**Report No. 102** (Aug 2017) on the **Surrogacy (Regulation) Bill** 2016

**Analysis and Comments**

Report No. 102 of the Parliamentary Standing Committee on Health and Family Welfare, on the Surrogacy (Regulation) Bill 2016, was laid on the table of the Lok Sabha and presented to the Rajya Sabha on 10th August 2017. (23,24)

It contains hearings with all stakeholders and witnesses, review of relevant documents and related legislation. The comments of the Standing committee are wide-ranging and pertinent, seeking to fill the gaps, explain and rationalize the statute. It includes responses from the Department of Health Research.

An analysis of the recommendations of the Parliamentary Standing Committee allows an exploration of some of the ethical, legal and social implications of surrogacy arrangements in our country, where diverse viewpoints and strong sentiment encounter difficult ground realities.

1. **Should the Surrogacy (Regulation) Bill, 2016 be integrated** with Assisted Reproductive Technologies (Regulation) Bill, 2014?

One of the important comments by the Parliamentary Standing Committee was that the Surrogacy (Regulation Bill) 2016 (hereafter referred to as Surrogacy Bill) may be superfluous, since most of the proposed regulation around surrogacy was already covered in the Draft Assisted Reproductive Technology (Regulation) Bill 2014 (hereafter referred to as ART Bill).

It is unclear why the ART bill languished since it was first proposed in 2008, and then revised repeatedly in 2010, 2013 and 2014, the revised versions attempting to address escalating protests and vilification of the sector at home and abroad.

One could speculate that the ART Bill was stalled because it focused more on the regulation of clinics and technological procedures rather than the ethical and social harms arising from its use. It did not address commercial surrogacy, exploitation of surrogates, and commoditization of children, which is the focus of the Surrogacy Bill. Concern from civil society was more about permissive guidelines and absent regulations that led to exploitation of Indian surrogates by economically advantaged global commissioning clients in cross border third party reproduction. Not all of these clients were infertile, and many used the unregulated surrogacy market for their aspiration needs. (25) Objections were not against the reproductive technology itself, but its commercialization and resultant harms. India suddenly found itself part of the very small group of nations that allowed commercial surrogacy. The reputation of being a surrogacy destination was internationally embarrassing for India, alongside current criticism for Human Rights violations. (26)

Since qualified doctors were present, both on expert committees and in charge of clinics, one can well ask how they let this happen. Were the stakes so high as to blind professionals to possible exploitation? The conflict of interest here is undeniable. To overcome this, regulatory bodies need to be guided not only by experts, but a wider range of stakeholders as well as guidelines from other countries. Our experience so far with radio-diagnostics, organ donation and now assisted reproduction, indicates that the law catches up much later in these contentious areas. We may need an independent body to evaluate the ELSI in medical and other scientific areas, in order to anticipate social consequences and harms along with benefits of new technologies. (27)

If the ART Bill and the Surrogacy Bill are to be merged, prohibition of commercial surrogacy must be clearly enunciated. This is imperative to send the right message to our citizens and to the world, ensuring that the market for surrogates, including sourcing agents, touts and surrogate hostels is deemed illegal. Altruistic surrogacy and modalities of compensation can be addressed subsequently.

In 5.93 the Report says regulation of all Infertility clinics using assisted reproductive techniques is a prerequisite for the Surrogacy Bill to be effective; the Draft ART Bill could compliment this Bill in regulating all the structures involved in reproductive medicine and surrogacy.

2. ‘The Committee recommends that the word **“altruistic**” in clause 2 (b) of the Bill be replaced with the word **“compensated”…**’

The arguments put forward by the Committee in 5.22 of the report against use of the term ‘altruistic’ express cynicism about the possibility that a surrogate would commit to pregnancy, childbirth and its risks, merely from an altruistic sense of compassion and maternal empathy. While the commitment and risks in surrogacy can be far greater than altruistic donation of a kidney or blood donation, it is important not to lose the emphasis on the component of *altruistic motivation*.

Altruism is the principle or practice of unselfish concern for the welfare of others. (28) It is accepted traditionally and culturally as a virtue, endorsed by religious and secular worldviews. There are many acts of sacrifice, heroism and generosity we encounter within the family structure or even within communities that while rare, surely exist. The nature of human relationships and experiences allows for unusual acts of giving and sharing that cannot always be rationalized. (29) It is possible that a surrogate can be motivated to assist an infertile couple to have a genetic child from a sense of empathy or concern, particularly a known person or friend. When she does, her welfare certainly deserves protection through regulations and insurance, ensuring standards of care and safety and covering all expenses and costs. However, this compensation mechanism must not detract from the voluntary altruistic nature of the action, and its primary intention.

Removal of the word ‘altruistic’ mitigates the act, and the message it sends about value and respect of a woman’s life and body. Use of the word ‘compensated’ undermines the altruistic aspect in volunteering to be a surrogate. It belittles a moral decision and human undertaking that cannot only be evaluated only in terms of money, even compensation. It is precisely this reduction into monetary terms that is considered degrading in commercial trade in organs and surrogacy, an important reason why this is banned in most countries in the world. (30) Retaining the term altruistic reminds all parties of the selfless nature of such acts, even when compensation mechanisms are in place.

The fact that altruism is more often encountered within families may have prompted the recommendation that only close relatives act as surrogates. The Committee presents good reasons why this could lead to coercion and may not be realistic, making the case that unrelated surrogates also be considered. This is reasonable, and the appropriate authority could evaluate the motivation of the unrelated surrogate, along the lines of the Transplantation of Human Organs Rules 1994, ensuring there is no coercion or commercial inducement corrupting the surrogate’s decision. (31)

There can never be a satisfactory price placed on a human organ or body process like pregnancy. It flows from the unique status of the human being, scripted through religious beliefs, human rights and even constitutional rights. Compensation is merely an effort at mitigating the cost and discomfort of an altruistic action. Clause 5.25 of the Report says that the Government should fix compensation and it should not be negotiable. Indeed, it will be an onerous task to create algorithms of suitable compensations for the duration, difficulties and discomforts of surrogate pregnancy. Will the Workman’s Compensation Act or Maternity Benefit Act be suitable basis for calculation? How can one be fairly compensated for the risks and discomforts, mental agony, family deprivations and physical changes? This calculation in terms of loss of productive days and family hardship is going to be a challenge. Again, it becomes another argument why the element of altruism cannot be denied, more so in the case of unrelated surrogates. (32)

Emphasis on the altruism component will ensure that surrogacy is not viewed as a form of employment for women. Compensation, while necessary, could alter the dynamics of the surrogacy agreement; which should be neither coercive nor exploitative. Could an upper limit be placed on compensation, so that it is not an inducement? In a country like India, where corruption goes unchecked, and vulnerable women live close to the poverty line, it would be crucial to scrutinize the terms and circumstances of every surrogacy agreement to ensure there is no commercial incentive. The experience of Government authorities with scrutiny of organ donors will be valuable here. A national registry of pre-screened and counseled volunteer surrogates could also mitigate this risk.

3. **Are Surrogacy Agreements enforceable**?

The Committee has strongly urged in clause 6.6 on the Report, that the surrogacy agreement should be comprehensive and legally binding. This presents difficulties because of the very nature of the product and services that the contract or agreement describes. One of the reasons that commercial surrogacy is banned in most countries is the questionable validity and enforcement of such a contract.

According to Section 23 of the Indian Contracts Act, ‘The consideration or object of a Contract is unlawful if it is forbidden by law, or would defeat the provisions of the Law, or would involve injury to a person or property of another, or the court considers it immoral or opposed to public policy.’(33) Pregnancy, hormonal manipulation and delivery presents the possibility of injury to the surrogate. Further, it could be deemed offensive to public sentiment and morality that a woman’s body is used in service to fulfill the aspirations of another party, commercializing the reproductive function of a human being. Also, in a country with laws against inequalities and injustices to women, surrogacy agreements involving this vulnerable population could be opposed to public policy; as would the indeterminate fate of children conceived through surrogacy and assigned parentage after birth. For these reasons, the legitimacy of such contracts would be questionable.

These agreements are also difficult to enforce. If the surrogate changes her mind and refuses to continue with the pregnancy, can she be forced to go through with it? Similarly, it may not be morally right to wrench the child away from the surrogate if she refuses to hand over the child after birth. In another scenario, it may not be in the best interest of the child to force the intended parents to accept responsibility of the child if they refuse to accept it, irrespective of their grounds for refusal. Further, the object of the contract is a human child, a situation that is ethically problematic, legally questionable and morally repugnant.

For these reasons, surrogacy contracts are unconscionable and unenforceable and would fall apart if tested by law. A tripartite understanding is the best one can expect, with signed consent of all parties involved: the surrogate, the clinic and the intended parent. An agreement of this kind can be recommended, as long as all parties understand its legal limitations. It could describe roles and obligations, possible limitations to autonomy of parties, as well as compensations and expenses, bringing transparency and information into the arrangement.

Given the limited awareness, empowerment and education of women in this country, and the lack of clear understanding about the limits of the law in these contentious areas, there is need for caution in navigating this landscape.

4. **Protection of the Surrogate**

Much of the recommendation of the Committee has been directed at protection of the rights and interests of the surrogate. Given the existing infertility burden and the diminutive fraction that would require surrogacy, the population of surrogates at risk is small. With the lure of commercial benefits removed and ban on access to foreigners, the numbers recede further. The Surrogacy Regulation Bill should bring the problem down to a manageable size that, comprehensively addressed through insurance and compensation, should lead to adequate protection of the surrogate. A national database of volunteer surrogates as recommended in 5.134 of the report, allows for pre-screening and counseling, complete information and understanding that can further protect the surrogate.

However, the Draft ART Bill says the ART banks will ‘supply surrogate mothers’. This is a contradiction, among many others, if the draft ART Bill and Surrogacy Bill are to be merged. According to the International Federation of Gynecologists and Obstetricians (FIGO) ‘surrogate arrangements should not be commercial and are best arranged by non-profit agencies’ (34)

In 5.26 the Report questions the choice of surrogacy as an avocation or way to retire debt. Is it right for a surrogate to earn this way just because other avenues are less remunerative? Article 21 of the Constitution enshrines the Right to life and livelihood in a dignified manner, while child bearing is risky and dehumanizing. Education and vocational training can be offer to all empanelled surrogates to provide wider life choices. The plight of these women should serve to alert the Government to its responsibility in education and employment for women and other neglected sub-sections of society.

The Report has suggested in 5.52, that accurate specialist designation, qualifications and experience be described for infertility clinics. Since the Clinical Establishment Act 2010 does not govern in many states, this requirement is important to protect patients and surrogates attending these clinics. The Draft Art Bill is silent on the qualifications and experience of professionals and employees in ART clinics.

Protection of the Surrogate through insurance is mentioned in 5.60 of the Report. Specific insurance products need to be designed for the purpose of surrogacy, with its unique risks and complications. It has to be clarified if leave and maternity benefits accrue to both the surrogate and the intended parent, and to what extent. It is unclear if employers would recognize surrogacy as grounds for maternity leave. Compensation alone may be insufficient, and must be complimented by access to health services and health insurance.

Information about health risks need to be comprehensive, and 5.120 of the Report suggests a neutral ‘Competent Authority’ to obtain signed consent from all parties; the surrogate, her husband, and the legal parents. Placing limits on the number of embryos implanted (5.125) and the number of cycles, as well as pregnancies (5.86) can mitigate risks. According to the FIGO recommendations, ‘all efforts must be taken to reduce the chance of multiple pregnancy with the ensuing risk to the surrogate mother and future babies’. (34) The ART Bill is unclear on this, and proper monitoring and documentation of procedures would be required. The surrogate should be allowed to stay at her home and care for her family, and not incarcerated in surrogacy hostels. This may require adequate counseling of husbands and children, along with nutrition and hygiene advice and diet supplements at home.

In 5.97, the Report clarifies that the MTP Act holds for surrogate pregnancy and the welfare of the surrogate is paramount. Some situations, however, may be problematic. If the surrogate changes her mind, can she request termination under the Act? How is her right weighed against that of the legal parents who are genetically related to the child and financially committed? If abnormalities in the child are detected late, after 20 weeks, can the surrogate be forced to terminate even at risk to her health?

5. **Protection of the Surrogate Child**

The voiceless entity in surrogacy is the child that changes hands after birth. The ban on commercial surrogacy will end the market that threatened to commoditize children. Media stories of abandoned and unwanted Indian surrogate children present a chilling counterpoint to the poignant pleas of infertile couples. Children are a vulnerable section of the population deserving of full protection by the state. These sentiments are amplified in report at 5.67 where the term ‘legal parent’ is proposed instead of ‘intending couple’ to emphasize the parental role and duty to the child. In fact, the Draft ART uses the term ‘commissioning couple’, which denotes a power imbalance and needs to be reframed. In 6.19, the names on the birth certificate should be decided before the child is born, placing full responsibility on the legal parents, their extended family and inheritors. It is unacceptable that a surrogate child, who is so intensely desired, should be left in the care of the State on any account.

The list of those eligible to seek a child through surrogacy must be closely examined. The best lens would prioritize ‘the best interest of the child’ in such an assessment. The argument of social stigma faced by infertile married couples can hardly apply equally to widows and single women. Progenitive stresses would differ for live-ins, same-sex and transgender couples. Without denying the human desire to reproduce, including ‘wider society’ in the eligibility list, as mentioned in 5.40, encourages aspirations over need, and must be examined. Given a choice, would it be in the best interest of the child to have a single parent or two parents of the same sex? These may be existential questions but caution is advisable, in the absence of longterm studies. (35)

Another issue expressed in 5.42 is the eligibility of NRI, PIO and OCI to access surrogacy in India. The experience with cross-border surrogacy so far, should discourage such arrangements in the short term at least. The Ministry of External Affairs deems these categories as ‘foreigners’, and moving surrogates or children across borders may face the same challenges of citizenship, abandonment and limited legal action, mentioned in 5.148 of the Report. For their own protection, surrogates and children would need to stay within the jurisdiction of the Indian government. This could be reviewed at a later date when Infertility clinics are fully regulated under the ART Bill.

Assessment of intended legal parents, including psychological testing by a ‘competent authority’ as with adoption, will protect the child’s interests. Prohibition of trafficking (5.148) and sex selection (5.149) and provision of adequate insurance cover (6.11) and breast milk (6.15) are protective measures. The report also recommends medical insurance cover for the child until maturity. Genetic testing may need to be included in the Bill, where parenthood is contested (6.27).

The option of adoption appears in 5.23. Even if there are insufficient children and current difficulties with adoption, this option should not be undermined and used as a justification for surrogacy. The Government could instead streamline and facilitate the adoption process in India.

Some areas remain problematic. Despite the longing for a child, would a disabled surrogate child be accepted by the parents? This needs to be an essential part of the counseling; that legal parents have no claims on perfection. If the parents die or separate, guardians should be named and consented before birth, which then become legal guardians. The process would have failed if a surrogate child, for any reason, becomes a ward of the state. If the surrogate carries twins and the couple desire only one child, can the fetal reduction be enforced? Are there limits to autonomy of either the parents or the surrogate, and should these be defined?

Penalties described in 5.158 are a good deterrent because of the unfortunate tendency to circumvent the law. Doctors and owners of infertility clinics would need to take responsibility for negligence or illegal acts. Parents who have used illegal coercion should not be excused, despite concerns about the welfare of the child.

6. **Ovum Donation and Embryos**

There is also possibility of exploitation of ovum donors, essentially sourced from the same population as surrogates. Unlike sperm donation, donation of the ovum involves hormonal manipulation and surgical procedure for extraction of eggs. The risks involved are significant, and donors are typically young single women who may not yet have children. The Report points out in 5.88 that gamete donors are not mentioned in the Surrogacy Bill.

To avoid undue inducement to women in view of possible risks, ovum donation should essentially be voluntary and altruistic, a onetime option. Commercial terms with donors would raise the issue of exploitation once again. Women who volunteer could be prescreened and counseled to ensure they have complete information about risks before donation. There must be pre-determined adequate compensation for these donors in addition to actual costs of medications and procedures, including medical insurance for at least one year. In 6.22 of the Report, it is recommended that terms of egg donation be defined. This area remains unclear in the ART Bill as well.

The Report recommends protocols in the storage and handling of embryos in 5.101, along the lines described in the ART Bill. This area is ethically troubling as the low success rates of the technology means that more ova than necessary may be harvested, putting donors at risk, and more embryos than necessary may be formed and implanted, putting surrogates at risk. The fate of excess embryos, whether implanted or frozen, is an ethical dilemma. For this reason, sale of embryos and advertising for embryos would need to be prohibitied.

If legal parents do not pay dues to the ART bank, or if the clinics shut down, should embryos be discarded? Some countries have embryo adoption and embryo donation programs that treat the embryo as a genetic child of the parents, with full moral status. If the embryo is viewed as a child, how should we think about freezing and destruction of embryos? This is a sensitive area that treads on beliefs about the genesis and respect for life, worthy of careful consideration.

**Recommendations**

The effort of the Government in bringing out the Surrogacy (Regulation) Bill 2016 is commendable, sending the right signals to the medical fraternity and wider society. While it requires some modifications, it addresses the social problem of exploitation of women and abandonment of children in commercial surrogacy arrangements.

The draft ART Bill is clearly required to regulate clinics, but it is unclear and incomplete in many aspects. The key issue is that it does not specifically prohibit commercial arrangements. The commercial linkages between ART Banks and ART Clinics are unclear and their roles and responsibilities require definition. If the Bills can be harmonized, it should in no way undermine the ban on commercial surrogacy.

As is the case with most excellent laws in this country, this Surrogacy Bill will only be as good as its implementation. Political and professional must be brought to bear to ensure that the spirit of the Bill is upheld.

Data from these clinics would be extremely important, to evaluate the sector and inform future decisions. It could also lead to modification of the statute in the future.

The Department of Health Research and the Ministry of Health and Family Welfare could consider establishing a Medical Technology Review Committee to evaluate new technologies presented as medical advancements, not including research. The experience of other countries with the specific technology and its implications can be reviewed, as well as the ethical, social and legal implications for our particular population. This would attempt to look beyond technical validity and usefulness, serving to inform health organizations and patients of possible ethical dilemmas and harm. Country needs, appropriateness, and social relevance could be evaluated. Genetic testing and enhancements, stem cell treatment and bio-banks, for example, may require this kind of review. It will be challenging to stay ahead of the science, but consultations and public viewpoints could contribute to a better understanding.

The Committee could include experts from humanities, human rights, gender studies, scientists, lawyers and laypersons. The objective is not to obstruct, but provide insights and advice to regulators and professionals. After all, it is the duty of the state to protect human rights and evaluate entitlements and social harm. Leaving any review completely to professional experts and medical societies, however well meaning, risks conflict of interest situations and limited viewpoints.

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