



THE LEGAL AND ETHICAL COUNTERACCUSATIONS OF THE SURROGACY REGULATION ACT 2021 ON INDIA'S FAMILY LAW AND SOCIAL NORMS

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ABSTRACT

Surrogacy is a process which was started around thirty times ago from a legal point of view. There was no legal perspective till 1976 it's the time when a counsel drafted the first traditional surrogacy agreement. In addition to gravity, changes in social morals also played a part of acceptance of surrogacy. The first in Vitro fertilization baby was born in the time 1978. But there was no legal enforceability in any country. Surrogacy gained further attention due to the rise in gravity probabilities in India. Surrogacy relate to a procedure in which a women who known as a surrogate mother who carries a baby in her womb behalf of the intended couple who's unfit to conceive child by their own due to gravity or any other complaint. In India two types of surrogacy procedure existed, Altruistic Surrogacy and Commercial Surrogacy. marketable Surrogacy is a practice where surrogate mother gets freights, remuneration, price, payment for giving birth of child. marketable surrogacy was legal in India between 2002 and 2005, but due to businesses of

marketable surrogacy flourished in lieu of the vast number of depressed women eager to make a fair living by renting their wombs. latterly on marketable surrogacy used as business Practice by dealing the baby and this leads to exploitation. After assaying the abuse of marketable surrogacy procedure the government legislated The Surrogacy Regulation Act 2021, this act prohibits the marketable surrogacy practice only permits the humanitarian surrogacy procedure in which no freights, remuneration, price would be handed to the surrogate mother only the medical charges give to the surrogate mother. The Surrogacy Regulation Act 2021 Only allow wedded man and women who can conclude for surrogacy procedure this act homosexual couples from using humanitarian surrogacy. This act hampered the rights of the LGBTQ+ community and this Act comes as a counter reaction to the other laws that passed in favor of LGBTQ+ community, like banning section 377 and right to sequestration. also this act affecting the abecedarian rights of the women to reproduce under composition 21 of the constitution. rather of total barring of marketable surrogacy there should be

some comprehensive approach taken by law towards this marketable surrogacy practice. We can say the Act is completely a positive development towards society but there are many aspect the laws of surrogacy stand antithetical.

Keywords : Surrogacy, LGBTQ+, Section 377, Constitution, Article 21¹

¹ INDIA CONST. art. 21.
The Surrogacy (Regulation) Act, 2021, No. 47, Acts of Parliament, 2021(India).

Baby Manji Yamada vs. Union of India and Another , A.I.R. 2008 SCC 518 (India).
Jan Balaz vs. Anand Municipality, A.I.R.2009 (India).
National Legal Services Authority vs. Union of India,



INTRODUCTION

Surrogacy, as a genetic term is a legal arrangement in which a woman agrees to carry and give birth to a child on behalf of another person or a couple. It's an agreement between a woman and a couple or the intended parents. The woman who agrees to give birth to a child on behalf of that couple is also known as a surrogate. This arrangement has become common and acceptable in society. When a woman cannot conceive due to various medical and personal reasons, she then opts for surrogacy. A surrogate, also called a gestational carrier, is a woman who carries a baby and gives birth to a child on behalf of those intended parents. Surrogacy is a blessing for that couple or person who are not being able to conceive. In India, surrogacy is legal, and gestational surrogacy is legal in India. A couple who wants to conceive a baby through surrogacy opt for gestational surrogacy. Surrogacy is an important treatment for infertility; it is a technique where an embryo is created *in vitro* and implanted into the surrogate's uterus, also known as the surrogate mother. People can also opt for adoption, but many couples wish to have a genetic connection with their child, which is not possible through traditional methods such as adoption. There are two types of surrogacy practice found in India. Surrogacy in the traditional sense, where the egg of the surrogate mother is used, where egg donation is not necessary in this process, the surrogate mother does not go through various fertility treatments. The other type of surrogacy is gestational surrogacy, in this type of surrogacy, an egg donor is necessary to create an embryo that the surrogate mother would carry. Surrogates usually prefer this

form of surrogacy since there is no emotional connection because she is not the biological mother of the child.

LEGAL PERCEPTIVITY OF SURROGACY LAWS IN INDIA

In India, commercial surrogacy was legalized in 2002, because of the immense growth of surrogacy in India, and it leads to an impeccable growth of several marketable enterprises, and when non-native couples came in India and searching for surrogate mothers who carry their child in their womb, also these enterprises, claiming their specialty in surrogacy law and guiding and aiding the foreign excursionists who came in hunt for Indian surrogate mothers. And these enterprises not only encourage baby selling but also dwindle the quality of women's quality, reproduction capacities, and inherit the value of the children by modifying them. And this massive growth of surrogacy procedure leads to the establishment of colorful foreign companies in India, and these companies aid them or help them find surrogate Indian mothers and also aid them for the paper work related to surrogacy procedure and help them to get a passport for their children and aid them in acquiring a passport and visa to depart from the country. And also numerous marketable enterprises established and make the surrogacy procedure a paying business. After assaying all the exploitation in marketable surrogacy practice, the 228th report of the Law Commission of India recommended the prohibition of marketable surrogacy and allowing only ethical humanitarian surrogacy. The Indian Council of Medical Research issued some guidelines for the regulation of surrogacy arrangements.

A.I.R.2014 SC 1863 (India)
Section 377 Indian Penal Code, 1860



According to this guidelines the surrogate mama would be entitle to financial compensation and the value of the compensation would be decided by the couple and the surrogate mama . also Surrogacy(Regulations) Bill 2016 and 2019 came into effect this bill was introduced in Lok Sabha, this bill only permit surrogacy only Indian heterosexual couple's and wedded for at least five times with gravity problem to pierce humanitarian or overdue surrogacy procedure and also this bill prohibits the marketable surrogacy in India. After that in 2021 The Surrogacy Regulation Act came into effect according to this act the couple who are unfit to conceive child by their own due to gravity or any other complaint. This act enjoins the marketable surrogacy practice and permits the humanitarian surrogacy procedure in this process financial benefit give to the surrogate mama only provides the clinical cost and protection addition to surrogate mama during the gestation. Under the ministry of Mansukh Mandaviya in order to ameliorate the installations handed in surrogacy clinic the ministry of Health and Family Welfare came up with Surrogacy (Regulation) Rules, 2022 on 21 June 2022.

LEGAL PROVISION RELATING TO SURROGACY IN INDIA

There are various legislation that deals with the surrogacy procedure in India those are :

The Indian Council Medical Research Guidelines, 2005

This regulation was drafted for the clinic which provide surrogacy treatments in India. This guidelines provide how a fertility clinic should employ Assisted Reproductive Technology (ART) operation. Although this

bill are solely advisory not legally binding in nature.

The Surrogacy Regulation Bill ,2019

This bill prohibits the commercial surrogacy and permits the altruistic surrogacy procedure. According to this bill only medical expenditure and insurance coverage ate provided to the surrogate mother no other remuneration, fees, reward Should not provide to the surrogate mother. Surrogacy performed for a monetary gain are referred to as commercial surrogacy. Also the certificate of Essentiality and certificate of Eligibility should be granted by the authority to the intended couple.

The Assisted Reproduction Technology Act, 2021

In India surrogacy is allowed to only married couple and who have Indian citizenship, but this Assisted Reproduction Technology Act allows surrogacy to all married couple, live - in- parents, single women, and also foreigners. This bill has provision for National Board, having the authority granted by the code of civil procedure. Under this bill ART would consists all the techniques which are required for attempt to get a women pregnant. This act also defines AART banks which provide supply and necessary items.

NATIONAL BOARD

The National board suggest various advice to the government on policy matters also suggest the necessary and minimum standards for the infrastructure labs. Also observed that the bill is being implemented properly or any necessary changes with time.



THE SURROGACY REGULATION ACT 2021

This Act enforced by the government for betterment of the surrogacy procedure in India and stopping the exploitation. This Act defines surrogacy, it's procedure in which a women carries a baby in her womb on behalf of the intended couple who are unfit to conceive child by their own due to some medical complaint. This act defines two types of surrogacy procedure those are, marketable Surrogacy and humanitarian surrogacy. marketable surrogacy it's type of surrogacy where the surrogate mama carries the child in her womb and delivers the child to the intending couple in return of financial benefit, then the surrogate mama gets financial benefit for carriers the child in her womb. The act defines marketable surrogacy it's process including selling and buying of mortal embryo by way of giving payment or price. The surrogate mama gets benefit freights, remuneration or financial incitement in cash or kind for dealing the child to the intended parents. Also The Surrogacy Regulation Act 2021 banned the marketable surrogacy practice in India. On the other hand, humanitarian surrogacy is another type of surrogacy in which no charges, charges, freights, remuneration or financial incitement of any nature is given to the surrogate mama . In this form of surrogacy also there has to other condition as well similar as the surrogate mama shall be married and should have children of her own. According to this act all the conventions which give surrogacy procedure need to registered their conventions under The Surrogacy Regulations Act 2021. Every installation that performs surrogacy treatments need to apply for enrollment within sixty days and enrollment must be renewed in every three

times as mentioned in the act. The intended couple wanting to have the baby by way surrogacy procedure need to be married under the Indian laws, the womanish age should be 25- 50 times and the joker should be 26- 55 times, also another important condition is that the couple shouldn't be having any other espoused or conceived through surrogacy or naturally. The surrogate mama who furnishing this service the age of the surrogate mama should be between the age of 35- 45 times. Any women can only be a surrogate mama only one time in her entire continuance. A instrument of quiddity or Gravidity are need to give to an willed couple who has medical need for surrogacy by The National State supported Reproductive Technology and Surrogacy Board. Also according to this act if any couple takes baby by the marketable surrogacy procedure shall be liable to pay forfeiture up to 50,000 rupees and aa well as imprisonment of 5 times, if it's committed for multiple times also fine shall be go up to 1 lakh and imprisonment of 10 times.

NEED FOR SURROGACY REGULATION ACT

Surrogacy is procedure or a blessing to those parents or couple who cannot conceive child by own, they go through this procedure and get an opportunity to have their own child and become a parents. The purpose of this procedure it is a scientific advancement but everything need a regulations, the regulation is necessary for control the process and prevent misuses and stopping people from exploiting these procedures.

The exploitation was first came in highlight in the case called Baby Manji v Union of India, it was argued that in India there were



no laws that governing the surrogacy procedure and due to which people are taking advantages and use this surrogacy process as a moneymaking business in this case it was realized that Union Of India should enforce significant laws relating to surrogacy, there should be laws that governing this surrogacy procedure. Also in many cases another conflict was recognized that the citizenship of children born out of surrogacy procedure was also raised and the right of surrogacy mother with respect of Monetary Benefit Act 1961 also observed in many cases. Due to these rising question and conflicts therefore a need for legislative framework was realized and The Surrogacy Regulation Act 2021 came into force. The objective behind of this act securing the rights of children born out of surrogacy and right of the surrogate mother. This act recognized the right of surrogate child as well as the right of surrogate mother. Also this act imposed ban on practice of commercial surrogacy, according to this act such ban are imposed for prohibit the commercialization of child and the rights of surrogate mother further it was observed that the existence of commercial surrogacy can lead to other offence such as child trafficking. Another aspect is that, in various time it was also seen that the intended couple violates the right of surrogate mother by not giving her the complete payment. Recognized this various existing issues putting a ban on commercial surrogacy is an ideal solution that the society is needed and it is an ideal way for betterment of the society. The second aspect of this act, according to this act marriage is an essential elements under this act the women who is married and has a child of her own is only eligible as a surrogate mother, this act specific that surrogate mother need to be a married women and have her own child. This clause indicates over the

promotion of the society's perspective of not encouraging or improving the condition of a single mother. This clause of the act also prohibits the chances of a couple to view surrogacy as an alternative measure to have a child, couple who uses surrogacy procedure as an alternative way to have child this clause prohibits this phenomenon.

DEMERITS OF COMMERCIAL SURROGACY BEING PROHIBITED

The marketable surrogacy was made legal in India in the time of 2002 but there were absence of laws, regulations and governing bodies this led to exploitation of women and child who has forced to live in bad and hygienic conditions. The Law Commission of India in the time 2009 observed the exploitation and need for regulation for the interests of the people. According to a 228th report of law Commission in Indian ménage a women or a woman gets respect only when she can have a child. The vacancy of surrogates come cheap due to being poverty in India and which led to their disquisition at colorful situations. If we talk about the humanitarian surrogacy in which no compensation entered by the surrogate only the expenditure that may be specified to insurance content or medical charges. Meanwhile in marketable surrogacy the surrogate mama gets payment, price, benefit, freights, remuneration, or financial incitement in cash or kind. It's necessary to regulates the surrogacy but banning isn't a result to help exploitations the government should regulate or cover the laws. Since section 4(iii)(b)(IV) formerly enjoin a women from being a surrogate mama more also formerly that's why marketable surrogacy can not be use as a source of income. There are numerous countries have



assessed tight laws for marketable surrogacy like for illustration Israel, South Africa, Russia and this are governed by the state authorities. The legalization of marketable surrogacy would help reduce the vast illegal request of surrogacy which put the surrogate and the child in a vulnerable situation. therefore marketable surrogacy should be legalized since it not only serves to raise the living norms of the financially underprivileged but also helps to help unlawful surrogacy from being as a result of prohibition on marketable surrogacy.

**RIGHT OF LGBTQ+ COMMUNITY
HAMPERED BY THE SURROGACY
REGULATION ACT 2021**

The rights of LGBTQ community hampered by this act, this act fluently slaps on the face of the LGBTQ community and single father's who want to have child because this Act only allows a fairly wedded man and women in India get a baby through this surrogacy procedure and thus the non double and the same commerce couple are not suitable to enjoy this parenthood indeed if they wish to. The Act infringes the Right to Parenthood for the LGBTQ community as Composition 21 of the Indian Constitution defined every person have the Right of Parenthood this act violates this right also this Act comes as a counter response to the other laws which is passed in favor of LGBTQ community, like banning section 377 and Right to insulation. In the case Navtej singh v Union of India, the Supreme court interdicted homosexuality. This supplication sought recognition of the right to fornication the right to sexual autonomy and the right to choice of sexual mate as a part of the right to life guaranteed under Composition 21 of the Indian constitution the Supreme court set up section

377 to be discrimination towards the Lesbian, Gay, Bisexual, Transgender community and noted that Sexual exposure was an inherit part of their identity, quality and autonomy. The five Judge Bench unanimously held Section 377 to be unconstitutional and read down Section 377 to the extent it criminalized consensual sexual conduct between overgrown- ups, whether of the same commerce or differently, in private. still, the Court clarified that concurrence must be free, voluntary and devoid of any constraint or coercion. and same commerce marriage is not legal in India hence homosexual couples do not come under the horizon of this act. In the corner decision National Legal Service Authority V. Union of India in this case the Supreme court ambisexual people as a third gender but The Surrogacy Regulation Act 2021 makes no citation of granting the people belonging to third gender equal rights.

**JUDICIAL PERPECTIVE AROUND
SURROGACY IN INDIA**

**Baby Manjhi Yamada v. Union Of India
(2008)**

In this case a Japanese couple who came to India and they go through by the surrogacy process to have a baby, for surrogacy practice the couple hired a women from Gujrat hence the women appointed as a surrogate mother. Some marital problem occur between the couple and the couple got divorced. Now the problem arise here the father of the child wanted the custody of the child who was a girl but in India a single father cannot adopt a girl child Supreme court give the rights to the grandmother of the child. This the case where supreme court realized the need for regulation law for surrogacy procedure in India.

**Jan Balaz v. Anand Municipality**

In this case a German couple who hired a surrogate mother who give birth to twins. The German couple worked in the united Kingdom and their twins need an Indian passport to travel, but the passport officials refused to issue passport to the twins since they did not have the citizenship because the procedure is being litigated in the court. And there was no Laws regarding surrogacy in Germany. The Supreme permit the children departure permission and German authorities allow them to adopt the children and fight for their rights.

CONCLUSION

The Surrogacy Regulations Act 2021 attempts to regulate surrogacy in India but this act fails to cover abecedarian rights which is guaranteed by the Indian Constitution. This act effectively excludes certain section of society, similar as LGBTQ+ community, single father etc. The Act is completely a positive development towards society but there are many aspect the laws of surrogacy stand unethical. According Article 21 of the Indian Constitution Right to Life' is an abecedarian aspect and Right to Reproduction also hampered by this Act. Also this Act a violation of Article 14 and 21 limits surrogacy while denying reduplication option. But, we can't deny the fact that this Act focus on the protection of women and child also look into the matter of quality surrogacy conventions, the guidelines made by this Act it's veritably poignant and necessary for this society but there's some changes demanded, the government should look into this different aspect and assessed certain rights and guidelines.