



THE IMPACT OF SURROGACY LAW; ENSURING THE FAIRNESS

Law

Rashmita Rana

KEYWORDS

AFTER years of struggle by activists, the Surrogacy (Regulation) Act, 2021 was enacted last year by Parliament to introduce and regulate the process of surrogacy. The Act was made effective on January 25 after the notification in the Official Gazette by the Union Government. There have been Bills passed in India for regulating surrogacy to allow those women who cannot conceive even after various fertility procedures to fulfill their dream of motherhood, and at the same time safeguard the right and integrity of the surrogate mother.

The Act, though, leaves certain necessary questions unanswered, apart from various gaps which need to be noticed. The primary criticisms against the Act are regarding who is allowed and not allowed to avail surrogacy services, the exclusion of non-binary gender, the prohibition of commercial surrogacy, the need to include traditional surrogacy, and the difficulty that medical practitioners might face because of the vagueness in the law.

The use of donor gametes was outlawed by a government notification in March 2023 that modified the legislation. For surrogacy, it said that "intending couples" have to utilise their own gametes. Zero A social welfare law known as the Surrogacy (Regulation) Act, 2021 was passed in India in order to safeguard the rights of surrogate mothers and surrogate children. Without a question, the Act deserves appreciation, notwithstanding some real-world issues.

The LGBTQ+ community and live-in partners may face discrimination under THE Surrogacy (Regulation) Act 2021.

Surrogacy as a practice might have become popular in India in the recent past, but its roots can be traced back to our mythological past. Lord Krishna's brother, Balaram, who was also the seventh child of Devaki and Vasudeva, was transferred to the womb of Rohini, (Vasudeva's first wife) to protect her from Devaki's brother, Kansa. Herein, Rohini acted as a surrogate to the intended parents (Devaki and Vasudev). Thus, Indian mythology has looked at surrogacy as a way to create or protect families, and not a procedure to be frowned upon.

While the Surrogacy (Regulation) Act, 2021 is the first legislation in India that controls the surrogacy practices, societal resistance against the process of surrogacy still prevails, especially in cases where the woman in the intending couple does not have a healthy egg and needs an egg donor for the surrogacy. The Act has raised various concerns not only in the minds of couples looking for surrogacy as an option to embrace parenthood, but also in the minds of medical practitioners due to the gaps in it. The progressive legislation, which aims to make surrogacy available to people unable to have children, has failed in its very nature to be progressive by being exclusionary and vague in its language, opening it to much deliberation and misinterpretation.

Although transnational surrogacy was banned in India in 2015, ART and domestic commercial surrogacy have continued to flourish with the help of entrenched networks of unvetted agents and private clinics. The new laws profess to put in place institutions like new National and State ART and Surrogacy Boards, as well as a National ART and Surrogacy Registry, to advise the government on regulation and policy matters. The Registry will also maintain a database of the ART treatments undertaken across the country to ensure transparency in such matters.

Any medical practitioner who commits an offense under the Act shall be punished with imprisonment extending up to five years and a fine of up to 100,000 Indian rupees. The offenses are non-bailable. If a subsequent offense is committed by the same person, the practitioner shall be reported to the appropriate authority and the State Medical Council for the suspension of their registration for five years.

Although transnational surrogacy was banned in India in 2015, ART and domestic commercial surrogacy have continued to flourish with the help of entrenched networks of unvetted agents and private clinics. The new laws profess to put in place institutions like new National and State ART and Surrogacy Boards, as well as a National ART and Surrogacy Registry, to advise the government on regulation and policy matters. The Registry will also maintain a database of the ART treatments undertaken across the country to ensure transparency in such matters.

Some experts have also raised concerns over the new laws' provisions to exclude millions of Indian citizens from accessing ART and surrogacy. Single men, cohabiting heterosexual couples, same-sex couples, and LGBTQ persons cannot access such services. This is despite the Supreme Court's rulings that consensual sexual activity between adults of the same sex is no longer a crime. The apex court had also reiterated the need for inclusion of same sex couples in all walks of life and has confirmed that the liberty to procreate is part of their right to privacy.

"Why has the country's highest court's jurisprudence not been factored into the laws? What happens to unmarried people and the LGBTQ community? Their exclusion is narrow and discriminatory," said Charu Malik of the Jagori Women's Resource Center, a Delhi-based women's organization.

Even for heterosexual married couples seeking a child born out of surrogacy, the activist added, the new laws list long and tedious criteria. "For instance, the provision that couples seeking surrogacy should be married for at least five years is an attempt at curtailing their freedom to start a family earlier if they so wish," Malik said.

Additionally, the couple has to include a man between the ages of 26 to 55 years and a woman of 25 to 50 years of age. Both have to be Indians, and should have no biological, adopted, or surrogate children (unless the child is mentally or physically challenged or has a life-threatening disorder).

The criteria for anyone opting to be a surrogate mother states that the woman in question must be married (at least once in her life) and should have her own child. She should be between 25 to 35 years of age and a close relative of the couple opting for surrogacy. Any woman agreeing to be a surrogate cannot be a surrogate more than once in her life and at the time she should be certified for medical and psychological fitness.

The bill also lays down specific eligibility criteria for both the couple opting for surrogacy and the surrogate mother. The couple in question is required to have a "certificate of essentiality," which includes a certificate of proven infertility of one or both persons, a court order on the parentage and custody of the child born through the surrogate, and insurance coverage for the surrogate mother for 16 months, including for post-partum delivery complications.

CONCLUSION:

Instead of making the new laws pioneering legislations that had the power to create an inclusive and egalitarian society, the law makers have ended up creating contentious regulations that are likely to attract litigation in courts and hurt the very women they intend to protect," said Delhi-based lawyer and activist Sanskriti Taneja.

The expert fears these drawbacks may also contribute to the development of an illegal, informal market in egg donation and surrogacy services. "Any time the law overstretchers itself by brushing

aside rights of stakeholders, it invariably creates a thriving grey market for the very services it seeks to regulate,” Taneja said.

“More likely, the new laws will create rather than solve the problems the government intended to address.”-Nov-2023