVs, fridges, and furniture, leaving little behind. The women were then coerced to become surrogate mothers again and only those who managed to do this successfully could alleviate their poverty to some degree.

On the other side, Banu was “very poor” but she built a house after becoming a surrogate mother three times. She had to repeat the process because her husband got the household into financial difficulties after her first surrogacy. On seeing what he saw as “easy money” come in after the child’s birth, he got into the habit of taking loans. Moneylenders began coming to her doorstep asking for their money, and whenever she had to raise Rs 1 lakh or so, she would go in for egg donation and surrogacy.

> Trafficking of women was rampant when there was no law on surrogacy. A 13-year-old from Jharkhand was trafficked to Delhi, raped, enslaved by the traffickers, and made to deliver six times.

Nargisa was “poor” and had bought a house after surrogacy. But the surrogacy money was spent and her husband began borrowing. Eventually, they had to sell the house they had bought. After having enjoyed the luxury of quick money, her husband refused to work for the usual wage, but Nargisa refused to become a surrogate mother again or donate eggs and they became “very poor”. “It has been one of the worst times,” she said during the survey.

Trafficking of women was rampant when there was no law on surrogacy. A 13-year-old from Jharkhand was trafficked to Delhi, raped, enslaved by the traffickers, and made to deliver six times (Hindustan Times 2015). She was made to breastfeed the children for six months before they were given away. This came out when she was rescued by rights activists and she filed a complaint with the child welfare committee in her home district when she was a 31-year-old in 2015. The same network that was used to lure girls to work as house maids or to be forced into prostitution was used for trafficking them for surrogacy. “They treated me like a money-minting machine. My will never mattered to them, all they wanted was me to deliver babies for them,” she said. Recently, there has been another similar incident reported from the northern districts of West Bengal (Hindustan Times 2015).

All this brings us to the issue of the societal pressure to have children. When they choose to live without children, couples are often labelled as abnormal. Women carry a double burden because they become targets of abuse and their bodies are subjected to treatments, irrespective of whether they are infertile or not. Women feel pressured to try technological reproduction simply because it exists. They walk into a dark tunnel, hoping that there will be a light at the end of it. But they do not know that the tunnel keeps getting longer because doctors do not fully inform them about the depression that comes with the hormones or about the success rate of IVF, which is quite low (R, Cabra et al., 2018).

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Women going through IVF treatment face social stigma, and experience psychological problems due to the hormone treatment and physical stress due to the infertility treatment. Their bodies are violated at different levels—physical, psychological, and social. And the surrogacy process is likely to put another woman (the surrogate mother) through the same set of problems. In addition, it puts the surrogate mother’s health, freedom, and even life at risk. If individual reproductive rights violate other people’s human rights and social justice, it cannot be considered a constitutional right. Surrogacy promotes a deeply embedded classist, pronatalist, patriarchal, racial, and ableist social hegemony.

The 2021 Act

One option would be to allow the human rights violations under a legal umbrella and the other would be to protect women and children under a law that penalises violators. The Surrogacy (Regulation) Act, 2021 is a very detailed law, and it stipulates rules that IVF clinics, intended parents, and surrogate mothers are expected to follow. Clinics need to be registered with the National Assisted Reproductive Technology and Surrogacy Registry (NARTSR). The NARTSR boards are to be constituted at the central and state levels, with members including representatives from the medical fraternity, social scientists, women’s welfare organisations, and civil society.

> Some important aspects of exploitation have been addressed in the 2021 Act. There can be no abortion conducted without the written consent of the surrogate mother and it has to be in accordance with the Medical Termination of Pregnancy Act, 1971...

As with the Pre-conception and Prenatal Diagnostic Techniques (PC-PNDT) Act, 1994, appropriate authorities (AAs) have been appointed to monitor the implementation of the Act. The AAs have been given important responsibilities such as maintaining records, and the authority to search any place or summon any person violating the Act. They have the power to suspend or cancel registrations, investigate complaints, take appropriate legal action, supervise the implementation of the rules, and recommend changes required in them to the Board.

Some important aspects of exploitation have been addressed in the 2021 Act. There can be no abortion conducted without the written consent of the surrogate mother and it has to be in accordance with the Medical Termination of Pregnancy (MTP) Act, 1971, amended in 2021. Surrogacy is prohibited for commercial purposes and the sale of a child, any related prostitution, and any other form of exploitation can be punished. However, the forms of exploitation have not been specified. Clinics cannot advertise with the aim of

inducing women into surrogacy or promote commercial surrogacy. Any sort of racket, organisation, or group to recruit surrogate mothers is prohibited. Any use of brokers or agents to arrange for surrogate mothers is also not allowed and clinics are restricted from selling embryos or gametes for surrogacy purposes.

Sex selective abortions are prohibited during the surrogacy process as an extension of the PC-PNDT Act. There is insurance cover for a period of 36 months to take care of post-partum health issues. Only women between the ages of 25 and 35 are eligible to involve themselves in altruistic surrogacy. Since the risk of obstetric complications increases with higher maternal age, this clause safeguards women from unnecessary danger. Surrogate mothers have to be informed about all the side effects of altruistic surrogacy and their written consent has to be obtained. Women are allowed to withdraw before the embryo transfer. Widows/divorcees between the ages of 35 and 45 years can avail themselves of altruistic surrogacy. It is unclear why this clause exists, but it gives room for single ever-married women to have genetically linked children.

> Altruistic surrogacy is yet another area for debate because most of them are commercial as well—women are stereotyped into a caring, giving role while exploitation goes on in the background.

Intended parents should not have had a biological child, an adopted child, or another child through surrogacy. The only exception is if the child is disabled. Intended mothers have to be between 23 and 50 years of age and intended fathers between 26 and 55 years. Children are protected from abandonment and exploitation under the Act. NRIs are allowed to avail themselves of altruistic surrogacy in India. Partial commodification of women's body-space continues through a clause that holds surrogate mothers must feel for their child and desire to be a part of their lives even if it is an altruistic surrogacy. Altruistic surrogacy is yet another area of debate because most of them are commercial as well—women are stereotyped into a caring, giving role while exploitation goes on in the background.

The punishment for evading the law is 10 years imprisonment and a Rs. 10 lakh fine for clinics and five years in jail and a Rs. 5 lakh fine for intended parents.

Conclusions

The Surrogacy (Regulation) Act, 2021 is quite detailed and well thought out, but its implementation needs to be effective. Although there is a fear that surrogacy will go underground and comparisons are being made with the PC-PNDT Act, it is not that easy because surrogacy is a year-long procedure. The business has experienced a setback with the prohibition on foreigners coming to India for commercial surrogacy and many women unwilling to take the risk for a low monetary return. The legal outcome now depends on effective implementation of the Act.

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