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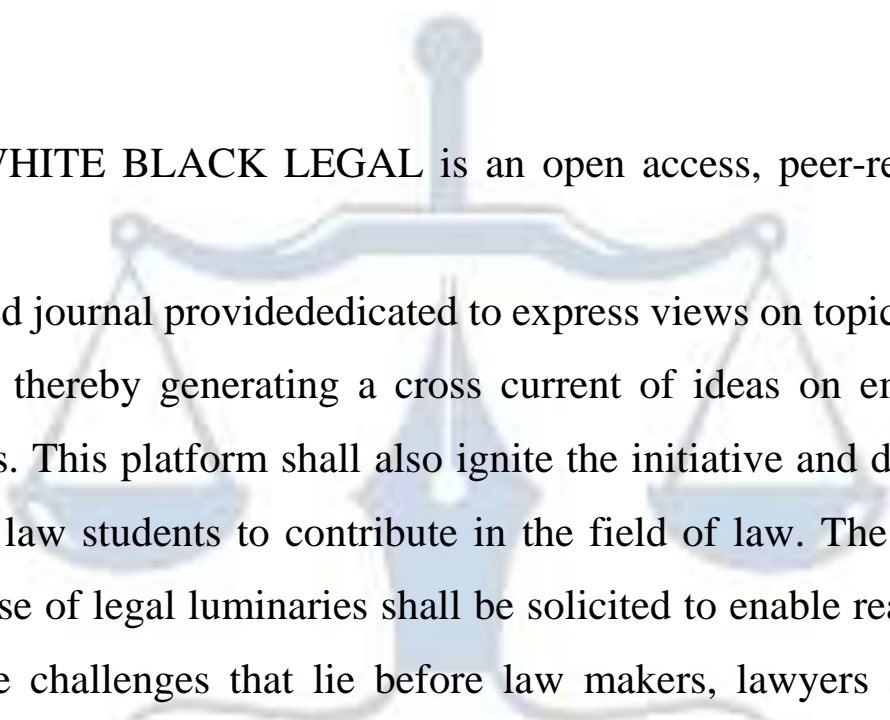


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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

# **ANALYSIS OF SURROGACY REGULATION** **ACT 2021**

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## **Abstract**

*The desire of infertile couple to have a child of their own has inter alia led to the concept of surrogacy. It has its own welcomes and flip side. Surrogacy is a practice where a woman who is, or is to become, pregnant agrees permanently to surrender the child (ren) born of that pregnancy to another person or couple (the desire parents). It involves conflict of various interests and would have inscrutable impact on the primary unit of society viz. family. The present paper focuses particularly upon the surrogate, while also discussing some issues relating to children born as a result of such arrangements. The paper would also be an analysis of the current existing legal framework for surrogacy in India.*

*Key words-* surrogacy, analysis,

## **1. Introduction**

In the recent time, the concept of surrogacy is evolving quickly and is of prime importance to those couples who are infertile and therefore it is significant to regulate the surrogacy market and bring out the necessary legislation to remove any ambiguity which is faced by the masses. The Surrogacy (Regulation) Bill, 2019 was introduced in Lok Sabha on July 15, 2019 and passed by House on August 5, 2019. The 2019 Bill was referred to a Select Committee which submit its report on February 5, 2020.<sup>1</sup> The Surrogacy (Regulation) Bill 2019 was passed in Rajya Sabha on December 8, 2021 with certain amendments (as suggested by Select Committee) and finally enacted as a law on the 25<sup>th</sup> December 2021. It was released with Assisted Reproductive Technology (Regulation) Act 2021 and came into force on 25<sup>th</sup> January 2022.

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<sup>1</sup> Report of the Select Committee on the Surrogacy Bill, 2019, February 5, 2020.

The Act seeks to establish operational rules and institutional infrastructure to protect the bonafide interests of the parties wanting a child through surrogacy. The main objective of the Bill is to prevent exploitation of surrogate mothers, abandonment of children born out of surrogacy and the import of human embryos and gametes which have been reported over the years. Further the very purpose of the Act is to ensure that the procedure of surrogacy remains ethical and transparent and promote the welfare of all the parties involved in the surrogacy contract.

## 2. Analysis of the Act

The surrogacy Regulation Act is divided into VIII chapters and total 54 sections.

**Chapter I** of the Act deals with preliminary and provide for the enforcement and definition clauses. Section 2 of the Act provides for the definition clause. Terms such as ‘altruistic surrogacy’<sup>2</sup>, ‘commercial surrogacy’<sup>3</sup>, ‘insurance’<sup>4</sup> ‘intending woman’<sup>5</sup> ‘surrogacy’<sup>6</sup>, surrogate mother have been defined coherently. ‘Compensatory Surrogacy’ has been omitted since it could have led to commercialization of surrogacy.

**Chapter II (Section 3)** of the of the Act deals with the Regulation of Surrogacy Clinics. The section 3 of the Act provides for the prohibition and regulation of surrogacy clinics.

**Chapter III (Section 4 to Section 10)** of the Act deals with Regulation of surrogacy and surrogacy procedures. It lays the need to obtain certifications and only then procedures can be performed in government recognized clinics. For the procedure, the following certification are necessary and then only surrogacy procedures can be conducted.

Certificate of Essentiality: it is granted as per form 11 to the intended couple if the conditions under Section 4 (iii) a of the Act are satisfied.

Certificate of eligibility: it is provided to the surrogate mother and intending mother as per section 4 (iii) (b) and (c)

**Chapter IV (Section 11 to Section 11)** of the Act deals with Registration of surrogacy clinics and establishment of National Assisted Reproductive Technology and Surrogacy Registry.

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<sup>2</sup> Section 2 (b) of Surrogacy Regulation Act 2021

<sup>3</sup> Section 2 (g) of Surrogacy Regulation Act 2021

<sup>4</sup> Section 2 (q) of Surrogacy Regulation Act 2021

<sup>5</sup> Section 2 (s) of Surrogacy Regulation Act 2021

<sup>6</sup> Section 2 (zd) of Surrogacy Regulation Act 2021



**Chapter V (Section 17 to Section 34)** of the Act deals with the constitution of national Assisted Reproductive Technology and Surrogacy Board and State Assisted Reproductive Technology and Surrogacy Boards. Through the establishment of National Surrogacy Board at the central level and State Surrogacy Board and appropriate authorities in states and Union Territories, the Act seeks to regulate the practice of surrogacy and monitor it closely. The function of Boards is to advise the Central Government on policy formulation relating to surrogacy, monitor and review the implementation of the Act or rules and regulations, laying down the code of conduct of surrogacy clinics, supervise the functioning of State Surrogacy Board and performance of various bodies constituted under the Act.

**Chapter VI (Section 35 to Section 37)** of the Act deals with the appointment of appropriate authority and their functions. To put a stricter regulatory mechanism in place, the Act empowers the appropriate authority to issue, suspend, or cancel the registration of surrogacy clinics; recommend the accurate standards; investigate and take actions in case of any deviation from the Act and lastly to take into account the change in technology and social conditions.

**Chapter VII (Section 38 to Section 45)** of the Act deals offences and penalties. The offence under this shall be cognizable, non-bailable and non-compoundable. Strict punishment has been provided under the Act for contravening the provision of the Act. Ensuring stringent punishment helps in fulfilling the obligations arising out of surrogacy contracts and protecting the interest of bonafide parties.

**Chapter VIII (Section 46 to Section 54)** of the Act deals with miscellaneous provisions.

### **3. Lacunae in the Act**

#### **i) Complete ban on commercial surrogacy**

The Surrogacy (Regulation) Act 2021 put complete ban on commercial surrogacy. The 'right to livelihood' is an essential ingredient as provided under Article 21 of the. But this right of livelihood is violated as the 2021 Act puts a complete ban on commercial surrogacy. Surrogacy was a means of livelihood for many low-income Indian women. A complete ban on it will now make them financially dependent on others.

**ii) Exclusion of LGBT community**

The Surrogacy (Regulation) Act 2021 only allows a man and a woman alone, who are legally married under Indian laws, to avail of surrogacy services, thus prohibiting non-binary and same sex couples from experiencing the joy of parentage.

**4. Conclusion**

The Surrogacy (Regulation) Act 2021 is a progressive piece of legislation that aims to protect the interest of bonafide parties and allows them to opt for surrogacy procedure in more easy way. The Act aims to prevent the exploitative practices that were carried out earlier and ensure that the provisions of the Act to be carried out ethically and transparently by regulating the surrogacy procedure. The Act plays a pivotal role and act as pillar of support to the parties by fulfilling the aspirations of infertile couples. No doubt the Act is complete in itself but it has some lacunae as well which needs to be addressed.