THEME - LEGISLATING BODIES: ARTs IN THE DEVELOPING WORLD

Ending commercial surrogacy in India: Significance of the Surrogacy (Regulation) Bill, 2016

OLINDA TIMMS

Abstract

The introduction of the Surrogacy (Regulation) Bill, 2016 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 have reviewed the Bill, and its fate was to be decided in the Winter Session of Parliament, 2017. It is still unclear whether the Bill will come up for decision in the Budget Session that will reconvene on March 5, 2018. The market for infertility treatments has attracted to India global clients seeking access to surrogates and procedures at lower costs. 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 technologies. Can commercial surrogacy be allowed in a country where injustice, inequalities, and poorly implemented laws place vulnerable women and children at risk? The proposed Bill could shut the door on commercial surrogacy arrangements in India and bring regulation into this sector of medical services.

Introduction

The introduction of the Surrogacy (Regulation) Bill, 2016 (henceforth called "the Surrogacy Bill") in 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 is designed to shut the door on commercial surrogacy arrangements in India, bringing to an end the covert exploitation of women in third-party reproduction. Parliamentary Standing Committee Report No 102 on the Surrogacy Bill was submitted in the Lok Sabha and Rajya Sabha on August 10, 2017, and the fate of the Bill was to be decided in the Winter Session of Parliament, 2017. At this point, it is still unclear whether the Bill will come up for decision in the Budget Session that will reconvene on March 5, 2018 (2).

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Background: Third-party reproduction

The options available for overcoming infertility increased with the advancement of new medical technologies using in vitro fertilisation (IVF) in the 1980s. However, along with the 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 aside in the hubris of this medical conquest of infertility as doctors focused on providing solutions rather than on their 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 favoured" destination for fertility options—a certain 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).

The 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, and stigma and psychological distress, it also carried possible harm to third parties such as egg donors and surrogates (8). This added another dimension to infertility treatments, comparable to organ donation: that of the rights, safety, and best interest of donors and surrogates needing to be protected. Not quite being patients, they did not share the same relationship with the medical professional, but there was nonetheless a professional duty owed to them. They could not just be commodified as a third-party "means" to overcoming infertility (9).

For this reason, when this unregulated sector boomed in response to market forces and demand from abroad, it was not the medical technology but the fate of the gamete donors, surrogates, and product children that became the focus of concern and social condemnation. Unbridled commercialisation in the 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—a slum-dweller, financially stressed, and probably 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 polarisation became extreme (10).

Responsiveness and relevance

It was important for each issue to be defined and viewed through the appropriate lens so that it 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 risks being obfuscated with arguments about the rights and needs of infertile couples; they 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 is understandable and may be pursued within limits. On the other hand, donors and surrogates enjoy a constitutional right to life under Article 21 of the Constitution of India, 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 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 Technology (Regulation) Bill, 2014 (henceforth called "the ART Bill"), now before Parliament, is silent on commercial surrogacy. It covers the broader objective of supervision and regulation of ART clinics, personnel, and technical procedures, drawing mainly from the Indian Council of Medical Research (ICMR) National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India, 2005 (13).

A second reason for the need for the Surrogacy Bill was the commodification of children born through commercial surrogacy, which is 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 around parenthood and the best interests of the child that demand attention and closely tie into a legal understanding of child rights and human dignity (14).

Critics of the Surrogacy Bill condemn it as hasty and hold that it is designed to assuage social protest and global vilification while being unmindful of the broader benefits of assisted reproductive techniques. The ART Bill was expected to address these concerns around surrogacy and commercial exploitation. In fact, these issues were left unaddressed. The Surrogacy Bill can be viewed as a purposive response to infertility clinics and doctors, who went about the business of running a baby market, neglectful of 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 into responding with the Surrogacy Bill. The Bill was aimed at ending the commercial and exploitative aspects of commercial surrogacy and not dismantling the technology itself (15).

Culmination of regulatory effort

The Surrogacy Bill did not emerge 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 commercialisation of reproductive technologies made the news and India got tagged as a "baby outsourcing" destination (16).

The ICMR proposed its draft National Guidelines for the Accreditation, Supervision and Regulation of ART Clinics in India, in 2002, which mentioned commercial surrogacy arrangements, and 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 ART Bill in 2008. This Bill went through serial 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 was 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 and abandoned babies and received condemnation for allowing "Indian wombs for rent" (19).

Report No. 228 of the Law Commission of India—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, especially those of the surrogate child (20).

The Ministry of Home Affairs responded to the issue of citizenship of surrogate babies in its letters of July 9, 2012 and February 19, 2014, tightening the eligibility criteria for foreign nationals seeking surrogacy contracts in India (21).

The Ministry of Home Affairs placed further restrictions on allotment of medical visas in a letter dated November 3, 2015 (22) and went on to prohibit foreign nationals and Person of Indian Origin or Overseas Citizen of India card holders from commissioning surrogacy in India by withdrawing the earlier letters of July 9, 2012 and February 19, 2014, cited above.

A further restriction from the Ministry of Commerce in its notification dated October 26, 2015 prohibited the import of embryos for purposes other than research (23). The Department of Health Research, in its notification dated November 4, 2015 [as cited in the Parliamentary Standing Committee Report No. 102 on the Surrogacy Bill (2: p 2)], also upheld the notification of the Home Ministry to ban commercial surrogacy in India and advised state governments of the same.

In June 2014, the Committee on the Rights of the Child examined the reports from India under the Convention on the Rights of the Child and Optional Protocols on the Involvement of Children in Armed Conflict and on the Sale of Children, Child Prostitution and Child Pornography. 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 commodification of children were inadequately addressed in the ART Bill. It was against this background that the Surrogacy Bill was approved by the Cabinet in August 2016 and introduced in the Lok Sabha in November 2016 (25). 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 defence of its most vulnerable citizens. Following this lead, other Asian countries have also introduced prohibitive legislation; any dilution or rollback of this legislation, after having come so far, will be viewed as an unconscionable sellout (26).

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Report of the Parliamentary Standing Committee on the Surrogacy (Regulation) Bill, 2016: A commentary

OLINDA TIMMS

Abstract

Soon after the Surrogacy (Regulation) Bill, 2016 was approved by the Cabinet for introduction into Parliament in 2016, it was submitted for review to a Parliamentary Standing Committee on Health and Family Welfare. The report of this committee, The 102nd Report on the Surrogacy (Regulation) Bill, 2016 was laid on the table of the Lok Sabha and presented to the Rajya Sabha on August 10, 2017. It contains hearings with stakeholders and witnesses and a review of relevant documents and related legislation. The comments of the Parliamentary Standing Committee are wide ranging and pertinent, seeking to fill the gaps and explain and rationalise the statute and includes responses from the Department of Health Research. This commentary seeks to analyse the recommendations of the Committee, exploring some of the ethical, legal, and social implications of surrogacy arrangements in our country, where diverse viewpoints and strong sentiments can encounter difficult ground realities.

Introduction

Soon after the Surrogacy (Regulation) Bill, 2016 (henceforth "the Surrogacy Bill") was approved by the Cabinet for introduction into Parliament in 2016, it was submitted for review to a Parliamentary Standing Committee on Health and Family Welfare. The report of this committee, The 102nd Report on the Surrogacy (Regulation) Bill, 2016 (henceforth "the Report") was laid on the table of the Lok Sabha and presented to the Rajya Sabha on August 10, 2017 (1,2). It contains hearings with stakeholders and witnesses and a review of relevant documents and related legislation. The comments of the Parliamentary Standing Committee (henceforth "the Committee") are wide ranging and pertinent, seeking to fill the gaps and explain and rationalise the statute. It includes responses from the Department of Health Research.

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An analysis of the recommendations of the Committee allows an exploration of some of the ethical, legal, and social implications (ELSI) of surrogacy arrangements in our country, where diverse viewpoints and strong sentiments can encounter difficult ground realities.

Should the Surrogacy Bill be integrated with the Draft Assisted Reproductive Technology (Regulation) Bill, 2014?

One of the important comments by the Committee was that the 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 (henceforth "the ART Bill") (3).

It is unclear why the ART Bill languished because, since it was first proposed in 2008, and then revised in 2010, 2013, and 2014, each revision attempted to address vilification of the sector at home and abroad (4).

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 commodification 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 aspirational needs (4). Objections were not against the reproductive technology itself but its commercialisation and resultant harms. India suddenly found itself part of the very small group of nations that allow