



A Critical ANALISIS of Surrogacy Regulation ACT, 2021

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Abstract - This article studies Indian laws especially relating to surrogacy and suggest effective measures to remove lacuna in present laws . The essential core of a family is parenthood. In this light parenthood is the social institution that prepares and sustains individuals for life in society.¹ Right to reproduction is a fundamental right under article 21 of Indian constitution.² The natural method of reproducing children is through procreation. The married couple's desire to have children has been destroyed by infertility. Infertility in couples is a prevalent problem in the current era. The topic of infertility is frequently stigmatised in Indian society. One of the most important treatments for an infertile couple is surrogacy. Regardless of the availability of a biological or natural process for giving birth to new children, surrogacy is one of the special ways that humans can create a new born baby. It was identified as a means of putting a smile on the faces of childless parents. Every technological innovation has advantages and disadvantages, but throughout time, certain self-centered and evil people have grossly misapplied it by taking advantage of surrogates at every possible opportunity. There is no legislation to regulate surrogacy in India ICMR issued guidelines to regulate ART and surrogacy process in 2005 but now India has enacted The surrogacy Regulation Act,2021 and surrogacy Rules,2022. The present paper is totally based on secondary source of data such as legal Journal, books, Magazines, Newspaper and web sources etc.

Key word: surrogacy, Infertility, Surrogate, Commercial, Lacuna, enacted laws

I. Introduction:

God created Universe³. Everything is control by the God. Reproduction of child is also a

natural process. Nature creates also human beings. Man is unique creation of God on earth. Despite the fact that man cannot become God and can never control nature, he has now achieved the status of master. He has explored the entire planet and created tools to make his existence easier in this imaginative environment. In terms of population, India is the largest nation on earth. It is believed that having a kid enhances a couple's marriage by increasing their happiness, sense of purpose, sense of security, success, and prosperity. A married pair naturally wants to have their own biological child since they wish to live honourably in society. Medical science has proved various biological and medical causes of infertility like repeated miscarriage, high blood pressure, defective uterus, age fetors, liver or kidney disease. diabetes , thyroid disorders, Adrenal disease, and genetic challenges⁴. But due to in fertility, they are unable to fulfil their will of own offspring through procreation.⁵ However, with time came a surge of hope for infertile couples thanks to the development of science and technology, particularly in the area of surrogacy. Despite the lack of a biological or natural process for giving birth to new children, surrogacy is one of the significant advancements of this new era of science and technology and one of the most original ways for humans to create new human beings. For childless couples everywhere, the surrogacy process is a blessing. Surrogacy process is a boon for barren couple in the whole world.

¹ <https://imp.center/i/parenthood-meaning-importance-5476/> VISITED ON 5/6/2023 at 5:10 pm

² J.N. Pandey Constitutional Law of India, Allahabad Law Publication, 5th Edition 2005, page No. 231

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https://en.wikipedia.org/wiki/God_become

s_the_Universe VISITED ON 30/5/23 at 9:10pm

⁴ <https://www.webmd.com/infertility-and-reproduction/guide/using-surrogate-mother> VISITED ON 5/6/23 at 4:30pm

⁵ Emily Mc Donald Events. "A global perspective on infertility : An under recognized public Health issue, Carolina papers, university center for international studies the university of north cardina at chapel Hill No. 18(2004)



Surrogacy: The term surrogacy is new, yet the practise dates back centuries. The word "surrogate" originates from the Latin word "surrogates," which is a variation of the word "subrogate" and means "subrogate or substitute." In reality, it is a way of substituting the surrogate mother for the natural mother, who is unable to bear the kid, when the natural mother is unable to do so. In which a person appointed to act in the place of another⁶. In this way, a surrogate mother is a woman who agrees to carry a child on behalf of another infertile woman, either from her own egg or implantation in her womb of a fertilized egg from other woman.⁷ When a woman (the surrogate Mother) agrees to carry a pregnancy for the intended parents, a third party is involved in the process of surrogacy. Three people are involved in the surrogacy process: the biological mother, the biological father, and the third person, the surrogate mother, who gives birth to the kid on their behalf. In this sense, surrogacy enables infertile couples to assist those who are unable to conceive as well as those who cannot satisfy their social aspirations of motherhood. The concept of surrogacy has become an alternative method for the couples to overcome the problems of having adopted the children as well as to reduce the infertility rates in the society.

Definition:

1. Black's law Dictionary defines "surrogacy is an agreement wherein a woman agrees to be artificially inseminated with the semen of another woman's husband. She agrees to conceive a child, biological father and his wife."⁸
2. The Warnock Report defines "surrogacy as the practice whereby one women carries a child for another with the intention that the child should be handed over after birth."
3. The oxford Dictionary defines "surrogacy mother as a woman who bear a child on behalf of another woman, either from her own egg fertilized by the other woman's partner or from the implantation in her womb of a fertilized egg from the other woman."
4. According to section 2(t) of the Draft Assisted Reproductive Technologies regulation Act, 2008 defines "Surrogacy as an agreement in which a woman agrees a pregnancy achieved through an

Assisted Reproductive Technology in which neither of the gametes belong to her or her husband, with the intention to carry it till term and hand over the child to the person or persons for whom she is acting as a surrogate."

5. According to section 2 (zd) "surrogacy" means a practice whereby one woman bears and gives birth to a child for an intending couple with the intention of handing over such child to the intending couple after the birth."⁹

Types of Surrogacy: There are four types of surrogacy which are followings;

a. **Traditional Surrogacy-** In Traditional Surrogacy. The intended father or a sperm donor artificially inseminates the surrogate mother in traditional surrogacy. She is the child's biological mother because the surrogate used her own eggs. The child's genetic ties to the surrogate mother and intended father or sperm donor are thus established. However, when the surrogate mother gives up her parental rights, the intended parents must assume custody of the child.

b. **Gestational Surrogacy-** In this type of surrogacy, an embryo is produced using the in vitro fertilisation procedure (IVF). The intended couple's eggs and sperm or those from a donor are utilised in the IVF process. The surrogate mother's uterus receives the embryo after it has been created. In this instance, the biological mother is not the surrogate. Genetically, the child is connected to the individuals who donated their sperm and eggs.¹⁰

c. **Commercial surrogacy-** When the surrogate mother receives payment in addition to insurance from the intended parents and payment for the costs associated with carrying the child, the procedure is known as commercial surrogacy. It also covers the procurement and exchange of human embryos for surrogacy. Additionally, it covers the purchasing and selling of human embryos for surrogacy¹¹.

d. **Altruistic surrogacy-** This kind of surrogacy takes place when the surrogate mother conceives a child for the intended parents without receiving any payment aside from medical expenses and other required expenses. For carrying the child, she is also covered by insurance. A close friend or family

⁶ Anish V. Pillai, "surrogate Motherhood and the Law International and National Perspective", edition 2015, Regal Publications New Delhi page 43

⁷ IBID

⁸ <http://www.advocatekhoj.com> visited on 21/5/2023 at 7:pm

⁹ The Surrogacy Regulation Act, 2021

¹⁰ Kasectiveclpana V. Jawale,"Does Law Protect Surrogacy?: National International Perspectives" Civil and Military Law journal july –sept. 49 (2013).

¹¹ The Surrogacy (Regulation) Act 2021(Act 47 of 2021), s.2(1)(g).



member will typically carry it out. Usually, a close friend or member of the family will carry it out.¹²

Indian Legal Perspective: Prior to 2021, surrogacy in India was not expressly regulated. Only two legislative initiatives offered assistance to parents who wanted to use surrogates: the Assisted Reproductive Technology (Regulation) Bill and the Surrogacy (Regulation) Bill. Due to a protracted dispute over both legislation, they were both still pending before the Indian Parliament. The Assisted Reproductive Technology (Regulation) Act of 2021 and the Surrogacy (Regulation) Act of 2021 are the statutes that result from the bills' final modifications to make them more appropriate for the demands of modern India. However, only a few pieces of indirect law, such as the Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act of 1994 and the Medical Termination of Pregnancy Act of 1971, exist to safeguard the reproductive rights of women in this country. In reality, though, these laws are powerless to address issues like the exploitation of women brought on by commercial surrogacy, the rights of surrogate mothers, or the justifications and punishments for breaking a surrogacy contract. In India, the adoption of two new direct laws has been beneficial in this regard. However, in order to improve the outlook for the future, the new legislation is also open to criticism. The following sections describe these legislation. Act 2021 regulating surrogacy, after years of legal battle by activists, both houses of Parliament approved the surrogacy regulation bill. The Act No. 47 was finally approved by the Indian President on December 25 and published in the Official Gazette on 25th January 2021. The key objective of the Act is to govern ART, the surrogacy process, and other mothers involved in it in India, with a special focus on bonus commercial surrogacy. The Act only recognises surrogacy under certain conditions, which means that the surrogate mother is not paid anything other than medical costs and insurance. There are 54 sections and 8 chapters in the surrogacy Regulation Act, 2021, which are under:

Chapter first: This is divided into two sections. Section 1 establishes the chapter's brief title and introduction; section 2 offers definitions of several terms related to surrogacy methods, including "abandon child," "altruistic surrogacy," "board," "commercial surrogacy," "egg," "embryo," and "foetus," among others.

¹² The Surrogacy (Regulation) Act 2021(Act 47 of 2021), s.2(1)(b).

Chapter second: In section 3, the regulation of surrogacy clinics is explained. No medical professional doing associate or assistance related to the surrogacy operation may work for a surrogacy clinic. All forms of advertising are prohibited.

Chapter Third: The third chapter is divided into four to ten sections, each of which provides detailed explanations of surrogacy regulation. A certificate of recommendation from the board established by this Act must be obtained before any location, including a surrogacy centre, may be used for surrogacy treatments. The major goal is to stop surrogate mother and child exploitation, and the appropriate authority will not give a certificate of eligibility to a surrogate mother unless she satisfies the following requirements:

- (a) In order to be a surrogate mother, a married woman must have her own child and be between the ages of 25 and 35. She may also donate her oocytes or eggs.
- (b) A woman who is willing may also be allowed to act as a surrogate mother by undergoing the Act's surrogacy procedure.
- (c) No woman is permitted to use her own gametes as a surrogate more than once in her lifetime.
- (d) A surrogate mother's fitness certificate must be obtained.
- (e) The surrogate mother's prescribed form must be filled out with a written approval.
- (f) According to the Act, a surrogate child who has a handicap, genetic condition, or sexual orientation will not be abandoned by the intended parents and will instead be treated as if they are the kid's real parents.

Chapter four: Chapter 4 specifies the registration requirements for surrogacy clinics under Sections 11 to 16. No surrogacy clinic may register unless it has the necessary facilities and equipment, including enough staff members who are qualified to perform the procedure, physical infrastructure, and diagnostic tools. The relevant authorities must issue the registration certificate following an investigation. To provide clinics a notice and give them a fair opportunity to hearing. A surrogacy clinic may be subject to criminal prosecution, concealment, and suspension by the appropriate authorities. Any party who is dissatisfied with an appropriate authority's decision may file an appeal with the state government within 30 days after the decision, as per Section 14 of the Act.

Chapter five: defines the National Assisted Reproductive Technology and Surrogacy Board. Sections 17 to 24 deal with the national board, whereas sections 26 to 34 deal with the statistics



board. Boards shall be created at the national and state levels in accordance with the Act. The national board shall be established by and filled with qualified members by the central government in line with this Act. The board must convene at least once every six months, and in the event that the chairperson is unable to do so, the vice chairman shall preside at the meetings of the Board. The board will provide advice to the federal government on issues pertaining to surrogacy and will determine the minimum requirements for laboratories, diagnostic tools, physical facilities, and specialists. The operations of the state board are under the supervision of the national board. For executing the duties and overseeing the application of the Act's requirements, the state board, which serves as the national board, must be established by the concerned State Government in each state and union territory. Every four months at a minimum, the state board must meet. All matters of the board shall be decided by a majority of the word of the members present and voting.

Chapter six: it is stated that within 90 days of the commencement of the Act, the Central Government shall designate one or more relevant authorities for each union territory. The same state government will act similarly in state. The duties of the relevant authority include establishing the requirements for surrogacy clinics and issuing, suspending, and cancelling the registration of those clinics. When someone violates the Act's rules or is doing anything improper, the authority has the authority to take action.

Chapter seven: provides penal provision under the Act. Penalties under the Act are provided. Any group, individual, laboratory, or clinic that engages in commercial surrogacy or takes advantage of surrogate mothers and children faces a fine and/or term of imprisonment that may reach ten years. If no one complies, assisted reproduction will be penalized by up to 10 lakhs in fines and five years in prison. The rules of plea bargaining under the Criminal Procedure Code of 1973 do not apply to offences under this Act, which are to be treated as crimes under this Act under the Code of Criminal Procedure of 1973. No court inferior to a metropolitan magistrate or a Judicial Magistrate of first class shall try any offence under this Act.

Chapter Eight: offers several provisions. Every registered surrogacy clinic is required to save all documentation relating to surrogacy procedures for a period of 25 years. The central government may issue regulations to implement this Act's provisions. With the central government's previous consent, the

board may create regulations. Rules and regulations must be presented to the legislature.

Key Features of the Surrogacy Regulation Act:

This analysis provides an overview of the key provisions and implications of the Surrogacy (Regulation) Act, 2021.

1. Avoiding Commercialization: The Act's main goal is to forbid commercial surrogacy and stop the commodification of women's bodies. Only altruistic surrogacy is permitted, and the intended parents' immediate family members are the only permitted surrogate mothers. This clause guarantees that surrogacy is not carried out for financial benefit and guards against the exploitation of weak women.

2. Eligibility and Requirements: The Act specifies a number of requirements and eligibility standards for intended parents, surrogate mothers, and other parties participating in the surrogacy process. Couples wishing to apply must be at least five years into their marriage and be childless. A "certificate of eligibility" and a "certificate of essentiality" issued by the proper authority should also be in their possession. Surrogate mothers must be married, have their own kid, and be a close relative of the intended parents.¹³ While protecting the interests of all parties involved, these laws seek to regulate and streamline the surrogacy procedure.

3. National Surrogacy Board and State Surrogacy Boards: The Act creates both State Surrogacy Boards and a National Surrogacy Board at the state and federal levels. These boards are in charge of approving, suspending, or revoke surrogacy clinic licences. They also act as regulatory organisations to monitor how the Act is being applied and to resolve any complaints or disagreements that may come up. By establishing these bodies, effective regulation of surrogacy is monitored and enforced.

4. Establishment of the National Assisted Reproductive Technology and Surrogacy Registry: Under Section 9 of the Act, calls for the creation of the National Assisted Reproductive Technology and Surrogacy Registry, which will serve as a national database for all ART clinics and banks under section 11 of The Surrogacy Act.

5. Designation of the Appropriate Assisted Reproductive Technology and Surrogacy Authority: Section 12 of the Act stipulates the appointment of one or more Appropriate Assisted Reproductive Technology and Surrogacy Authorities

¹³ The Surrogacy (Regulation) Act 2021(Act 47 of 2021), Sec.4(111) a



for the States and Union territories to grant, suspend, or cancel registration of an ART clinic or bank and to take the necessary legal action against anyone who uses assisted reproductive technology inappropriately under Section 13.¹⁴

6. The following rights and obligations: The Act recognises the rights and obligations of intended parents, surrogate mothers, and the children born through surrogacy. It places a strong emphasis on safeguarding the surrogate mother's physical and mental health, outlawing her exploitation, and ensuring that she receives the necessary medical care and financial support. The Act also protects a child's right to inheritance, identity, and a safe and caring environment. These clauses set the child's best interests as their first priority and offer a legal foundation for protecting their rights.

7. Genetic Testing: According to Section 25 of the Act, pre-immunization genetic testing must be done to check the human embryo for known, inherited, hereditary, or genetic illnesses. This clause is required and also mandatory provision.

8. Penal Provision and Offenses: The Act imposes stringent penalties for violations, offenses, and non-compliance with its provisions. Engaging in commercial surrogacy, advertising for surrogacy, or exploiting surrogate mothers can result in imprisonment and fines. These penalties act as deterrents and discourage illegal practices in the surrogacy industry.

Denunciation / Critique of the Surrogacy (Regulation) Act 2021:

Although the Act's primary characteristics are commendable, a critical review of the Act is necessary to determine its long-term success. The Surrogacy (Regulation) Act, which is the primary subject of discussion in the study, is also passed in the same year as the Assisted Reproductive Technology (Regulation) Act, 2021. As a result, the Act's fundamental structure and salient aspects are listed below:

1. Limited Scope: The use of surrogacy is restricted to charitable endeavors and close family members, which may prohibit single parents and same-sex couples as well as other people who do not fit the eligibility requirements from using the service.

2. Decrease the Availability of Surrogate Mothers: As the pool is only comprised of immediate family members, the Act may result in a reduction in the

number of surrogate mothers available. If commercial surrogacy is permitted in other nations, there may be a rise in the demand for surrogacy services there.

3. Prohibit commercial surrogacy: The Act's focus on the regulation and prohibition of commercial surrogacy may impede the growth of an ethical and regulated surrogacy industry in India, thereby causing business associated to surrogacy to relocate to other nations.

4. Implementation challenges: Because of the requirement for collaboration between various authorities and boards at the national and state levels, implementation issues, such as monitoring and implementing the Act's requirements, may occur.

5. Inconsistency between the Two Laws: There is a conflict between the two laws. The Surrogacy Act and ART are both in place to address related issues. They do, however, impose arbitrary classifications, such as a maximum age. For example, the ART Act defines a "commissioning couple" as a "infertile married couple" where the woman's age is between 21 and 50. According to the Surrogacy Act, "intending couples" are those who have a medical condition that calls for surrogacy and in which the lady is between the ages of 23 and 55 and the male participant is between the ages of 26 and 55.¹⁵ Additionally, 'commissioning couples' under the ART Act are not limited by nationality, whereas married Indian men and women are the only permitted couples under the Surrogacy Act. The Surrogacy Act divides women into two categories: first, under section 4(iii)(c)(I), as part of the intending couple, being a woman between the ages of 23 and 50; and second, as a "intending woman," defined under section 2(1)(s), being an Indian woman who is a widow or divorcee between the ages of 35 to 45 years. The ART Act defines a woman as any woman over the age of 21.

6. Infringement of Fundamental rights: The Constitution's Articles 14 and 15 are allegedly being violated, which is the foundation for several challenges. Except for married couples and a select group of women, everyone's decision to choose surrogacy is illegal under the Surrogacy Act. The ART Act and the Surrogacy Act exclude and discriminate against same-sex couples and other LGBTQI people as well as single women (those who are not widowed or divorced as well as those who are widowed and/or divorced and less than the age of 35 or more than 45 years old) without any justification.

¹⁴ The Surrogacy (Regulation) Act 2021(Act 47 of 2021).ss.12,13.

¹⁵ The Surrogacy (Regulation) Act 2021(Act 47 of 2021).s.4(c)(1)



Men who are unmarried, couples experiencing secondary infertility, and couples in whom one or both partners do not fit within the permitted age ranges are also disqualified.

7. Lack of pertinent provision: The Explanation to section 4(iii)(a)(1) of the Act allows for the establishment of a District Medical Board. The parent Act and the applicable Rules do not, however, specify who would make up such a board, how its members would be chosen or elected, or how long they would serve on such a District Medical Board.

8. Excluding live-in partnerships from Present Act: Live-in partners are not included in the Act's regulatory purview. Contrary to what is commonly believed, live-in relationships between consenting adults are not illegal in India, as was established in the 2006 case of *Lata Singh v. State of UP*.¹⁶ A live-in relationship is covered and safeguarded by Article 21 (right to life), the Supreme Court concluded in the case of *S. Khushboo v. Kanniammal*. In *Payal Sharma v. Superintendent Nari Niketan*,¹⁷ the Allahabad High Court ruled that "a man and a woman, even without getting married, can live together if they choose." Thus, it has been established by the courts that not all socially objectionable behaviour needs to be classified as illegal. However, it is unclear and needs to be addressed why these spouses do not have the same parental autonomy as other couples.

8. Unexpected Ramifications for Mental Health: Although the existing Act is thorough and strict in evaluating a surrogate's psychological eligibility, it only mentions ensuring psychological fitness while screening and approving surrogate mothers. This Act does not address the potential for post-implantation new-onset psychiatric illnesses. In addition, the surrogate mother's untreated mental health problems could be dangerous to the developing foetus. The Act does not specify a formal psychiatric evaluation by a mental health professional for the purposes of a psychological fitness certificate, despite the fact that such a provision exists. This illustrates how unprepared legal authorities are to address potential mental health problems in order to provide comprehensive treatment.

The Delhi High Court received a petition from Karan Balraj Mehta and Dr. Pankuri Chandra asking for the decriminalisation of commercial surrogacy under the Assisted Reproductive Technology (Regulation) Act, 2021, and the Surrogacy (Regulation) Act, 2021. The petition challenges the exclusion of a single,

unmarried man and a married woman who is pregnant from the surrogacy programme. Petition was challenged on the ground violation of fundamental right Article 14 and 21 of the constitution. The freedom to make one's own reproductive decisions is a right to privacy protected by Article 21 of the Constitution. Consequently, it is not possible to remove anyone's right to protection from unjustified legislative interference into matters that often affect a person's decision to become a surrogate parent or to bear children on their own. This petition is pending.

Conclusion: Analysing the issues and potential outcomes of the Surrogacy (Regulation) Act, 2021 would give an idea of how well-suited this piece of legislation is to stopping the scourge of commercial surrogacy in India. Commercial surrogacy was legal in India between 2002 and 2015. Different legal frameworks were developed in various nations as surrogacy became in popularity around the world. India developed into a market for commercial surrogacy in order to provide surrogate children to affluent childless international couples in exchange for a substantial amount of money. Number of issues has risen in *Baby Manji* famous case¹⁸. After a long legal battle, finally On January 25th, 2022, the new Surrogacy (Regulation) Act, 2021, went into force. As a result of the changed law, only charitable surrogacy is now permitted, prohibiting people with financial resources from abusing and utilising the surrogacy option. Act prohibits commercial surrogacy, as well as the trade of human gametes and embryos. It's interesting to note that the 1948 Universal Declaration of Human Rights, accepted by India, can still be used to argue that the Act complies with its provisions. According to Article 16.1 of the Declaration, Men and women of full age enjoy the freedom to marry and have children without being subject to restrictions based on their race, ethnicity, or religion. The Indian judiciary is aware of this and views the right to procreate as essential. For instance, the Andhra Pradesh High Court affirmed that "the right to reproductive autonomy" is comprehensive under the "right to privacy" and that "the right to civil rights" comprises the choice to reproduce. in *B. K. Parthasarathi v. Government of Andhra Pradesh*.¹⁹ In a historic ruling, the Supreme Court recognised transgender people as a third gender in *National Legal Services Authority v. Union of India*²⁰. No

¹⁶ AIR 2006 SC 2522

¹⁷ AIR 2001 ALL.254

¹⁸ AIR, 2008 SC

¹⁹ 2002 (1)ALD 199,199(5)ALT 715.

²⁰ AIR 2014 SC 1863



mention of allowing third-gender individuals equal rights is made in the Surrogacy (Regulation) Act, 2021. Additionally, the rights of surrogate mothers and surrogate infants were not safeguarded in the lack of apparent statutory safeguards. By virtually prohibiting surrogacy as a last alternative for biological motherhood, the Act severely excludes certain groups from society, such as LGBTQIA+ individuals. So it is necessary to amend the Act in order to make it a more comprehensive piece of legislation that promotes an egalitarian and inclusive society. This can be accomplished by admitting the shortcomings and the fact that the new law has benefited some Indian society's citizens more than others. Therefore, the author wants to call attention to several Act deficiencies in this work that could obstruct societal advancement and lead to corruption. Additionally, the author hopes to offer certain remedial measures that stimulate progress towards the desired outcome.