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Women's rights under Surrogacy Act and Constitution

Introduction

*"All love begins and ends with motherhood, by which a woman plays the God. Glorious it is as the gift of nature, being both sacrosanct and sacrificial, though; now again, science has forced us to alter our perspective of motherhood," says Robert Brown. The altered perspective is what forms the kernel of this conundrum.*¹

The desire to have a family crosses marital status and sexual orientation. However, in India, the opportunity to obtain parenthood through surrogacy is still limited by the Surrogacy Act of 2021². While the Act seeks to regulate a complex profession and prevent exploitation, its restrictions raise questions about women's reproductive rights.

Commercial surrogacy became allowed in India in 2002 when the Indian Council for Medical Research (ICMR)³ established standards. It was unregulated due to a lack of controlling legislation from the government. The most significant influence came from the case of *Baby Manji Yamada v. Union of India*⁴, in which the government was encouraged to establish legislation to regulate surrogacy. In its 228th report in 2009, the Law Commission proposed rules to govern surrogacy in order to protect the parties involved, namely the surrogate mother and the intending couple, by include crucial aspects such as transparency, privacy, financial support for the surrogate mother, and legitimacy for the surrogate child. Following several draft proposals, the Surrogacy (Regulation) Act of 2021 was passed, which had incompatible measures incapable of protecting the rights of surrogate mothers and intended parents. The Act of 2021 unilaterally prohibits commercial surrogacy and only allows altruistic surrogacy with close relatives. This prevents the surrogate mother from receiving financial compensation for

¹Sri H Siddharaju vs The Union of India

²The Surrogacy (Regulation) Act, 2021, No. 47, Acts of Parliament, 2021 (India).

³Indian Council of Medical Research, <https://main.icmr.nic.in/> (last visited, Apr. 16, 2024)

⁴ AIR 2009 SUPREME COURT 84

her job. The concept of demonising commercial surrogacy leads us to feel that commercial surrogacy is inherently exploitative, whereas altruistic surrogacy is not. The Act also includes cruel clauses such as requiring a surrogate mother to be married with the stipulation that she can only be a surrogate once in her lifetime. It also requires the intending couple who wishes to perform surrogacy to obtain a certificate of recommendation and a certificate of essentiality from the proper authority, as well as to have no biological, adoptive, or prior surrogate children. As a result, this paper contends that the provisions of the Surrogacy (Regulation) Act, 2021 arbitrarily violate the fundamental rights of the very persons it wants to empower. The transgressions include the right to life, personal liberty, choice, privacy, equality, and profession as guaranteed by Articles 21⁵, 14⁶, and 19⁷ of the Indian Constitution, respectively.

What is Surrogacy?

*“Surrogacy” means 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.*⁸

Eligibility for Surrogacy

The Act has allowed altruistic gestational surrogacy only for the infertile Indian married couples.

According to section 2(h)⁹ of the Act, only married couples can opt for surrogacy. Unmarried and same sex couples are excluded or debarred from doing so.

Furthermore, section 5¹⁰ of the Act, says that the surrogate mother must be a close relative of the couple who is opting for surrogacy and she cannot receive any monetary compensation except the medical expenses incurred and insurance coverage.

Case under Article 21

Legal analysts anticipate challenges to the Surrogacy Regulation Act of 2021 under Article 21 of the Indian Constitution, which protects the right to life and personal liberty. While no documented court cases have yet challenged the Act's provisions, researchers predict

⁵India Const. art. 21

⁶India Const. art. 14

⁷India Const. art. 19

⁸The Surrogacy (Regulation) Act, 2021, § 2(zd), No. 47, Acts of Parliament, 2021 (India).

⁹The Surrogacy (Regulation) Act, 2021, § 2(h), No. 47, Acts of Parliament, 2021 (India).

¹⁰The Surrogacy (Regulation) Act, 2021, § 5, No. 47, Acts of Parliament, 2021 (India).

challenges due to its restrictions on surrogacy. The Act's limits may conflict with interpretations of Article 21, particularly those concerning women's freedom over their bodies and reproductive decisions. Surrogacy proceedings under the Act may include fundamental rights like as privacy, dignity, and autonomy, raising concerns about the Act's conformity with constitutional norms.

Right to Privacy

The act requires the prospective couple to get a certificate from the relevant authority. The certificate is only issued if the following conditions are met.

1. Legally wed couple of Indian origin.
2. The age of man shall be between 26-55 years; and the age of woman shall be between 25-50 years on the day of certification.
3. No biological, adopted or previous surrogate child of their own for at least 5 years.

For at least 5 years, they have not had a biological, adoptive, or surrogate kid. The certificate of essentiality will only be issued to couples who are unable to conceive naturally after five years of unprotected coitus. It is necessary to declare the certificates of essentiality that need either one or both of the couple to be infertile in order to be qualified FOR SURROGACY. This provision violates the couple's right to privacy. This condition is so narrow that it makes it hard for persons like:

1. The woman, who suffers from medical conditions such as uterine fibroids, that generally allow a woman to conceive but prevent her from carrying a baby to the term.
2. The woman who can conceive but do not wish to carry a child,
3. A person who has lost a husband or a wife after marriage and do not want to remarry but wishes to have a child of their own through surrogacy.
4. A single parent who was divorced wanting to opt for surrogacy to found their family.

Obtaining a certificate of essentiality makes them ineligible to have children through surrogacy. This violates the intending couple's right to reproductive autonomy as guaranteed under Article 21. The right to reproductive autonomy is having legal protection and the ability to make your own decisions about birth control, pregnancy, and childbearing. It is an innate right conferred upon a person by virtue of being born as a human being.

The Supreme Court established in the case of *B.K. Parthasarathi v. Govt. of Andhra Pradesh*¹¹ that an individual's right to reproductive autonomy is a facet of his right to privacy, while agreeing with the decision of the US Supreme Court in *Skinner v. State of Oklahoma*¹², which characterised the right to reproduce as one of man's basic civil rights, a fundamental right under Article 21 of the Constitution.

In *R. Rajagopal v. State of Tamil Nadu*¹³, the Supreme Court ruled that the right to privacy is implied in Article 21's guarantee of life and liberty to all persons. It is a right to be alone. The Act of 2021 violates the intending couple's right to privacy and dignity under Article 21 by requiring them to disclose a certificate of essentiality. The Supreme Court ruled in the landmark case of *Navtej Singh Johar v Union of India*¹⁴ that a citizen has the right to protect his own privacy, that of his family, marriage, childbearing, procreation, motherhood, and education, among other things, and that sex, sexuality, and procreation are not only private choices but also questions of dignity.

The requirement that the pair be married for at least 5 years is a violation of the fundamental right to reproductive autonomy and the right to privacy. Given the shift in lifestyles and the development of later-age weddings, when people are well into their 30s or even 40s and decide to settle down, a five-year wait can alter the quality of their gametes and reduce their chances of reproduction through surrogacy. It further restricts the couple with no biological, adopted or prior surrogate children of their own and even the infertile couple who wish to have children early to unreasonably wait for a prolonged period of 5 years. It also bars the couple who already have a biological, adopted or surrogate child, from exercising their right to reproductive autonomy to have children through surrogacy. The act does not provide as to why it bars couples with biological, adopted or prior surrogate children from opting to choose surrogacy.

The Right to Equality

The Act of 2021 unfairly restricts its application to married heterosexual couples, excluding homosexual couples, single parents, live-in relationship couples, and foreigners based only on sex, marital status, and country. It haphazardly takes away the right of homosexual couples,

¹¹B.K. Parthasarathi v. Govt. of Andhra Pradesh 1999 SCC OnLine AP 514

¹²Skinner v. State of Oklahoma 1942 SCC OnLine USSC 125

¹³R. Rajagopal v. State of Tamil Nadu (1994) 6 SCC 632

¹⁴Navtej Singh Johar v Union of India (2018) 10 SCC 1

live-in relation couples, single parents, and foreigners to choose surrogacy as a mode to found a family, solely discriminating without any reasonable classification on the basis of a person's sex, marriage status, and nationality, and arbitrarily restricts the unreasonably discriminated class to exercise their right to reproductive autonomy, i.e. exercising their own choice in matters of childbirth, as held in *B.K. Parthasarathi v. Govt. of Andhra Pradesh*¹⁵,

It also prohibits couples with biological, adopted, or prior surrogate children from choosing surrogacy, and there is no rational nexus between such classification and the purpose of the act, which is to prevent surrogate mother exploitation in violation of Article 14. The Act requires men to be between the ages of 26 and 55 and women to be between the ages of 25 and 50 to be eligible for surrogacy. This prescription of different ages for men and women has no rational nexus with the Act's object, and this classification reinforces the age-old patriarchal value that men must be older than women.

By prohibiting single parents from using surrogacy to start a family solely on the basis of marital status, especially when single parents are allowed to adopt children, the act clearly demonstrates that there is an unreasonable classification, and the act fails to provide a rational nexus between the classification and the act's goal of protecting surrogates from exploitation. As a result, the Right to Equality guaranteed by Article 14 of the Constitution has been badly violated.

Furthermore, intrinsic rights such as the right to reproductive autonomy are available to all people simply by virtue of being human, and nationality cannot legitimately be used to deny basic civil rights. It is critical to note at this point that the right to parenthood has been recognized in international law through multiple Covenants and Declarations, including the International Covenant on Civil and Political Rights (1966) and the Universal Declaration of Human Rights (1948). The right to "found a family" is established as being available to all people, regardless of race, nationality, or religion. On the contrary, prohibiting foreign nationals from pursuing surrogacy in India while permitting Indians to do altruistic surrogacy implies that foreign nationals can exploit surrogates but Indians cannot. As a result, the act completely

¹⁵Supra note 11

fails to establish a reasonable nexus between the classification and the purposes intended by the act. Thus, it breaches Article 14 of the Constitution.

In addition to the arbitrary classifications, the Act of 2021 encourages existing prejudices through clauses such as prohibiting homosexuals and live-in couples from pursuing surrogacy, which heavily stigmatizes homosexuality and unmarried couples living together. Furthermore, allowing uncompensated surrogacy while restricting paid surrogacy presupposes that women's natural function is to bear children, reinforcing conventional societal attitudes that place little economic value on women's labour. These are the very concepts from the past that the Doctrine of Equality seeks to eliminate.

The Right to Freedom of Trade and Profession

Surrogacy is not inherently immoral. It can be concluded from the fact that the Act of 2021 did not outright prohibit the practice of surrogacy. Though it prohibited commercial surrogacy, in which the surrogate mother is compensated for her services beyond reimbursement of medical expenses, it permitted altruistic surrogacy, in which no charges, expenses, fees, remuneration, or monetary incentive of any kind, other than medical expenses and such other prescribed expenses incurred on the surrogate mother and the surrogate mother's insurance coverage, are given to the surrogate mother or her dependents or her representative. It is critical to emphasize that by prohibiting commercial surrogacy, the government has unjustly violated the freedom of trade and profession of lakhs of surrogate women.

Childbearing is usually regarded as dangerous, and enabling commercial surrogacy promotes the commodification of women's labour and the exploitation of surrogate mothers. On the contrary, the altruistic surrogacy model expects women to go through the physical and emotional anguish and labour of giving birth to a child only out of compassion, and it assigns no economic value to women's work by excluding women's labour, which is far removed from current reality. However, at this point, it is important to consider that surrogacy has evolved into a sort of reproductive labour with fair remuneration for providing this service.

It became a means of survival and a temporary career for some poor rural women because it pays the surrogate mother roughly five years' entire family income, which can substantially alter the direction of their lives. It can be examined that Women's right to Work, which was enshrined in Article 6 of the International Covenant on Economic, Social, and Cultural Rights

(ICESCR)¹⁶, which encapsulates the right to provide this reproductive service for a fee, and that this should not be viewed as problematic simply because pregnancy and childbirth involve some risks to a woman's health, as there are other jobs such as being a firefighter or a police officer, which are inherently dangerous but which do not elicit the same negative response as commercial surrogacy (and may not pay as much money).

The Act breaches surrogates' right to trade and profession as contained in Article 19 of the Indian Constitution, and by allowing altruistic surrogacy among close relatives, it fails to achieve its goal of reducing surrogate mother exploitation. It is important to mention that Altruistic Surrogacy can result in physical abuse and torture of surrogates due to the additional unwanted pressure from family members to become surrogates for other family members due to a lack of other options. It reinforces discriminatory beliefs that limit women's authority by denying them the right to earn money from this activity and obscuring women's labour.

The prohibition of the practice of commercial surrogacy and limiting the practice of altruistic surrogacy to only once in surrogates' life violates the "Right to Livelihood" and "Decisive Autonomy of the Surrogates".

Many underprivileged women in society choose surrogacy as a means of earning a living since it allows them to make a small sum of money that will last several years. Instead of establishing an appropriate framework to control surrogate mother exploitation, the Act prohibited commercial surrogacy, failing to realize that some women make a living from commercial surrogacy. Furthermore, the ban may encourage black marketing in surrogacy, resulting in increased exploitation of surrogate mothers and removing surrogate mothers' right to earn a living through surrogacy, as guaranteed by Article 21 of the constitution.

Furthermore, the act includes a provision that unethically restricts a surrogate mother from practicing surrogacy more than once in her lifetime. The Indian Constitution provides every citizen significant autonomy in reproductive decisions. This right of a citizen cannot be violated in any way. In the landmark case of *Suchita Srivastava v Chandigarh Administration*¹⁷, the court ruled that "reproductive rights include a woman's entitlement to carry a pregnancy to its

¹⁶the International Covenant on Economic, Social, and Cultural Rights <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights> (last visited Apr. 14, 2024)

¹⁷*Suchita Srivastava v Chandigarh Administration* (2009) 9 SCC 1

full term, to give birth, and to subsequently raise children; and that these rights form part of a woman's right to privacy, dignity, and bodily integrity."

The provisions of this Act limit an individual who is well, psychologically and physically stable, and who wishes to practice surrogacy as a profession to earn a living. It is important to note that a woman's right to privacy includes the right to make decisions about her own body and work. If a woman freely chooses to pursue surrogacy as a profession, the act prohibiting her from doing so violates her right to decisive autonomy to be a surrogate.

It also infringes her right to a livelihood, as guaranteed by Article 21 of the Constitution. As a result, every citizen's right to privacy in matters affecting a person's decision to bear a child as a surrogate mother through surrogacy cannot be violated by the state's arbitrary action to limit women's decisive autonomy, reproductive and professional choices in a democratic society.

Conclusion

Mr. Hari G Ramasubramanian, who was the Chief Consultant at Indian Surrogacy Law Centre, Chennai, notes that the concept of surrogacy is received in a very negative sense in the Act, "By permitting only altruistic surrogacy, the commercial dynamic involved in the process is removed. And this will only oppress the women for not doing what they can do".¹⁸

India has an 8% infertility rate, and there is still a significant demand for Indian surrogate mothers. This ban on commercial surrogacy will put an end to the hopes of couples who are not ready or unable to opt for altruistic surrogacy, as making their personal affairs known to those who know them will eventually lead to more black-marketing in surrogacy. It is true that surrogacy is a billion-dollar industry that needs to be properly regulated, by replacing commercial surrogacy with ethical surrogacy and enacting strict laws for both surrogates and intended couples, taking into account the needs of women who can conceive but do not want or cannot carry a child due to medical conditions, as well as homosexual, live-in couples, and single parents who want to have their own children. Exploitation is only possible when

¹⁸Blanket ban on commercial surrogacy eliminates aspect of privacy; unfair to couples who marry late, homosexuals-india news, Firstpost, Firstpost (2018), <https://www.firstpost.com/india/blanket-ban-on-commercial-surrogacy-eliminates-aspect-of-privacy-unfair-to-couples-who-marry-late-homosexuals-5799601.html> (last visited Apr 28, 2022).

commercial surrogacy is unregulated; when it is regulated, government can attempt to protect the rights of all parties.