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The Evolution Of Laws Around The Practice Of Surrogacy And Assisted Reproductive Technology

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INTRODUCTION

Until 2005, there were no guidelines and/or regulations governing the practice of assisted reproduction or surrogacy, running of infertility clinics, and supervision of their performance in India. Only in 2005, the Indian Council of Medical Research (ICMR) and National Academy of Medical Sciences (NAMS) came out with National Guidelines for Accreditation, Supervision and Regulation of Assisted Reproductive Technology (ART) Clinics in India (ICMR Guidelines) to fill this lacuna and provide means of maintaining a national registry of such clinics in India.

Thereafter, the Law Commission of India in its 228th Report presented on 5 August 2009 took up the subject of '*Need for Legislation to regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of Parties to a Surrogacy*' and recommended putting a ban to the practice of commercial surrogacy as there was lack of proper legal framework. It was noted that surrogacy in India, was primarily being availed by foreigners due to low costs thus leading to exploitation of surrogate mothers, who were primarily poor and lacked education. In view of the above, Ministry of Home Affairs, Government of India banned commercial surrogacy for foreigners vide a notification in 2015.

The present article talks about the development of laws pertaining to the **Assisted Reproductive Technology (Regulation) Act 2021** and **Surrogacy (Regulation) Act 2020** and the petition challenging them.

Surrogacy (Regulation) Act, 2021

The first Surrogacy (Regulation) Bill was introduced in 2016 before Lok Sabha, however, it lapsed after Parliament was dissolved. Subsequently, the Surrogacy (Regulation) Bill, 2019 (Surrogacy Bill 2019) was introduced by the Ministry of Health and Family Welfare in Lok Sabha, on 15 July 2019. The same was passed by the Lok Sabha on 5 August 2019. The Surrogacy Bill 2019 aimed at regulating the surrogacy procedure to *inter alia* stop the exploitation of women and to ensure the protection of rights of the children born out of surrogacy.

The Rajya Sabha referred the Surrogacy Bill 2019 for examination to a Select Committee comprising of 23 members of Rajya Sabha on a Motion adopted by the House on the 21 November 2019. Thereafter, the report of the Select Committee was presented before the Rajya Sabha on 5 February 2020, suggesting the changes in the aforesaid bill. Subsequently, the Surrogacy (Regulation) Bill 2021 was introduced and notified as Surrogacy (Regulation) Act, 2021 (Surrogacy Act) on 25 January 2022.

The Surrogacy Act introduced various provisions that make the practice more stringent which include, *inter alia*, but not limited to:

- i. registration of surrogacy clinics shall be mandatory, (*Section 11*)
- ii. No commercial surrogacy, only altruistic surrogacy (without monetary compensation to the surrogate mother other than the medical expenses and insurance coverage during the pregnancy) would be allowed to be taken up by the surrogacy clinics. (*Section 3*)
- iii. Surrogacy clinics would not be allowed to store/sell/import human embryos or gamete for surrogacy. (*Section 38*)
- iv. All matters related to abortion would be allowed to be performed by surrogacy clinics with due consent only. For instance, abortion would be allowed to be performed with the written consent of the surrogate mother and the appropriate authority. (*Section 10*)

Further, the Surrogacy Act provides for the various rules for the surrogate mother (*Section 4*) such as the surrogate has to be a close relative of the couple, that the surrogate has to be a married woman with a child of her own, aged between 25 to 35 years, that the surrogacy can only be undertaken once by the surrogate mother, that the surrogate should be certified as medically and psychological fit. Further, the Surrogacy Act provides for rules for the intending couple as well, such as they would have to be aged between 23 to 50 years for females and between 26 to 55 for males, not have any surviving child biologically, through adoption or through surrogacy.

Further, it is pertinent to note that the intending couple would further require a variety of certificates/permissions including the certificate of essentiality, certificate of

medical indication, certificate of eligibility etc., to be sought from the District Medical Board, and an order concerning parentage passed by court of the Magistrate etc. under Section 4 (iii) (a) of the Surrogacy Act.

In addition, Section 38 of the Surrogacy Act provides for the offenses which are punishable by imprisonment which may extend up to 10 years, and a fine which may also extend up to 10 lakh Rupees. The offenses as enumerated in the Surrogacy Bill include:

- i. undertaking or engage in commercial surrogacy.
- ii. advertisement of commercial surrogacy.
- iii. exploiting the surrogate mother or child in any manner.
- iv. abandoning, exploiting, or disowning a surrogate child.
- v. selling or importing human embryos or gametes for surrogacy; and
- vi. Conduct Sex selection

Assisted Reproductive Technology (Regulation) Act 2021

The Assisted Reproductive Technology (Regulation) Bill 2020 (ART Bill 2020) which seeks to provide for the regulation of Assisted Reproductive Technology services in the country, was introduced in Lok Sabha on 14 September 2020. Similar to the Surrogacy Bill 2020, The ART Bill 2020 was also referred to a Department-Related Parliamentary Standing Committee on Health and Family Welfare on 3 October 2020 (Standing Committee). The said Standing Committee presented the report on ART Bill before Rajya Sabha and Lok Sabha on the same day, i.e., 19 March 2021, wherein they gave suggestions on how to make the ART Bill more comprehensive.

Recognizing the possibility of numerous commercial and profit inducing activities being run through these clinics, several offenses were laid down, for instance sex selection (Section 26), abandoning, or exploiting children born through ART, selling, purchasing, trading, or importing human embryos or gametes, transferring the human embryo into a male or an animal, (Section 33) etc. These offences are punishable with a fine between 5 and 10 lakh Rupees for the first contravention.

Thereafter, the ART (Regulation) Bill 2021 was notified as ART (Regulation) Act, 2021 on 25 January 2022.

The Act further disallows any kind of advertisement. For instance, for the said purpose the website may contain a disclaimer that the law does not permit advertisement of any manner regarding facilities of sex selective assisted reproductive technology and that by accessing the website, the person doing so acknowledges and confirms that they are only seeking information of their own accord and that there has been no form of advertisement or inducement, regarding facilities of sex selective assisted reproductive technology.

THE RECENT DEVELOPMENT

A petition has been filed by Mr. Arun Mathuvel [Writ Petition(s)(Civil) No(s).756/2022] in the Supreme Court of India challenging provisions of aforesaid Acts.

It has been contended on behalf of the Petitioner that:

- i. both the Acts lack clarity in addressing the essential goal of regulating surrogacy and other assisted reproductive techniques;
- ii. a sudden and complete ban on commercial surrogacy is bound to create a black market and therefore more exploitation;
- iii. there are ambiguities within the Acts regarding unreasonable mandates raising the cost of surrogacy and lack of transitory provisions; and
- iv. the provisions of both the Acts are likely to result in exploitation of women within the family akin to forced labour, and unregulated markets for surrogacy.

Accordingly, the Supreme Court of India has sought responses from the Ministry of Health and Family Welfare, the Ministry of Women and Child Development and the India Council of Medical Research and listed the matter hearing on 9 January 2023.

CONCLUSION

The law has to move along with medical advancements and suitably be amended so that it does not give rise to dilemma or unwarranted harsh situations. The Surrogacy Act prohibits commercial embryo surrogacy and storage of embryos for the purpose of surrogacy. Further, the practices that have been now recognized as offences would have to be paid severe attention to, to avoid any contravention and resultant fines/punishments. The guidelines ought to be followed to the maximum extent possible for a clean track record, further keeping in mind the criminal offenses that have been included. If the aforementioned pending petition in the Supreme Court of India is allowed, the judiciary will widen and crystalise the scope of those who can qualify as commissioning couples, the clinics who can engage in these practices etc.

Therefore, while the current status of the Acts has been captured and summarized, the same is not set in stone and is an ever-evolving field of law and is subject to various changes taking place on account of some of the above-mentioned situations.

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