

Surrogacy Bill 2019- “ A Game Changer”??

DR.SAMIT SEKHAR

Owner

Chief Embryologist.

Kiran Infertility centre Pvt.Ltd.

Joint Secretary.

INSTAR.



Fertility/Obstetrics/Gynaecology/Dental/Skin & Aesthetics/ (Hyderabad, Bengaluru)

Surrogacy Bill 2019- “A Game Changer”??

Statement on the floor of the house

When the Surrogacy (Regulation) Bill, 2019 was introduced in the Rajya Sabha, The Hon'ble Minister for Health Shri. Dr.Harsh Vardhan termed it a 'game-changer'.

It was perhaps for the first time that any Govt. or Department aimed to regulate the much discussed topic “ Surrogacy”

2.What was the Need for the bill

As per the statement given in the Lok Sabha and Rajya Sabha the Hon'ble minister stated that several countries have banned commercial surrogacy. It is only legal in the state of California besides Russia and Ukraine.

According to the statement of the hon'ble Minister “A rough estimate says there are about 2,000-3000 surrogacy clinics running illegally in the country and a few thousand foreign couples resort to surrogacy practise within India and the whole issue is thoroughly unregulated,”

Some estimates even mentioned in parliament stated the surrogacy Industry in india to be 2 billion American dollars(study by CII) with over 3000 illegal clinics and these need to be regulated

In comparison the Ayushman bharat Pradhan matri yojna has a budget of 6400 crores which is considerably lesser

3. Another major reason sighted was “Exploitation” a highly thrown about word when it comes to Surrogacy and hence a bill was needed to prevent “Exploitation”.

4.Contents of the Bill.

Major clauses

The surrogacy bill 2019 proposed a complete ban on commercial surrogacy and allowed only “Ethical” surrogacy with a close relative.

It prohibits any money to be paid except “the medical expenses incurred on surrogate mother and the insurance coverage for the surrogate mother”.

.The Surrogacy (Regulation) Bill, 2019 also provides for constitution of surrogacy boards at national and state levels.

5. Why is the bill so contentious?

. Usually when a comprehensive legislation is drafted a lot of ministries especially the law ministry's views and opinions are sought in order to ensure that the piece of legislation sought to be tabled in parliament is compatible with the existing civil and criminal laws of the country.

This is all the more important for a subject like surrogacy which has not only profound medical but also social and legal implications.

. Most if not all medical treatments involve only a single party/patient but Surrogacy involves multiple parties like the commissioning/intending parent, Oocyte/sperm donors/ Surrogate mother and the baby/ies apart from ART banks, Medical practitioners, Lawyers etc.

6. In India previous Governments have made numerous attempts to draft legislations related to ART and surrogacy and ICMR has been in the forefront of drafting these legislations but it has only now reached the threshold of being made into a law.

7. Current status

As you all maybe be aware that there were comprehensive discussions and debates regarding the bill in the upper house of parliament for almost 2 Days, something which is very rarely seen in our parliamentary system.

We must give credit where it is due to some of the members of the upper house who cutting across party lines urged the minister to make several much needed amendments to the bill before getting it passed in the rajya sabha.

Even some ruling party members also pressed for major amendments to the bill.

We must thank our hon'ble Minister of health who himself being a very accomplished Doctor took the well thought of decision to send the bill to the Select committee of parliament and did not pass a bill which still needs a lot of improvements especially if it has to be seen as a comprehensive, inclusive and non discriminatory piece of legislation which stands as a beacon for the rest of the world to follow.

2(b) “altruistic surrogacy” means the surrogacy in which no charges, expenses, fees, remuneration or monetary incentive of whatever nature, except the medical expenses incurred on surrogate mother and the insurance coverage for the surrogate mother, are given to the surrogate mother or her dependents or her representative.

2(f) “commercial surrogacy” means commercialization of surrogacy services or procedures or its component services or component procedures including selling or buying of human embryo or trading in the sale or purchase of human embryo or gametes or selling or buying or trading the services of surrogate motherhood by way of giving payment, reward, benefit, fees, remuneration or monetary incentive in cash or kind, to the surrogate mother or her dependents or her representative, except the medical expenses incurred on the surrogate mother and the insurance coverage for the surrogate mother;

2(g) “couple” means the legally married Indian man and woman above the age of 21 years and 18 years respectively; (h) “egg” includes the female

2 (r) “intending couple” means a couple who have been medically certified to be an infertile couple and who intend to become parents through surrogacy;

2(zf) “surrogate mother” means a woman bearing a child (who is genetically related to the intending couple) through surrogacy from the implantation of embryo in her womb and fulfils the conditions as provided in sub-clause (b) of clause (iii) of section 4;

3 (vii) no surrogacy clinic, registered medical practitioner, gynaecologist, paediatrician, embryologist, intending couple or any other person shall store a human embryo or gamete for the purpose of surrogacy:

4. On and from the date of commencement of this Act,— (i) no place including a surrogacy clinic shall be used or cause to be used by any person for conducting surrogacy or surrogacy procedures, except for (a) when either or both members of the couple is suffering from proven infertility.

5(a) the intending couple is in possession of a certificate of essentiality issued by the appropriate authority, after satisfying itself, for the reasons to be recorded in writing, about the fulfilment of the following conditions, namely:— (I) a certificate of proven infertility in favour of either or both members of the intending couple from a District Medical Board;

5(II) an order concerning the parentage and custody of the child to be born through surrogacy, has been passed by a court of the Magistrate of the first class or above, on an application made by the intending couple and the surrogate mother.

Who can be a surrogate mother?

(I) no woman, other than an ever married woman having a child of her own and between the age of 25 to 35 years on the day of implantation, shall be a surrogate mother or help in surrogacy by donating her egg or oocyte or otherwise;

(II) no person, other than a close relative of the intending couple, shall act as a surrogate mother and be permitted to undergo surrogacy procedures as per the provisions of this Act;

(V) a certificate of medical and psychological fitness for surrogacy and surrogacy procedures from a registered medical practitioner;

(c) an eligibility certificate for intending couple is issued separately by the appropriate authority on fulfilment of the following conditions, namely:— (I) the age of the intending couple is between 23 to 50 years in case of female and between 26 to 55 years in case of male on the day of certification; (II) the intending couple are married for at least five years and are Indian citizens; (III) the intending couple have not had any surviving child biologically or through adoption or through surrogacy earlier:

43. (1) The surrogacy clinic shall maintain all records, charts, forms, reports, consent letters, agreements and all the documents under this Act and they shall be preserved for a period of twenty-five years or such period as may be prescribed: Provided that, if any criminal or other proceedings are instituted against any surrogacy clinic, the records and all other documents of such clinic shall be preserved till the final disposal of such proceedings

OFFENCES AND PENALTIES

35. (1) Any person, organisation, surrogacy clinic, laboratory or clinical establishment of any kind which contravenes any clause or sections of this act

shall be an offence punishable with imprisonment for a term which may extend to ten years and with fine which may extend to ten lakh rupees.

37. Any intending couple or any person who seeks the aid of any surrogacy clinic, laboratory or of a registered medical practitioner, gynaecologist, pediatrician, embryologist or any other person for commercial surrogacy or for conducting surrogacy procedures for commercial purposes shall be punishable with imprisonment for a term which may extend to five years and with fine which may extend to five lakh rupees for the first offence and for any subsequent offence with imprisonment which may extend to ten years and with fine which may extend to ten lakh rupees.

38. Whoever contravenes any of the provisions of this Act or the rules or the regulations made thereunder for which no penalty has been provided in this Act, shall be punishable with imprisonment for a term which may extend to three years and with fine which may extend to five lakh rupees and in the case of continuing contravention with an additional fine which may extend to ten thousand rupees for every day during which such contravention continues after conviction for the first such contravention.

102nd report by the parliamentary standing committee

1. Altruistic Surrogacy

“Based on the analysis of the facts in the preceding paras, the Committee is convinced that the altruistic surrogacy model as proposed in the Bill is based more on moralistic assumptions than on any scientific criteria and all kinds of value judgments have been injected into it in a paternalistic manner. Altruistic surrogacy across the world means compensated surrogacy and a range of monetary payments to surrogate mothers are permitted as reasonable compensation. Even the Law Commission Report No. 228 of 2009 recommends reimbursement of all reasonable expenses to the surrogate mother. The Committee, therefore, recommends that the word “altruistic” in Clause 2 (b) of the Bill be replaced with the word “compensated” and appropriate modifications be incorporated in the said Clause and other relevant Clauses of the Bill with a view to harmonizing the Bill with the compensated surrogacy model.

2. definition of a Intending/infertile couple

5.40 The Committee notes that the Bill limits the option of surrogacy to legally married Indian couples. The Committee observes that limiting the option to avail surrogacy facilities to an Indian heterosexual married couple to have their own biological child has overlooked a large section of the society. Given our sentiments and sensibility, the social status of a woman in our society is judged by her reproductive life and there is a lot of pressure on her for child bearing. The Department of Health Research by imposing prohibition on widows and divorced women seems to have closed its eyes to the ground reality. Besides, the decision to keep live-in partners out of the purview of the Bill is indicative of the fact that the Bill is not in consonance with the present day modern social milieu that we live in and is “too narrow” in its understanding.

Even the Supreme Court has given legal sanctity to live-in relationships. Surrogacy is one of the least used options by childless Indians. If all these categories are to be banned then why have surrogacy at all. The Committee, therefore, recommends that the Department should broadbase the eligibility criteria in this regard and widen the ambit of persons who can avail surrogacy services by including live-in couples, divorced women and widows. Appropriate alterations accordingly be made in Clause 2(g) and 4(iii)(c) of the Bill.

3. Did not want Surrogacy restricted to Indians only

“The Committee finds no point in restricting NRIs, PIOs and OCI card holders from availing surrogacy services in India. The Committee is of the view that since the NRIs, PIOs and OCIs cardholders are of Indian origin only, there should not be any prejudice and discrimination towards them when it comes to allowing them for opting surrogacy in the country of their origin”

4. regarding the wait period of 5 years from the date of marriage

“The Committee is of the view that the fundamental right to reproduce to have a child is a part of a person’s personal domain and fixing a period of five years will only cause breach of his/her reproductive rights and delayed or deferred parenthood.”

“Since conception has many interplay functions, a five year time bar would add to the misery of already distressed intending couples. The five year waiting period is therefore arbitrary, discriminatory and without any definable logic. The Committee, therefore, recommends that the definition of infertility

should be made commensurate with the definition given by WHO. The words “five years” in Clause 2(p) and 4(iii)(c) II, be therefore, replaced with “one year” and consequential changes be made in other relevant Clauses of the Bill. The Committee further recommends that in circumstances where the need for surrogacy is absolute due to medical reasons like absence of uterus, destruction of uterus because of cancers, fibroids etc., even the prescribed one year period should be waived-off. “

5. Regarding the Surrogate being a “close relative”

5.83 Keeping in view the facts as stated above, the Committee is convinced that limiting the practice of surrogacy to close relatives is not only non pragmatic and unworkable but also has no connect with the object to stop exploitation of surrogates envisaged in the proposed legislation. The Committee, therefore, recommends that this Clause of “close relative” should be removed to widen the scope of getting surrogate mothers from outside the close confines of the family of intending couple. In fact, both related and unrelated women should be permitted to become a surrogate. “

The Committee is, however, of the view that the proposition of a close relative becoming a surrogate mother overlooks the various social, legal, emotional and ethical dynamics of this issue and is fraught with numerous disruptive issues for several reasons.

Regarding Criminal liability

5.159” The Committee notes that Clause 36(1) deals with punishment for surrogacy professionals or any other person who owns a surrogacy clinic or employed with such a clinic or centre etc and renders his professional or technical services. This Clause stipulates imprisonment for minimum five years and fine upto ten lakh rupees. The Committee would like to emphasize that transgressions which are purely procedural or technical in nature should be viewed in a broader perspective and should not invite stringent provisions.”

5.160 “The Committee agrees with the contention of the stakeholders that surrogacy and its related procedures are not criminal activities. It is a procedure which is an advancement in the medical science in the field of assisted reproductive technology to have a biological child for infertile couple or for those who are unable to have their own child due to medical reasons. It is also true that the concerned parties are neither criminals nor are they threat to the society. Moreover, penal sanctions on the commissioning parents would have a definite impact on the surrogate child. The child would be separated from his/her own biological parents, and would be denied of custody care arrangement defeating the very purpose of the Bill. “

Regarding not allowing freezing of embryos for Surrogacy

5.103 The success rate of implantation of embryos in one singular attempt is around 30% under the best of circumstances. Gamete (either oocytes or sperm or both) also need to be cryo-preserved before creating the embryos as the timing of the creation of the embryos in-vitro has to be in line with the menstrual cycle of the surrogate mother. The Committee notes that repeated extraction of eggs and fertility medicines that stimulate egg production may lead to the risk of Ovarian Hyperstimulation for the intending mother or the donor.

There may be several situations like the surrogate mother aborting on the way, the baby being born still or dying early or turning out to be congenitally abnormal, which may warrant storage of embryos. (Para 5.102) Keeping in view the facts as stated above the Committee fails to comprehend the rationale behind such limitations on the storage of human gametes and embryos. The Committee feels that the infertile couple and the surrogate mother should not undergo same trauma repeatedly. This can be avoided with the storage facilities. The Committee, therefore, recommends that the storage of embryos should be permitted and Clause 3(vii) be amended appropriately permitting storage of embryos on the lines of ART Bill 2014.

Recommendations sent by INSTAR to the Health ministry, Chairman of Rajya Sabha and to all other elected representatives of Parliament.

1. Allow compensated surrogacy
2. Fix compensation of 5 lakhs INR to Surrogate mother to be transferred to her own bank account.
3. Make District medical health authority as incharge for surrogacy. They are already incharge for ART clinics. No need to set up separate surrogacy boards as this will be an unnecessary expenditure on the state exchequer.
4. Remove close relative clause as it is discriminatory and will lead to present and future complications for all parties
5. Fix age of surrogate mother between 21 to 40 years
6. Fix age of commissioning/intended parents between 25 to 55.
7. Life insurance compulsory for surrogate mother
8. Drop criminal prosecution of Doctors.
9. Allow surrogacy for Married Couples, Single and divorced men and women

9. The Indian economy is already in a precarious state and one of major factors for this is poor rural consumption and spending and passing this bill will be further effect thousands of poor and middle class Indian patients, Surrogate mother's their families and clinics as Surrogacy will not be a treatment option for them anymore.

10. Allow surrogacy for Overseas citizens of India

11. Allow surrogacy for Married Heterosexual foreigners with genuine infertility conditions.

12. The Bill also does not state what happens in case the bill is passed in Rajysabha as is then what happens to the pending cases, what is the legal status of the embryos and what happens to the Surrogate mothers who are already pregnant.

13. The Bill did not take into account the findings and recommendations of the joint parliamentary committee for health headed by Shri Ram Gopal Yadav.

Keeping the above points in mind we humbly request that you request the Rajya Sabha Chairman to refer this bill to the select committee for further scrutiny as passing it in the present format will be gross injustice to the millions of infertile couples of this country.