

THE DEBATES AROUND THE SURROGACY ACT

Relevant for: Developmental Issues | Topic: Rights & Welfare of Women - Schemes & their Performance, Mechanisms, Laws Institutions and Bodies

As per the Surrogacy Act that kicked in from January this year, a married couple can opt for surrogacy only on medical grounds | Photo Credit: Getty Images

The story so far: Petitioners in the Delhi High Court questioned why marital status, age, or gender were the criteria for being allowed to commission or not commission surrogacy in India. The female petitioner said that she already had a child but the trauma of the first childbirth experience and her need to juggle work with child care persuaded her that surrogacy would be a better option for the second child. But under the provisions of the Surrogacy Act, she was denied a chance at commissioning surrogacy.

As per the Surrogacy Act that kicked in from January this year, a married couple can opt for surrogacy only on medical grounds. The law defines a couple as a married Indian “man and woman” and also prescribes an age-criteria with the woman being in the age group of 23 to 50 years and the man between 26 to 55 years. Additionally, the couple should not have a child of their own. Though the law allows single women to resort to surrogacy, she should either be a widow or a divorcee, between the age of 35 to 45 years. Single men are however, not eligible.

The Surrogacy (Regulation) Bill was introduced in Parliament in November 2016, and passed in the Winter session of Parliament in 2021.

The Act sought to regulate the surrogacy part of a rather flourishing infertility industry in the country. Defining ‘surrogacy’ as a practice where a woman undertakes to give birth to a child for another couple and agrees to hand over the child to them after birth, it allows ‘altruistic surrogacy’ — wherein only the medical expenses and insurance coverage is provided by the couple to the surrogate mother during pregnancy. No other monetary consideration will be permitted.

India has emerged as a hub for infertility treatment, attracting people from the world over with its state of the art technology and competitive prices to treat infertility. Soon enough, due to prevailing socio-economic inequities, underprivileged women found an option to ‘rent their wombs’ and thereby make money to take care of their expenses — often to facilitate a marriage, enable children to get an education, or to provide for hospitalisation or surgery for someone in the family.

Once information of the availability of such wombs got out, the demand also picked up. Unscrupulous middle men inveigled themselves into the scene and exploitation of these women began. Several instances began to emerge where women, in often desperate straits, started lodging police complaints after they did not receive the promised sum.

Other issues also began to crop up. For instance, in 2008 a Japanese couple began the process with a surrogate mother in Gujarat, but before the child was born they split with both of them refusing to take the child. In 2012, an Australian couple commissioned a surrogate mother, and arbitrarily chose one of the twins that were born.

The time therefore, was ripe for proper regulation.

Any couple that has ‘proven infertility’ are candidates. The ‘intending couple’ as the Act calls

them, will be eligible if they have a 'certificate of essentiality' and a 'certificate of eligibility' issued by the appropriate authority. The former will be issued if the couple fulfils three conditions: One, a certificate of infertility of one or both from a district medical board; Two, an order of parentage and custody of the surrogate child passed by a Magistrate's court; Thirdly, insurance cover for the surrogate mother.

An eligibility certificate mandates that the couple fulfil the following conditions: They should be Indian citizens who have been married for at least five years; the female must be between 23 to 50 years and the male, 26 to 55 years; they cannot have any surviving children (biological, adopted or surrogate); However, this would not include a 'child who is mentally or physically challenged or suffers from life threatening disorder or fatal illness.'

Only a close relative of the couple can be a surrogate mother, one who is able to provide a medical fitness certificate. She should have been married, with a child of her own, and must be between 25 and 35 years, but can be a surrogate mother only once.

Even at the Bill stage, while there was a general murmur of appreciation, and some strident approval from infertility experts, there was some apprehension about the too restrictive regulations. For instance, it does not allow single women, or men, or gay couples to go in for surrogacy. Representations from these groups emerged even as Health Minister J.P. Nadda introduced the Bill in the House.

Others, primarily those involved in organ transplantation, pointed out how despite a similar, stringent law — the Transplantation of Human Organs Act — organ commerce continues to thrive in the country. Brokers continue to operate, though with less temerity and more covertly, sometimes with hospital authorities, to pull wool over the eyes of the appropriate authority and law enforcement officials. Clearly the issue will have to be handled with a stern visage, even as sensitivities of people are factored in.

These apprehensions and perceived hitches due to the exclusionary criteria, have already come to the forefront in the short period that the Act has been operational. A path of litigation is possibly the course ahead, and if a critical mass builds up, amendments might have to be resorted to in order to resolve the grievances and ensure access for all categories of parents.

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