Title:  **Ending Commercial Surrogacy in India -** Significance of the **Surrogacy (Regulation) Bill 2016**

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Abstract:

The introduction of the Surrogacy (Regulation) Bill into Parliament, in August 2016, was a much-awaited response to citizen voices and human rights groups, calling for action in the unregulated area of commercial surrogacy arrangements. Both houses of Parliament are reviewing the Bill and its fate will be decided in the Winter Session of Parliament 2017. The Bill seeks to protect the rights of women and children at risk of exploitation and commodification as third parties in infertility treatments that use assisted reproductive technology. The market in infertility treatment has attracted global clients to India, seeking access to surrogates and procedures at lower costs. Commercial Surrogacy cannot be allowed in a country where injustice, inequalities and poorly implemented laws places the health and lives of vulnerable women and children at risk. Bringing regulation into this sector of medical services, the proposed Bill shuts the door on commercial surrogacy arrangements in India.

Introduction

The introduction of the Surrogacy (Regulation) Bill into Parliament, in August 2016, was a much-awaited response to citizen voices and human rights groups, calling for action in the unregulated sector of commercial surrogacy that placed the welfare of a section of Indian women and children at risk. 1

Against the background of pre-existing guidelines and draft regulations that governed the assisted reproductive technologies landscape, this Bill shuts the door on commercial arrangements in surrogacy in India, bringing to an end the covert exploitation of women in third party reproduction. The Parliamentary Standing Committee’s Report No. 102 on the Surrogacy (Regulation) Bill was submitted in the Lok Sabha and Rajya Sabha on 10th Aug 2017, and the fate of the Bill will be decided in the Winter session of Parliament this year. 2

Background – Third party Reproduction

The available options to overcome infertility increased with advancement of new medical technologies using In vitro fertilization (IVF) since the 1980s, but along with refinement of techniques and new possibilities including gamete donation and surrogacy, came questions about the nature of parenthood, treatment of embryos and exploitation of women. 3 Moral justification and ethical debate about harm to women, family structures and children were swept away in the hubris of this medical conquest of infertility, as doctors focused selectively on providing skill-based solutions rather than social implications or consequences. 4,5

Infertility clinics flourished in the 1990s, riding the wave of a global demand for IVF and surrogacy services at lower costs in an unregulated environment, and India became stuck with the dubious reputation of being the ‘most-favored’ destination; tinged with undercurrents of backroom notoriety that Indian medical tourism had certainly not intended to project. 6 Objections on ethical grounds in response to reports of exploited egg donors and surrogates, were brushed off as uninformed, moralistic and detrimental to hapless infertile patients who were finally able to experience the joys of parenthood. 7

This juxtaposition of rights and goods in this context was unsettling, constraining discussions and consensus on what emerged as an important social debate. It was becoming increasingly clear that treatment of infertile patients with new assisted reproductive techniques was unlike treatment for other medical conditions. Not only was reproductive medicine fraught with ethical concerns for infertile patients linked to high costs, hormonal stimulation, storage and manipulation of embryos, stigma and psychological distress, but there was possible harm to third parties such as egg donors and surrogates. 8 This added another dimension to infertility treatments, comparable to organ donation, where the rights, safety and best interest of ‘donors and surrogates’ needed to be protected. Not exactly patients, they would not share the same relationship with the doctor, but there was a professional duty owed to them. They could not be commodified as a third party ‘means’ to overcome infertility. 9

For this reason, when this unregulated sector boomed due to market forces and demand from abroad, it was not the medical technology, but the fate of gamete donors, surrogates and children that became the focus of concern and social condemnation. Unbridled commercialization in a context of social inequality would inevitably lead to exploitation; wealthy foreigners and infertility clinics were in a position to drive bargains in donor or surrogacy contracts. The profile of the typical Indian surrogate, slum-dwellers, financially stressed and often desperate, deepened the conviction that this was at heart, an issue of injustice. When the surrogacy contract involved cross-border clients and Indian slum-dwellers, the polarization became extreme. 10

Responsive and Relevant

It was important for the issues to be appropriately labeled and not clouded by diminution, so that they could be ultimately addressed. Even when surrogates testified about the joy experienced in helping infertile couples, and the heaven-sent ‘earnings’ from surrogacy and egg donation, it did not obscure their vulnerability to exploitation and underlying injustice. It just spoke of their impoverishment and lack of opportunity to earn adequately in a dignified manner.

This stark reality should not be obfuscated with arguments about rights and needs. Infertile couples undoubtedly have reproductive rights, but these clearly are negative rights. In enabling access to infertility treatments, surely the modalities and means must be legally and socially acceptable. The emotional quest for parenthood must not be allowed to cloud out duties and boundaries. On the other hand, donors and surrogates enjoy a constitutional right to life in Article 21, a positive right that includes the right to health and livelihood with dignity. 11 Article 23 also describes the right not to be exploited. 12 For this reason, Government regulation that seeks to address this undermining of fundamental rights is crucial and exigent. The Surrogacy (Regulation) Bill is framed to address mainly the issues of injustice and exploitation in this unregulated medical sector. Apart from minor modifications, it clearly signals the Government’s intention to address the social harms linked to the commercial component of surrogacy arrangements. In contrast, the draft Assisted Reproductive Technologies (ART) Bill 2014, now before Parliament, is silent on commercial surrogacy. It covers a broader objective of supervision and regulation of ART clinics, personnel and technical procedures, drawing mainly from the ICMR National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India, 2005. 13

A second reason for the Surrogacy (Regulation) Bill was the commodification of children born through commercial surrogacy, in violation of child rights. Here again, reports of abandonment of surrogate babies, contractual agreements for handing over children, fears of trafficking across borders and citizenship obstacles were the focus of concern. These are non-medical, ethical concerns of best interest of the child and parenthood that demand attention, closely tied in to a legal understanding of child rights and human dignity. 14

Critics of the Surrogacy (Regulation) Act condemn it as hasty; designed to assuage social protest and global vilification, unmindful of the broader benefits of assisted reproductive techniques. In fact, the Bill can be viewed as a purposive response to the uncaring attitude of Infertility clinics and doctors, who went about the business of a baby-market, neglectful of duties to protect the interests of surrogates and children, and dismissive of ethical concerns. Beyond the obvious benefits of assisted reproductive technologies, there were ethical, legal and social implications that needed to be addressed. It was the absence of systematic evaluation and self-regulation by the medical fraternity, even in the face of bad press and sustained criticism by social groups that pressured the Government to respond with the Surrogacy (Regulation) Bill; aimed at ending the commercial and exploitative aspects of commercial surrogacy, and not the reproductive technology itself. 15

The Culmination of Regulatory Effort

It is not that the Surrogacy Regulation Bill 2016 emerged in a vacuum. In fact it marks the end of a continuum of debate and review at many levels, that began in the early 2000s, when commercialization of reproductive technologies made the news and India got tagged as a ‘baby outsourcing’ destination. 16

The Indian Council of Medical Research (ICMR) was first off the blocks with its Draft National Guidelines for the Accreditation, Supervision and Regulation of ART Clinics in India in 2002 that mentioned commercial surrogacy arrangements. The Ministry of Health and Family Welfare approved these guidelines in 2005. 13 Commercial arrangements were not prohibited and these guidelines were ineffective, as they did not carry the weight of legislation. In response, the ICMR drafted the ‘Assisted Reproductive Technology Regulation Bill’ in 2008 (Draft ART Bill) This Bill went through repeated revisions in 2010, 2013 and 2014 as it moved through the Ministry of Health and Family Welfare, the Ministry of Law and Justice and the Cabinet successively. 17 At this point the Bill stalled, and the Infertility Clinics lobby pushed back against the progressively tightening regulations in a growing medical industry worth $400 million annually. 18 On the other hand, the Government continued to face pressure from media reports of surrogate exploitation, abandoned babies and condemnation for allowing ‘Indian Wombs for Rent’. 19

Report No. 228of the Law Commission of India, on the ‘Need for Legislation to Regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations to Parties to a Surrogacy’ was submitted to the Ministry of Law and Justice in Aug 2009. It highlighted the conflict of Interest involved in Commercial surrogacy, its impact on the family unit in society, and the complexities in safeguarding rights and freedoms of those involved. It recommended prohibition of commercial arrangements, while allowing altruistic surrogacy in a regulated framework that protected the rights of all parties involved, specially the surrogate child. 20

The Ministry of External Affairs responded to the issue of citizenship of surrogate babies in its letter of July 2012, restricting eligibility criteria for foreign nationals seeking surrogacy contracts in India. 21

The Ministry of Home Affairs placed further restrictions on the medical visa in a letter dated Dec 2012 and went on to prohibit foreign nationals, PIOs and OCI card holders from commissioning surrogacy in India. 22

A further restriction from the Ministry of Commerce prohibited import of embryos for purposes other than research in its notification dated 26th Oct 2015. The Department of Health Research, in its notification of 4th Nov 2015, drove a final nail in the coffin by upholding the notification of the Home Ministry to ban Commercial surrogacy in India and advised state governments of the same. 23

The June 2014 United Nations Human Rights Committee on Rights of Child examined the reports of India under the Convention and Protocols on Children in Armed Conflicts, Sale of Children and questions were raised about ‘legislation and cooperative measures to combat trafficking in persons as well as the sale of children through surrogacy and adoption’. 24

Clearly, the focus of concern was the social and legal implications of third party assisted reproductive technologies, as distinct from the technology itself. These human rights concerns about exploitation of surrogates and commoditization of children were inadequately addressed in the Draft ART Bill 2014. It was against this background that the Surrogacy (Regulation) Bill was approved by the Cabinet in August 2016 and introduced into the Lok Sabha in November 2016.

The proposed merger of these two Bills regulating this sector can be envisaged *as long as the ban on commercial surrogacy is carried through*. India has sent a strong signal to the world in defense of its most vulnerable citizens, picked up by other Asian countries that have also introduced prohibitive legislation; any dilution or rollback of this legislation, having come so far, will be viewed as an unconscionable sellout.25

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