

The Regulation of Surrogacy in India: Questions and Complexities

While instances of commercial surrogacy have risen by leaps and bounds (a recent article in a leading national daily estimates that the cost of the surrogacy market is over 2000 crore), its regulation or rather non-regulation has been a matter of concern. Within this flourishing market, even as clinics and other players continue to make huge profits, there are several ethical concerns that arise out of the increasing commercialization of women's bodies and bodily labour; this includes concerns about the health and rights of the surrogate and the child/children born out of surrogacy. Given such a context, the need for a comprehensive legal framework cannot be overemphasized. This is particularly evident in cases involving legal tussles about the citizenship status of children born through transnational surrogacy arrangements.

In the proposed Draft Assisted Reproductive Technology (Regulation) Bill and Rules-2010, prepared by the Indian Council of Medical Research (ICMR), a substantial section is devoted towards regulating surrogacy arrangements. Though a welcome step, significant gaps in the protection of surrogate women and children still remain. The most striking of these perhaps is the provision for payment to the surrogate woman, which appears to undermine her rights by favouring instead the intended parents. According to the present Draft, payment to the surrogate is to be made in five installments instead of three (as in Draft 2008, the only previous version). The majority, i.e. 75 per cent of the payment is to be paid as the fifth installment, following the delivery of the child. This is in complete contrast to the Draft 2008, in which there was provision for the majority of the payment (i.e. 75 per cent) to be made as the first installment. This not only shows a clear priority accorded to the intended parents, but also betrays that the worth of the surrogate's labour, pregnancy, related emotional and physical risks etc are considered reducible to and meaningless without a tangible reproductive output, the baby. The potential health risks that a surrogate might face (as a result of undergoing IVF) do not appear to be a cause of concern at all. For instance, according to the Bill, only gestational surrogacy, i.e. through IVF, will be permitted, and genetic surrogacy, i.e. through IUI, which is the less invasive option, is ruled out. While this may be to avoid any contesting claims over the custody of the baby later, it again reveals that the 'commercial angle' outweighs the 'human', and no nuanced understanding of the surrogate's rights, who may have voluntarily entered into a contract but may also relate to the baby in emotional ways.

The present Draft has also increased the number of permitted successful live births for a surrogate from three (in the previous Draft) to five; this is inclusive of the surrogate's own children. This provision inadequately addresses an aspect critical to the surrogate's health: the number of permitted cycles she can undergo. Since the number of live births is not equivalent to the number of ART cycles, to effectively ensure that the surrogate's health is not exploited, the maximum number of permitted cycles must also be specified.

In lieu of the recent and controversial cases of international surrogacy that have resulted in legal battles for citizenship status for the child/ren, the Bill has made provisions to address this issue. The draft Bill now makes it mandatory for foreign couples to produce a certificate from their countries declaring that the respective countries permit surrogacy, and that the child will be considered a legal citizen. As an increasing number of couples from other countries access surrogacy services in India, such a provision will be a useful legal framework. The Draft Bill should take concrete measures to address the legal needs of the surrogate women.

Therefore, it can be concluded that while a legislation to regulate the untrammelled commercialism of ARTs and surrogacy in India is a much-needed step towards checking unethical medical practice, the human rights of the surrogate and the children—legal, financial, and health-related—need to be better protected.

*** This post has been published in the form of an article in the Medico Friend Circle Bulletin**

Taken from Sama (A Resource Group for Women and Health) Website:

<https://samawomenshealth.wordpress.com/2011/04/23/the-regulation-of-surrogacy-in-india-questions-and-complexities/>