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CRITICAL ANALYSIS ON **SURROGACY REGULATION ACT, 2021**

AUTHORED BY - SACHIN K S

Abstract

After many years of struggle, Parliament finally approved the Surrogacy (Regulation) Act, 2021, bringing the surrogacy practice under control. On January 25, the Union Government published a notice in the Official Gazette announcing the Act's implementation. In order to help women who are unable to conceive despite using multiple reproductive procedures to fulfill their desire for motherhood while also preserving the rights and dignity of the surrogate mother, bills to regulate surrogacy have been approved in India. The Act, however, has a number of gaps that we will describe below, leaving many significant issues unanswered. In order to act in the greatest interests of the people, I want to emphasize how crucial it is to alter the Work to make it more inclusive and transparent. The Act has mostly been criticized for its restrictions on who can use surrogacy services, the exclusion of non-binary gender, the ban on commercial surrogacy, the requirement to include traditional surrogacy, and the challenges that medical professionals may have as a result of the law's ambiguity. The progressive law, which aims to open up surrogacy to those who are unable to have children, has failed to be progressive because it is exclusive and unclear in its phrasing, opening it up to much discussion and incorrect interpretation. This law still fixed many gaps like same-sex marriage and individual parent to go through the process of surrogacy but it has many issues in the rights of the surrogate mother and the moral aspects of them. This paper analyses the amended act of The Surrogacy Regulation Act, 2021 and its major issues.

Keywords: Surrogacy regulation act 2021, motherhood, ethical rights, same-sex marriage, rights of surrogate mother, commercial surrogacy

Introduction

The word “ Surrogate” means substitute which is originated from a latin term “surrogates” that’s when a person is appointed to act in place of an another person.“It is the practice by which a woman (called a surrogate mother) becomes pregnant and gives birth to a baby to give it to someone who cannot have children.”¹.Nature has given women the capacity to procreate, and every woman values the mothering experience. But as infertility rates rise and technology advances, surrogacy is becoming more and more popular. Adoption is the usual method, while assisted reproductive technology (ART), which involves achieving pregnancy partially or entirely artificially, is the unconventional method.

Surrogacy was first recognized legally about 30 years ago. However, looking back, it's clear that most societies accept the idea of surrogacy. The first successful artificial insemination surrogacy took place unethically in 1881. It has faced a tremendous lot of opposition and debate since then.Before 1976, when an advocate created the first conventional surrogacy agreement, there was no proper legal structure. The surrogate mother was not paid in any way. The first IVF (In Vitro Fertilization) child was born in 1978. There was no legal enforceability in any nation.

Ethical aspects in Surrogacy

Despite the mere fact that surrogacy has been advantageous for everyone involved , there are certain sensitive factors that must be handled carefully with the legislation to protect and safeguard the rights of intended parents and surrogate mothers. Few also believe that using commercial surrogate for buying and selling a woman’s womb is immoral.Affluent and powerful infertile couples would acquire and take advantage of the poor, needy Indian women who would become the source for bearing the child.

Surrogate parenting is unnatural and immoral because it forcefully “breaks” the bond which is emotional between the child and the biological mother.² We usually neglect the biological child and fail to recognise the potential trauma associated with the mother giving her child up for adoption.³ This has ethical implications about the child's right to know the mother (surrogate); how the surrogate

¹ *Merriam-Webster Dictionary.*

² Ragini Kulkarni, *Ethical Dilemmas in Surrogacy*, Hektoen International (2017).

³ Bhimji, S., *Womb for Rent: Ethical Aspects of Surrogate Motherhood*, CMAJ, Vol. 137 (1987).

mother's emotional traits affect the behaviour of the surrogate child; social exclusion; and a host of other societal and religious ramifications. It is ironic that people use surrogates yet there are over 12 million orphans in India. In India, adopting a kid is a challenging and drawn-out process for childless couples who desire to provide these children with a home.⁴

Prohibition of commercial surrogacy

In India, commercial surrogacy is legalized in 2002; nevertheless, the absence of a comprehensive set of regulations regulating the procedures of commercialization resulted in the abuse of the surrogates, where they were made to live in unhygienic conditions among other issues. In 2009, the Law Commission of India recognized the exploitation which happens in the form of unlicensed surrogacy practices and also recognized the need for creating regulations for safeguarding people's rights.

The Act of 2021 prohibits commercial surrogacy and solely recognizes altruistic surrogacy. Altruistic surrogacy is defined as no remuneration offered to the surrogate other than expenses recommended or spent owing to insurance coverage or medical expenses. Meanwhile, commercial surrogacy happens when, in addition to the surrogate's medical bills and other mandated expenses and insurance coverage, her services are commercialized and she receives "payment, reward, benefit, fees, recompense, or monetary incentive in cash or kind." Given the potential for surrogate exploitation, it is imperative to regulate the surrogacy industry. Regulating commercial surrogacy, however, is not the same as outright banning it. Commercial surrogacy is forbidden after the Act takes effect, according to Section 3(ii). Under Section 38(ii) of the Act, commercial surrogacy is a crime punishable by up to ten years in prison and a fine of up to ten lakh rupees. If found engaging in the same practise again, the punishment may be raised to ten years in prison and a fine of up to ten lakh rupees. The individual seeking commercial surrogacy faces up to five years in prison and a fine of up to five lakh rupees.

In the case of Baby Manji Yamada, The Supreme court maintains the legality of the agreement for surrogacy and gave the intended father - which means also the biological father - custody of the child notwithstanding arguments between the intended parents. However, since there is no limitation, there have been instances where it has raised serious concerns about the child's citizenship, making the

⁴ Pikee Saxena, Archana Mishra and Sonia Malik, Surrogacy: Ethical and Legal Issues, Indian Journal of Community Medicine (2012), Issue 37(4), pp. 211-213.

need for surrogacy regulations even more critical.

Surrogacy laws in other countries

In certain nations, the national government does not regulate surrogacy; rather, individual states and provinces do. A nation or province may not be the best choice for an international surrogacy just because there is no federal laws outlawing it. Without rules, unethical practises might easily become possible.

If you're considering international surrogacy, there is truly just one nation with clear regulations that shield intended parents and surrogates from potential legal issues: the United States. Although each state has its own surrogacy legislation, the practise is well-regulated and the procedure is carried out lawfully and ethically in those places where it is allowed. As a result, the United States is typically the best choice for intended parents who are from other countries. Other nations might allow surrogacy, but only under certain restrictions that might make the procedure more challenging or unethical. Intending parents must already have a close friend or relative in that country who is willing to take part in an altruistic surrogacy because many countries do not authorise paid surrogacy. It may be absolutely illegal for non-citizens to use a surrogate in some other countries, making it challenging for an international intended parent to do so.

If prospective parents can choose between a nation that allows surrogacy and one that forbids it, they should choose the former. Making the decision to use a surrogate in a nation with surrogacy restrictions may make it more difficult for the intended parents to bring their child home.

On the other side, some surrogacy laws may actually make the procedure safer than in nations without such laws, so it's up to you and your attorney to decide which course of action is best for your particular circumstance. Finally, some governments outright prohibit all forms of surrogacy or make surrogacy impossible to execute by rendering contracts unenforceable.⁵ While surrogacy is expected to continue in private arrangements, it is strongly advised that you do not pursue surrogacy in one of these nations due to the potential legal ramifications. These are the countries that do restrict surrogacy :Cambodia,Denmark,France,Germany,Ireland,Italy,Spain,Portugal,Bulgaria,Nepal. International surrogacy laws are undoubtedly complex and inconsistent. The United States is the friendliest and

⁵ Black's Law Dictionary, Bryan A. Garner, 8th Edn. 2004, p. 4529.

safest nation in which to carry out a surrogacy. Because state laws permit commercial surrogacy and fully protect both parties to the transaction, many foreign couples choose to have children through surrogacy in the United States. Whatever nation you select to complete your surrogacy in, be sure you are completely aware of the laws there regarding surrogacy and how to protect your rights as an intended parent or prospective surrogate.

Analysis of Surrogacy regulation act

On January 25, 2022, the Surrogacy (Regulation) Act 2021 became law. While allowing altruistic surrogacy, the Act aims to limit commercial surrogacy. In commercial surrogacy, the surrogate mother receives remuneration for her services in addition to reimbursement for her medical costs. The arrangement of compensation may provide a way for intended parents and surrogate mothers to be taken advantage of in a culture where there is inequality. In altruistic surrogacy, the surrogate mother does not be paid, other than for medical expenses and insurance throughout the pregnancy.

In India, commercial surrogacy was legalised in 2002. Due to the absence of legal limits and their enforcement, surrogate mothers experienced exploitation, unhealthy living conditions, and unfair treatment. The law is therefore a step in the right direction, but it has created its own set of issues by outlawing commercial surrogacy.

By shifting from a rights-based to a needs-based approach, the ban on commercial surrogacy restricts women's freedom to make their own reproductive decisions and their right to become mothers. One could argue that the state should protect the child's birthright and forbid the exploitation of impoverished mothers through surrogacy. The current Act, however, falls short of finding a middle ground between these two objectives.

The Act directly affects women's fundamental freedom to procreate under Article 21 of the Constitution while upholding long-standing patriarchal norms that place little importance on women's labour. The altruistic surrogacy concept assumes that women will only undergo the physical, mental, and emotional labour of childbirth out of compassion, which is far from the truth. Such irrational assumptions encourage the patriarchal mindset of society and restrict the autonomy of persons with reproductive organs. Additionally illegal is commercial surrogacy, which deprives surrogates of a reliable source of income and lowers the pool of potential donors. Overall, this action indirectly rejects parent-choice couples' desire to have children.

Altruistic surrogacy has a lot of negative aspects as well. The relationship is put in jeopardy both during the surrogacy procedure and after the baby is born, which can lead to emotional problems not just for the intended parents but also for the surrogate child. Altruistic surrogacy significantly restricts the intended couple's possibilities for choosing a surrogate mother because so few family members are eager to participate.⁶

There is no third-party involvement in altruistic surrogacy. A third-party involvement ensures that the intended pair will bear and support the surrogacy process's medical and other related expenses. In general, a third party helps the intended parents and the surrogate mother manoeuvre the complex procedure, which is not always possible with altruistic surrogacy.

The Bill then specifies the eligibility requirements for couples thinking about surrogacy. The eligible couple should receive "certificates of eligibility" and "certificates of essentiality" from the appropriate authorities. A person who wants to become a parent through surrogacy must additionally fulfil the following extra criteria:

- Heterosexual pair (opposite gender) with a guy aged 26 to 55 and a woman aged 25 to 50.
- The couple should be married for a minimum of five years.
- Should not have any additional children, biological, adoptive, or surrogate. The Act, however, exempts couples who have children with (a) a physical/mental handicap or (b) a life-threatening ailment from this requirement.

The Act also stipulates that a couple must wait five years (counting from the date of marriage) before receiving a certificate of infertility. The inability of the partners to begin a family sooner is directly hampered by this disease.

The Act's age restrictions for men and women further support patriarchal beliefs that men should be older than women. It is also silent regarding the process to use if just one parent qualifies for the provision and the other does not.⁷

The Act also stipulates that the surrogate must be a near cousin of the husband who is between the

⁶ Dr Devdutt Pattanaik, 'Infertility, Artificial Insemination and Surrogate Mother in Hindu Mythology' <www.blog.drmlalpani.com/2014/11/infertility-artificial-insemination.html?m=1> accessed 27 March 2022.

⁷ Ministry of Law and Justice, Government of India. The Surrogacy (Regulation) Act. (2021). Accessed: April 19, 2023: <https://dhr.gov.in/document/acts-circulars/surrogacy-regulation-act-2021>.

ages of 25 and 35. As a result of family pressure to employ surrogates for other relatives, this requirement may result in physical abuse and domestic violence.

The law discriminates against children with disabilities. The Act defines childlessness as the absence of children who lack basic necessities. It also suggests that, if they have a child with a serious illness, a couple look into surrogacy. Children with disabilities are treated inhumanely by this section, which directly violates their rights.

“This law is a kind of discrimination against young people with impairments. The Act defines having special needs children as being childless. It also advises contemplating surrogacy if the couple's child suffers from a serious illness. This provision directly infringes on the rights of the disabled children, depriving them of treatment in accordance with dignity.”⁸ The Act is an insult to both the LGBTQ+ community and single fathers who want to start a family. 15% of the population belongs to the LGBTQ+ community, and 20% of those looking for surrogacy are single parents. This statute is a response to past legislation supporting the LGBTQ+ community, such as the Right to Privacy and Section 377's prohibition. Furthermore, the Act breaches the right to parenthood for members of the LGBTQ+ community and single fathers, as established by the Supreme Court of India in Article 21, by restricting the Act to cis-gender heterosexual couples and single moms (widows and divorced). In conclusion, despite what appear to be good intentions and thoughtful plans to protect surrogate mothers, they reinforce society's typical patriarchal values by assuming heterosexual marriage as the basis for parenthood, which violates the fundamental rights of the LGBTQ+ community, single men and women, and other vulnerable groups.

Lacunae in the Surrogacy (Regulation) Act, 2021

The Surrogacy (Regulation) Act, 2021 was eventually enacted by Parliament last year after years of conflict, placing the surrogacy practise under regulation. The Union Government announced the Act's implementation via an official gazette notice that was published on January 25. Bills to regulate surrogacy have been approved in India in order to assist women who are unable to conceive despite utilising numerous reproductive procedures to fulfil their desire for parenthood while also protecting the rights and dignity of the surrogate mother. However, aside from a few gaps that we will explore

⁸ C. Surrogacy, LTD. (August 2016). Parents, available programs for intended parents. Gestational Surrogacy. [Online]. Available: <http://www.circlesurrogacy.com/parents/programs>.

below, the Act leaves some important matters unsolved. By making changes when necessary to act in the best interests of the public, I try to emphasise how important it is for the Act to become more inclusive and transparent. The Act has mostly been criticised for its restrictions on who can use surrogacy services, its exclusion of non-binary gender, its ban on commercial surrogacy, its omission of traditional surrogacy, and the challenges that medical professionals may encounter as a result of the law's ambiguity. Even though India's Surrogacy (Regulation) Act of 2021 is the first law to govern surrogacy practises, societal hostility to the procedure still exists, especially when the intended mother lacks a viable egg and needs an egg donor for the surrogacy.⁹ The Act's flaws have caused a variety of concerns, not only in the minds of couples exploring surrogacy as a means of embracing motherhood but also in the minds of medical professionals. The progressive law, which aims to open up surrogacy to those who are unable to have children, has failed to be progressive because it is exclusive and unclear in its phrasing, opening it up to much discussion and incorrect interpretation.

Conclusion

In India, surrogacy is legal. However, making it commercial is against the law. Surrogacy is a humanitarian act that is legal. It is illegal under Indian law. Commercial surrogacy should be avoided by no couple. Surrogacy falls within the category of reproductive choices for women, and it is recognised as a fundamental right under Article 21 of the Indian Constitution.

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