
SURROGACY LAWS IN INDIA

Ankesh Kumar, LLM (Family Law), Amity University, Noida

ABSTRACT

The current research looked into one of the controversial but vitally essential topics of surrogacy, specifically with reference to the laws of India.

In order to get ready for this study, I studied a variety of scholarly articles and research papers that covered a wide range of subjects. These articles and papers were published in academic journals as well as other newspapers and publications. In addition, in order to conduct a judicial interpretation analysis, I have referred to a variety of judicial decisions from both India and other countries, in addition to the most recent statutes and reports from the law commission.

The topic of surrogacy is extremely important for a variety of issues pertaining to family law, including single parenthood, L.G.B.T.Q., and other legal concerns; however, the laws that have been developed in this regard are not sufficient enough to deal with all of the social issues; as a result, it requires a number of modifications.

I. INTRODUCTION

The subject surrogacy is one of the important family matters of family relations, because in every part of the world parent having his own child is an important part of their life. Surrogacy has made this possible for all those who is not able to reproduce child naturally.

The concept of surrogacy is very new to world, and many countries still don't have any law for it. Most of the countries, made law in 21st century. India is also one of them. Since, surrogacy now involves multi legal aspect in present era such as LGBTQ, Single parents, O.C.I, Parenting leave commercial surrogacy and others. The present law does not include every aspect related to surrogacy, which makes it an incomplete law and it requires amendment to bridge a gap between present law and law required.

II. MEANING OF SURROGACY

Surrogacy refers to the arrangement in which a couple that wants to start a family pays another woman to carry and give birth to their child. Using a surrogate is a form of assisted reproduction performed by a third party. The surrogate mother bears the kid to term after being artificially inseminated with sperm of intended father, and then the infant is given to the intended parents to be raised by them. A biological mother is treated differently in traditional surrogacy, which can frequently result in psychological difficulties for both the biological mother and the kid. In vitro fertilization (IVF) is used to carry out gestational surrogacy, the other form of surrogacy. Using IVF, a couple can have a child by retrieving the mother's (or donor's) eggs, fertilizing them with the father's (or donor's) sperm, and then implanting the resulting embryo in uterus of gestational surrogate. Traditional surrogacy relies on less successful outcomes and is associated with a higher level of technological complexity than gestational surrogacy.

III. SURROGACY LAWS IN INDIA

A surrogacy agreement is a legally binding contract between a woman, often known as the surrogate, and the intended parents who are willing to have a child. This arrangement has evolved into one that is considered standard and acceptable in today's culture. When a mother or a woman who wants to have a child but cannot conceive for any number of reasons (whether they be medical or personal), a lot of individuals choose to go the route of surrogacy instead. A mother's life is likely to be put in danger as a result of giving birth to a child. It's a boon for

parents or persons who want to have a kid but can't, therefore having sufficient rules on the subject is crucial. If you are unable to have children but would like to, surrogacy can be a lifesaver. According to Indian legislation, only gestational surrogacy is legal.

Following are the laws which directly or indirectly deals with surrogacy:

Guidelines published by the Indian Council of Medical Research in 2005

These rules were drafted to regulate the practices of ART clinics in the Indian subcontinent that facilitate surrogacy arrangements. In this suggestion, we outlined the steps and therapies that fertility centres should take while introducing ART. These Guidelines were developed prior to the passage of the ART Bill; nonetheless, they are purely advisory and have no binding legal effect.¹

A Bill to Regulate Surrogacy, Introduced in 2019

The Bill does not enable any type of surrogacy that is performed for financial gain; nevertheless, it does not prohibit altruistic surrogacy. In the case of altruistic surrogacy, the surrogate mother does not get any monetary compensation of any kind. This includes not only the cost of her pregnancy-related medical care but also the cost of her Coverage from an insurer. To perform a gestational carrier arrangement for financial gain or reward (in cash or kind), in addition to providing necessary medical bills and insurance coverage, is considered commercial surrogacy.²

The appropriate authorities needs to issue the prospective pair both a "certificate of essentiality" and a "certificate of eligibility" before the adoption can take place.

In order to obtain a certificate of essentiality, one must first satisfy a number of prerequisites, which include the following requirements:

A certificate of infertility issued by a District Medical Board is required as evidence to demonstrate that either one or both members of the couple who wants to have the baby are infertile or unable to have a child at this time.

¹ Ananya Bose, *Is Surrogacy Legal In India*, Ipleaders Blog (July 21,2022), <https://blog.ipleaders.in>

² *Id.* at 1.

It is necessary for the Magistrate Court to issue an order determining who will have custody of the surrogate kid.

After the baby is born, the surrogate mother needs to have health insurance covering postpartum difficulties in her name for a period of sixteen months after the baby is born.

Act of 2021 Concerning the Facilitation of Assisted Reproductive Technology

Surrogacy is legal for married couples in India who hold Indian citizenship. However, there are some restrictions. On the other hand, the Assisted Reproductive Technology Act (ART) makes it possible for single women, married couples, live-in partners, and even foreigners to access assisted reproductive technology. This bill includes a provision for a National Board, which would be vested with the authority that a civil court is accorded by virtue of the Code of Civil Procedure. There are fewer than one thousand clinics in our nation that offer surrogacy, although there are more than forty thousand that offer assisted reproductive technology (ART).

In recent years, assisted reproductive technology (ART) in India has emerged as a popular draw for foreign patients seeking medical treatment, and the number of clinics that offer this service continues to expand daily. There are a number of options for achieving pregnancy, including gamete donation, intrauterine insemination, in-vitro fertilization, intracytoplasmic sperm injection, and pre-implantation genetic testing.

At the moment, there are no well-established ART clinics operating in India. Despite concerns over the ethical, medical, and legal aspects of ART facilities and ART banks, the Lok Sabha has adopted a Bill that will regulate and supervise these institutions.

In accordance with the terms of the bill, assisted reproductive technology (ART) would include all of the procedures that are necessary in order to make an effort to conceive in a woman. From inserting the gamete or embryo into a woman's reproductive system to handling sperm or oocytes outside the human body.

The ART banks that would provide and supply the requisite products are outlined in the Act as their definition. Women who are older than the minimum age required for marriage but are under the age of 50 and males who are older than the minimum age required for marriage but are under the age of 55 years would be eligible for these services.

Not only does the act include provisions for ART banks and other facilities, but it also establishes bodies that will be responsible for regulating the act.

National Board

This Board has been established in order to make recommendations and offer advice to the government on a variety of different policy topics. This Board will recommend the essential and minimal criteria for the infrastructural labs, as well as the staff that should be hired in the clinics and banks, such as doctors and nurses. These would check to see if the bill is being implemented correctly and make suggestions for adjustments as necessary over time.

Registry of the Nation

It will include a centralized database that contains information on all of the clinics and banks located around the country, in addition to the nature, types, and scope of services that are provided, as well as the results of those services. The information will be sent to the National Board, which will utilize it to set norms and standards based on what it learns from the register.

Registration Authority

These would be presided over by a chairperson, who is required to hold a position in the health department that is higher than that of the joint secretary. A law officer from the department of law, a woman who has a prominent position in a women's organization, a registered medical practitioner who occupies an eminent position in the field, and a vice-chairman ranking above the joint director in the health department are the members of the panel.

The registration authority will be responsible for a number of things, including: approving, rejecting, or revoking ART centers' registrations; enforcing standards and overseeing law implementation; receiving complaints and feedback of any violation of provisions; taking legal action against the improper use of ART and launching investigations; and advising the National and State Boards on how to update the rules in light of developments in both technology and scientific understanding Act of 2021 Regarding the Regulation of Surrogacy.

Early in the month of December in 2021, this Bill was finally approved. The following

is a list of some of the most important aspects of the Act:

Under this Act, each and every clinic that offers surrogacy as a therapy or facility must be registered, and all of the medical professionals who work in those clinics must meet the requirements outlined in this bill in order to be allowed to practice.

Within the first sixty days following the appointment of the competent authority, any facility that offers surrogacy treatments is required to submit an application for registration. It is necessary to renew your registration every three years.

Any surrogacy clinic, gynaecologist, embryologist, or other medical practitioner is not allowed to engage in any sort of commercial surrogacy. This includes the practice of gestational carrier. Under the terms of the 2021 Act, surrogacy can only be performed for charitable purposes.

In order to comply with Indian law, the couple who is planning to have a child together, often known as the "intending couple," must first get married. The age range for male candidates should be between 26 and 55 years old, and the age range for female candidates should be between 25 and 50 years old. Additionally, another essential requirement is that they should not already have any other children, whether they were born naturally or the result of surrogacy or adoption.

It is necessary for the woman who will be offering this service, who will be the surrogate mother, to be between the ages of 35 and 45. During her whole lifespan, a woman is not eligible to serve as a surrogate mother more than once.

An intended couple that has a medical need for surrogacy is required to submit a "Certificate of Essentiality/Infertility" to the National or State Assisted Reproductive Technology and Surrogacy Board. This certificate must be renewed annually.

The intended surrogate mother has a right to know about any and all potential risks and side effects associated with the procedure. In addition to this, the surrogate mother is required to offer written informed consent in a language that she is able to comprehend.

In accordance with the provisions of this bill, a registry known as the National Assisted Reproductive Technology Registry would be established, and its primary responsibility

would be to oversee the process of registering medical facilities that offer surrogacy services.

Any couple who is found to have obtained a child through the practice of commercial surrogacy would be subject to the provisions of this Act, which stipulates that they will be liable for a fine of up to 50,000 rupees as well as a prison sentence of up to 5 years. In addition, if the same offense is done several times, the fine will increase to one lakh, and the amount of time spent in jail would increase to ten years. Any person, company, or clinic that is proven to be involved in the exploitation of surrogate mothers or children who were born as a result of surrogacy is subject to a maximum penalty of 10 years in prison as well as a fine of ten lakhs of rupees.

IV. SURROGACY: JUDICIAL APPROACH IN INDIA

In 1994, in the city of Chennai, the practice of surrogacy was first documented in India. The first documented case of commercial surrogacy in India took place in 1997, when an Indian woman consented to carry a child for another family in exchange for payment. In the most recent decade, there has been a significant rise in the number of children born in India as a result of the practice of surrogacy. It is important to note that when "commercial" surrogacy was practiced for the first time in India, it sparked a heated debate about whether or not the practice was within the bounds of the law. In the two seminal instances known as "*Baby Manji*" and "*Jan Balaz*", the Supreme Court did not rule that the practice of surrogacy or the contract for it were illegal; rather, it endeavoured to find solutions to the major issues that arose from the situation. As a consequence of this, the only logical conclusion is that such practices and contracts are permitted under Indian law. Although there will not be a specific law in India that addresses surrogacy until December 2021, the "ICMR Guidelines and the Draft ART Bill" both regard surrogacy and surrogacy contracts to be valid. This is the case despite the fact that India does not now have such a statute.

Baby Manji Yamada v. UOI and Ors.³

In this particular instance, a Japanese couple wanted to conceive a baby through surrogacy thus they travelled to India. Now, they decided to use a surrogate mother, so they recruited a woman from Gujrat, a region in India where the practice of using a woman other than the

³ (2008) 13 SCC 518

biological mother to carry a child is common. As a result of the conflicts that emerged during their marriages, the couples eventually separated. Now, the child's male parent wished to gain custody of their daughter. The child was a girl. It is not possible for a single male parent in India to adopt a girl child. In this particular instance, the Supreme Court decided that the child's grandmother should be awarded the rights. The Supreme Court came to the conclusion that there should be laws that govern surrogacy.

The petition for the writ of certiorari was dismissed, and the Supreme Court decided "that:

The petitioner had the legal right to pursue whatever legal recourse that was open to them in the event that they had a problem with the order that was issued by the Central Government regarding issues such as passports, visas, movement, and so on.

It was brought to everyone's attention that the Commissions for Protection of Child Rights Act, which was passed in 2005, was enacted for the purpose of protecting the rights of children and ensuring a swift trial for crimes committed against children.

In the circumstances presented here, the Commission is the appropriate body to make any decision that needs to be made. It is unnecessary to delve into the locus standi of respondent 3 and investigate whether or not there is any involvement of bona fides.

Due to the fact that the Supreme Court had not been presented with the aforementioned complaint regarding Baby Manji, the order that demanded her appearance before the court was invalid. It was ordered that in the event that someone had a complaint, they should bring it to the attention of the commission that was established in accordance with the statute.

It was stressed that the commission needs to take into account a variety of important elements.

Kaushal Kadam v. Union of India⁴

A policy was formulated by the Ministry of Home Affairs, India, where certain guidelines were laid down for providing surrogacy services in India for foreign nationals, and it also mentioned that "the couple should produce a duly notarized agreement between the

⁴ (2015) SCC Bom 805.

applicant couple and the prospective Indian surrogate mother." The court held that there is no prohibition in India for commissioning surrogacy, and there is no law that has been enacted to regulate surrogacy in India. In addition, there is no law that has been enacted.

In Kiran Kailas Gavhande v. UOI⁵

The petitioners consist of the surrogate and the commissioning/intended parents in a situation where a surrogacy agreement has been executed between them. The petitioner was informed that the fetus has a serious defect in the heart, which is the reason why, after obtaining the report, the decision was made to terminate the pregnancy.

Jan Balaz v. Anand Municipality and Ors.

The question of whether or not a child born in India to an Indian surrogate who carried the child for a biological father who was not from India would be eligible for citizenship by birth in India is an important one that has never been addressed before in this country. The babies in this scenario are citizens of India because they were conceived via in vitro fertilization (IVF) and delivered in India. The person who filed the petition for them in India named them "Balaz Nikolas" and "Balaz Leonard" on the passport application. The petitioner's name appeared on the birth certificate as the father of the child, while the surrogate's name appeared on the certificate as the mother. The petitioner stated that since children are brought into the world in India and are residents of India, Germany should not recognize them as residents of Germany because they are Indian citizens.

According to the petitioner, the refusal of passports violates the law and is in violation of Art 21 of the Indian Constitution. The Law Commission of India stated in its 220th Report on the "Need for Legislation to regulate Assisted Reproductive Technology Clinics" as well as the rights and obligations of parents to a surrogacy that "surrogacy agreements will continue to be governed by a contract between the parties, which will include all terms requiring surrogate mother's consent to bear the child, agreement of a husband and other family members for the same, medical procedures of artificia" (surrogacy agreements will continue).

⁵ 2018 SCC OnLine Bom 18453

The Supreme Court of India has decided that children who are born in India to gestational surrogates are citizens of India and can therefore apply for passports in their own names. In this decision, the Court also cites *Buzzanca v. Buzzanca*⁶, In that case, the Court decided that a married couple are the child's lawful parents when they have a child using non-genetically related embryos and sperm that were placed in a surrogate.

In Mr Ebert Trujillo Duthil v. Marjina Khatun

The court ruled that "the Law Commission of India in its aforesaid report recommended that surrogacy agreements be treated at par with other contracts and that the principles of Indian Contract Act and other laws shall be applicable to these kinds of agreements." The report was referred to by the court as "the aforesaid report." It further proposed that the parents who are commissioning the adoption of the kid be made legally obligated to accept custody of the child regardless of any abnormalities that the child may have, and that refusal to do so should be considered an offense in and of itself. In addition to this, it suggested that the surrogate mother should give up all parental rights over the child, as well as the requirement that the names of the baby's genetic parents be included on the birth certificate for children born through surrogacy.

In K. Kalaiselvi v. Chennai Port Trust⁷

Considering that the Court ordered the respondent Chennai Port Trust to offer leave to the petitioner recognising the kid received via the operation of surrogacy, the question arises as to whether or not a woman employee is entitled to maternity leave in the event that she gives birth to a child through the process of surrogacy.

In Manji Yamada v. Union of India⁸

The well-respected Court said that the intended father could be a single guy or a gay couple or male homosexual pair, and the organizations typically assist with the medical and legal aspects of the process.

⁶ 1961 CAL. App 1410

⁷ (2013) 1 CLR 969

⁸ Supra note 1 at 2.

Agreements to act as surrogates can also be negotiated on an individual basis.

P. Geetha v. The Kerela Livestock Development Board Ltd⁹

The case at hand addressed maternity leave, and the Supreme Court came to the conclusion that "there ought not to be any discrimination of a woman as far as the maternity benefits are concerned only on the ground that she has obtained the baby through surrogacy." It is also made abundantly apparent that, taking into consideration the difference between maternity and motherhood, the petitioner is eligible for all of the advantages that an employee could have on post-delivery, with the exception of the leave that involves the health of the mother after the birth. In other words, the child-specific statutory benefits, if there are any, should be extended to the petitioner, and they can be granted to the petitioner. The similar conclusion was reached in the case of *Pratiba Himral v. the State of Himachal Pradesh and Others*¹⁰, which stated that the purpose of maternity leave is to maintain the dignity of motherhood by ensuring that both the mother and her child receive adequate care.

In *Rama Pandey v. Union of India*¹¹

According to a statement made by the judge Rajiv Shaktiher, "...In my opinion, wherever there is an arrangement for surrogacy, the commissioning mother continues to remain the legal mother of the child, both during and after the pregnancy." To illustrate my point, let's say that the surrogate mother and the commissioning parents have a disagreement, and the surrogate mother makes the decision to terminate the pregnancy on her own, even though she is still within the time frame allowed by law for the termination of a pregnancy.

In this scenario, the commissioning parents would have the legal right to prevent the surrogate mother from engaging in any behaviour that could be harmful to the interests of the child. My opinion is that the fact that the commissioning mother is the child's legal mother would provide the legal basis for the court to examine such a request. This would be one of several factors that would be considered. The fact that an agreement to engage in surrogacy is regarded as legitimate by the legal system in this nation provides the foundation for this kind of judgment to be drawn.⁸¹As a consequence of this, the court does not regard

⁹ 2015 (1) KHC 165

¹⁰ MANU/HP/0528/2021

¹¹ (2015) DLT 756

the petitioner's choice to acquire a child through a surrogate arrangement as being either immoral or unethical.

V. CONCLUSION

The process of surrogacy in India is a difficult one. Even before beginning the procedure, there are a number of legal obligations that need to be satisfied. In addition to this, there is also a societal stigma associated with the practice of surrogacy. The general population in India does not make use of reproductive technologies to the same extent that celebrities do, such as Priyanka Chopra and Nick Jonas, Shilpa Shetty and Raj, and many others. As a result, we still discover a lack of use of such operations among the general population. Even though having a baby through surrogacy is a wonderful option for families in these situations, the practice still needs to gain more social acceptance. It is necessary to come to terms with the reality of the situation if a woman is unable to give birth.

In this area, there is a pressing requirement for heightened awareness, as well as some clarification regarding the applicable legal framework. The decision to outlaw commercial surrogacy should be re-examined as soon as possible. Additionally, the laws need to be revised to better accommodate homosexual couples as well as single parents. There also has to be more stringent regulations in place to manage the health of the child, as well as the surrogate mother and the environment in which they live. It is a blessing for people or couples who desire to experience motherhood to have the option of surrogacy.