
Analysing the New Surrogacy Norms in India in light of The Surrogacy Regulation Act, 2021 & Its Social Implications

NAME: NEHA PUROHIT

DESIGNATION: ASSISTANT PROFESSOR, SCHOOL OF LAW, ALLIANCE UNIVERSITY, BENGALURU.

ADDRESS: ALLIANCE UNIVERSITY, BENGALURU

EMAIL: neha85.purohit@gmail.com

ABSTRACT:

Assisted Reproductive techniques have proved to be a godsend in case of spouses and partners or single parents who are not able to produce progeny due to various medical, emotional or personal reasons. Surrogacy, that may be called as a rented womb for gestation period is also a method of assisted reproductive techniques, which has become exponentially popular since its introduction in late 80s thereby giving reality to the dreams of individuals who had lost hopes of having children. Countries like Russia, Ukraine and some parts of the United States have legalized both altruistic and commercial surrogacy, by reason of which they became the surrogacy hubs of the world. India was also a surrogacy heaven along with U.S.A. until the Indian Government put a complete ban on commercial surrogacy in the year 2018 as it had become a modus operandi for jeopardizing vulnerable and poor women and neglecting their rights in lieu of being compensated by the intended parents. This paper will focus mainly on what are the new procedures of surrogacy in India after the Introduction of The Surrogacy Regulation Act, 2021. The Researcher will also try to explain what are the requisites imposed upon surrogate mothers and intended parents under the said legislations. Further the researcher will analyze the effects of such amendments in the law upon the society and to what extent the new amendments have been able to achieve the objective laid by the legislature. The Research Methodology adopted is doctrinal including the principles of fundamental research. Literature Review comprises an analysis of the write-ups and case studies, of eminent authors expert in the field of surrogacy laws.

KEYWORDS: Surrogacy, social implications, surrogate mothers, intended parents, conditions for surrogacy, Surrogacy Regulation Act 2021, India.

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1. Introduction

Reproduction is attributed to every living creature, as this is how they or we all multiply in number. While for other living beings it may be an act for just increasing their population but in case of us i.e. humans it is not so merely, it is much more than an increased population. Reproductive rights are integral to human dignity and individuality as the enforcement of these rights ensure the protection of a subset of several other rights like right to life, right to family, right to have children etc. Reproduction is a natural and inherent process and almost every individual has, desires to produce progeny who look like him or her or who can be his or her successor and lead a family legacy even after their death but this process however, is sometimes obstructed either by organic or inorganic reasons in certain human beings, thereby destroying hopes of having a complete family and natural successors. This is the gap which the development of science and technology have tried to fill in the lives of people who were not able to conceive and reproduce naturally by devising methods like the Assisted Reproductive technologies.

Assisted reproductive technologies i.e. ATR are medical procedure for treatment of infertility issues in couples who desire to become parents, it involves procedures such as [in vitro fertilization](#) (IVF), [intracytoplasmic sperm injection](#) (ICSI), [cryopreservation](#) of gametes or embryos, and/or the use of [fertility medication](#). Surrogacy is also one method of ATR which may be called as a rented womb, wherein couples who are not able to naturally reproduce may take assistance of another surrogate or substitute woman from the gestation period till the birth of child. It has been defined as, “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”. Surrogate pregnancy aids in ensuring the right to family and having genetically related children for many intended couples who are not biologically able to produce offspring.

Surrogacy may be of different types like traditional or gestational, where Traditional surrogacy uses the surrogate mother's egg for conception. In contrast, gestational surrogacy is performed by transferring embryos made through [IVF](#) with eggs from the intended mother or a donor. Surrogacy may be of altruistic or commercial type the former one is one kind in which no monetary incentive other than the necessary medical expenses of the surrogate mother or her health insurance is paid the latter one however is one in which surrogacy procedures or services are commercialized i.e. selling, buying or trading of embryos or providing surrogacy services for monetary incentives either in cash or kind excluding the necessary medical expenses of the surrogate mother or her health insurance. Commercial surrogacy in India was permitted till 2018 but after the Government pushed for restrictions on it, telling the Supreme Court in a 2015 affidavit that it did not support commercial surrogacy. In 2019, the government revived a 2016 bill banning commercial surrogacy. This move of the Indian Government had come after the Select Committee on Surrogacy Regulation Bill, 2019 submitted a report to the parliament that expressed concerns about the misuse of surrogacy which had led to unethical practices, exploitation of surrogate mothers and children born out of it and import of Human Embryo or gametes as India had become one of the most

popular reproductive tourism destination of the world because of the cost effective treatment and in the absence of any strict comprehensive laws to regulate surrogacy and related procedures.

The new surrogacy laws whether be it the, 'The Surrogacy Regulation Act 2021' or the Assisted Reproductive Technology Act, 2021' have entailed in itself the essential qualifications and disqualifications for both the intended parents or Commissioned Couple as well as the surrogate mother and also the rights and duties of the parties in surrogacy, The objectives that the said law seeks to achieve is to put a blanket ban on unethical Surrogacy practices and promote Altruistic ethical surrogacy for needy infertile married couple.

In this paper the researcher will try to analyze the new laws for entering into surrogacy agreements and how rise to new rights and liabilities of both the parties. This research will also focus upon the effect that the amendments introduced will have on the society and the surrogacy market in India, and also that how far this law will prove to be effective in addressing the ethical issues relating to Surrogacy.

2. The New Surrogacy Norms After 2021-

The Surrogacy Regulation Bill 2019, received the assent of the President of India on 25th of December, 2021 after thorough background deliberations and recommendations from various Agencies and Ministers of the government like the Law Commission of India or Department of Health Research, Ministers of External Affairs, Minister of Health and family welfare, Communication and technology, commerce and industry etc, Parliament discussions, Report of Standing Committees of Parliament, and Public Interest Litigations , which provides for the new definitions and qualifications for intended parents and surrogate mothers and connected matters thereto. I will bring out and analyze in this part of the paper, what are the new prerequisites of surrogacy and its types allowed in India and also what are the qualifications and disqualifications applicable for the parties who intend to enter into a surrogacy agreements.

2.1 Meaning of Surrogacy:

According to Black's Law Dictionary, 'an agreement wherein a woman agrees to be artificially inseminated with the semen of another woman's husband.'

The New Encyclopedia Britannica defines- 'Surrogate motherhood' as the practice in which a woman bears a child for the couple to produce children in the usual way

Upon perusal of the definition of surrogacy, which provides that, "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" it can be said that it has not undergone any major amendment however the words

'Intending Couple' and *'Woman'* are significant here in regard to persons who are eligible to avail surrogacy, therefore it is important here to understand as to what is meant by these two i.e. Intended Couple and Woman respectively.

2.2 Parties to Surrogacy Arrangements:

According to the statute the terms 'Intending Couple' and 'Intending women' have been given a very controlled and strict meaning, which indeed ousters a category of individuals and also affects their right to family if they otherwise are eligible for resorting to surrogacy, which will be discussed in the later part of this paper.

2.2.1 Qualifications of Intending Parents and their Rights:

Reading sections 2(1)(h) & 2(1)(r) of the Act, together gives a narrow meaning of the term 'Intending Couple' which can only be the ones who are Legally married Indian man and woman and are above the age of 21 & 18 respectively. Further here it is also important to see that the said couple apart from the aforementioned qualification have to have an intention of becoming parents by Gestational surrogacy only if medical grounds necessitate it. The couple is deemed 'eligible' if they have been married for five years, the wife is aged between 25-50 years and the husband is between 26-55 years. The couple must not have any living child (biological, adopted or surrogate.) An Indian Widow or Divorcee woman between the age of 35-45 is also qualified to be and Intending Parent.

The Intending parent shall have rights of the natural guardian over the surrogate born child as they would have in case of a legitimate biological child and they shall also give all the privileges to the child as would have been given to a natural child for parentage, support and inheritance. The Intending parents shall not have a right to give consent for abortion it is only given to the Surrogate woman.as it will require a written consent of her and also an authorization of the appropriate authority appointed under the said Act.

2.2.2 Qualifications for a surrogate Mother And her Rights:

A surrogate mother as defined by Merriam Webster, "a woman who becomes pregnant by artificial insemination or by implantation of a fertilized egg created by in vitro fertilization for the purpose of carrying the fetus to term for another person or persons"

Oxford learners define Surrogate as, "a woman who gives birth to a baby for another person or couple, usually because they are unable to have babies themselves."

Both the abovementioned definitions give a general idea about who a surrogate mother is, however the Surrogacy Regulation Act, 2021 provides a specific and strict understanding of the term which is as, "a woman who agrees to bear a child (who is genetically related to the intending couple or intending

woman) through surrogacy from the implantation of embryo in her womb and fulfils the conditions as provided in sub-clause (b) of clause (iii) of section 4.”

Certain other qualifications as regard the woman being between 25-35 years, should be married, should have had a child of her own and a certificate of being both physically and psychologically being fit, should also be given from a Registered Medical Practitioner, have been mandated by the Section 4 of the Act. This definition specifically provides for a surrogate woman to be genetically related to the Intending couple, which is being argued to be a discriminatory qualification on the ground that it is restricted only to such women who are related to couple and the ones who are otherwise fit for surrogacy and willing as well, are disqualified and so it is violative of the Article 21 of the Constitution of India, that guarantees Right to life and Personal Liberty, which also includes right to reproductive choices of a woman as has been interpreted by the Supreme Court of India in the case of *Suchita Srivastava V Chandigarh Admn.*

The Surrogate mother have been provided rights and benefits under the Act like Right to Voluntary Consent to becoming surrogate, Informed Consent of procedures and side effects of it, right to withdraw consent before implantation of the Embryo in her womb. Further an insurance cover of 36 Months covering the post-delivery complications has also been directed under the Law, from the Intending Parents/Woman. However the surrogate shall have not rights of any kind over the child born and she is under legal obligation to handover the child to the Intending Parents/Woman, as the child is considered to be their biological child, but a Report on a study conducted in the cities of Delhi and Mumbai on surrogate mothers by the Centre For Social Research have concluded that the surrogate mothers have not replied to the question of how do they feel about handing over the child to the intending parents the reason behind it that the surrogates were in the middle of their pregnancy and this is the most uncomfortable question for which they are not emotionally prepared. It should not be forgotten that though the surrogate mother is not genetically linked to the child, yet, the life they rear in their womb has got some emotional attachment towards it which is humane

2.3 Types of Surrogacies:

Surrogacy is of three kinds. They are Genetic surrogacy/partial surrogacy, Total surrogacy and Gestatory/Gestational surrogacy.

In Genetic/ Partial Surrogacy, woman's egg either through artificial insemination or less often by natural intercourse is fertilized by the sperm of the male partner of the couple desiring the child (commissioning father). Here the surrogate mother is the genetic mother of the child and the commissioning mother plays the role of social and legal mother. This type of surrogacy is also called as Partial Surrogacy or Traditional Surrogacy.

Total surrogacy is where the surrogate's egg is fertilized with the sperm of the donor or the commissioned father.

3. where the surrogate's egg is fertilized with the sperm of the donor or with the commissioning father. In Gestatory/Gestational Surrogacy, the egg and semen are obtained from the In Gestational commissioning couple (or from anonymous donors), and the resultant embryo is subsequently implanted into the surrogate or carrying mother. Here, the surrogate mother has no genetic link with the child. This type of surrogacy is also called as Full Surrogacy.

2.3.1 Commercial and Altruistic Surrogacy:

Surrogacy may be commercial or altruistic, depending upon whether the surrogate receives financial reward for her pregnancy. If surrogate receives money for the surrogacy arrangement, it is considered commercial, and if she receives no compensation beyond reimbursement of her medical and other pregnancy-related expenses along with the insurance coverage for her, it is referred to as altruistic.

The Surrogacy Regulation Act, 2021 also explains both the above types still, it only allows the latter one and completely prohibits and criminalizes the former i.e., Commercial Surrogacy and may also attract punishment of Imprisonment which may extend to 10 years along with fine which may extend to 10 lakh Rupees. Commercial Surrogacy started in India in the year 2002 and since then it became the one of the most favorite fertility tourist spots for the people from countries like Britain, Australia, Japan and United States to name a few, owing to low-cost technology, skilled doctors, scant bureaucracy and a plentiful supply of surrogates as has been reported by Thompson Reuters foundation. The scale of economics involved in surrogacy is unknown, but a study by the United Nations in July 2012 estimated the business at >\$400 million a year, with over 3000 fertility clinics across India. And the maximum number of it being reported to be in Gujarat.

As reported in a study conducted by the Centre for Social Research supported by the Department of Women and Child Development of the Government of India, around the year 2012 that majority of the surrogate mothers in the metropolitan cities of Delhi and Mumbai were from economically weaker section and they alleged that poverty and illiteracy was one of the main causes to opt for Surrogacy as a means to raise, money and become financially stable. The report also highlighted that the majority of the surrogates were underpaid and Uncared for.

Commercial Surrogacy had other negative incidents as question on custody of children like in the case of Baby M in U.S.A.(1998), or in case of Baby Manji Yamada v Union of India, abandonment of surrogate children on separation of partners of spouses, or on the child being born with some mental or physical disorder like the tragic story of Gammy from Thailand, a child with Down Syndrome, whose parents abandoned him with the surrogate mother after he and his twin sisters were born to an Australian couple.

Banning Commercial surrogacy in light of the above grounds and even as recommended by the 228th Report of the law commission in 2009 and the report of The Select Committee on Surrogacy Regulation Bill, 2019 submitted to the Parliament of India in February 2020, it appears that the legislature has tried to address the ethical issues involved in commercial surrogacy practices, but how far does it prove to be effective is yet to be examined as the law has just been introduced.

2.4 Regulation and Registration of Surrogacy Clinics:

The Legislature has also incorporated provisions relating to the regulation and registration of surrogacy clinics by an Appropriate Authority. These provisions put restrictions on the Surrogacy clinics and the medical practitioners involved in the surrogacy process like gynecologist, pediatrician, embryologist to not engage, advertise or promote commercial surrogacy in any manner and also not to misuse surrogacy for, sex determination of the child. All these acts have been declared as criminal offences and it may consequently lead to cancellation of registration as well.

2.5 National & State Assisted Reproductive Technology and Surrogacy Boards:

The law further makes provisions for setting up of two tier Assisted Reproductive Technology and Surrogacy Boards, one at the National Level and Others at State levels. The key functions of the boards include advising Central Government on surrogacy policy matters, reviewing and monitoring the implementation of the provisions of this Act, lay down Code of Conduct for the surrogacy clinics, performance of various bodies and supervise functioning of the State Boards, which are constituted under Section 26.

2.6 Offences:

The New law on surrogacy enumerates a range of acts as offences like engaging, advertising, promoting or inducing anyone for commercial surrogacy, determining sex by abuse of surrogacy procedure, abandon or exploit surrogate child and mother, unlawfully selling or buying human gametes or embryos and any act which amounts to contravention of the law relating to Surrogacy or Assisted Reproductive Techniques. These offences invite severe punishments of imprisonment along with monetary fines.

After comprehensively analyzing the major amendments on the Law relating to surrogacy it can be stated that the move of the legislature in bringing the surrogacy practices in line with the ethical and legal safeguards is a constructive one, as exclusion of commercial surrogacy and permitting altruistic one indeed prevents commoditization and exploitation of needy and vulnerable women, and further keeps intact the sanctity of the relation of between surrogate and the Intending parents and the child as well, and this is also why majority nations including the developed and the developing of the world have opposed commercial surrogacy. But nonetheless, only prohibiting commercial surrogacy would not essentially mean that all the objectives that the Law seeks have been attained and also that it is in conformity with all the constitutional philosophies like right to equality, right to life, right to dignity etc. as the present provisions regarding the qualifications and disqualifications of the parties to a surrogacy agreement still leave certain grey areas in them, which needs to be illuminated and functioned upon, as to attune the law with the rights of those individuals, who seem to be adversely affected by them.

3. Social Implications of the Law.

Since the Indian market was opened for Commercial surrogacy in 2002 India became the most desired fertility destination in the world, because of factors like highly skilled doctors, availability of medical services, abundance of poor, unguarded and unregulated surrogate laborers and absence of concrete regulations, from the government. After which several agencies of the government like Law commission of India, the opposition, Human rights activists, and the media all pressed for safeguarding the interest of the parties involved in the surrogacy agreements, which were being exploited at the whims and fancies of infertility clinics/agencies who gained the utmost economic benefits out of it. In response to such enigmas, the Parliament Introduced the Surrogacy Regulation Bill,2019 and The Assisted Reproductive Technology Bill, 2019 which as stated by the Union Health Minister Sri. Mansukh Mandaviya was to protect women and children from exploitation. Although from prohibiting illegal and unethical practices of surrogacy which is the objective of the Act, the interest of surrogate mothers, children and the intending parents can be safeguarded to an extent, but still there are certain areas in this Law which the legislature has not taken into consideration as to whether they are in conformity with the basic rights guaranteed under the constitution of India like right to equality, right to life, right to profession, right to family, to those individuals, which have been disqualified from availing surrogacy, and indeed how adversely different sections of society will be affected by these gaps. I will highlight those areas here.

3.1 Implications upon unmarried couples:

As it has been discussed earlier that for an Indian couple to avail surrogacy now, the existence of legal marriage must be there, so indeed it bars all the couples who are not married but are in live in relationship and they are otherwise suited to avail surrogacy. This is a paradox of law that if the law and the Apex Court in India recognizes live in relationships, and gives certain rights and duties to the live in partners, and further the court has also given legitimacy to children born in such relations. how can a discrimination of being married and not married be said to be persuasive under the lens of article 14 of the constitution, which gives right to equality to every person before the state. The right to have genetically related children to a couple who is not married, cannot be denied to them only on the distinction of marriage, if they are medically unfit to produce progeny, even when the science has been developed for the benefit of such people.

3.2 Implications Upon Single Males & Females aspiring for children:

The Surrogacy Regulation Act, 2021 disallows any single unmarried female excluding divorcee and widow and single male whether they are widower or divorced to become Intending Parents. This distinction is again, inconsistent with the fundamental rights of equality and right to life of an individual as depriving someone of his or her basic freedoms like right to children or family which are

recognized by international documents as article 8 & 16 of Universal declaration of Human Rights, to which India is also a signatory, without a reasonable nexus is encroachment by state.

As reported by India Today Magazine Insight in article by, 'Sonali Acharjee' who interviewed several single/prospective divorcee women in Delhi, and certain medical experts in Mumbai in the field of surrogacy who spoke of their or their patients plight, who would not be able to avail services of surrogate and become mothers of genetically related children, after the passing of this Act, because of only the fact that they were not married, and were unable to give birth, biologically due to medical unfitness.

Besides of all these loops, the Law leaves no scope at all for single men, whether or not they are widower or divorcee, to become a parent of a genetically related offspring, which appears to be very unkind reflection of the Law. This discrepancy in the eligibility of a person to avail surrogacy is violative of the Right to Life under Article 21 of the Constitution that also includes the right to procreation and parenthood under the right reproductive autonomy, as has been held by the Supreme Court in the case of *Suchita Srivastava & Anr v. Chandigarh Administration*, (2009) 9 SCC 1.

3.3 Implications on Homosexual couples & transgenders:

It has not been a very long time, since the Apex Court of the Country has recognized the identity of Same sex people and secured their right to live with dignity as a dimension of right to life under article 21 of the constitution upholding that every individual irrespective of their gender identity and sexual orientation have the right to live with dignity, autonomy and make personal and private choices without State interference. Furthermore the liberalized approach of the Indian Judiciary was reflected in the landmark case of *National Legal Services Authority v Union of India* which recognized transgender people as the third gender, and they to have similar rights as other individuals. It is very ironical that although both these sections i.e. homosexuals and transgenders are considered equal in the eyes of Law in respect of other rights then why have they been denied the right to have a family or children by traditional means of surrogacy. They have been kept out of the scope of the Act, thereby jeopardizing their rights to equality, and right to life. Is it that only human who are considered as the so called 'normal' can have access to family and children, which is an unacceptable opinion?

3.4 Implication as to only Married Woman eligible as surrogate:

The Act specifically states that a woman can only be a surrogate if she had been married and has had a child of her own earlier. The incidence of such requisite's points at a very narrow, meaning of a surrogate mother. The idea that a married woman only can be a fit surrogate appears to be irrational, again on the ground of equality. This leads to the interpretation that a woman who has never married but who is otherwise fit to bear a child and give birth, is absolutely interdicted from the purview of this Act although she may be a willing woman to opt for surrogacy. Further the woman can only be a

surrogate once in life time, which is contradicting with the right of the woman over her body and reproductive choices.

As India has legitimized surrogacy and abortion and the Indian Courts have progressively interpreted the right to reproductive choices and also India is a party to international conventions like CEDAW, ICCPR, ICESCR, CRC which recognize reproduction rights, so it is obligatory upon the government that it secures this right to all of its citizens without any discrimination. Having a mandate of becoming surrogate mother only once in lifetime intersects with the right to trade and profession under the article 19(1)(g) as has been argued by women rights activist and doctors as putting a ban on commercial surrogacy completely also denies a woman autonomy over her body and deprives her of the financial gains that she could have by legally adopting to be a surrogate mother and bring economic stability for her. It has been reported by an author Chandrika Manjunath in her article, where she quoted Dr. Nayana Patel who is a fertility expert, that the life standard of surrogate women had raised because of the income that they could earn by becoming surrogates, several times. Having been married and become surrogate only once deprives a considerable section of society of their reproductive rights, autonomy over body, right to life and, right to profession, which could only be denied to a citizen upon reasonable restriction, and the Surrogacy Act, 2020 does not provide any such reasonable restriction considering the above arguments.

3.5 Implications on the surrogacy market:

3.5.1 Black market & corruption:

Penalizing commercial surrogacy completely, may shutdown the official surrogacy market in India, which was reported earlier as the largest provider of commercial surrogacy services in the world. The Confederation of Indian Industry estimated commercial surrogacy to be a 2-billion-dollar industry by 2012, and the Indian Council of Medical Research, before recent regulation, expected those numbers to rise to 6 billion dollars way back in 2018. However, the complete ban will not hinder intentions of people still to make money out of such surrogacy agreements, this may indeed give rise to black marketing and corruption by agencies like hospitals and clinics running business of surrogacy.

3.5.2 Exploitation of Surrogate:

Promoting altruistic surrogacy is an ethical step but nonpayment of appropriate compensation to a woman who puts her life to a hold for almost two years without the unforeseen pre and post effects of child birth, coz sometimes pregnancy results in very serious complications for life, of a woman in also a way of exploitation, especially when she knows that the child is not hers, and even after an emotional connect it.

3.5.3 Exaggerating Pregnancy Compensation:

The woman who opts to become a surrogate and when she can do it only once in her life, she also may in disguise, demand for a compensation, for her bill for healthcare and hospital charges, which

may be much more than that prescribed by the law. This is possible when she has no second chance to earn from surrogacy, so that it can give her a stability for a certain time.

3.5.4 Resorting to adoption by deprived couples and individuals:

As a considerable section of the society is deprived under the provision of this Act of their reproductive rights, therefore the adoption industry may get a boost as a substitute of surrogacy, but still the desires on an individual to have a biologically related child of his or her own cannot be fulfilled as adoption is taking someone else's biological child to be your own.

The law has forbidden commercial and transnational surrogacy which, may be a step in preventing exploitation of women, children, intending parents as well as put end to numerous cross border litigations regarding surrogacy, how ever the exclusion of various sections of individuals as mentioned above from the scope of it, certainly has an inimical effect upon their fundamental rights of privacy, equality, and right to life which is the responsibility of the state to safeguard and remedy. These implications as analyzed above must be taken cognizance of by the legislature while drafting any law, which is a beneficial law for Public like the Surrogacy Regulation Act, 2021.

4. **Conclusion:**

The surrogacy law is a welfare legislation that aims to protect the rights of the people involved in it and regulate the procedures for surrogacy and Assisted Reproductive Technology. These laws have entailed in them several provisions that fails to incorporate the vested interest of different sections of the society like unmarried men and women, homosexuals, and transgenders, by unconditionally rejecting them as being ineligible for surrogacy without giving cogent reasons for such exclusion. The objective of the Act is to prevent exploitation of women and children, however the implications that the strict enforcement of this law will have on society may result in their exploitation indeed. The Approach of the Legislature is narrow in terms of discriminating between individuals who could and who could not avail surrogacy, thereby consequently encroaching upon their fundamental rights enshrined in the part III of the constitution of India, as it fails to strike a balance between who should be included and who should be excluded from the scope of The Act.

The solution to problems of exploitation of surrogate parties is not absolute ban but a strict check upon the entire process of surrogacy, by authorized agencies of the government. If the reflections of the Surrogacy Regulation Act, 2021 upon society are considered and addressed closely, better enforcement of the Law can be ensured and the objectives that it lays down could be more relatively achieved.