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**Legal Evolution of Surrogacy in India: Examining Recent Legislative Changes, Their Implications, and Future Outlook.**

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**Abstract**

*The concept of surrogacy is all about carrying a baby for other parents who are unable to carry a baby due to some medical problems they face. Infertility is common to both men and women, if women is incapable, sperm of the husband is injected to the egg of the surrogate women and if both are incapable the sperm will be donated by the donor and that will be injected to the surrogate mother egg. This concept created a lot problems due to their unrestricted and unregulated mechanism. This made women's body as a business commodity, that exploits both the surrogates and the intended parents due to the presence of intermediaries. It has created legal, social and ethical problems that affects the Indian society as whole. Because of cheap medical costs, many foreign people exploit Indian women. This directly affecting the bodily autonomy of a women. The visibility of legal vacuum is clear and evident, so creating a separate law is became of need of the time. The government of India enacted the surrogacy regulation act,2021, to eradicate the commercial aspects of this concept and made it as charity thing. This act imposed so much of restrictions on intended parents and the surrogates, that eventually the drawback of this act. It excludes many sections of this society i.e., single persons, LGBTQ+ Community. This shows that act is narrow and it should be enacted for the benefit of each section of the society. This Article explores the evolution of surrogacy legislation in India and explains the key aspects of the surrogacy act,2021 and its implications, finally reiterated about the future changes in the legislation.*

**INTRODUCTION**

We all know that, the reproduction is the central point of the human existence and the human race. Not only for us, which is a common reason for every living creature is existing right now and in future also. In simple words the process of reproduction in human being is happened when the

sperm (Man) reach the egg (Women), which is called the fusion of gametes, then it will grow into an embryo, Eventually the foetus continue to grow in the uterus approximately nine to ten months, finally the foetus will expel and the baby will come out. It is evident that women are naturally gifted to produce/ grow a baby. So, ultimately, they are always in a

position to get attention, when it comes to reproduction related issues. Scientists are trying to replace the men and women in the cycle of reproduction in the 21<sup>st</sup> century, especially to remove the role of women. Technological developments like Artificial Wombs (ectogenesis), Stem cell-derived gametes (IVG- In Vitro Gametogenesis) scientist are working on converting stem cells (blood or skin) into egg and sperm cells, Parthenogenesis (Virgin birth in science) here embryo develops without fertilization, Cloning (Somatic cell nuclear transfer-SCNT) using donors DNA scientists will create an embryo, 3D Bioprinting of Organs (creating a womb- like structures). All the above-mentioned technological progress are in the experimental stages or phases right now, these things are majorly happening in the developed countries because of their financial and skilled human resources. When these are happened in future it will create ethical, legal and moral problems. At present Women are indispensable in the process of reproductions. Before going further, one thing I want to clarify that the infertility problem is common to both men and women. So, due to medical reasons not all women are capable of reproduction. For the need of this there is a concept called “Surrogacy” was evolved and provided a solution to the infertility problem faced by

women. The medical cost surrogacy is very cheap in compared to other developed countries, so India has become the favourite destination for foreigners to do surrogacy procedures. This has again created legal and moral issues that made women body as a commodity for making profit. This is because of no separate legal framework for surrogacy in India. Many activists voiced for legal reforms in this sector. After a long struggle, the government of India enacted the surrogacy (regulation) act,2021. To regulate this sector in India and create systematic mechanism.

### **WHAT IS SURROGACY AND ITS FORMS**

The Latin word “surrogatus” which means “Substitute” is the genesis for the word “Surrogacy”, In simple words a woman a carrying a baby for another women, because of the inability of that women due to some medical conditions. This procedure is done voluntarily by the surrogate women and not for the commercial benefits she receives after doing this procedure. The Warnock Report describing it as a practice where one woman carries a child for another with the intent to hand the child over after birth.

Four Forms of Surrogacy, they are,

- **Traditional Surrogacy-** genetic link created between the child and

the surrogate mother

- **Gestational Surrogacy-** no genetic link between the child and the surrogate mother
- **Commercial Surrogacy-** providing money beyond the medical costs. This was banned under surrogacy regulation act, 2021.
- **Altruistic Surrogacy-** close relative of the intended parents to become a surrogate mother. They will not receive any money beyond the medical costs for the pregnancy. This is the only procedure that was allowed in the act.

## **EVOLUTION OF SURROGACY LAWS IN INDIA**

Before the enactment of the surrogacy regulation act, there was no separate and uniform legislation for surrogacy in India. There were only guidelines which was issued by the Indian council of medical research (ICMR), which is comes under the ministry of health and family welfare, which predominantly focused on the Assisted Reproductive Technology (ART), It doesn't have any binding power on the persons who involved in the surrogacy procedures. A separate legislation for the surrogacy was flagged by the 228<sup>th</sup> Law Commission Report issued in the year 2009. The Surrogacy (Regulation)

Act, 2021 enacted to regulate the procedure of surrogacy in India and the ultimate goal of this act to prevent and protect women from exploitation and the upholding bodily autonomy of the surrogate mother and safeguards all parties with respect to surrogacy in India. This act has 8 chapters and 54 Sections.

## **IMPORTANT SURROGACY CASES IN INDIA**

Several important legal cases have shaped surrogacy laws in India. One of the earliest was Baby Manjhi Yamada v. Union of India (2009), in this case an Indian woman was hired as a surrogate mother for a Japanese couple, they were separated after the baby born, which created legal confusion of the custody of the child. The Supreme Court of India eventually allowed the surrogate baby to go with her grandma. This case confirmed that surrogacy was legal in India, encouraging more international surrogacy arrangements. Another major case was Jan Balaz v. Anand Municipality (2009), where a couple from Germany had twins through an Indian surrogate. Since Germany did not accept surrogacy, the twins were denied citizenship. The Gujarat High Court granted them Indian passports, but their parents had to adopt them due to legal hurdles. A similar issue arose with an Israeli gay couple who opted for surrogacy

in India. Israeli law required a DNA test to confirm paternity, which delayed the issuance of legal documents and passports for the child. These two major judgements pushed the government to legislate a uniform legal framework for surrogacy in India. Eventually leading to the development of the Surrogacy (Regulation) Act, 2021.

### **THE SURROGACY REGULATION ACT, 2021**

- ❖ 8 CHAPTERS
- ❖ 54 SECTIONS
- ❖ ENACTMENT DATE: DECEMBER 25, 2021
- ❖ ENFORCEMENT DATE: JANUARY 25, 2022

### **OVERVIEW OF THE SURROGACY REGULATION ACT, 2021**

As I previously mentioned that this act was legislated with the intention to safeguard all parties with respect to the procedure of surrogacy in India. It abolished the commercial method and allowed only the altruistic method of surrogacy. This act protects these three peoples,

- **Baby born out of this procedure.**
- **Women who carry the baby.**
- **The parents for whom this procedure is done.**

Some of the significant provisions of this legislation are discussed below. They are,

### **1. Banning of Commercial Surrogacy**

In India, commercial surrogacy is vehemently prohibited by the Surrogacy Regulation Act, 2021. It exploited monetarily disadvantaged ladies by paying more than their insurance and medical costs. solely altruistic surrogacy is permitted by this Act, in which the surrogate mother receives payment for the healthcare costs. The legislation protects the surrogate's body from being used as an asset for profit making, by limiting surrogacy to non-commercial agreements. In order to guarantee that the procedure is family-centred and not driven by money.

### **2. Requirements for Surrogate Mothers and Intended Parents**

The Act establishes stringent guidelines for identifying intended parents and surrogate mothers.

#### **For Intended Parents:**

- ✓ **Couples Without Children:** The intended parents are required to be not having children; however, they may be exempt if they have a kid with an intellectual or physical impairment or a disease that might endanger their own life. Status of Marriage: It is only available to married couples who have no children for five years (Minimum).
- ✓ **Requirements of Age for Intended Parents:** The guy must be in

between the ages of 26 and 55, while the lady must be in between the ages of 23 and 50.

- ✓ Certificates: The pair must have a Certificate of Eligibility, which attests to their compliance with the law, and a Certificate of Essentiality, which attests to their medical necessity for surrogacy.

#### **For Surrogate Mothers:**

- ✓ Relationship Status: This provision guarantees that the procedure stays within the family or close- knit ties.
- ✓ Age Requirement: 25–35 age range.
- ✓ Times of Participation: Only once in her lifetime is a lady permitted to serve as a surrogate.
- ✓ Fitness Necessities: A physician with expertise must certify that the surrogate is both emotionally and physically capable of carrying a pregnancy to a period of time.
- ✓ Surrogate’s Marital and Parental Status: A married lady who has already given birth to her own biological kid is required to serve as the surrogate.

### **3. Setting up of National and State Surrogacy Boards**

To monitor surrogacy Procedures and ensure legal compliance, the Act requires

the establishment of regulating agencies at the National level (National Assisted Reproductive Technology and Surrogacy Board) and in the State levels (State Assisted Reproductive Technology and Surrogacy Board).

#### **National Surrogacy Board:**

- The Union govt appoints professionals from a range of disciplines, including public administration, law, and medical, to the National Board.
- This board is tasked with providing advice to the govt in related the surrogacy procedures in India. Creating a minimum standard for clinics involved in surrogacy, and ensuring uniform application of the law across all states.

#### **State Surrogacy Boards:**

- The Act also created the State Surrogacy Boards in each state and union territory. These boards regulate surrogacy practices within their jurisdictions.
- The state boards oversee the registration and operation of surrogacy

clinics, ensure clinics meet required standards, and handle grievances or legal disputes related to surrogacy. These boards are critical in enforcing the Act's provisions and preventing the exploitation of surrogates and intended parents and finally made sure that all the ethical practices are dully followed.

#### **4. Registration of Surrogacy Clinics**

Registration of surrogacy clinics in India is compulsory under the act.

**Ban on Advertising:** Surrogacy clinics are prohibited from advertising their services in any form. This is aimed at preventing the commercialization of surrogacy and exploitation of vulnerable women. By enforcing strict registration requirements and banning advertising, the Act seeks to ensure that only legitimate and ethical clinics are allowed to conduct surrogacy procedures.

- **Mandatory Registration:** Clinics cannot offer surrogacy services unless they are registered and licensed. This registration ensures that clinics meet the necessary standards for infrastructure,

equipment, and qualified personnel.

#### **5. Safeguarding Surrogate Mothers**

Safeguarding of surrogate mothers' rights and welfare is given particular attention in the Act. This involves making certain that they are not taken advantage of and that their physical and emotional well-being are given first priority during the surrogacy procedure.

- **Informed Consent:** Before the surrogacy procedure starts, the clinic should get the consent from the surrogate in written letter with duly signed by her without any pressure. She must be aware of the risk and obligations associated and participates into the contractual arrangement freely.
- **Healthcare and Insurance Coverage:** The intended parents must give the surrogate mother health insurance that will cover her for 16 months following the child's birth. During and after the pregnancy, this helps guarantee that the surrogate's health is completely taken care of.

- **No Monetary remuneration:** Aside from payment for insurance and medical costs, surrogates are not eligible to receive any monetary remuneration. This guarantees that surrogacy is carried out for charitable rather than profit-driven purposes.
- **Safeguarding from Exploitation:** The statute safeguards surrogates' rights and prevents them from exploitation for monetary benefit by making sure they are not forced or compelled to become surrogates.

## 6. Surrogate Babies Rights

The Act guarantees that surrogate babies are legally protected and have the same rights as ordinary children.

- **Parenting legality:** The women who carried the baby (Surrogate) doesn't have any right on the baby. All rights are duly vested with the parents arranged this procedure (Intended Parents).
- **Succession Rights:** The

baby have all rights of succession from the intended parents.

- **Equal treatment:** The kid receives treatment equally in all ways, with their rights to identity, care, and protection preserved. By protecting surrogate

children's legal rights, the legislation guarantees that those children won't face prejudice or legal confusion about their paternity.

## 7. Penal Provisions

The Surrogacy Regulation Act, 2021, imposes severe penalties to those break the rules and make sure that they adhere to the Act and discourage unlawful activities.

- ❖ **Punishment for Commercial Surrogacy:** Commercial surrogacy carries a maximum **10-year jail** sentence and/or **a fine** of up to **₹10 lakh**. This includes providing or accepting any kind of cash payment outside medical expenses.
- ❖ **Torture and Exploitation:** There will be harsh legal repercussions for any kind of violence, neglectful behaviour, or infringement of surrogate mothers' rights.

❖ **Unregistered Clinics:** Clinics which function devoid of registration or that break the requirements of their licence are subject to penalties and may even be charged with a crime.

## **8. Genetic Testing Prior to Implantation**

Before embryos are placed in the surrogate mother, the Act requires that they undergo pre- implantation genetic testing. This examination guarantees that there are no genetic or inherited abnormalities in the embryos. The goal is to protect the baby's physical and mental health and his/her future by preventing the birth of children with severe genetic illnesses.

## **IMPLICATIONS OF THIS ACT AND ITS FUTURE OUTLOOK**

India's Surrogacy Regulation Act of 2021, while designed to address ethical concerns in surrogacy arrangements, which was highly condemned for too strict provisions and exclusionary nature of the act. The law permits only altruistic surrogacy method. This narrow scope effectively denies access to single persons, LGBTQ+ peoples, and those without willing relatives, undermining reproductive rights for many. 5 years of marriage life is mandatory between partners to do this procedure and childless further limits eligibility, excluding those with secondary

infertility or children with severe disabilities. The Act's stringent conditions have drastically reduced the availability of surrogates, as few women are willing to participate without financial compensation. This shortage may push couples to seek surrogacy services abroad, potentially leading to unregulated and exploitative practices contrary to the law's

intended purpose. Critics argue that banning commercial surrogacy altogether removes a vital economic opportunity for disadvantaged women who previously relied on it for income.

Implementation challenges further complicate matters, as the law requires coordination between multiple authorities, leading to bureaucratic delays and inconsistencies. The Act also conflicts with the Assisted Reproductive Technology (ART) Act, creating confusion due to differing eligibility criteria, such as age limits and nationality restrictions. Legal experts highlight that the Act violates fundamental rights under Articles 14 (equality) and 21 (personal liberty) of the Indian Constitution by excluding LGBTQIA+ individuals, single parents, and live-in couples' groups already recognized by courts as valid family units. The law's heteronormative



approach ignores modern family structures and denies reproductive autonomy to marginalized communities. Mental health provisions are another critical gap. While surrogate mothers undergo psychological screening, the Act fails to mandate ongoing support during or after pregnancy, leaving them vulnerable to emotional and psychological stress. Lastly, the unclear framework for District Medical Boards responsible for approving surrogacy cases raises concerns about arbitrary decision-making and inefficiency.

In summary, while the Act aims to prevent exploitation, its restrictive and exclusionary nature has drawn widespread criticism for limiting reproductive rights, creating legal inconsistencies, and failing to address practical and ethical challenges in surrogacy arrangements. Reforms are needed to ensure inclusivity, clarity, and adequate support for all stakeholders involved.

## **CONCLUSION**

India's 2021 Surrogacy Act brings much-needed regulation to the previously unmanaged surrogacy sector. The law bans commercial surrogacy, allowing only unpaid arrangements between close relatives, aiming to protect women from exploitation and prevent the commercialization of reproductive

services. While this addresses ethical concerns about treating women's bodies as commodities, the Act's strict rules have created new problems. The law's major limitation is its narrow eligibility criteria. Only married heterosexual couples can use surrogacy, excluding singles, same-sex couples, and others who don't fit traditional family definitions. This violates constitutional rights to equality and privacy for many citizens. The complete ban on paid surrogacy may also backfire, pushing couples to seek services abroad where regulations may be weaker. Practical challenges exist too. Finding willing surrogates becomes difficult when limited to unpaid relatives. The complex approval process involving multiple government bodies creates confusion, especially since surrogacy rules don't align well with other fertility laws. The Act also fails to provide mental health support for surrogates or clear guidelines for medical boards overseeing cases.

While the Act represents progress in regulating surrogacy, its restrictive approach needs revision. Future amendments should make the system more inclusive for all family types, consider regulated commercial options, and improve support systems. Only through balanced reforms can India develop a surrogacy framework that truly protects

women's rights while serving the diverse needs of its population.

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