

BOOK REVIEW

Overseas children: challenges in international surrogacy arrangements

RAKHI GHOSHAL

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The practice, the contract, the challenges

A couple from the UK travelled to Ukraine in search of a surrogate mother. According to the Human Fertilisation and Embryology Authority (HFEA)(UK), a birth mother is the legal parent of the child, irrespective of citizenship, and so in this case, it considered the Ukrainian surrogate the legal mother. However, Ukraine law ruled that the surrogate could not be the legal parent, leading to an impasse that left the child without a country and a parent. The UK courts eventually ruled in favour of the commissioning couple, but the absence of international guidelines on surrogacy contracts continues to throw up challenges that violate the human rights of one or all parties involved.

Surrogacy contracts are commonly made between people from different jurisdictions. Consequently, arriving at a mutually beneficial endpoint becomes difficult, if not impossible. The edited volume under review takes up the task of unpacking the problems that plague this domain and discusses the practical implications and consequences of the absence of international guidelines. It examines the problems of a lack of international surrogacy laws from the perspectives of the three primary stakeholders, the surrogates, the commissioning parents and the children born through surrogacy. Consequently, the articles examine the promises and problems in surrogacy, and take different positions vis-à-vis the availability of the surrogacy as a service.

Tammy Johnson discusses the landscape of the regulation of surrogacy in Australia, which largely permits only altruistic surrogacy and criminalises transnational arrangements. Johnson argues for a nationally homogenised regulatory model and recommends legalisation of surrogacy against financial compensation so that surrogates can better

place their claims and exploitation is minimised. She also recommends that only gestational surrogacy be permitted, ie the surrogate should only gestate the embryo, and her eggs should not be used. Richard Storrow provides an overview of surrogacy practices and norms in the USA; akin to the Australian regime, surrogacy regulations in the USA span from the prohibitive to the permissive, challenging interstate contracts.

Sonia Allan argues that the commonly drawn distinction between traditional surrogacy and compensated surrogacy is fallacious: in both cases, the child is actually "sold". To claim that there is no genetic connection between the gestational surrogate (who does not use her eggs but only gestates the foetus) and the foetus violates the former's human rights, especially when research has shown that the surroundings of the gestating woman actively inform foetal growth, not to mention that it is her placenta which helps the foetus live and grow.

In 2012, the Centre for Social Research in India interviewed around 100 surrogates and other stakeholders and concluded that most women had decided to become surrogates "due to poverty", exposing a system rife with inequalities, even though such women are known to use the language of altruism. Allan argues that women learn (or are made to learn) this language, but in reality, it is all about unequal socioeconomic locations. She demands a ban on commercial surrogacy because true agency and decision-making are simply not possible in commercial surrogacy. This demand resonates strongly with the current Indian scenario where, as on August 24, 2016, commercial surrogacy has been subjected to a caveat-less ban. The rationale for the ban is similar to some of Allan's arguments, viz that exploitation of women who come from economically compromised backgrounds needs to be stopped. However, arguments are flying thick and fast about how this law is itself working to reify the identity of those who work as surrogates as mere wombs with no voice or agency to think for themselves. While a range of physically and economically exploitative jobs in the informal sector never receive any footage, surrogacy has been banned on these very grounds. This urges us to remain alert to other agendas of the state, to the ideological positions that are circulated beneath the moral guise of the ban. The ban imposed by the Indian state is designed in a pro-poor language, talking about the rights of underprivileged women but only when they rent out wombs. It is intriguing to observe that the same state does not think

Author: **Rakhi Ghoshal** (rakhi.ghoshal@gmail.com), Consultant Researcher, Spandan Apartments, Kalikapur, Kolkata 700 078, West Bengal, INDIA

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much before erasing their livelihoods by building dams, or allowing corporates to indiscriminately mine their lands.

Not necessarily exploitative

Surrogacy helps ascertain an individual's/couple's right to a biological child and thus extends one's reproductive freedom by providing access to wombs outside the woman's (ie the intending mother's) body. However, this access to other wombs – ie the extension of reproductive freedom can only happen through the language of a social contract which needs to be drawn up between the individual/couple and the one whose womb is hired. "While [a] contract is designed to facilitate the competition of the market, it is not generally equipped to balance power relations in an intimate dealing," thereby meriting juridical monitoring, says Kate Galloway. She points out that the normative stance is to equate reproductive "right" with the commissioning couple (their right to have a biological offspring) and reproductive "justice" with the surrogate woman (ensuring a just surrogacy contract). In arguing that for the surrogate, too, the question can be one of reproductive right, Galloway contests the mainstream feminist position that surrogacy, by default, is exploitative in purpose and essence.

Fighting the assumption that infertile Australian couples are, by default, exploitative human beings, Anita Stuhmcke stresses the dyad of reproductive choice and autonomy, and insists on the decriminalisation of surrogacy. The "solution," she argues, does not lie in criminalising a practice but in making regulations humane and transparent, echoing what Amrita Pande reasons in the context of the ongoing debates on surrogacy in India. Pande points out the inherent contradiction in the logic of the recent blanket ban, premised as it is, on an idea of compulsory exploitation of women. While the fear of exploitation of workers in the informal sector has pushed demands for protection, humane regulations and more transparency; in the case of surrogacy, the same fear is making us ban the practice without entering into any dialogue with the "workers" involved.

Refuting the popular assumption that surrogacy is all about exploitation of poor women by richer couples, Normann Witzleb and Anurag Chawla point out that surrogates are known to have taken care of their own children's weddings, invested in property, borne the treatment costs of their family members and started their own businesses with the money received. It becomes, they argue, rather patronising to presume that the poor and less educated are not equipped to decide for themselves. Soon after the August 2016 ban on surrogacy in India, Geeta Pandey spoke to some surrogates in Chennai, and documented how they were using the money earned to repay

debts, send their children to better schools, set up businesses and build their own tenements. Exploitation and liberation can, at times, be two sides of the same coin – complicating the baselines for those who draft policies and design laws.

And finally

It is important to acknowledge that cross-border (or intra-country) surrogacy contracts are not designed with the intention of exploiting poor women; infertile couples are not evil beings who set out to oppress the poor. Surrogacy contracts get drawn as couples/individuals experience the urge to have a genetic child and, for all practical purposes, undergo the process economically – a complex trajectory which has worked such that richer nations have, in effect, converted parts of the developing world into "surrogacy hot-spots." The ethics of wanting an "own child" and societal pressures that make childlessness a fault or disease, is a different debate, and often gets conflated with the one on surrogacy as exploitative by definition.

This edited volume calls several of the existing knots into question; it promotes no one unanimous ideological position but highlights the complex nature of the issue. However, the arguments in favour of designing better laws and ensuring safeguards for the surrogates outweigh those arguing for a blanket ban. From a regime of no laws, conflicting inter-country laws and restrictive laws, it is time to move to one with transparent, beneficial and humane laws, those which will take the rights of all parties into account. Unfortunately, in India, right now, the flow is in the reverse direction – and surrogates are lining up in silent protest, demanding that they *also* be consulted, that they be offered more agency and bargaining power rather than be completely dispensed with by a patriarchal state that decides who should reproduce, for whom, and how.

A personal favourite is the chapter by Anthony Wood that lends a rather intimate and subjective touch to this academic subject. Located at the cusp of legal studies, human rights and sociology, this compilation makes a valuable contribution to some extremely topical concerns.

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