BLOGS

Surrogacy Law in India: Present Framework and Limitations

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Introduction

As a broad concept, surrogacy constitutes a legal agreement involving a woman, referred to as the surrogate, and individuals desiring to become parents. This arrangement has gained widespread recognition and acceptance in contemporary society.

Numerous individuals consider surrogacy as a viable option if the intended mother or woman is unable to conceive due to diverse medical or personal factors. In instances where childbirth poses a potential risk to the mother's life, surrogacy offers a solution.

For those yearning to become parents but facing fertility challenges, surrogacy emerges as a providential solution. Consequently, the necessity for robust regulations in this domain becomes paramount.

Traditional Approach to Surrogacy

Traditional surrogacy, in its conventional form, involves utilizing the surrogate mother's own eggs, thereby obviating the requirement for egg donation.

This method employs intrauterine insemination, a straightforward approach that spares the surrogate from extensive fertility procedures. The intended mother is also spared the need for treatments or the egg retrieval process, given that her eggs are not utilized in this process.

Modern Approach to Surrogacy

Gestational surrogacy, a distinct category, necessitates the involvement of an egg donor to craft the embryo designated for the surrogate mother's gestation. This method employs the In Vitro Fertilization (IVF) process. The embryo is fashioned using the intending mother's eggs and the father's sperm, subsequently being carried by the surrogate.

This form of surrogacy is favored by surrogates due to the absence of emotional ties; the surrogate isn't biologically related to the child. Gestational surrogacy tends to be pricier due to the distinct fertility treatments and separate egg retrieval processes undergone by both parties involved.

Legal Regulations on Surrogacy in India

In India, there are several legal provisions and regulations that pertain to surrogacy. These regulations aim to define and manage various aspects of surrogacy arrangements, from the role of medical institutions to the rights of intended parents, surrogate mothers, and children born through surrogacy.

The key legal provisions related to surrogacy include:

- Indian Council of Medical Research Guidelines, 2005

These guidelines were introduced to oversee the operations of Assisted Reproductive Technology (ART) clinics offering surrogacy services in India. While these guidelines provide directions for how fertility clinics should conduct ART procedures, they are advisory in nature and not legally binding.

- Surrogacy Regulation Bill, 2019

This bill addresses commercial surrogacy, allowing altruistic surrogacy while banning commercial transactions. In altruistic surrogacy, the surrogate mother receives only medical expenses and insurance coverage, excluding monetary remuneration.

The bill requires intended couples to obtain a 'certificate of essentiality' and 'certificate of eligibility' from the competent authority. Certain conditions, such as infertility certification and legal custody orders, must be met before receiving the certificate of essentiality.

The bill penalizes offenses such as advertising or commercializing surrogacy, exploitation of surrogate mothers, abandonment of surrogate children, and trading in human embryos or

gametes. Penalties for these offenses range from imprisonment to fines.

- Assisted Reproductive Technology Act, 2021

This act not only pertains to surrogacy but also encompasses a broader range of assisted reproductive technologies. Surrogacy is open to married couples with Indian citizenship as well as married couples, live-in partners, single women, and foreigners under the ART Act.

The Act establishes a National Board, a National Registry, and a Registration Authority to oversee and regulate assisted reproductive technology facilities and practices. It encompasses procedures from gamete or embryo transfer to various reproductive interventions.

- Surrogacy (Regulation) Act, 2021

This Act, passed in 2021, encompasses various aspects of surrogacy arrangements. It mandates that all clinics providing surrogacy services must be registered under this act, and practitioners in those clinics must meet specific criteria. Commercial surrogacy is strictly prohibited, and only altruistic surrogacy is allowed.

The Act specifies eligibility criteria for intended couples and surrogate mothers, including age restrictions. A ‘Certificate of Essentiality/Infertility’ is required for intended couples with a medical need for surrogacy. Surrogate mothers must be informed of potential risks and provide informed consent.

The Act establishes a National Assisted Reproductive Technology Registry to oversee registration of surrogacy clinics. It outlines penalties for violations, including fines and imprisonment for commercial surrogacy and exploitation of surrogate mothers or children born through surrogacy.

These legal provisions collectively aim to regulate and govern surrogacy practices in India, protecting the interests of all parties involved while addressing ethical, medical, and legal considerations.

Who Qualifies to be a Surrogate?

According to legal requirements, the surrogate herself must meet specific criteria to be eligible for surrogacy. She must fall within the age range of 25 to 35 years and be married with at least one child of her own.

Additionally, she should be a first-time surrogate, indicating that she has not previously carried a child for another couple. A certified psychiatrist must also confirm her mental fitness.

Upon obtaining eligibility certificates for both the intending couple and the surrogate, they can proceed to approach an Assisted Reproductive Technology center for the embryo transfer process.

Furthermore, the law stipulates that both the surrogate and the intending couple need to have their Aadhaar cards linked. This requirement serves to establish traceability through biometric data, thereby minimizing the potential for any unethical or illegal activities within the arrangement.

Additional Aspects of the Surrogacy Law

- Restriction on Homosexual Couples: The law acknowledges marriage only between heterosexual individuals according to the Indian marriage act. Consequently, homosexual couples are not permitted to utilize surrogacy as a means to have children.
- Surrogate's Obligations: Once the surrogate enters into a surrogacy contract, she is obligated to carry the pregnancy to full term. She cannot terminate the pregnancy without the requisite authorization from the appropriate authority.
- Genetic Connection: The law mandates that the embryo used in surrogacy must have a genetic connection to the intending couple. It can be genetically related to either the man, the woman, or both. Embryo donation is prohibited in surrogacy arrangements.
- Divorcee or Widow Participation: The law permits a divorcee or widow, aged between 35 and 45 years, to offer her eggs for surrogacy.
- Surrogacy Abroad: If an Indian couple utilizes the services of a surrogate outside the country, any child born from such an arrangement will not be recognized as an Indian citizen.
- Responsibility in Case of Death: In the unfortunate event that the commissioning couple passes away before the child is born, the responsibility of raising the child falls on the nominees specified in the surrogacy contract. These nominees are obligated to care for the newborn child. However, they can later choose to give up the child for adoption or to an orphanage.
- Child's Rights: Children born through surrogacy hold the right to be informed about their origins when they reach the age of 18. They are also entitled to access information about the identity of the surrogate mother.

Judicial Perspectives on Surrogacy in India

The legal landscape surrounding surrogacy in India has been shaped by various court cases that have highlighted the complexities and need for regulations in this area. Some notable cases include:

Baby Manji Yamada v. Union of India (2008):

In this case, a Japanese couple sought surrogacy services in India. However, marital issues arose, leading to divorce. The father desired custody of the child, a girl. The Supreme Court granted custody rights to the child's grandmother due to legal limitations preventing a single father from adopting a girl child. This case underscored the necessity for a regulated legal framework for surrogacy.

Jan Balaz v. Anand Municipality (2008):

A German couple hired a surrogate mother in India who gave birth to twins. The twins needed Indian passports to travel, but the lack of citizenship led to passport issuance complications. The Supreme Court granted departure permission for the twins to leave the country. German authorities later facilitated their adoption by the intended parents, highlighting the need for international recognition of surrogacy arrangements.

Suchita Srivastava v. Chandigarh Administration (2009):

In a case involving a mentally impaired woman who was raped and became pregnant, the court affirmed her right to reproductive choice, including carrying the pregnancy to full term, giving birth, and ensuring dignity and privacy. Article 21 of the Constitution was invoked to uphold these rights.

Justice K.S. Puttaswamy v. Union of India (2018):

This case was not exclusively focused on surrogacy but had implications for it. The court ruled that requiring a certificate of infertility violates the right to privacy. It also held that making such a certificate mandatory from a district medical board contradicts societal moral and ethical standards, emphasizing the importance of upholding fundamental rights.

Shortcomings in the Surrogacy (Regulation) Act, 2021

- Limited Beneficiaries

The Act confines eligibility to two categories: legally married intending couples with a certificate of infertility, and intended women who are widows or divorcees within a specific age range. This excludes unmarried women who wish to be mothers but face conception challenges. This perpetuates societal taboos against childbirth without marriage. It also ignores situations where a woman cannot bear a child for various reasons but still wants to have one.

- Exclusion of Unmarried and Live-In Partners

The Act's terminology restricts access to services only for legally married couples within certain age limits, disregarding unmarried or live-in partners. This biases in favor of marriage as an institution. The Act also fails to address couples with chronic diseases that may be transmitted to their child, apart from vaguely allowing surrogacy based on the Board's identification of conditions or diseases.

- Exclusion of LGBTQIA+ Community

The Act's limitations reflect societal gender biases, allowing only legally married heterosexual couples to utilize surrogacy. The Act's focus on "a man and a woman" implies exclusivity to heterosexual couples. While the Supreme Court's 2008 ruling (*Baby Manji Yamada v. Union of India*) recognized surrogacy's acceptance for various parenting arrangements, the Act's implementation undermines the rights of gay couples and non-binary individuals by denying them the opportunity to become parents.

The Act's rigidity disregards the progress towards LGBTQIA+ rights, as evidenced by the decriminalization of homosexuality in *Navtej Singh v. Union of India* (2018). By failing to extend surrogacy rights to same-sex couples and non-binary individuals, the Act contradicts principles of equality enshrined in the Indian Constitution's fundamental rights. Recognizing and accommodating the LGBTQIA+ community's parenting aspirations is essential for promoting a more inclusive and just society.