Regulation of Surrogacy in Indian Context

Sama–Resource Group for Women and Health

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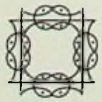

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Introduction

The word "surrogate" is derived from the Latin word "subrogare", which means "appointed to act in the place of". In simple terms, a surrogate woman is one who agrees to carry a pregnancy to term for a couple or individual, in case it is not possible for them/her to do so themselves/ herself. Although surrogacy can be done through different techniques/technologies, it in itself is not a procedure, but an arrangement. Generally, this arrangement is placed under the umbrella term of Assisted Reproductive Technologies (ARTs)[1], as it involves the use of ART procedures.

The arrangement of surrogacy can be defined/distinguished on the basis of whether the child is born using the egg of the surrogate woman or of the intended mother or of the egg donor. In traditional surrogacy, a surrogate is inseminated with the intended father's or donor sperm and anticipates a relatively normal pregnancy and birth with no major hormonal manipulations. In-Vitro Fertilisation/Embryo transfer (IVF/ ET) surrogacy is another process where a surrogate is implanted with an embryo or embryos created with another woman's eggs and thus must experience multiple hormonal interventions. The embryo might be a result of the fertilised gametes of the intended parents, or gametes (either sperm or egg or in some cases both) obtained from the donors[2]. With advancements in the realm of reproductive technologies, surrogacy has moved from genetic to gestational. Further, in the case of gestational surrogacy, many permutations and combinations are now possible.

Another dimension for distinguishing surrogacy is on the basis of the motive behind entering into the surrogacy arrangement and the payment made to the surrogate. Based on this, surrogacy can be either **Commercial or Altruistic**. Commercial surrogacy is a form of surrogacy in which the surrogate enters the arrangement purely for financial reasons. In such instances, the surrogate is paid to carry a child to maturity in her womb. In Altruistic surrogacy, the surrogate receives no financial reward for her pregnancy, where the motive is purely altruistic.

Regulating Surrogacy in India

While the surrogacy industry has continued to proliferate, the Indian state has failed to regulate and monitor this growing industry. Yet, its implications for the rights of the surrogate and the child/children born cannot be ignored. In this flourishing market, even as the clinics and the other players continue to make huge profits, the concerns and the ethical predicament with the increasing commodificaiton, fragmentation and commercialization of women's bodies have posed innumerable concerns. This is further compounded by the rising number of cases involving the citizenship status of the child born through transnational surrogacy arrangements. In such a context, the need for a comprehensive regulatory mechanism and a legal framework cannot but be overemphasized.

In the proposed *Draft Assisted Reproductive Technologies (Regulation) Bill and Rules -2010* by the Indian Council of Medical Research (ICMR) a substantial part is devoted towards regulating surrogacy arrangements. There are significant gaps in the Draft ART Bill and Rules 2010, which compromises on protection and safeguarding the rights and health of surrogate mothers and children. It appears that the focus of the Bill by the ICMR is on promoting the interest of the private sector and not on its regulation. It is important to promote accountability among the providers, establish systems of audit of clinics, initiate public research on infertility and ARTs, and follow up regarding health outcomes of donors, surrogates, children born through ARTs, drugs administered during these procedures, etc.

1 Technologies that assist reproduction, increasing the chances of conception and carrying a pregnancy to term are collectively known as Assisted Reproductive Technologies, or ARTs. They include procedures ranging from the relatively simple Intra-Uterine Insemination (IUI) to variants of In-Vitro Fertilisation (IVF), more commonly known as 'test-tube baby technology'.

2 Here the surrogate is not providing the genetic material (i.e her egg), but only gestates the child for nine months.

The (Draft) Assisted Reproductive Technologies (Regulation) Bill & Rules -2010
Surrogacy: Main Provisions

(1) Both the couple or individual seeking surrogacy through the use of assisted reproductive technology, and the surrogate mother, shall enter into a surrogacy agreement which shall be legally enforceable.

(2) All expenses, including those related to insurance if available, of the surrogate related to a pregnancy achieved in furtherance of assisted reproductive technology shall, during the period of pregnancy and after delivery as per medical advice, and till the child is ready to be delivered as per medical advice, to the biological parent or parents, shall be borne by the couple or individual seeking surrogacy.

(3) Notwithstanding anything contained in sub-section (2) of this section and subject to the surrogacy agreement, the surrogate mother may also receive monetary compensation from the couple or individual, as the case may be, for agreeing to act as such surrogate.

(4) A surrogate mother shall relinquish all parental rights over the child.

(5) No woman less than twenty one years of age and over thirty five years of age shall be eligible to act as a surrogate mother under this Act. Provided that no woman shall act as a surrogate for more than five successful live births in her life, including her own children.

(6) Any woman seeking or agreeing to act as a surrogate mother shall be medically tested for such diseases, sexually transmitted or otherwise, as may be prescribed, and all other communicable diseases which may endanger the health of the child, and must declare in writing that she has not received a blood transfusion or a blood product in the last six months.

(7) Individuals or couples may obtain the service of a surrogate through an ART bank, which may advertise to seek surrogacy provided that no such advertisement shall contain any details relating to the caste, ethnic identity or descent of any of the parties involved in such surrogacy. No assisted reproductive technology clinic shall advertise to seek surrogacy for its clients.

(8) A surrogate mother shall, in respect of all medical treatments or procedures in relation to the concerned child, register at the hospital or such medical facility in her own name, clearly declare herself to be a surrogate mother, and provide the name or names and addresses of the person or persons, as the case may be, for whom she is acting as a surrogate, along with a copy of the certificate mentioned in clause 17 below.

(9) If the first embryo transfer has failed in a surrogate mother, she may, if she wishes, decide to accept on mutually agreed financial terms, at most two more successful embryo transfers for the same couple that had engaged her services in the first instance. No surrogate mother shall undergo embryo transfer more than three times for the same couple.

(10) The birth certificate issued in respect of a baby born through surrogacy shall bear the name(s) of individual / individuals who commissioned the surrogacy, as parents.

(11) The person or persons who have availed of the services of a surrogate mother shall be legally bound to accept the custody of the child / children irrespective of any abnormality that the child / children may have, and the refusal to do so shall constitute an offence under this Act.

(12) Subject to the provisions of this Act, all information about the surrogate shall be kept confidential and information about the surrogacy shall not be disclosed to anyone other than the central database of the Department of Health Research, except by an order of a court of competent jurisdiction.

(13) A surrogate mother shall not act as an oocyte donor for the couple or individual, as the case may be, seeking surrogacy.

(14) No assisted reproductive technology clinic shall provide information on or about surrogate mothers or potential surrogate mothers to any person.

(15) Any assisted reproductive technology clinic acting in contravention of sub-section 14 of this section shall be deemed to have committed an offence under this Act.

(16) In the event that the woman intending to be a surrogate is married, the consent of her spouse shall be required before she may act as such surrogate.

(17) A surrogate mother shall be given a certificate by the person or persons who have availed of her services, stating unambiguously that she has acted as a surrogate for them.

(18) A relative, a known person, as well as a person unknown to the couple may act as a surrogate mother for the couple/ individual. In the case of a relative acting as a surrogate, the relative should belong to the same generation as the women desiring the surrogate.

(19) A foreigner or foreign couple not resident in India, or a non-resident Indian individual or couple, seeking surrogacy in India shall appoint a local guardian who will be legally responsible for taking care of the surrogate during and after the pregnancy as per clause 34.2, till the child / children are delivered to the foreigner or foreign couple or the local guardian. Further, the party seeking the surrogacy must ensure and establish to the assisted reproductive technology clinic through proper documentation (a letter from either the embassy of the Country in India or from the foreign ministry of the Country, clearly and unambiguously stating that

(a) the country permits surrogacy, and

(b) the child born through surrogacy in India, will be permitted entry in the Country as a biological child of the commissioning couple/individual) that the party would be able to take the child / children born through surrogacy, including where the embryo was a consequence of donation of an oocyte or sperm, outside of India to the country of the party's origin or residence as the case may be. If the foreign party seeking surrogacy fails to take delivery of the child born to the surrogate mother commissioned by the foreign party, the local guardian shall be legally obliged to take delivery of the child and be free to hand the child over to an adoption agency, if the commissioned party or their legal representative fails to claim the child within one months of the birth of the child. During the transition period, the local guardian shall be responsible for the well-being of the child. In case of adoption or the legal guardian having to bring up the child, the child will be given Indian citizenship.

(20) A couple or an individual shall not have the service of more than one surrogate at any given time.

(21) A couple shall not have simultaneous transfer of embryos in the woman and in a surrogate.

(22) Only Indian citizens shall have a right to act as a surrogate, and no ART bank/ART clinics shall receive or send an Indian for surrogacy abroad.

(23) Any woman agreeing to act as a surrogate shall be duty-bound not to engage in any act that would harm the foetus during pregnancy and the child after birth, until the time the child is handed over to the designated person(s).

(24) The commissioning parent(s) shall ensure that the surrogate mother and the child she deliver are appropriately insured until the time the child is handed over to the commissioning parent(s) or any other person as per the agreement and till the surrogate mother is free of all health complications arising out of surrogacy.

Policy Recommendations

1. The *Draft Assisted Reproductive Technologies (Regulation) Bill and Rules -2010* should keep in mind the concerns of all the key parties involved in the arrangement, which would include: Commissioning Couple(s)/intended parents, Surrogate, Child/ren born through the arrangement. In the current form, the Draft Bill seems to be skewed in favour of private providers and commissioning couple(s).
2. The Draft Bill in its current form does not contain any provision for the regulation of other players like the medical tourism agencies, surrogacy agencies, surrogacy homes and hostels, surrogacy law firms etc. It is important to question the promotion of commercial interests and the opening up of markets for medical tourism. The Bill must contain concrete and stringent provisions for regulating the functioning of these varied agencies.
3. While the Draft Bill stipulates the sourcing of the surrogate only through an ART Bank, there is an absence of clarity about what or who comprises an ART Bank, as well as its role, registration, functions, etc. Much caution needs to be taken before allowing ART banks to 'supply' surrogate mothers as we know most of the surrogate mothers come from marginalized communities. The government cannot pass a law that would take advantage of the vulnerability of the people due to their situations and circumstances.
4. The present Draft Bill has done away with the word 'small' in describing risks associated with ARTs. Many serious health risks (procedural and drug related, both the woman and child) need to be acknowledged and clearly mentioned even in the Consent Form. The consent form should also mention, where relevant, that long term effects of drugs and procedures such as complications arising out of unnecessary Caesarian sections, are under-researched. The risks of multiple births, preterm births and low birth weight that are most common with surrogacy do not feature in the Bill.
5. Though the Draft Bill mentions an 'appropriate' insurance of surrogate mother and the child by the commissioning parent(s), it does not elaborate on the kind and extent of insurance that will be provided, particularly in the context of post delivery and follow-up care. Considering the health risks that surrogacy entails, the Bill also needs to incorporate provision of compensation to the surrogate and her family in extreme cases of severe health complications and death.

   The insurance coverage for the surrogate mother, if any, ought to be not just till the delivery, but for at least a year thereafter.
6. If the surrogate mother develops some temporary or permanent ailment or health condition due to the pregnancy, her costs of treatment should be covered till the ailment exists medically, and compensation ought to be paid, for loss of job or labour or work that the women could have done prior to the pregnancy or thereafter, by the commissioning parents of the child.
7. The present draft's provisions with regard to payment to the surrogate raise serious concerns about the undermining of her rights. According to this draft, payment to the surrogate is to be made in five installments instead of three (previous Draft) with the majority, i.e. 75 per cent, to be paid as the fifth and final installment, following the delivery of the child. This is in complete contrast to the previous Draft (2008), wherein the majority of the payment, i.e. 75 per cent, was to be paid as the first installment. This shift reflects that the priority accorded to the intended parent(s) is much higher than that of the surrogate. The health risks that the surrogate might face (as a result of undergoing IVF) are not taken into account, and her 'worth' is wholly contingent on a measurable reproductive 'output', i.e. the baby. An equitable mode of payment to the surrogate needs to be stipulated in the Draft Bill.
8. Independent and long-term counseling should be mandated in the Draft Bill for the surrogate and also to the commissioning parents. As of now, counseling remains a one-time information giving process completely dependent on the discretion of the clinic. Further, there needs to be a clear demarcation between the mandatory information that should be provided and counseling. As such, counseling as a process has to be a comprehensive, balancing the needs and well being of all the parties involved in the arrangement.
9. Considering the vulnerable position the surrogate occupies and the absence of any kind of legal assistance, provision of a state sponsored legal counsel should be made mandatory in all arrangements of surrogacy. Such a step would be useful in administration and preservation of the contract. This would also take care of any possible legal contests on behalf of the surrogate.

10. According to the Draft Bill, "*Surrogacy*", means an arrangement in which a woman agrees to a pregnancy, achieved through assisted reproductive technology, in which neither of the gametes belong to her or her husband, with the intention to carry it and hand over the child to the person or persons for whom she is acting as a surrogate;

    "*Surrogate mother*", means a woman who is a citizen of India and is resident in India, who agrees to have an embryo generated from the sperm of a man who is not her husband and the oocyte of another woman, implanted in her to carry the pregnancy to viability and deliver the child to the couple / individual that had asked for surrogacy;

    "*Surrogacy agreement*", means a contract between the person(s) availing of assisted reproductive technology and the surrogate mother;

    According to this definition, all surrogacy arrangements that involve the woman bearing a child using her egg (oocyte) and the commissioning man's sperm/donor sperm are illegal. "The definition underlines the fact that the surrogate mother is not the biological parent thus emphasising that only those that contribute the genetic material can be considered to be biological parents. The fact that a human body nurtures the pregnancy has, according to this Bill, nothing to do with biology"[3]. This definition also means that less invasive and expensive procedure like Intra Uterine Insemination (IUI) cannot be used for surrogacy arrangements.

    Genetic or Traditional surrogacy should be included in the Draft Bill as it is less invasive and without major hormonal manipulations.

11. The use of technologies like Preimplantational Genetic Diagnosis (PGD) has raised many social and ethical issues, including concerns around eugenic implications and sex- selection. The present Bill (like the previous one) does not detail any Consent Form for the procedure of PGD. In the Agreement for Surrogacy (Form J) there is a mention that the surrogate will not be asked to undergo a sex determination test for the child. However, this does not include PGD, which is conducted on the embryo before it is transferred into the surrogate's uterus. Further, the Consent Form for IVF and Intra Cytoplasmic Sperm Injection or ICSI (Form D, Pg 41) does not mention the prohibition of sex-selection during these procedures. Given the growing use of PGD, it should be strictly monitored and made available only in cases where there is significant risk of a serious genetic condition in the embryo.

12. Comprehensive and stringent regulatory provisions towards protecting the rights and well being of the children born out of surrogacy arrangements should be included in the Bill. Adequate follow up measures, especially in the context of trans-national surrogacy, should ensure that no violation takes place. The Draft Bill mandates the appointment of a local guardian in the case of commissioning couples staying outside India, who will be legally obliged to take delivery of the child born of the surrogacy arrangement if the commissioning couple does not do so. The local guardian may hand over the child to an adoption agency, or bring him/her up. The Draft Bill should, however, clearly demarcate the role of the local guardian to safeguard the well being of the child and oversee to prevent any abuse.

3 Shah Chayanika Regulate technology, not lives: a critique of the draft ART (Regulation) Bill Indian Journal of Medical Ethics Vol VI No 1 January-March 2009

Status of Surrogacy in Some Other Parts of The World[4]

Country	Status of Surrogacy
Australia	Prohibits commercial surrogacy. The state of Queensland bans all forms of surrogacy. In the other Australian states such as Victoria, the Australian Capital Territory, Tasmania, and South Australia commercial surrogacy is prohibited, but altruistic surrogacy is allowed.
Canada	Prohibits commercial surrogacy. Is silent on noncommercial surrogacy.
China	Prohibits commercial surrogacy.
France	Prohibits all surrogacy.
Germany	Prohibits all surrogacy.
Italy	Prohibits all surrogacy.
Israel	Prohibits commercial surrogacy but allows noncommercial surrogacy.
India	Allows all surrogacy.
Norway	Prohibits all surrogacy.
Russia	Allows all surrogacy.
Singapore	Prohibits all surrogacy.
Sweden	Prohibits all surrogacy.
Ukraine	Allows all surrogacy.
United States of America	Commercial surrogacy is not allowed in some of the states. States that allow but regulate surrogacy are: California, Arkansas, Florida, Illinois, Nevada, New Hampshire, Texas, Utah and Virginia.
United Kingdom	Prohibits commercial surrogacy but allows noncommercial surrogacy.
Vietnam	Prohibits all surrogacy

4 Points, K. (2009). Strategies for Protecting the Health and Human Rights of Surrogates in India: A Multi-country Legislative Analysis. Prepared for Sama Resource Group for Women and Health and Generations Ahead. Duke University Sanford School of Public Policy Master's Project.

Sama

Sama is a Delhi based resource group working on issues of women's rights and health. Sama seeks to locate the concerns of women's health in the context of socio-historical, economic and political realities, and find linkages between women's well being and livelihoods, food, violence and other larger issues that affect their lives. Sama has been working closely with community based organisations, health networks, people's movements, women's groups and health care providers across the country, primarily through building capacities, action research and advocacy.