
AN OVERVIEW AND OTHER KEY ASPECTS OF THE SURROGACY (REGULATION) ACT, 2021

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Abstract :

Being a mother is the best feeling a women can have ever in whole life. But due to reason of infertility, she cannot able to enjoy motherhood. Infertility affects many women and couples worldwide, often leading to emotional turmoil and a profound sense of loss. In today's society, however, advancements in reproductive technology have provided alternatives, with surrogacy emerging as a beacon of hope for those unable to conceive. Surrogacy offers a viable alternative for women who cannot carry a pregnancy themselves. In this arrangement, a surrogate mother carries the child for intended parents. Before 2015 commercial surrogacy has been practiced in India but it frequently resulted in exploitation of vulnerable and underprivileged women, and many surrogate moms had medical risks and inadequate postpartum care. Therefore in order to curb this, Surrogacy (Regulation) Act was passed in the year 2021. The Surrogacy (Regulation) Act, 2021, which address the complexities of surrogacy, providing a legal framework for intended parents, surrogate mothers, and the child. Its primary aim is to prohibit commercial surrogacy while allowing altruistic surrogacy, thus safeguarding the rights and welfare of surrogate mothers. This article provides an overview of the Act's provisions, its objectives, and the impact on the surrogacy industry.

Keywords : Surrogacy, Commercial Surrogacy, Altruistic Surrogacy, Infertility, Surrogate mother.

Introduction :

While infertility can lead to feelings of despair, surrogacy offers a hopeful path towards motherhood, allowing women to realize their dreams of having a family. By embracing this option, individuals can foster emotional healing, supporting one another throughout the journey. There has to be development of new reproductive technologies to help those who are unable to conceive start families. The development of more effective methods of artificial reproduction has made a surrogacy a realistic option. The surrogacy is a noble concept which helps to intending parents to form genetic tie between them and child. And this is the reason of rapid growth of surrogacy practice worldwide. India had been the preferred destination offering surrogacy services at low cost in an underprivileged woman taking up the role of surrogate mother as an attractive economic option.

In India, Surrogacy has emerged as a controversial and ethically sensitive particularly with India being a global destination for commercial surrogacy in the past. However, the lack of proper regulation led to exploitation, abuses, and ethical concerns. These challenges highlighted the urgent need for regulatory framework, leading to the enactment of The Surrogacy (Regulation) Act, 2021. This Act aimed to provide legal clarity, protect the rights of

all parties involved, and ensure ethical practices in surrogacy arrangements.

Understanding of Surrogacy Arrangement :

The New Encyclopedia Britannica defines ‘surrogate motherhood’ as the practice in which a woman bears a child for a couple unable to produce children in the usual way. According to the Black’s Law Dictionary, surrogacy means the process of carrying and delivering a child for another person. A surrogate mother is a woman who bears a child on behalf of another woman, either from her own egg or from the implantation in her womb of a fertilized egg from other woman. There are following types of surrogacy –

Gestational Surrogacy :

Gestational surrogacy is when a person carries and gives birth to a baby for another person or couple. It’s usually done through IVF (in vitro fertilization). The person who carries the pregnancy has no genetic relation to the baby.

Traditional Surrogacy :

A woman who carries and gives birth to a baby for a person who is not able to have children. The woman who is the traditional surrogate can either get pregnant by artificial insemination with sperm from a sperm donor, or her eggs can be fertilized in the laboratory with sperm from a sperm donor to make an embryo. The embryo is implanted in the uterus of the traditional surrogate, who carries the baby until birth. The traditional surrogate is genetically related to the baby and is the biological mother.

Commercial surrogacy :

In commercial surrogacy, the surrogate mother is given monetary compensation by the couple for carrying the child in her womb and the child is given to them either privately or through the adoption

Altruistic surrogacy :

In altruistic surrogacy, the intended parents undertake to bear the medical expenses for the surrogate mother.

Legal background of Surrogacy in India :

In 2005, the Indian Council of Medical Research issued guidelines for surrogacy, allowing monetary compensation decided by the involved parties. These guidelines prohibit the surrogate from contributing her egg and require her to relinquish all parental rights. The guidelines aimed to address ethical concerns and regulate the surrogacy industry in India.

With the augmentation of the surrogacy industry, the downside of the commercialization could also be seen; causing wide spread concern amongst activists. The case of Baby Manji Yamada v. Union of India in 2009, is an example of the same. In this case, Baby Manji Yamada, born to an Indian surrogate mother for a Japanese couple, faced legal uncertainties when the couple separated before the child’s birth. The lack of legal provisions

and Japanese government restrictions on taking the child to Japan led to Supreme Court intervention, allowing the child to leave with her grandmother. This case prompted the Indian government to enact surrogacy regulations. In 2008, the Supreme Court's decision in Manji's case allowing commercialization of surrogacy boosted confidence in the Industry.

Around the same time, the Assisted Reproductive Technology (Regulation) Bill, 2008 was being formulated. Despite not being presented to Parliament, the Law Commission initiated a study on surrogacy, leading to its 228th Report in August 2009 proposing a new legislation for surrogacy regulation. The surrogacy industry grew, so did concerns of women's exploitation, commodification of motherhood, and human rights violations. In an effort to prevent women from being exploited, the Indian government had taken successive administrative measures to regulate surrogacy. On November 21, 2016, the Surrogacy (Regulation) Bill, 2016, was introduced in the Lok Sabha (House of the People) and sent to the standing committee on January 12, 2017. The report was submitted to the standing committee on August 10, 2017, and the bill finally passed at the Lok Sabha on December 19, 2018. The Surrogacy (Regulation) Bill, 2016, aims to prohibit commercial surrogacy while fostering altruistic surrogacy in India. The Bill also intends to protect surrogate mothers and children from exploitation. Again, Lok Sabha passed the Surrogacy Regulation Bill, 2019, and introduced in the Rajya Sabha. But it was considered a replica of the Surrogacy Regulation Bill, 2016. This led to the modification in the Surrogacy (Regulation) Bill, 2020, which was passed by the Rajya Sabha on December 8, 2021, by the Lok Sabha on December 17, 2021, and got the assent of the President on December 25, 2021, and finally became The Surrogacy (Regulation) Act, 2021.

OVERVIEW ON THE SURROGACY (REGULATION) ACT, 2021 :

The Parliament of India has enacted the Surrogacy (Regulation) Act, 2021 on 25th December, 2021. This Act specifically speaks for the constitution of National Assisted Reproductive Technology and Surrogacy Board, State Assisted Reproductive Technology and Surrogacy Boards and appointment of appropriate authorities for regulation of the practice and process of surrogacy and for matters connected therewith or incidental thereto.

Key Aspects of the Surrogacy (Regulation) Act, 2021 :

Definitions :

- Section 2 (1) (b) of the Act defines , "altruistic surrogacy" means the surrogacy in which no charges, expenses, fees, remuneration or monetary incentive of whatever nature, except the medical expenses and such other prescribed expenses incurred on surrogate mother and the insurance coverage for the surrogate mother, are given to the surrogate mother or her dependents or her representative;
- Section 2 (1) (g) of the Act defines "commercial surrogacy" means commercialisation of surrogacy services or procedures or its component services or component procedures including selling or buying of human embryo or trading in the sale or purchase of human embryo or gametes or selling or buying or trading the services of

surrogate motherhood by way of giving payment, reward, benefit, fees, remuneration or monetary incentive in cash or kind, to the surrogate mother or her dependents or her representative, except the medical expenses and such other prescribed expenses incurred on the surrogate mother and the insurance coverage for the surrogate mother.

- Section 2 (1) (r) of the Act defines "intending couple" means a couple who have a medical indication necessitating gestational surrogacy and who intend to become parents through surrogacy.
- Section 2 (1) (s) of the Act defines, "intending woman" means an Indian woman who is a widow or divorcee between the age of 35 to 45 years and who intends to avail the surrogacy.

Regulation of Surrogacy Clinics :

Section 3 of the Act provides that, on and from the date of commencement of this Act, no surrogacy clinic, unless registered under this Act, shall conduct or associate with, or help in any manner, in conducting activities relating to surrogacy and surrogacy procedures.

Regulation of Surrogacy and Surrogacy Procedures :

- Section 4 of the Act provides that, on and from the date of commencement of this Act, no place including a surrogacy clinic shall be used or cause to be used by any person for conducting surrogacy or surrogacy procedures, except for the purposes of gestational or altruistic surrogacy and not for commercial surrogacy.
- Section 4 (iii) (a) of the Act provides that, the intending couple is in possession of a certificate of essentiality issued by the appropriate authority, after satisfying itself, for the reasons to be recorded in writing.
- Section 4 (iii) (b) of the Act provides that, the surrogate mother is in possession of an eligibility certificate issued by the appropriate authority. She must be married women having child of her own and between age of 25 to 35.
- Section 4 (iii) (c) of the Act provides that, an eligibility certificate for intending couple is issued separately by the appropriate authority. The intending couple are married and between the age of 23 to 50 years in case of female and between 26 to 55 years in case of male on the day of certification and the intending couple have not had any surviving child biologically or through adoption or through surrogacy earlier:

Establishment of National Assisted Reproductive Technology and Surrogacy Registry.

There shall be established a Registry to be called the National Assisted Reproductive Technology and Surrogacy Registry for the purposes of registration of surrogacy clinics under this Act.

Constitution of the National Assisted Reproductive Technology and Surrogacy Board :

Section 17 of the Act provides that, The Central Government shall, by notification, constitute a Board to be known as the National Assisted Reproductive Technology and Surrogacy Board to exercise the powers and perform the functions conferred on the Board

under this Act.

Constitution of State Assisted Reproductive Technology and Surrogacy Board :

Section 26 of the Act provides that, Each State and Union territory having Legislature shall constitute a Board to be known as the State Assisted Reproductive Technology and Surrogacy Board or the Union territory Assisted Reproductive Technology and Surrogacy Board, as the case may be.

Appointment of the Appropriate Assisted Reproductive Technology and Surrogacy Authority :

Section 35 of the Act speaks for the appointment of one or more Appropriate Assisted Reproductive Technology and Surrogacy Authorities for the States and Union territories to grant, suspend or cancel registration of a surrogacy clinic and to take appropriate legal action against the misuse of surrogacy by any person under Section 36.

Offences and Penalties :

The Act prescribes stringent punishments for practicing sex selection,undertaking commercial surrogacy, exploitation of surrogate mothers and children born through surrogacy.

- Section 38 prescribes punishment for all these offences with imprisonment for a term which may extend to 10 years and with fine which may extend to 10 lakh rupees.
- Section 39 prescribes punishment for contravention of the provisions of the Act with imprisonment for a term which may extend to 5 years and with fine which may extend to 10 lakh rupees.
- Section 40 prescribes punishment for not following altruistic surrogacy with imprisonment for a term which may extend to 5 years and with fine which may extend to 5 lakh rupees for the first offence and for any subsequent offence with imprisonment which may extend to 10 years and with fine which may extend to 10 lakh rupees.

The key features of the Act are very impressive, especially the provisions for prohibition of commercial surrogacy and implementation of altruistic or gestational surrogacy.

Surrogacy (Regulation) Rules, 2024 :

- The undergoing surrogacy must have both gamete from the intending couple . However, in case when the District Medical Board certifies that husband or wife constituting the intending couple suffers from medical condition necessitating use of donor gamete then surrogacy using donor gamete is allowed subject to condition that the child to be born through surrogacy must have atleast one gamete from intending couple.
- Single women (*divorcee or a widow*) undergoing surrogacy must use self-eggs and donor sperms to avail surrogacy procedure.

Conclusion :

The Surrogacy (Regulation) Act, 2021 will provide an idea that, this piece of legislation

is an effective legislation for preventing the curse of commercial surrogacy in India. The Surrogacy (Regulation) Act, 2021 in India focuses on regulating surrogacy, particularly by prohibiting commercial surrogacy and promoting altruistic surrogacy. This means that while it allows surrogacy for couples facing infertility, it prohibits any financial compensation to the surrogate beyond medical expenses and insurance. The Act also aims to protect the rights and well-being of surrogate mothers and the children born through surrogacy. It seeks to eliminate exploitation while ensuring that surrogate pregnancies are conducted under safe, ethical condition. The act prescribes strict penalties for violation of provisions of Act.

Referances :

- <https://www.britannica.com/dictionary/surrogacy>
- <https://www.advocatekhoj.com/library/lawreports/needforlegislation/>
- <https://my.clevelandclinic.org/health/articles/23186-gestational-surrogacy>
- <https://www.cancer.gov/publications/dictionaries/cancer-terms/def/traditional-surrogate>
- Report of the Law Commission of India, 228 (2009) P 9
- Baby Manji Yamada v. Union of India, AIR 2009 SC 84
- Report of the Law Commission of India, No.228, p.9.
<http://www.lawcommissionofindia.nic.in/reports/report228.pdf>
- Kunal Debnath, Sreetama Chatterjee , “The Surrogacy (Regulation) Act, 2021: Analyzing the effectiveness of India's ban on commercial surrogacy
<https://d1wqtxts1xzle7.cloudfront.net/117559005/Surrogacy-libre.pdf?1724091643=&response-content-disposition=inline%253B+f>
- The Surrogacy (Regulation) Act, 2021 Section 2(b)
- The Surrogacy (Regulation) Act, 2021 Section 2(g)
- The Surrogacy (Regulation) Act, 2021 Section 2 (1) (r)
- The Surrogacy (Regulation) Act, 2021 Section 2 (1) (s)
- The Surrogacy (Regulation) Act, 2021 Section 4 (iii) (a)
- The Surrogacy (Regulation) Act, 2021 Section 4 (iii) (b)
- The Surrogacy (Regulation) Act, 2021 Section 4 (iii) (c)
- The Surrogacy (Regulation) Act, 2021 Section 15
- The Surrogacy (Regulation) Act, 2021 Section 17
- The Surrogacy (Regulation) Act, 2021 Section 26
- The Surrogacy (Regulation) Act, 2021 Section 35
- The Surrogacy (Regulation) Act, 2021 Section 38
- The Surrogacy (Regulation) Act, 2021 Section 39
- The Surrogacy (Regulation) Act, 2021 Section 40
- “Surrogacy Regulation Act 2021”– Current Update
<https://www.indoreinfertilityclinic.com/surrogacy-regulation-act-2021-current-updates/es>,