



A LEGAL STUDY OF SURROGACY IN INDIA

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ABSTRACT

Surrogacy is a promising treatment for infertility. It can potentially solve several intolerable difficulties which the infertile couples and their families face. Although initially frowned upon, evidence shows that the surrogacy arrangements are more acceptable now than when it was first introduced. Nevertheless, changes in the attitude in decision making about surrogacy can also be seen in some countries, but there are still indications of the degree of divergence between discourse and the actual practice of different forms of surrogacy around the world. Social, ethical and legal problems are subject to major debates and disagreements in natural or partial surrogacy or genetically unrelated full surrogacy. Genetic gestation surrogacy may largely free from social, legal and moral complications. It is a great choice of infertility treatment if the couple want their own genetic baby, but it still requires more thoughts and discussion. The paper presents surrogacy, its types, laws, acts and judgements given by courts.

Key Words: Surrogacy, Types, Laws, Acts, Provisions and way forward

INTRODUCTION

Surrogacy is a legal arrangement between parents intending to have a child and the surrogate mother. In India, surrogacy is an accepted practice in society and it also finds mention in mythological texts such as the Mahabharata¹ Medical reasons or medical threats to the body of the intended mother are the most common reasons for choosing surrogacy. For instance, a woman who has had a hysterectomy (removal of the uterus) cannot carry a pregnancy herself, but she may still want to have a biological child. Thus, a surrogate mother could carry a fertilized embryo created with the woman's egg and her partner's sperm. Surrogacy is an arrangement in which a woman (the surrogate) agrees to carry and give birth to a child on behalf of another person or couple (the intended parent/s). A surrogate, sometimes also called a gestational carrier, is a woman who conceives, carries and gives birth to a child for another person or couple (intended parent/s). Altruistic surrogacy involves no monetary compensation to the surrogate mother other than the medical expenses and insurance coverage during the pregnancy. Commercial surrogacy includes surrogacy or its related procedures undertaken for a monetary benefit or reward (in cash or kind) exceeding the basic medical expenses and insurance coverage.

TYPES OF SURROGACIES

There are two types of surrogacies. One is the traditional method and the other is the gestational method. In traditional surrogacy, the surrogate mother uses her egg, so there is no need for an egg from a different person. This makes the process simple and doesn't require the surrogate mother to undergo many fertility treatments. The sperm is placed inside the surrogate mother's uterus using a process called intrauterine insemination. The intended mother does not need to go through any procedures to get her eggs since they are not used here. Nevertheless, in gestational surrogacy, the in vitro fertilization method is used, commonly known as the IVF technique. Only this method is legal in India. Gestational surrogacy is usually preferred by surrogates because they are not biologically related to the child. This means that they do not have a genetic connection to the baby and are less likely to develop an emotional attachment. Gestational surrogacy can be more costly than traditional surrogacy because both the intended mother and the surrogate need to undergo fertility treatments and egg retrieval procedures. The intended mother or a donor must provide the eggs, which requires hormone injections and careful monitoring. The surrogate must also undergo medical testing, hormone treatments and the implantation procedure.

LAWS RELATED TO SURROGACY IN INDIA

Laws taboo commercial surrogacy that is punishable with a jail term of 10 years and a fine of up to Rs.10 lakhs. The law allows only altruistic surrogacy where no money exchanges hands and where a surrogate mother is genetically related to those seeking a child. In family law for surrogacy, the surrogate mother shall have an eligibility certificate issued by the appropriate authority as no woman other than a married woman having her child and is between the ages of 25 and 35 years on the date of implantation, shall be a surrogate mother. This is provided as per FORM 17 B. She must not provide her gametes.

Surrogacy is helpful for people who can't have a baby on their own, but it can also lead to myriad problems. Commercial surrogacy, where people pay for someone to have their baby, is made taboo in India for a few reasons. The woman who carries the baby is often treated poorly and not paid fairly.² This can cause problems for her physically, mentally and financially. Child trafficking has also increased because of surrogacy.³ Surrogacy can also make babies seem like things that people can buy, which raises ethical questions. There are also psychological problems with surrogacy.⁴ These were the common reasons why the Government of India made a ban on the commercial surrogacy entirely and regulations to govern more than 3000 IVF clinics were passed.⁵

LEGAL PROVISIONS IN INDIA

The Government of India made some legal provisions for abating the surrogacy rate which are as follow

The legal provision in India include

- ❖ Surrogacy (Regulation) Act, 2021
- ❖ The Surrogacy Regulation Act, 2022
- ❖ The Surrogacy Regulation Rules, 2022
- ❖ Recent Amendments

Surrogacy (Regulation) Act, 2021

Provisions

Under the Surrogacy (Regulation) Act, 2021, a woman who is a widow or a divorcee between the age of 35 and 45 years or a couple, defined as a legally married woman and man, can avail the provision of surrogacy if they have a medical condition necessitating this option. The intended couple shall be a legally married Indian man and woman. Moreover, the man shall be between the ages of 26-55 years and the woman shall be between the ages of 25-50 years, and shall not have any previous biological, adopted, or surrogate child. It also bans commercial surrogacy, which is punishable with a jail term of 10 years and a fine of up to Rs 10 lakhs. The law allows only altruistic surrogacy where no money exchanges hands and where a surrogate mother is genetically related to those seeking a child.

Challenges

Exploitation of the Surrogate and the Child

The banning of commercial surrogacy moves from the rights-based approach to needs-based approach by removing the women's autonomy to make their own reproductive decisions and right to parenthood. One could argue that the state must stop the exploitation of poor women under surrogacy and protect the child's right to be born. However, the current Act fails to balance these two interests.

Reinforces Patriarchal Norms

The Act reinforces traditional patriarchal norms of our society that attributes no economic value to women's work and, directly affecting the fundamental rights of the women to reproduce under Article 21 of the constitution.

Emotional Complications

In altruistic surrogacy, a friend or relative as a surrogate mother may lead to emotional complications not only for the intending parents but also for the surrogate child as there is great deal of risking the relationship in the course of surrogacy period and post birth. Altruistic surrogacy also limits the option of the intending couple in choosing a surrogate mother as very limited relatives will be ready to undergo the process.

No Third-Party Involvement

In an altruistic surrogacy, there is no third-party involvement. A third-party involvement ensures that the intended couple will bear and support the medical and other miscellaneous expenses during the surrogacy process. Overall, a third party helps both the intended couple and the surrogate mother navigate through the complex process, which may not be possible in the case of altruistic surrogacy.

Some Exclusion from Availing Surrogacy Services

There is an exclusion of unmarried women, single men, live-in partners and same-sex couples from availing surrogacy services. This amounts to discrimination based on marital status, gender and sexual orientation, and denies them the right to form a family of their choice.

The recent changes made by the Supreme Court include

- ❖ A government notification in March 2023 amended the law, banning the use of donor gametes.
- ❖ It said “intending couples” must use their own gametes for surrogacy.
- ❖ The petition was filed in the Supreme Court challenging the amendment as a violation of a woman’s right to parenthood.
- ❖ The Court interpreted the requirement for the child to be "genetically related" as being related to the husband.
- ❖ The Court emphasized that the law permitting gestational surrogacy is "woman-centric," meaning that the decision to have a surrogate child is based on the woman's inability to become a mother due to her medical or congenital condition.
- ❖ The Court clarified that when Rule 14(a) of the Surrogacy Rules applies, which lists medical or congenital conditions that allow a woman to opt for Gestational Surrogacy, the child must be related to the intended couple, especially the husband.
- ❖ Gestational surrogacy is a process where one person, who did not provide the egg used in conception, carries a foetus through pregnancy and gives birth to a baby for another person or couple.
- ❖ The Supreme Court stayed the operation of Rule 7 of the Surrogacy (Regulation) Act, 2021, to allow the woman suffering from the Mayer-Rokitansky-Küster-Hauser (MRKH) Syndrome—a rare congenital disorder that affects the female reproductive system—to undergo surrogacy using a donor egg.
- ❖ Rule 7 of the Surrogacy Act bans use of donor eggs for the procedure.

The Surrogacy Regulation Act, 2021

The Act allows only altruistic surrogacy, which means that the surrogate mother cannot receive any compensation apart from the medical expenses incurred during pregnancy including insurance coverage. Commercial surrogacy, where the surrogate is paid in cash or kind, is banned. Before the intended couple can proceed with the surrogacy, they need to obtain two certificates – a certificate of essentiality and a certificate of eligibility – from a competent authority. To obtain a certificate of essentiality, certain conditions must be met. The couple must provide a certificate of infertility from a District Medical Board confirming that they are unable to conceive. The Magistrate Court must also pass an order regarding custody of the child. Additionally, insurance for the surrogate mother must be provided to cover postpartum complications for 16 months after delivery. Further, the Act prohibits any kind of advertisement for commercial surrogacy. The penalty for these offenses can be up to ten years of imprisonment and a fine of up to ten lakh rupees. It requires all clinics providing surrogacy treatment to be registered and for practitioners for meeting certain criteria. The intending couple must be legally married, meet age requirements, and have no other children through surrogacy or adoption.

The Surrogacy Regulation Rules, 2022

The Surrogacy Regulation Rules, 2022 were notified by the central government to set forth the necessary criteria and regulations applicable to be registered surrogacy clinics. These clinics are required to have a minimum staff composition consisting of at least one gynecologist, anesthetist, embryologist and counsellor. Additional personnel may be employed from ART Level 2 clinics. The gynecologist must hold a post-graduate degree in gynaecology and obstetrics, and possess experience in performing ART procedures. Surrogacy clinics must undergo registration with the appropriate authority and pay the prescribed fees. Upon approval, a certificate of registration is granted, which must be prominently displayed within the clinic premises. In the event of application rejection, cancellation or suspension, the applicant has the right to appeal within a 30-day timeframe using the designated appeal form. Authorized entities are empowered to conduct unannounced inspections of surrogacy clinics, including their facilities, equipment, and records, with the caveat that such inspections do not endanger stored gametes or embryos. The surrogate mother's voluntary consent, as specified in the guidelines, is mandatory for the surrogacy procedure. The number of attempts for surrogacy is capped at a maximum of three. Normally, the gynaecologist is expected to implant only one embryo, but in exceptional cases, up to three embryos may be allowed. If the surrogate mother wishes to terminate the pregnancy, the process must adhere to the guidelines outlined in the Medical Termination of Pregnancy Act, 1971. Besides, it is mandatory for the intending couple or woman for procuring health insurance covering duration of 36 months for the surrogate mother's protection.

RECENT AMENDMENTS AND DEVELOPMENT

The first amendment to the Rules, which was notified on 10th October, 2022, modified Rule 5(2) regarding insurance coverage for surrogacy. According to the revised rule, the intending couple must purchase insurance coverage for 36 months and guarantee it by signing an affidavit. Previously, the affidavit had to be sworn before the Metropolitan or the Judicial Magistrate of the First Class. The 2022 Amendment introduced flexibility in this process by allowing the affidavit to be sworn-in before either of two additional classes of authorities, namely an Executive Magistrate or a Notary Public. This change is expected to streamline the process and make it easier for intending couples to apply for surrogacy. By expanding the list of authorized authorities who can swear the affidavit, the amendment provides more options for the intending couple to comply with the insurance coverage requirement. This is likely to result in a quicker and smoother surrogacy application process.

The second amendment to the Rules, which was announced in March 2023, disallows intending couples from using donor gametes for surrogacy. Earlier, the rule stated that surrogacy treatment could include fertilization of donor oocyte by the husband's sperm, which was interpreted by some to mean that using donor gametes was allowed. However, the 2023 Amendment replaces this provision with a new one that explicitly prohibits the use of donor gametes, whether for couples or single women (widows or divorcees). The amendment also clarifies that surrogate mothers cannot provide their gametes. Thus, intending parents who have medical issues with their gametes and need donor gametes to conceive a child may face difficulties in opting for surrogacy in India. The amendment restricts the pool of eligible persons who can commission surrogacy, along with other restrictions based on age, marital status, and medical requirements.⁶

LANDMARK JUDGEMENTS

1. **Jan Balaz v. Anand Municipality [2009 SCC OnLine Guj 10446]:** This is a landmark case in Indian surrogacy law. In 2008, the Petitioner, a German national, entered into a surrogacy agreement with an Indian woman to have a child. The child was born in Gujarat, India, and the petitioner obtained a birth certificate for the child. Nevertheless, when the Petitioner tried to leave India with the child, he was prevented from doing so by the authorities. The Petitioner filed a petition in the Gujarat High Court seeking permission to leave India with the child. The Court initially denied the petition, citing concerns about the child's welfare and the legality of commercial surrogacy in India. However, the court ultimately granted permission to the Petitioner to leave with the child, subject to certain conditions. The case brought attention to the issue of commercial surrogacy in India and there is a dire need for clearer laws and regulations around surrogacy agreements. It also highlighted the need to ensure the protection and welfare of children born through surrogacy arrangements.

2. **Baby Manji Yamada v. Union of India [(2008) 13 SCC 518]:** This case involved a surrogate baby born to a Japanese couple through a surrogate mother in India. The couple later divorced, and the mother refused to take custody of the child, while the father was unable to obtain a visa to enter India to collect the child. The case raised questions about the legal status and rights of surrogate children and the responsibilities of surrogacy clinics and intended parents. Eventually, the Supreme Court directed the Japanese consulate in India to issue travel documents for the child so that she could be taken to Japan and recommended that the Indian government create regulations to govern surrogacy in India.

WAY FORWARD

By focusing on inclusivity, ethics, and medical advancements, India can establish a robust legal framework for surrogacy that respects individuals' rights, ensures the well-being of all the parties involved, and supports those seeking to start families through assisted reproductive technologies.

CONCLUSION

Surrogacy is when a woman carries a baby for a couple who are unable to conceive or carry a child themselves for medical or physical reasons. The surrogacy decisions are based on the moral, religious, and philosophical principles of the society in which they are undertaken. Furthermore, the ethical and social implications are deeply intertwined with religious traditions and communities. Which countries prohibit surrogacy depends on what religion the majority of the population belongs to and what the precept on procreation is of that particular religion. The literature shows that artificial reproductive technology is allowed in every country but all types of third-party assisted reproduction is restricted in some countries and cultures on the basis of adultery, preservation of lineage, inheritance, potential incest among the half-siblings, and possible eugenics. Genetic gestation surrogacy may bypass these problems. In a genetic gestational surrogacy arrangement, there is no chance of incest among the half-siblings as the genetic relationship is already known, and there is no fear of confusion of lineage of the child as the biological parents are already confirmed. In this arrangement, the surrogate mother does not actually engage in any act of adultery, as it does not involve any body contact of a sexual/adulterous nature; therefore, the punishment of adultery is not applicable. This is because it is believed by some groups that introducing a third party is presumably problematic as it introduces a third party into the sacred dyad of husband and wife relationship that may threaten the marital bond. Motherhood may be problematic in genetic gestational surrogacy in some cultures; however, since neither the biological mother nor the surrogate has comprehensively fulfilled the definition of motherhood, according that culture, motherhood can be confer to genetic mother by weighing the public benefit and necessity within the marriage bond. As genetic gestational surrogacy is largely free of social, legal, and moral complications, it can be used to provide the highest form of happiness to couples for whom the concept of family was previously impossible.

In conclusion, surrogacy laws vary across different countries and regions and are constantly evolving. India has a comprehensive legal framework for surrogacy with the Surrogacy Regulation Act, 2021 and its associated Rules regulating all aspects of surrogacy. However, recent amendments to the Rules have brought new restrictions and may pose challenges to those who require donor gametes to conceive a child. The laws of surrogacy aim to balance the rights and interests of all parties involved, and individuals considering surrogacy should seek legal advice to ensure compliance with relevant laws and regulations.

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