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LEGAL ASPECTS OF SURROGACY IN INDIA

Sudarshana Panchariya

INTRODUCTION :

Surrogacy the practice by which a woman carries and delivers a child for another person or couple sits at a complex intersection of medical ethics, human rights and the law. For decades, India was among the world's most popular destinations for commercial surrogacy attracting thousands of foreign couples drawn by relatively low costs and a largely unregulated environment. However, this openness raised serious concerns about the exploitation of surrogate mothers, the commodification of reproduction and the legal status of children born through such arrangements. The enactment of the Surrogacy Regulation Act, 2021 marked a decisive turning point transforming India from a permissive surrogacy market to a country with one of the more restrictive regulatory frameworks in the world.

HISTORICAL BACKGROUND :

Prior to 2021, surrogacy in India was governed primarily by guidelines issued by the Indian Council of Medical Research (ICMR) in 2005,¹ which lacked statutory force. Commercial surrogacy flourished under this vacuum with India earning the unfortunate tag of the “surrogacy capital of the world.” The absence of a binding legal framework left surrogate mothers vulnerable to exploitation, contractual abuse and denial of adequate medical care. The Supreme Court's intervention in *Baby Manji Yamada v. Union of India*² brought the legal complexities of surrogacy into sharp focus highlighting the urgent need for legislative clarity regarding the citizenship, custody and parentage of children born through surrogacy. This case along with growing international concern, catalysed the legislative process that eventually produced the 2021 Act.

¹Indian Council of Medical Research, National Guidelines for Accreditation, Supervision & Regulation of ART Clinics in India (2005), https://main.icmr.nic.in/sites/default/files/guidelines/ART_CLINIC_GUIDELINES.pdf.

²*Baby Manji Yamada v. Union of India*, (2008) 13 SCC 518, <https://indiankanoon.org/doc/344613/>.

THE SURROGACY REGULATION ACT, 2021 :

The Surrogacy (Regulation) Act, 2021³ represents the cornerstone of India's legal framework on the subject. The Act unequivocally prohibits commercial surrogacy, permitting only altruistic surrogacy wherein the surrogate mother receives no monetary compensation beyond medical expenses and insurance coverage. The Act carefully defines who may act as a surrogate mother.⁴ She must be a close relative of the intending couple, be a married woman who has previously given birth to a child of her own, be between 25 and 35 years of age, and may serve as a surrogate only once in her lifetime. These conditions while designed to protect women, have drawn criticism for being unduly restrictive. As regards intending parents, the Act originally restricted surrogacy to married Indian couples but subsequent amendments have extended access to widows and divorced women. Single men and same-sex couples however, remain excluded. The Act also establishes a National Surrogacy Board and corresponding State Surrogacy Boards, tasked with overseeing the implementation of the legislation, granting approvals and maintaining registries of surrogacy clinics.

RIGHTS AND PROTECTIONS OF THE SURROGATE MOTHER

A significant dimension of the 2021 Act is its attempt to safeguard the rights and wellbeing of surrogate mothers who have historically been among the most vulnerable parties in surrogacy arrangements. The Act mandates that the intending couple provide the surrogate mother with insurance coverage for a period of sixteen months covering pregnancy and post-delivery complications.⁵ The surrogate mother also retains the right to withdraw her consent before the embryo is implanted, though once implantation has occurred, withdrawal is not permitted.

LEGAL STATUS OF THE CHILD BORN THROUGH SURROGACY

The Act provides that a child born through surrogacy shall be deemed to be the biological child of the intending couple and shall be entitled to all rights and privileges available to a natural child including rights of inheritance. The surrogate mother relinquishes all parental rights upon the birth of the child. The issue of citizenship for children born to foreign intending parents through Indian surrogates had previously created considerable confusion, as illustrated in Jan

³Surrogacy (Regulation) Act, 2021, No. 47, Acts of Parliament, 2021 (India), <https://legislative.gov.in/sites/default/files/A2021-47.pdf>.

⁴Surrogacy (Regulation) Act, 2021, § 4(iii)(b), No. 47, Acts of Parliament, 2021 (India) (conditions for surrogate mother).

⁵Surrogacy (Regulation) Act, 2021, § 38, No. 47, Acts of Parliament, 2021 (India) (insurance and medical expenses of surrogate mother).

*Balaz v. Anand Municipality*⁶, where children born to a German couple through an Indian surrogate were left in a legal limbo regarding citizenship. The current framework, by restricting surrogacy to Indian citizens, largely resolves this particular concern.

CRITICISM AND GAPS IN THE LEGAL FRAMEWORK

While the 2021 Act is a welcome step toward regulation, it is not without significant shortcomings. The blanket prohibition on commercial surrogacy, though well-intentioned, may drive the practice underground, making surrogate mothers even more vulnerable. The restriction of surrogacy to altruistic arrangements involving close relatives places an undue burden on families and may not always reflect genuine altruism.

The exclusion of single men, unmarried couples and same-sex partners from accessing surrogacy has been criticised as discriminatory and inconsistent with evolving constitutional jurisprudence on equality and the right to found a family. In a country where the Supreme Court has progressively expanded the scope of personal liberty under Article 21 of the Constitution, such categorical exclusions invite legal challenge. Furthermore, the Act does not adequately address the mental health support and long-term rehabilitation of surrogate mothers, a gap that advocates for women's rights have highlighted repeatedly.

CONCLUSION

The Surrogacy (Regulation) Act, 2021 reflects India's determination to move away from the exploitative commercial surrogacy model and toward a framework grounded in dignity and regulation. It provides a much-needed legal structure that addresses issues of consent, parentage, and the rights of children. Yet, the law's restrictive eligibility criteria, potential for familial coercion under the altruistic model, and exclusion of several categories of intending parents reveal that the legislative journey is far from complete. A truly comprehensive surrogacy law must balance the legitimate aspiration of parenthood against the imperative to protect the bodily autonomy and wellbeing of women. As courts and legislators continue to grapple with these questions, the legal landscape around surrogacy in India will undoubtedly continue to evolve.

⁶*Jan Balaz v. Anand Municipality*, AIR 2010 Guj 21, <https://indiankanoon.org/doc/1534892/>.