

May the surrogate speak?

[Bronwyn Parry](#) 14 December 2015

Surrogacy is said to exploit vulnerable women and commodify the resultant child, but context is everything. Our new series explores the complex lived experiences of surrogates from around the world.



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Commercial surrogacy, the practice of bearing a child for another for payment, has recently been described as '[the new frontline in human trafficking](#)'. Such claims reflect concerns not merely about babies being produced, on order, for sale across a market, but also about [poor women being coerced or deceived into a trade in which they are reduced to mere vessels or wombs](#). Members of the judiciary in Australia and India have recently demanded the imposition of complete bans on the practice of international or cross border commercial surrogacy. The justifications for doing so may seem obvious, but, in fact, benefit from some careful scrutiny.

What such analyses reveal is that commercial surrogacy is not a singular phenomenon, but rather a complex, highly variegated set of practices shaped by the social and cultural values and economic environments in which they are practiced. Invocations to ban appeal to a set of moral norms that are assumed to be universally shared, but which often prove exceptionally complicated to enact in specific contexts. To explain why this is so, I have invited leading

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researchers in the field to unpack some of the taken for granted assumptions around surrogacy: to demonstrate how and in what ways lived experiences of surrogacy around the globe complicate and undermine comfortable, at times sanctimonious accounts of why this 'abject' practice needs to be regulated out of existence.

It seems appropriate to begin in India. Since the 1980s this country has become a popular destination for couples seeking gestational surrogates, and commercial surrogacy has thus come to form an important sector of their now burgeoning assisted reproduction (AR) services industry. As part of attempts to improve regulation of the sector, successive Indian governments have sought to develop a suitable legislative instrument: "The Assisted Reproductive Technology (Regulation) Bill". Elaborated through the work of the Indian Council for Medical Research, the proposed bill has been through a number of iterations (2008, 2010 and 2014). Specialist advisory agencies such as the Indian Society of Assisted Reproduction (ISAR) were invited to comment on the drafts, groups that in turn proposed a series of refinements including a number of detailed, context specific regulations on fertility treatment including heightened protections and more detailed contractual agreements for surrogates and egg donors.

Imagine then [ISAR's surprise](#) when, in October 2015, just prior to the long awaited final ratification of the bill, two justices of the Supreme Court of India suddenly elected to weigh in on the debate over the future of commercial surrogacy by inviting the Indian government to unilaterally ban the practice. To the general astonishment of assisted reproduction specialists, academics, and policy makers the Modi Government agreed. Within the week, the government had declared, via [a Ministry of Home Affairs circular](#), an outright and immediate ban on both the provision of surrogacy services to foreign nationals and the importation of frozen embryos. It also stated its intention, via an affidavit to the Court, "[to prohibit and penalise all commercial surrogacy services](#)".

In a market that has become as publicly maligned as commercial surrogacy, the desire to occupy the moral high ground is strong and the overnight enactment of bans provides a seemingly efficient means by which to secure it. However, it is both important and instructive to look in detail at the narratives that were proffered in India to defend the Modi government's decision. A number were appealed to: that commercial surrogacy in India is profoundly under-regulated; that this necessarily results in the economic and psychological exploitation of vulnerable women; that these women are being 'used' by wealthy foreigners in ways that are unashamedly neo-colonialist. It is possible to investigate these claims more closely by drawing on my current research into the expansion of assisted reproductive services in India. Let's begin with the first.

Not so much under-regulated as unequally regulated

It is an oft-repeated assertion that the assisted reproduction industry in India is woefully under-regulated. References to it being something akin to the 'wild west' are [commonplace](#). Such narratives rest on three key presumptions: a) the commercial AR sector is riven with illegal practice; b) that the industry would benefit from much more robust regulatory oversight of the kind offered in the UK by organisations such as the HFEA (Human Fertilisation and Embryology Authority); and c) that the lack of regulation is an artefact of the unchecked neoliberalisation of the Indian economy, one designed to facilitate business development by lowering barriers to entry.

It is undoubtedly true, as our research in the field has shown, that some sectors of the fertility industry in India are very poorly regulated. This includes, as my colleague Rahki Ghosal reveals, the lower order ‘fertility clinics’ that pop up on every dusty street corner of India’s metropolitan cities. It would be wrong to assume however that all fertility service provision is equally unregulated. In our three years of fieldwork we have attended many very high tech clinics whose services (including surrogacy) are, in fact, very highly regulated. In our experience, the general rule of thumb is the more sophisticated the clinic, the more detailed the regulation. In fact, one clinic director sighed when I asked him about the additional licencing requirements that were due to accompany the 2015 ratification of the ART Bill: “This will just be my 31st licence – I actually have to get 30 already so this will be one more”. In reality, the regulatory landscape is uneven but with some notable pockets of best practice. By this I mean not only best practice in India, but arguably internationally as well.

Commercial surrogacy in leading hospitals in Mumbai and Delhi is, for example, highly contractualised. It has been argued that many surrogates lack the capacity to oversee their own contracts and rely on intermediaries whose involvement is elided in the contract itself. This is often true, although such opacity is hardly unique to this sector of employment. The contracts would undoubtedly benefit from further refinement, a point which both the ICMR and women’s advocacy groups such as SAMA had sought to address in the 2015 Bill.

Whilst contractualisation has its shortcomings, it is surely preferable to the situation that exists in its absence. Ironically, the UK is not an exemplar in this regard. HFEA provides robust oversight of the clinical fertility services sector in Britain, yet it has washed its hands of the regulation of surrogacy, which it frames as an altruistic practice that occurs within the permissive domestic space of ‘the home’. Reward for providing surrogacy services in the UK can thus only legally take the form of ‘compensation’ for lost wages and expenses, the amount of which is potentially open to continual re-negotiation as the pregnancy progresses. This can expose both surrogates and intending parents to extortion, scams, and rip offs for which they have no legal form of redress.

Contracts at least provide some degree of (imperfect) protection to the contracting parties in the Indian context. A ban will, however, force such negotiations ‘off piste’, to be conducted out of sight in communities where power relations are inevitably inflected with India’s inextricable caste and gendered politics. Without contract and clinical oversight commercial surrogacy risks being re-cast as ‘altruistic surrogacy’. This sounds desirable, perhaps even noble, but will potentially expose surrogates who lack autonomy and access to power or information to even more serious forms of hidden coercion.

The labour of labour

This brings us to attend more closely to the question of who is labouring for whom and under what conditions? Another familiar narrative surrounding surrogacy in India is that it is a service primarily for wealthy foreigners who exploit vulnerable Indian women to secure their much desired ‘biological’ child. The Modi Government has capitalised on this narrative by suggesting that the ban should apply to ‘foreigners’ but not overseas citizens of India (OCIs), people of Indian origin (PIOs), non resident Indians (NRIs) or even possibly to foreigners married to Indian citizens. These consumers are acceptable to this government it seems. Why is that? There is little doubt that the ban constitutes a show of nationalistic fervour and a performance of authority from the Modi Government—a case of regulating that which, as Schurr and Perler’s article also argues, is simply the easiest and most convenient to ban. I say

this because, as our work on this project has shown, it is no longer foreign nationals who constitute the largest consumers of surrogacy services in India but rather India's own rising middle classes. In this context it becomes clear that whilst banning foreigners is the most politically attainable form of regulation it is certainly not the most morally consistent.

Though most people frame surrogacy as 'parenting' and imagine it in relation to their own experience of pregnancies in the context of family life (their own, a friend's, partner's, or relatives), as Christina Weis suggests it is demonstrably a form of paid labour for many women. Surrogacy is certainly not an industry without risk—as Sayani Mitra's compelling article confirms. But to argue, as many do, that the physical or psychological risks of this work are exceptional to the deployment of feminised reproductive labour is simply specious.

Must commercial surrogacy always be exploitative of an underclass of women? As other studies have shown and as our own also confirms, many of these women make deliberate and considered decisions to participate. Of course some do so under conditions of structural violence—which constrain their life and employment choices—but certainly not all, as Zsuzsana Berend's piece demonstrates. For those that do, this is regrettably the world they inhabit. Those who seek to remove this form of employment must face the realities, as well as accept the moral and political responsibility for the alternatives that these women will be forced to accept. For many this will involve labour in even more poorly regulated sectors such as domestic service, toxic industries, or sex work, all of which are less economically rewarding and potentially even more precarious and hazardous than surrogacy.

There is also the question of how women deploy their earnings from surrogacy, and indeed of what motivates them to perform this work. Many of the surrogates we interviewed were very entrepreneurial and intended to use the money to lift themselves and their families out of intergenerational poverty by educating their female children, or buying a business. But it is not just economic need that drives their involvement. Many consider their work a kind of philanthropic labour. They participate not just to earn money but to assist other women to overcome the enormous stigma attached to infertility in Indian culture as well as abroad. Many of the gendered and racialised accounts that we encounter regarding surrogates also act to prevent marginalised or poorer women from occupying the role of benefactor to women of a more privileged class. It might be worth contemplating who benefits from the narrative that keeps this power hierarchy intact.

Constructing commercial surrogacy as an abject practice that is inherently problematic—like other practices usually included under the label of 'trafficking' and 'slavery'—often proves to be counterproductive. The possibility that any ban on commercial surrogacy will extinguish the practice is fanciful to say the least. Addressing the inequities in practice that we see in different corners of the globe requires thoughtfully constructed, nuanced and most importantly grounded regulation—not bumptious self-congratulatory bans that may only serve to worsen experiences and outcomes for those already operating at the margins of society. After all, what will it achieve globally? India is now part of a highly interconnected and interdependent globalised fertility industry. If the tide of surrogacy goes out in India then it will only wash up somewhere else, displacing the inequities that exist in one country onto unsuspecting others.