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SURROGACY LAW IN INDIA: AN OVERVIEW

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Abstract

Surrogacy, the arrangement where a woman agrees to bear a child for another individual or couple, has gained prominence in India over the years. It is a method of assisted reproduction where a woman (the surrogate) carries and delivers a baby for another person or couple (the intended parents). The Surrogacy (Regulation) Act, 2021, lays down the conditions under which surrogacy is permitted and the penalties for violations. The Act was enacted to curb unethical practices and protect the rights of surrogate mothers and the child born through surrogacy. India's surrogacy laws reflect a cautious approach to balancing ethical considerations, medical advancements, and social norms. While the Surrogacy (Regulation) Act, 2021, has brought much-needed clarity, it leaves room for future amendments to address inclusivity and practical challenges.

Keywords: Surrogacy, The Surrogacy (Regulation) Act, 2021, legal framework, types of surrogacy

Introduction

Surrogacy, the arrangement where a woman agrees to bear a child for another individual or couple, has gained prominence in India over the years. It is a method of assisted reproduction where a woman (the surrogate) carries and delivers a baby for another person or couple (the intended parent(s)). This arrangement allows individuals or couples who cannot conceive naturally to have a biological child. However, the ethical, social, and legal complexities surrounding surrogacy have necessitated robust legislative frameworks. India's approach to surrogacy has evolved significantly, culminating in the Surrogacy (Regulation) Act, 2021, which provides a structured mechanism to regulate surrogacy practices in the country.

India was once a major hub for surrogacy due to its lower costs, advanced medical facilities, and the availability of surrogate mothers. Many foreign couples sought surrogacy services in India, making it a prominent destination for international surrogacy. Today surrogacy is regulated under the Surrogacy (Regulation) Act, 2021.⁶⁰

Legal Framework Governing Surrogacy in India

The Surrogacy (Regulation) Act, 2021, lays down the conditions under which surrogacy is permitted and the penalties for violations. The Act was enacted to curb unethical practices and protect the rights of surrogate mothers and the child born through surrogacy. Here are the key highlights of the legislation:⁶¹ Only **altruistic**

⁶⁰ <https://www.pregnancybirthbaby.org.au/surrogacy>

⁶¹ <https://www.indiacode.nic.in/bitstream/123456789/17046/1/A2021-47.pdf>

surrogacy is permitted under the Act. This means the surrogate mother cannot receive monetary compensation other than medical expenses and insurance coverage.⁶²

Types of Surrogacy

- **Traditional Surrogacy:** This form of surrogacy involves the surrogate mother being artificially inseminated with the sperm of the intended father. In this case, the surrogate's eggs are fertilized by the intended father's sperm, making her the genetic mother of the child she carries.
- **Gestational Surrogacy:** This is a more contemporary and commonly used method of surrogacy today, primarily facilitated by surrogacy service providers. In gestational surrogacy, an In-Vitro Fertilization (IVF) process is used to fertilize the intended mother's eggs with the intended father's sperm. Donor sperm and eggs can also be utilized. The fertilized embryos are then implanted into the surrogate's uterus, meaning she has no biological connection to the baby; she is simply the carrier.
- **Altruistic Surrogacy:** In this type of surrogacy, a woman agrees to be a surrogate without receiving financial compensation. Typically, surrogates are paid for their time and the associated costs of pregnancy, but altruistic surrogates often help someone they know, like a close friend or family member, and may only receive reimbursement for medical expenses.
- **Independent Surrogacy:** This type of surrogacy involves women who choose to offer their services without the assistance of a surrogacy agency. However, this arrangement can be riskier due to the absence of screenings and protections.

Commercial surrogacy, where surrogates are paid for carrying the child, is prohibited.

Eligibility Criteria for Couples:

Only Indian heterosexual married couples are eligible for surrogacy.

The couple must be married for at least five years and unable to conceive due to medical reasons.

Age criteria: The wife must be between 23-50 years and the husband between 26-55 years.

Eligibility of Surrogate Mothers:

The surrogate must be a married woman aged between 25 and 35 years with at least one biological child.

She can act as a surrogate only once in her lifetime.

Establishment of Regulatory Bodies:

The Act mandates the formation of a National Surrogacy Board and State Surrogacy Boards to oversee implementation.

Clinics conducting surrogacy procedures must be registered.

Prohibition of Certain Practices:

Selling or buying human embryos or gametes for surrogacy is banned.

Abandoning a child born through surrogacy is prohibited.

Penalties:

Violators can face imprisonment and fines, with penalties ranging up to ten years in jail and fines of up to INR 10 lakh.

Landmark Cases in Surrogacy Law

Several cases have shaped the discourse on surrogacy in India:

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

This case highlighted the lack of regulation in commercial surrogacy. A Japanese couple commissioned a surrogate in India, but the commissioning parents divorced before the child's birth. The legal vacuum on surrogacy at the time created issues regarding the child's citizenship and parental rights. The Supreme

⁶² Sec 2(b) of the Surrogacy (Regulation) Act, 2021

Court acknowledged the need for clear surrogacy laws.

Jan Balaz v. Anand Municipality (2009): This case dealt with the nationality of children born through surrogacy. A German couple's twins born via surrogacy in India were denied German citizenship. The Gujarat High Court granted the children Indian citizenship, emphasizing the challenges of cross-border surrogacy.

Jayantkumar J. Pandya v. State of Gujarat (2018): The case examined ethical issues in commercial surrogacy and brought attention to the exploitation of women in unregulated surrogacy arrangements. It underscored the urgency of comprehensive legal measures, influencing the drafting of the Surrogacy (Regulation) Bill.

Criticisms and Challenges

While the Surrogacy (Regulation) Act, 2021, aims to address ethical concerns, it has faced criticism:

Exclusion of LGBTQ+ and Single Parents:

The Act restricts surrogacy to heterosexual married couples, leaving out single individuals and same-sex couples, sparking debates about inclusivity.

Altruistic Model Limitations:

Critics argue that the altruistic model imposes an undue burden on surrogate mothers without adequate compensation for their time and effort.

Enforcement Challenges:

Implementing the Act requires significant infrastructure and monitoring to prevent clandestine commercial surrogacy practices.

Conclusion

India's surrogacy laws reflect a cautious approach to balancing ethical considerations, medical advancements, and social norms. While the Surrogacy (Regulation) Act, 2021, has brought much-needed clarity, it leaves room for future amendments to address inclusivity and practical challenges. As India navigates the

complexities of surrogacy, ensuring the rights and dignity of all stakeholders remains paramount.

Surrogacy is a life-changing option for many, enabling the creation of families that might not otherwise be possible. However, it raises complex ethical, legal, and social questions that require careful consideration and regulation. As science and societal norms evolve, surrogacy will continue to be a focal point of global reproductive discussions