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A CONSTITUTION'S PERSPECTIVE **OF THE SURROGACY** **(REGULATION) ACT 2021.**

AUTHORED BY - BHARGAV A R

ABSTRACT

India's unregulated surrogacy industry is enormous, enabling Western couples to get their baby delivered by a surrogate mother in India. India legalised commercial surrogacy to promote medical tourism generating 2-3 billion dollars annually. However, the Surrogacy (Regulation) Act 2021 passed recently abolishes the legality of commercial surrogacy. Owing to the ban on commercial surrogacy, the law only allows surrogacy for cases of altruism. The recent law has brought in regulation for the huge unregulated surrogacy industry, and steps have been taken to protect women from surrogate mothers from being exploited; however, a few gaps have been identified with the passing of the recent law. With the motive of preventing exploitation, the law cut off the means of livelihood for thousands of surrogates when their only source of income was by being a surrogate. The laws are heteronormative and prevent same-sex couples, single men, and unmarried couples from using Assisted Reproductive Technology (ART) services which go against international standards of reproductive rights. The paper aims to analyse the provisions of the Surrogacy (Regulation) Act, 2021, coherent with Article 14 of the Indian Constitution.

KEYWORDS: SURROGACY (REGULATION) ACT 2021, COMMERCIAL SURROGACY, ALTRUISM, HETERONORMATIVE, ASSISTED REPRODUCTIVE TECHNOLOGY

INTRODUCTION

Surrogacy is “the process where a woman agrees to carry a pregnancy that is genetically unrelated to her and her husband, intending to carry term and hand over the child to the genetic parents for whom she is acting as a surrogate”.¹ Infertile couples are tremendously benefitted by fulfilling the dream of having a child through the process of surrogacy. Apart from adoption, surrogacy shines a light on infertile couples to give birth to and raise children having their DNA.

Altruistic surrogacy and Commercial Surrogacy are the two kinds of surrogacy. These two kinds of surrogacy have their differences in the monetary and transactional aspects and no indifference concerning the medical procedures followed. Altruistic surrogacy is when the surrogate mother is only compensated for the medical expenses incurred by her during the pregnancy. No compensation is paid on the lines of service or favour to the surrogate mother. On the other hand, commercial surrogacy is where the surrogate mother is compensated for carrying the pregnancy along with the medical expenses incurred. Women involved in being mothers are paid huge sums of money to help them sustain their living.

SURROGACY LAWS - A WORLD VIEW

Commercial surrogacy was an enormous unregulated sector in India. Countries like the United States, Russia, Georgia, and Ukraine have commercialised surrogacy and are strictly regulated, unlike India, until recently. However, a few countries like France, Germany, Ireland, Italy, Spain, and Portugal have been on the backlash when it comes to commercial surrogacy. They have constituted that a commercial surrogacy arrangement overseas would be a criminal offence in their home country or state. Taking into view a global perspective, Surrogacy laws vary significantly from one country to another, and in some cases, even from one state or province to another within the same country.

¹ *Indian Council of Medical Research, National Guidelines for Accreditation, Supervision and Regulation of ART Clinic in India (2005).*

Surrogacy in the USA varies by state, as there are no federal surrogacy laws. States like Arizona have made surrogacy unenforceable, while states like Indiana declare surrogacy contracts void and unenforceable. North Dakota voids traditional surrogacy contracts but recognises gestational surrogacy agreements. In Washington, surrogate agreements are typically permissible, but paid agreements are not. Florida and Illinois project and allow surrogacy but with regulations.

Surrogacy in Russia was an unregulated activity that has continued to be commercial since 2011. During the Pandemic, a large number of babies were left stranded with their surrogate mothers due to the closing of international borders. In December 2022, the President gave his assent to a law banning foreign citizens and stateless people from availing of surrogacy services.

In Brazil, surrogate parenthood is legally unconstrained, and the surrogate mother is strongly protected under the law. Surrogacy is legal in Brazil for infertile couples, but specific requirements must be met, including the approval of both parties. Surrogacy is allowed only among relatives; the surrogate mother must be under 50 years old and have at least one child. Surrogacy in Brazil is strictly altruistic, with the surrogate mother unable to receive any financial compensation for carrying the baby. Donors and surrogates in Brazil must be identified, and their names must appear on the baby's birth certificate.

Thailand's commercial surrogacy industry flourished until being banned due to instances such as the "Baby Gammy" case and the Mitsutoki Shigeta controversy. Since 2014, the military administration has forcibly shut down the commercial process. Thailand made commercial surrogacy illegal in 2015. Only married heterosexual Thai couples are able to complete surrogacy in Thailand. Any surrogate must be a sibling of one member of the couple. She must be married, have her husband's consent for the surrogacy process, and have her own child. Any selling of ovum, sperm, or embryos is prohibited from combating the commercial use of assisted reproductive technology.

South Africa requires the parties to show they are suitable persons to be considered parents.

A surrogate is not entitled to any compensation other than medical expenditures or income losses

as a result of the inability to work. The law prohibits running surrogacy agencies as well as sourcing and charging commissioning parents for finding a surrogate.²

Some countries have comprehensive legal frameworks that recognise surrogacy as a legitimate form of assisted reproduction, while others have banned or restricted the practice. In some countries, surrogacy is only allowed for altruistic purposes, where the surrogate mother is not paid for her services, while in others, commercial surrogacy is legal, where the surrogate mother receives compensation for carrying the child. The laws surrounding surrogacy can also vary in terms of the rights and responsibilities of the surrogate mother and the intended parents, including issues related to parentage, custody, and citizenship. Given the complex and often rapidly evolving nature of international surrogacy laws, it is essential for anyone considering surrogacy to seek legal advice and guidance from experts in their specific location to understand their rights and obligations and to ensure that they are operating within the legal boundaries of their jurisdiction.

SURROGACY LAWS IN INDIA

Surrogacy in India is a vast sector. Citizens from all over the world fly to India to have their babies through surrogacy. The cost-effectiveness of surrogacy in India is much lesser when compared to other countries. Commercial Surrogacy in India is a big business. Surrogacy is just one of the many techniques that are available to infertile couples to achieve their dream of having a child. Commercial surrogacy differs from altruistic surrogacy in terms of the amount of money paid to the surrogate mother. While in altruistic surrogacy, the payment is restricted only to the medical expenses incurred by the surrogate mother, in commercial surrogacy, the woman is paid more than mere expenses. It is this very amount of 'something more than the medical expenses that act as bait to lure women into acting as surrogates for potential commissioning couples.³ To

² Surrogacy in Thailand: What You Need to Know | Surrogate.com.

<https://surrogate.com/intended-parents/international-surrogacy/surrogacy-in-thailand/>

³ Munjal-Shankar, Diksha. "COMMERCIAL SURROGACY IN INDIA: VULNERABILITY

CONTEXTUALISED." *Journal of the Indian Law Institute* 58, no. 3 (2016): 350–66.

safeguard the rights of surrogate mothers and other women considering surrogacy, a legal framework is required. Without clear definitions, utilizing unnecessary and emotional terms like "business" surrogacy, "moral" surrogacy, and so on doesn't, in actuality, enhance the basic centre issue of seen double-dealing of women. It is essential to comprehend that the money paid for surrogacy is a compensation mechanism rather than a means of earning money. If the surrogate views compensation as a form of profit, the situation is entirely different. This is an issue of understanding, and the solution for inspiring the situation with women is by instructing them about their regenerative freedoms, consequently empowering them to pursue informed choices. Blanket acts only promote corrupt and unethical practices.⁴ However, in light of efforts to end the hiring of wombs in India, the Parliament has passed the Assisted Reproductive Technology (Regulation) Act and the Surrogacy (Regulation) Act.

AN OVERVIEW OF THE SURROGACY (REGULATION) ACT, 2021

The Surrogacy (Regulation) Act 2021 replaces the Surrogacy Regulation Act 2019 and seeks to regulate and prohibit commercial surrogacy in India. The Act permits altruistic surrogacy, where the surrogate mother is not paid beyond medical expenses and insurance coverage, but only for Indian couples who are legally married and have been proven medically unfit to carry a child. The Act also allows single women and widows to opt for surrogacy, subject to certain conditions, including being a close relative of the surrogate mother. It permits only Indian citizens to avail of surrogacy services in the country, and foreign nationals, NRIs or PIOs (Persons of Indian Origin) are not eligible. The Act lays down the eligibility criteria for surrogate mothers, including that they must be a close relative of the intending couple, between the ages of 25 and 35, and have a child of their own. The surrogate mother cannot provide her own gametes for surrogacy, and a surrogate can only undergo surrogacy once in her lifetime. The Act establishes the National Surrogacy Board, State Surrogacy Boards, and the National Registry of Surrogacy, which will

<http://www.jstor.org/stable/45163396>.

⁴ Barua, Mrinal. "Surrogacy Debate." *Economic and Political Weekly*, vol. 51, no. 37, 2016, pp. 4–5.

JSTOR, <http://www.jstor.org/stable/44003692>. Accessed 24 Apr. 2023.

oversee the regulation of surrogacy in the country. The Board will ensure the welfare and rights of the surrogate mother and the child born through surrogacy and monitor the implementation of the Act.

SURROGACY (REGULATION) ACT, 2021, FROM THE PERSPECTIVE OF THE CONSTITUTION OF INDIA

The Surrogacy (Regulation) Act 2021 prohibits commercial surrogacy in India. This means that no person, clinic, or hospital can carry out commercial surrogacy or receive payment in exchange for arranging or facilitating surrogacy services. The only exception to this prohibition is for altruistic surrogacy, where a close relative of the intended parents can act as a surrogate mother without receiving any monetary compensation. The primary reason for the prohibition of commercial surrogacy is to prevent the exploitation of women, especially those from economically disadvantaged backgrounds. In the past, there have been several instances where women were forced to become surrogate mothers against their will or were not adequately compensated for their services. By prohibiting commercial surrogacy, the Surrogacy (Regulation) Act of 2021, seeks to protect the rights and dignity of women and prevent any kind of exploitation or abuse. However, the prohibition of commercial surrogacy has also been criticized by some as being overly restrictive and potentially discriminatory towards those who cannot find a close relative willing to act as a surrogate. The Act only allows for altruistic surrogacy, which may not be feasible for all intended parents. Additionally, the Act does not provide any alternative options for those who require surrogacy services but do not have access to a close relative who can act as a surrogate.

Analysing this regulative legislation in the eyes of the Constitution of India, a lot of inferences can be drawn. Section 38 of the Surrogacy (Regulation) Act 2021 entails the prohibition of commercial surrogacy, exploitation of surrogate mothers and children through surrogacy.

“Section 38 of the Surrogacy (Regulation) Act 2021 lists the various activities that are prohibited with respect to commercial surrogacy in India. According to this section, no person or

organization can undertake commercial surrogacy or provide any component procedures or services related to it. This includes running a racket or an organized group to select surrogate mothers or using individual brokers or intermediaries to arrange for surrogate mothers and surrogacy procedures.

The Act also prohibits the issuance, publication, distribution, or communication of any advertisement in any manner regarding commercial surrogacy. Furthermore, it is illegal to abandon, disown, or exploit in any form the child or children born through surrogacy or to exploit the surrogate mother or the child born through surrogacy in any way. The sale of human embryos or gametes for the purpose of surrogacy, as well as importing or helping to import human embryos or gametes for surrogacy or surrogacy procedures, is also prohibited. Conducting sex selection in any form for surrogacy is also a punishable offence. Any person or organization found to be in contravention of the provisions listed in Section 38 of the Act shall be punishable with imprisonment for a term that can extend up to ten years and a fine that can go up to ten lakh rupees. The Act also defines the term "advertisement" to include any notice, circular, label, wrapper, or any other document, including advertisements through the Internet or any other media, in electronic or print form. It also includes any visible representation made by means of any hoarding, wall painting, signal light, sound, smoke or gas."

The fundamental right to equality is guaranteed under Article 14 of the Constitution of India. Article 14 states, "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India." The Act restricts and excludes the LGBTQ+ community from availing of surrogacy services. Gay Couples have no provision to raise a child of their genes if not for the process of surrogacy. Only married Indian couples are eligible for limited and conditional surrogacy, and other individuals are further disqualified on the basis of their nationality, sexual orientation, marital status, and/or age. This will not stand the correspondence test or the trial of sensible grouping under the Article leading to a serious violation of Article 14 of the Indian Constitution.

Showcasing the existing gender bias which prevails in our society, the Act exclusively 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 parenthood. Although in the case of *Navtej Singh Johar v Union of India (2018)*, the criminalization of homosexuality under Section 377 of the Indian Penal Code was struck down by the Supreme Court, same-sex marriages have not yet been legalized in India, restricting that portion of same-sex couples from qualifying under section 2(h) of the Act. The section further stresses that a couple must constitute a man and a woman, limiting the right to avail surrogacy services to a heterosexual married couple.⁵ The Act therefore puts a constraint on the reproductive rights of Live-in couples, members of the LGBTQ community, and single, divorced, or widowed parents prohibiting them from participating in surrogacy under the Act, which makes their exercise of reproductive autonomy unlawful.

The Surrogacy (Regulation) Act, 2021 poses a threat to the right to privacy upheld in the Puttuswamy judgment by forcing a married couple to publicly declare their infertility raises privacy concerns, especially given the stigma often attached to infertility. The Act raises similar concerns for surrogates as well, since they too would have to disclose their identity. This would put the lives of individuals in limelight considering their need for privacy in procedures like surrogacy. This would hamper the core idea of Article 19 that guarantees freedom of speech and expression to an individual.

⁵ Tekriwal, D., Sahu, S., Leaflet, T., Bakshi, G. K., Kohli, T., Biswas, P., & Nair, R. (2022, May 14). *Lacunae in the Surrogacy (Regulation) Act, 2021 – The Leaflet*. The Leaflet – an Independent Platform for Cutting-edge, Progressive, Legal, and Political Opinion.

<https://theleaflet.in/lacunae-in-the-surrogacy-regulation-act-2021/>

CONCLUSION

The members of the LGBTQ community, willing single parents, and prospective childless couples are all affected by the Act. In reality, altruistic surrogacy is a myth because it is difficult for intended couples to locate a willing surrogate mother who intends to give birth to a child at no cost. Under-the-table transactions will be possible as a result of this. The Demonstration made it unlawful for unfamiliar couples as well as planned Indian couples who, as of now, have a youngster and limits the opportunities for the LGBTQ people group and single guardians. The Act imposes stringent conditions and requirements on eligibility certificates, the Act also severely restricts the autonomy of married couples and potential surrogates. In addition, the Act blatantly ignores the fact that the women who choose to become surrogate mothers are from economically disadvantaged backgrounds and for them, surrogacy is a source of livelihood. Heavy onus laying prerequisites such as childlessness, five years of non-conception for intending parents, and the surrogate being a close relative are prone to criticism. They won't be able to make a living as a result of a complete ban on commercial surrogacy; instead, they will be expected to perform reproductive labour without being compensated.

