

INTELORANCE IN SURROGACY

- By Anil Malhotra

On November 4, surrogacy for foreign nationals in India has been banned pursuant to a mandate issued by the Ministry of Home Affairs. Like a commodity, it has been taken off the shelf for foreigners in a knee jerk reaction. This is oblivious of the fact that on September 30, 2015, a draft Bill titled "The Assisted Reproductive Technology (Regulation) Bill, 2014" (ART Bill) had been circulated by the Ministry of Health and Family Welfare in public domain for general public/ stakeholders inviting suggestions/ comments within 45 days i.e. till November 15. Till date the same have not been finalized and the Bill has not been tabled in Parliament. This Bill contemplates that surrogacy shall be available to all married infertile couples thereby, debarring single persons from surrogacy. However, it proposes to disallow surrogacy for foreigners but makes it permissible for Overseas Citizens of India (OCIs), People of Indian Origin (PIOs), Non-Resident Indian (NRIs) and foreigners married to Indian citizens with two years of marriage who will have to obtain a medical visa for surrogacy in India. The Bill further proposes foreign nationality for such surrogate children of above foreign commissioning parents with limited entitlement of Overseas Citizen of India (OCI) status under the Citizenship Act, 1955 and disentitles Indian citizenship to such surrogate children. Strange but true. The executive has abrogated a right of surrogacy whilst the Parliament has yet to legislate on the subject and public opinion has been sought on the ART Bill, 2014. Thus, seeking public suggestions is an exercise in futility. The firm executive policy mandate seems to have aborted the right at inception. Surrogacy law is in a limbo and executive fiat rule the roost. This is not democracy.

The Indian Council of Medical Research (ICMR) working under the auspices of the Ministry of Health and Family Welfare finalised the National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India in 2005 after extensive public debate all over the country from all stake holders. Under these 2005 guidelines, there was no legal bar to the use of Artificial Reproductive Technology (ART) by a single, an unmarried foreign woman or foreign couple and the child born would have legal rights on the woman or man concerned. These guidelines are the only complete set of applicable provisions prevalent as of now, subject to modifications. Thereafter, the draft Assisted Reproductive Technology (Regulation) Bill, 2008 (ART Bill 2008), the draft Assisted Reproductive Technology (Regulation) Bill, 2010 (ART Bill 2010) and the draft ART Bill 2013, stated to be revised based on the recommendations of the Ministry of Law and Justice, have consistently proposed that ART in India would be available to all persons including single persons and foreign couples. The ART Bill, 2014, has however curtailed this right and the executive instructions of 2015 have clipped this right for foreigners in totality. Law is yet to follow

Anomalous and inconsistent it may seem, in the matter of Inter-Country adoptions, the Ministry of Women and Child Development has a diametrically opposite policy. It statutorily propagates inter-country adoptions from India for foreigners. The Juvenile Justice (Care and Protection of Children) Act, 2014 (JJ Act) allows a Court to give a child in adoption to foreign parents irrespective of the marital status of a person. It was notified and implemented from January 15, 2016 after passed by Parliament and approved by the President. The JJ Act also authorises State Governments to recognise one or more of its institutions or voluntary organisations as specialised adoption agencies for placement of orphan, abandoned or surrendered children for

adoption in accordance with the guidelines notified by Central Adoption Resource Agency (CARA). The latest guidelines governing Adoption of Children notified on July 17, 2015, have streamlined Inter-Country Adoption procedures, thereby permitting single parent adoptions with the exception of barring single male persons from adopting a girl child. The Missionaries of Charity with more than 15 recognised adoption homes in India have reportedly stopped adoption agency operations on being in conflict with single parent adoption norms. This has reportedly been termed in the media as not to be wanting to, "come under a uniform secular agenda". Parenthood for foreigners by adoptions and surrogacy have thus different inconsistent barometers and a conflict of parental rights. This is even though Parliament approves of adoption of children by foreigners, but sadly, surrogacy does not find favour in executive hands.

Surprising as it may seem, even though the ART Bill, 2014 proposes to allow surrogacy for NRI's, OCI's, PIO's and foreigners married to Indian citizens, the November 4 letter directs that no visas should be issued to foreign nationals for surrogacy in India and no permission should be granted by the Foreigners Regional Registration Office (FRRO's) to children born through surrogacy to foreign nationals including OCI cardholders. Visas, if any, granted to foreign nationals and permission, if any granted by FRRO's to OCI's for commissioning surrogacy in India have been cancelled from November 4 onwards. These instructions have been widely circulated for strict implementation to all surrogacy/ ART clinics and all concerned bodies.

Commercial surrogacy in vogue for foreigners for the past over ten years has been shut down overnight even though the ART Bill, 2014 is open for public comment till November 15. Tripartite constitutional fundamental rights of stakeholders stand violated in the process. Commissioning foreign parents as persons enjoy the protection of the equality of law and the Right to life under Articles 14 and 21 of the Constitution which cannot be taken away except according to the procedures established by law. A right to reproductive autonomy and parenthood, as a part of a right to life of a foreign person, cannot be circumvented by an executive order, especially when Parliament by law already permits parenthood by inter-country adoptions from India by foreigners. Moreover, the executive fiat of November 4, in advance aborts rights under the ART Bill, 2014 which propose surrogacy for OCI's, PIO's, NRI's and foreigners married to Indian nationals. Even medical professionals can no longer practice surrogacy for foreign parents, thereby imposing an unreasonable justification. Surrogate mothers too may claim deprivation of a right of livelihood. All these diverse rights have been curtailed in an undemocratic fashion.

The possible Government logic banning foreign surrogacy to prevent its misuse, seems counterproductive. Rich Indian commissioning parents can still exploit vulnerable surrogate mothers through water tight contracts. Barometers of domestic altruistic surrogacy will be a vent for corruption and exploitation, sweeping the business of surrogacy into unethical hands in an underground abusive trade of black market. The ends will defeat the means. Commercial surrogacy may still flourish without abandon. Sweeping it under the carpet will not help. It is already a reality in existence. Seeing is believing. Ignoring its prevalence cannot extinguish it in a stroke.

India having kindled the fire of surrogacy now cannot sit back and turn a blind eye. Surrogacy is not a commodity which can simply be taken off the shelf arbitrarily. Considering that the commissioning mothers may be Indian nationals whose lives and safety may be at grave risk, there is a dire need for enactment of a wholesome law enveloping all current societal practices associated with surrogacy. If by an existing

law made by Parliament, children from India are permitted to be adopted by foreigners irrespective of being a couple or being single, subject to checks, clearances, permissions and screening by a court, a similar logic must prevail for surrogacy as well. The proper approach would be to regulate the practice by a clear codified law in tandem with what has become a societal practice. Persons, citizens or foreigners will not matter. The appropriate and desirable method would be to create a mechanism to judge suitability of proposed surrogate parents rather than to debar all single or foreign persons. An existing strict and rigorous mechanism in existence for inter country adoptions administered by Central Adoption Resource Agency (CARA), which is now proposed to be a statutory body, is the ideal example to cite in support. We cannot shut our thinking simply because of the problems. Solutions must be found and a law governing surrogacy in the waiting for the past ten years must give birth to a statute. An executive decision cannot arbitrarily stamp out a determination process of rights of parties in motion. Dictatorship in surrogacy is not possible by intolerance. It is undemocratic. We cannot be a law unto making by usurping power to ourselves.

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