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Emergence Of Surrogacy And Assisted Reproductive Technology (Art) Laws In India- Recent Changes And Way

Forward

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Abstract:

The advent of science and technology has brought a great change in the life of human beings. Assisted Reproductive Technologies (ARTs) like In Vitro Fertilization (IVF), In Vitro fertilization-embryo transfer (IVF-ET), Gamete Intrafallopian Transfer (GIFT), Zygote Intrafallopian Transfer (ZIFT), and Frozen Embryo Transfer (FET) and Surrogacy have made aspirations of parenthood come true for many childless or intended couples who are unable to have their biological child. Being economically affordable to the individuals, significantly low-cost medical procedures, and the best medical services available, India has become one of the top destinations for medical tourism and transnational surrogacy and was also being referred to as the 'baby factory' of the world.

Constant legislative efforts made by the Government of India to protect the interests of the intended parents, regulate surrogacy and curb the exploitation of women (surrogate) has led to many changes in the surrogacy arrangements in India. The efforts to regulate surrogacy in India have led to the enactment of the Surrogacy (Regulation) Act, 2021 and Assisted Reproductive Technology (Regulation) Act, 2021 which are an amalgamation of ethical, social, legal, and scientific issues. This article discusses how the newly enacted laws make difference in the present situation in India. The article also discusses the emergence of Surrogacy Laws in India and the reasons which led to the failure of proper regulation on surrogacy for more than two decades. An attempt was made to evaluate the alternatives that may be adopted and a few recommendations has been made for more meaningful and just legislation and its implementation.

KEYWORDS:

Assisted Reproductive Technology (ART), Commercial Surrogacy, Altruistic Surrogacy, Surrogacy (Regulation) Act, 2021, Assisted Reproductive Technology (Regulation) Act, 2021,

Surrogacy Laws in India.

Introduction:

Assisted Reproductive Technology (ART) has advanced over the last few years and now it has been incredibly available to all infertile or childless couples. Due to the reason that the world's economy got expanded, many infertile couples were now able to afford sophisticated ART treatment which led to a drastic increase in the number of ART Clinics that provide care and treatment to the infertile couples. A few examples of sophisticated treatment regimens include in vitro fertilization-embryo transfer (IVF-ET), gamete intrafallopian transfer (GIFT), zygote intrafallopian transfer (ZIFT), and frozen embryo transfer (FET). IVF-ET has helped many couples conceive successfully. ART may be recommended when other treatments (such as IUI-intrauterine insemination) have not been successful or when there is severe male factor infertility, severe endometriosis, or tubal obstruction¹.

Another form of ART available for infertile couples to have their child is through the method of Surrogacy. The word 'Surrogate' came from the Latin term 'surrogatus', past participle of 'surrogare' which means 'to substitute' or 'appointed to act in the place of'. Surrogacy is a process where a woman, without being her egg used in the conception, carries a fetus throughout pregnancy and gives birth to a baby for another person or couple. The woman who carries the fetus is called a 'surrogate' or 'gestational carrier.' The person or couple who is seeking to parent the baby or babies is called the 'intended parents'. Hence, the Surrogate mother becomes Pregnant and gives birth to a child with an intention of giving away this child to the intended parents.

'Surrogacy' is an important fertility treatment, wherein advent of in vitro fertilization (IVF) has made motherhood possible for women without uterus, with uterine anomalies preventing pregnancies, with serious medical problems, or with other contraindications for pregnancy, to achieve motherhood through the use of embryo created by themselves or donor and transferred to the uterus of gestational carrier². This ART technique has helped not only infertile couples (who were facing serious medical problems on becoming parents), but also many of the same-sex male couples, transgender individuals or couples, prospective single males, etc.,

¹ Accessed online at <https://www.sart.org/patients/a-patients-guide-to-assisted-reproductive-technology/general-information/assisted-reproductive-technologies/> on 15th May 2022 at 21.30 hrs IST.

² Referred online at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6262674/> on 15th May 2022 at 15.30 hrs.

TYPES OF SURROGACIES:

- i. Traditional surrogacy is a type of surrogacy where the child is thereby genetically related to both the surrogate mother who provides her own egg, and the intended father or anonymous donor who is in turn regarded as the 'biological mother' who relinquishes her rights on the child post giving birth to the child.
- ii. Gestational surrogacy is a type of surrogacy where the surrogate does not provide the egg for fertilization, however the embryo of the intended couples is transferred into the womb of the surrogate mother. In this type of surrogacy, there will not be any genetical link between the surrogate and the child.

History Behind Surrogacy In India:

In order to promote medical tourism in India, the 'Commercial Surrogacy' or 'Rent a Womb' practice was legalized in India in the year 2002. In this process of Commercial Surrogacy Services, the surrogate mother is compensated for her services in addition to the medical expenses to meet her household expenses or by providing similar nature of economical help which can help her during the process. The lack of Regulations, low-cost infertility treatments/Clinics, and a large population of economically weaker women has led India to be the largest hub for transnational surrogacy. Currently, India is the largest producer of Commercial Surrogacy services in the world.

In the Landmark Judgment of *Baby Manji Yamada v. Union of India*³, a Japanese couple who wished to have a baby through surrogacy entered into a 'surrogacy contract' with an Indian woman in the city of Anand, Gujarat where surrogacy was pioneered. The intended couple went through matrimonial discord but the father still insisted on having custody of the child. Subsequently, the surrogate mother has given birth to a girl child. Under Indian Laws, single fathers cannot adopt a girl child. He sent his mother instead and a petition was filed before the Supreme Court for having the child's custody. There were no governing laws or regulations on Surrogacy at that time and hence, the Apex Court directed that the 'National Commission for Protection of Child Rights' to deal with this issue. Justice Arijit Pasayat and Justice Mukundan Sharma of the Supreme Court held that the father was the child's genetic father and he was given custodial rights of the child. The Government was instructed to issue the passport to the child (Baby Manji Yamada) and she returned with her grandmother. The Supreme Court in this case has taken apro-contract stand and held that the 'Surrogacy Agreement' was valid in India and went on par with the validity of Surrogacy in India.

³ Accessed online at <https://indiankanoon.org/doc/854968/> on 15th May 2022 at 21.45 hrs IST

In another Landmark Case of *Jan Balaz v. Anand Municipality*⁴, a German couple who wished to have a baby through surrogacy entered into a contract with a surrogate mother named Marthaben Immanuel Khrishti, and simultaneously twins were born. The German couple were working in the United Kingdom and were in need of Indian passports for their children to travel. Indian passport authorities have withheld the passports of the children as their citizenship has been litigated in the Indian Courts. Surrogacy was not recognized in the parent state of the German Couple. The Apex Court denied providing the passports of the Children but granted an exit permit and the German authorities have decided to give the couple an opportunity to adopt the children and fight for their rights. The Supreme Court of India also recommended the emergent legislation of law on surrogacy in India.

In both the above cases, the Supreme Court of India has taken a very pro-contract stand possibly as a way of encouraging commercial surrogacy, which contributes millions of dollars to India's economy. In light of the above cases, it becomes clear that there are many human rights issues involved in the 'commercial surrogacy' like the rights of the intending parents, the rights of the donors, the rights of the surrogate mother and also the rights of the child.

Evolution Of Surrogacy Laws In India:

In India, according to the National Guidelines for Accreditation, Supervision, and Regulation of ART Clinics, evolved in 2005 by the Indian Council of Medical Research (ICMR) and the National Academy of Medical Sciences (NAMS), the surrogate mother is not considered to be the legal mother. It also issued guidelines to regulate surrogacy arrangements⁵. The guidelines further specified that:

- i. The surrogate mother would be entitled to certain monetary compensation, the value of which would be decided by the couple and the surrogate mother.
- ii. The surrogate mother cannot donate her own egg for the surrogacy and that she must relinquish all parental rights related to the surrogate child.

In 2008, The Indian Council of Medical Research (ICMR) came out with a draft of legislation on Assisted Reproductive Technologies Bill, 2008. The Law Commission of India in its 228th report made its further suggestions on the issue of surrogacy in India and has recommended prohibiting commercial surrogacy and allowing ethical altruistic surrogacy by enacting a suitable legislation.

⁴ Accessed online at <https://vlex.in/vid/jan-balaz-vs-anand-572201774> on 15th Mar 2022 at 21.45 IST

⁵ Page 14 on Paragraph 1.14 referred in the Law Commission of India Reports- <https://lawcommissionofindia.nic.in/reports/report228.pdf>

One of the prime reasons for surrogacy services to bombard in India is poverty, which makes poor Indian women rent their womb for money or other essential commodities. It has also been reiterated in the Law Commission Report for the need for Surrogacy Laws in India. The Bill acknowledges surrogacy agreements and their legal enforceability. This will ensure that surrogacy agreements are treated on par with other contracts and the principles of the Indian Contract Act 1872 and other laws will be applicable to these kinds of agreements. The Bill provides that single persons may also go for surrogacy arrangements⁶.

According to the provisions of the Assisted Reproductive Technologies (ART) Bill, 2013- the first attempt by India to regulate commercial surrogacy, no woman of the age less than 21 years and more than 35 years can act as a surrogate mother. This bill leads to laying down a few conditions and implications for the foreign couples who are willing to opt for surrogacy in India. The compensation for the surrogacy as per the guidelines by the ART Bill, 2013 draft legislation will be the private negotiation between the surrogate mother and the commissioning or intended couples. The ART Bill, 2013 also bars homosexual couples, foreign single individuals, and the couple who were in a live-in relationship from having a child through a surrogate mother in India.

After all the chaos that has taken place on the lack of proper regulation and legislation on Surrogacy in India, Surrogacy Bill came into existence which laid down the process for surrogacy including foreign citizens who were approaching Clinics in India for surrogacy. On 28th September 2015, ICMR directed all the Clinics in India not to assist any foreign nationals in having a child through an Indian surrogate mother.

The Surrogacy (Regulation) Bill, 2016:

On 21st November 2016 the Surrogacy (Regulation) Bill, 2016 was presented before the Lok Sabha and the bill was passed on 19th December 2016 which primarily focuses on prevention of commercial surrogacy and the promotion of altruistic surrogacy. This bill safeguards the surrogate mother and child from exploitation. According to the provisions of the bill, any infertile married couple who is eligible in accordance with the provisions of the bill can bear a child with the help of a surrogate mother through surrogacy. However, the surrogate mother will not be entitled to any monetary benefit or compensation for renting her womb to the intended couple except for her medical and insurance expenses during pregnancy.

According to the Provisions of the Surrogacy (Regulation) Bill, 2016:

⁶ Page 17 on Paragraph 2.2 referred in the Law Commission of India Reports- <https://lawcommissionofindia.nic.in/reports/report228.pdf>

- i. Section 2 provides for 'Altruistic surrogacy'- means that the surrogacy in which no charges, expenses, fees, remuneration, or monetary incentive of whatever nature, except the medical expenses incurred on the surrogate mother and the insurance coverage for the surrogate mother, is given to the surrogate mother or her dependents or her representative.
- ii. Section 3 provides that there must be a registration of the surrogacy clinic and the process of surrogacy must be performed only at the registered clinic. The medical practitioner who is performing surrogacy must be qualified and there must not be any type of advertisement for the commercial surrogacy.
- iii. Section 4 provided Surrogacy procedures and its regulations, which include that there must be altruistic surrogacy, no whoring or trading of that surrogate child, a certificate for the infertility of the intending couple must be qualified for surrogacy and it should be checked by a qualified medical practitioner.
- iv. Eligibility criteria for Surrogacy:
 - For the Surrogate Mother- The woman to act as a surrogate mother must be married ever and between the ages of 25 to 35. There must be only a one-time surrogate mother in her lifetime and she has to be medically fit to act as a surrogate mother.
 - For the Intended Couples- The man must be the aged 26 to 55 and the women are aged between 23 to 50. Both the couples must have been married for the last five years and both the intended/commissioning couples must be the citizen of India and they have no child before this by any means.
- v. No abortion without the consent of the mother and consent of the Appropriate Authority (such authorization should comply with the provisions of the Medical Termination of Pregnancy Act, 1971).
- vi. No storage of Human Embryo or Gamete is allowed for surrogacy purpose.
- vii. The Constitution of the 'National Surrogacy Board' consists of the Chairperson- The minister who is in the charge of Ministry of health and family welfare. Vice-Chairperson- The person who is a secretary in charge of the department dealing with the circumstances related to surrogacy. Members- Three members from the ministry of the central government from the women and child development, Three women members from the parliament, and The Director-General of the Health Service of the Central Government.
- viii. Prohibition of commercial surrogacy and exploitation of surrogate mother, child born.
- ix. Offenses- According to the Bill, include performing or advertising the commercial form of surrogacy, exploitation of the surrogate mother, and trading of the human embryo or gametes for the commercial purpose of the surrogacy.

- x. Penalties- According to the Bill, include all the offenses mentioned above will consider the penalty of 10 years in jail and a monetary fine up to the amount of 10 Lakh rupees.

Disadvantages Of The Surrogacy Bill, 2016:

- i. Article 21 of the Indian Constitution was recognized to include the right to privacy, in the landmark judgment of *K.S. Puttaswamy and Anr. v. Union of India and Anr*⁷. In this Judgment, it has been held that the right to privacy is a facet of Article 21 of the Indian Constitution and is a fundamental right of any individual. The right to privacy includes the right to complete reproductive autonomy, and by that extension, the right to parenthood. It is not the domain of the state to interfere and abridge the fundamental rights of the individuals as their constitute parental rights. It is the prerogative of the person to decide the mode of parenthood, that is, whether to have a child born naturally or by means of surrogacy.
- ii. Conforming to this need of parenthood the Universal Declaration of Human Rights (UDHR) has under Article 16 declared the right to found a family as a basic human right. It says that family is a natural and fundamental unit of society and is entitled to protection by State and society⁸. However, the draft Bill allows only married couples to that extent of surrogacy and excludes single/divorced or widowed parents and the people belonging to the LGBTQ community thereby, criminalizing their exercise of reproductive autonomy in this regard. Article 14 of the Constitution guarantees a 'Right to equality' as a Fundamental Right to all the citizens of India. This Bill shall not stand the test of reasonable classification under Article 14 of the Indian Constitution.
- iii. According to Sections 7 and 8 of the Hindu Adoption and Maintenance Act, 1956- Any person who is a Hindu of sound mind and is not a minor has the capacity to take a son or a daughter in adoption. Section 57 of the Juvenile Justice Act, 2015 provides for conditional adoption which allows adoption for single and divorced parents. However, the draft bill limits the process of surrogacy only to married couples in India and hence, contradicts the provisions of the Hindu Adoption and Maintenance Act, 1956 and the Juvenile Justice Act, 2015.
- iv. The Bill purely ignores the fact that for many women in India who belong to vulnerable economic backgrounds, surrogacy is a source of livelihood and this commercial ban on

⁷ AIR (2017) 10 SCC 1

⁸ The Universal Declaration of Human Rights, Art. 16(3)

surrogacy deprives their right to livelihood and in turn expects the surrogate mothers to undergo reproductive labour without any compensation.

- v. Several other prerequisites such as a surrogate mother being a close relative of the intended parents, at least five years of non-conception for intending parents, and making conditions and requirements of the eligibility certificates for undergoing the surrogacy process has invited many criticisms on the Surrogacy (Regulation) Bill, 2016.

However, the Rajya Sabha did not pass the bill and further referred it to Parliamentary Standing Committee on 12th January 2017, to examine the provisions of the Bill and prescribe subsequent recommendations to the presented Surrogacy (Regulation) Bill, 2016. The Parliamentary Standing Committee presented the One Hundred-Second Report (102nd Report) and suggested progressive changes to the Surrogacy (Regulation) Bill, 2016 which subsequently paved the way for the enactment of the Surrogacy (Regulation) Bill, 2019.

The Parliamentary Committee further noted that-

"There is no doubt that as of today there is a potential for exploitation and the surrogacy model that exists today can and does exploit surrogate women. But this potential for exploitation is linked to the lack of regulatory oversight and lack of legal protection to the surrogate and can be minimized through adequate legislative norm-setting and robust regulatory oversight⁹".

The Parliamentary Standing Committee in order to make the 'surrogacy' easier has recommended a few changes to the draft bill:

- i. To delete the defined 'infertility' clause.
- ii. To delete a five-year waiting period in order to obtain an Infertility Certificate.
- iii. To delete the clause which only allowed for close relatives to act as surrogates.

The Committee while prescribing the changes, has completely followed a needs-based approach towards accessing surrogacy instead of advancing a rights-based approach.

Despite the Recommendations of the Parliamentary Standing Committee on Surrogacy (Regulation) Bill, 2016, the newly enacted Surrogacy (Regulation) Bill, 2019 completely ignored the recommendations and the new bill is an exact replica of the old bill. On 26th February 2020, the Union Cabinet approved the new Surrogacy (Regulation) Bill, 2020 allowing any 'willing' woman to be a surrogate mother. This 2020 Bill is a reformed version of the draft legislation that was passed by the Lok Sabha in August 2019¹⁰.

⁹ Referred 102nd Parliamentary Committee Report at http://164.100.47.5/committee_web/ReportFile/14/100/102_2018_6_15.pdf on Page 13

¹⁰ Sarvesh Kumar Shahi, "Surrogacy Bill is a big step forward" Deccan Herald, Mar. 05, 2020.

The Surrogacy (Regulation) Bill, 2020:

The Surrogacy (Regulation) Bill, 2020 incorporated the following changes in the Bill:

- i. Indian-originated married couples/Indian-married couples including Widows and Divorces were allowed to go for surrogacy. It also added Clause 2(s) which defines 'Intending Women' who can conceive a child.
- ii. National Surrogacy Board for policy making at the Central Level and State Surrogacy Board including appropriate authorities for acting as executive bodies in the State and Union Territories in India.
- iii. The term 'Close Relative' has been deleted and the term 'willing women' has been added which means that the intended parents can now choose any woman to be a surrogate mother who is willing and provides her wilful consent for the same.
- iv. The Insurance Coverage tenure has been increased from 16 months to 36 months.
- v. The definitions 'Infertility' and 'Incapacity of producing child after 5 years of marriage' have been deleted.

However, this Bill has failed to recognize and protect the rights of the Unmarried People and Homosexual couples (LGBTQ Community) on parenthood as the Bill only recognized the rights of married couples (heterosexual couples) and single women (Divorced/Widowed) to opt for surrogacy. The Apex Court has made its *Landmark Judgement*¹¹ to protect the interests of homosexual couples and has inspired same-sex marriage. However, here comes the question when their 'right to parenthood' have not been recognized through this Surrogacy (Regulation) Bill, 2020. Subsequently, The Assisted Reproductive Technology (Regulation) Bill and the Surrogacy (Regulation) Bill, both recently enacted by the Indian Parliament, will have a significant impact on Indian women's reproductive rights and health. Both of these legislations i.e., **the Assisted Reproductive Technology (Regulation) Act, 2021**¹² and **the Surrogacy (Regulation) Act, 2021**¹³ and came into force with effect from January 25, 2022 which replaced all the old Acts. The goal of the new legislation according to Ministry of Health is to 'regulate' and 'supervise' assisted reproductive technology (ART) clinics and surrogacy, as well as to curb unethical practises such as sex selection and surrogate mother exploitation, by imposing both monetary penalties and jail terms for violations.

¹¹ Navtej Singh Johar v. Union of India (2018) 10 SCC 1.

¹² Referred online at <https://egazette.nic.in/WriteReadData/2021/232025.pdf>

¹³ Referred online at <https://egazette.nic.in/WriteReadData/2021/232118.pdf>

The Assisted Reproductive Technology (Regulation) Act, 2021:

There are many ART Clinics in India which were operating and being run without any proper regulation in India. Hence, there was a huge need to properly regulate the ART Clinics. The primary purpose for the enactment of the Assisted Reproductive Technology (Regulation) Act, 2021 is:

“An Act for the regulation and supervision of the assisted reproductive technology clinics and the assisted reproductive technology banks, prevention of misuse, safe and ethical practice of assisted reproductive technology services for addressing the issues of reproductive health where assisted reproductive technology is required for becoming a parent or for freezing gametes, embryos, embryonic tissues for further use due to infertility, disease or social or medical concerns and for regulation and supervision of research and development and for matters connected therewith or incidental thereto.”¹⁴”

Salient Features Of The Act:

- i. The Act provides that every ART Clinic and bank must be registered under the National Registry of Banks and Clinics of India. The Registration Process will be facilitated by appointing relevant authorities in their respective states and the registry is meant to act as a centralized database to provide all types of ART Services in India. Such Registration must be renewed every 5 years or maybe cancelled or suspended if any ART Clinic contravenes the provisions of the Act.
- ii. The Act provides for the constitution of the National Assisted Reproductive Technology and Surrogacy Board under the National Board for the purpose of the Act. The National Board, the National Registry, and the State Board shall have the power to:
 - a. Inspect, any premises relating to assisted reproductive technology; or
 - b. Call for any document or material, in the exercise of their powers and discharge of their functions.
- iii. The Central Government may within 90 days from the date of commencement of the Act, by notification, establish for the purposes of this Act and Surrogacy Act, a Registry to be called the National Assisted Reproductive Technology and Surrogacy Registry.
- iv. The ART Clinics and Banks shall ensure that intended parents, women, and donors are eligible to avail of the ART procedures subject to the criteria as prescribed in the Act i.e.,

¹⁴ Supra note.11

- prior medical testing of the gamete donor for diseases, and that the intended couples were aware of the rights of the child born through assisted reproductive technologies.
- v. The Act provides that all the Banks and ART clinics shall maintain a grievance cell as per the manner prescribed in the Act for making complaints.
 - vi. The Act restricts Banks and ART Clinics to publish, distribute, and communicate any advertisement in any manner including on social media or the internet regarding their offering of sex-selective assisted reproductive technologies.
 - vii. The Act provides for offenses and penalties for contravention of the provisions of the Act which shall be punishable with imprisonment for a term of five years, extendable to ten years, or fine, not less than ten lakh rupees but may extend to twenty-five lakh rupees or with both.

The Surrogacy (Regulation) Act, 2021:

After prolonged years of waiting, the Surrogacy Regulation Act, 2021 was enacted to regulate the process of surrogacy and becomes the first legislation in India that controls the exploitation of women (through unsafe medical procedures) and surrogacy practices. This is progressive legislation that primarily aims to make surrogacy available for the intending couples and intending women. The primary purpose for the enactment of the Surrogacy Regulation Act, 2021 is:

“An Act to constitute 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.”¹⁵

Salient Features Of The Act:

- i. The Act provides that intended parents should not have other children, including biological, adopted, or surrogated. However, the Act relaxes the condition for intended couples who have children with:
 - a. Physical/Mental disability
 - b. Life-threatening disorder.
- ii. The Act provides that Surrogacy (ART) Clinics unless registered under the Act, shall conduct activities relating to surrogacy and surrogacy procedures. No paediatrician or gynaecologist or embryologist or any other medical practitioner shall conduct, offer, undertake, or promote to avail commercial surrogacy in any form.

¹⁵Supra note. 13

- iii. The Act completely bans commercial surrogacy and recognizes only altruistic surrogacy. Section 3(ii) prohibits commercial surrogacy and any kind of payment, reward, benefit, fees, remuneration or monetary incentive in cash shall not be provided to the surrogate mother for her services¹⁶.
- iv. Section 38(ii) of the Act makes the practice of 'commercial surrogacy' a punishable offence with imprisonment of up to ten years and a fine of up to ten lakh rupees. The person seeking commercial surrogacy is punishable with imprisonment up to five years and a fine of up to five lakh rupees, and if found to be indulging in the same practice again, the imprisonment may extend to ten years while the fine may go up to ten lakh rupees¹⁷.
- v. The Act provides that all side effects and after effects of the surrogacy procedures shall be informed to the surrogate mother and a written form of consent has to be obtained from the surrogate mother before undergoing any form of surrogacy procedures.
- vi. Every surrogacy clinic which is conducting surrogacy or surrogacy procedures, partly or exclusively, shall, within a period of sixty days from the date of appointment of appropriate authority, apply for registration¹⁸.
- vii. 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 Act¹⁹.

LIMITATIONS OF THE ASSISTED REPRODUCTIVE TECHNOLOGY (REGULATION) ACT, 2021 AND THE SURROGACY (REGULATION) ACT, 2021:

While both the Acts are timely enactments for a timeless problem of unregulated ART Clinics and to protect women undergoing the ART procedures from the unsafe and illegal procedures, they also have a few drawbacks that are left unaddressed leading to very serious concerns.

- i. The Act excludes unmarried men, widowed men, cohabiting couples, transgenders, and homosexual couples from availing of the ART services and also opting for surrogacy as a method of reproduction.
- ii. The prices of the ART treatment and procedures are not regulated under the Act which can actually be remediated by issuing directives to the departments, Banks, and ART Clinics.
- iii. It is the duty of the State to protect the rights of the unborn child and to prevent the exploitation of surrogate mothers. However, the 'Right to Reproduction' and 'Right to

¹⁶*Ibid.*

¹⁷*Ibid.*

¹⁸*Supra* note. 13

¹⁹*Ibid.*

Reproductive Autonomy' under the ambit of Article 14-'Right to Equality' and Article 21-'Right to Life' of the Indian Constitution is completely ignored and the reproductive choices and rights through ART and surrogacy were only provided to intended parents and single women which eventually leads to conflicting of interests of the unmarried, divorced, widowed people and LGBTQ+ communities.

- iv. As 'Commercial Surrogacy' is banned there is risk which may lead to unethical practices or middleman rackets to practice commercial surrogacy and the intended parents and surrogates would be forced to operate underground with a very high-risk exposure.
- v. The complete ban on commercial surrogacy affects the livelihood of the surrogate mother from economically vulnerable backgrounds, as commercial surrogacy is the means of their livelihood.
- vi. Infertile couples and surrogate mothers undergo immense emotional trauma and look for achieving the best within their limited means. This move of the government must not push infertile couples and surrogate mothers to commit a legal wrong for something as basic as parenting²⁰.

India, being a major hub for reproductive practices- both these Acts are considered to be Landmark Legislations that is certainly a step forward in the right direction to regulate ART Banks and Clinics in India and to stop the exploitation of vulnerable women.

Recommendations And Way Forward:

- I. In order to prevent the exploitation of surrogate mothers and for better and informed control over the surrogate markets, an 'Agency' for providing surrogates can be formed under the Act.
- II. The time frame of ninety days from the date of commencement of the Act imposed on the ART Clinics for obtaining certificate of registration to practice ART procedures and surrogacy process requires proper infrastructure for the effective implementation in order to prevent injustice to the stakeholders.
- III. The 2021 Act needs to be more inclusive in nature to include the rights and interests of the different sections of the society by addressing the issues that are left uncovered under the Act.

²⁰Accessed online at https://economictimes.indiatimes.com/magazines/panache/banning-commercial-surrogacy-will-expose-women-to-exploitation/articleshow/53889509.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst on 15th May 2022 at 18.30 hrs

- IV. 'Commercial surrogacy' can be allowed with certain restrictions under the Act as the compensation provided to the surrogate women acts as their livelihood, improves their standard of living, benefits their socio-economic lives, and also enables them to treat her with the utmost respect.
- V. More reforms were needed on the Surrogacy (Regulation) Act, 2021 to recognize 'Surrogacy' as a 'reproductive right' so that the Act can provide the bodily autonomy of the surrogate mother and the 'right to parenthood' of the intended parents.
- VI. Amount of fixed compensation needs to be imposed by the government on the surrogacy clinics which generally charge arbitrary prices for surrogacy arrangements. Additional regulations would enable the government to ensure that the clinics charge fair prices²¹.

Conclusion:

As India is becoming a thriving industry for the surrogacy process, it has brought certain complexities and many social, ethical, and legal issues related to surrogacy, necessitating the need for specific legislation. The Assisted Reproductive Technology (Regulation) Act, 2021, and the Surrogacy (Regulation) Act, 2021 comes at a timely opportune because there is a need to investigate the process of commercial surrogacy, which is becoming an unethical business for the people of India as a whole. The bill primarily focuses on the prohibition of exploitation of both the surrogate mother and the child born through surrogacy. Surrogacy has both positive and negative consequences in a country such as India. If used wisely, it provides satisfaction to many infertile couples who are unable to have a child; however, if the process of surrogacy is used carelessly or for commercial purposes, it has a negative impact on society as a whole.

²¹ Accessed online at <https://wcd.nic.in/sites/default/files/final%20report.pdf> available on Pg.169