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## The Surrogacy (Regulation) Act, 2021: Analysis Through The Lens Of Article 14 And Article 21 Of The Constitution Of India

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**Abstract:** There was an urgent need for a substantive legislation in the field of surrogacy<sup>1</sup> in India, as India had become a surrogacy hub for the world few years back. With the introduction of the Surrogacy (Regulation) Act, 2021<sup>2</sup> many issues are resolved, while certain are newly raised. The said Act is in place to curb unethical practices and regulate the booming surrogacy practice in India, but it fails to address the main problems related with surrogacy practices. It has kept unmarried individuals, homosexual couples, members of the Lesbian, Gay, Bisexual, Transgender (LGBT) communities, persons in live-in relationships away from accessing the service of surrogacy. It has violated their right to equality under article 14 and right to parenthood, right to reproductive autonomy as a facet of right to privacy under article 21 of the Constitution of India.

**Index Terms - Infertility, Parenthood, Surrogacy, Equality, Privacy, Reproductive Autonomy, Right to Life.**

### I. INTRODUCTION

*"The child is the beauty of God present in the world, that greatest gift to a family."* - Mother Teresa  
Having a child is the basic human urge to complete the family. But everybody is not able to give birth to the child naturally. Medical technology there comes to help. Surrogacy is 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.<sup>3</sup> It involves many stakeholders, the intended parents, surrogate mother, surrogate child, gynaecologist, embryologist, clinics, etc. Infertility has a social stigma attached to it in Indian society. Hence the surrogacy has been a boon for couples who face infertility. India had become a surrogacy hub for the whole world and the reproductive tourism was at the top position in India, due to cheapest costs involved for the surrogacy as compared to other countries. There was no substantive legislation to regulate the practice of surrogacy in India. Surrogacy had become a multibillion-dollar business in India, prompting a plethora of issues and arguments. It was legal in India, despite the fact that it exploits the surrogate and the child. Various attempts to regulate the surrogacy industry had been made, but none were completely successful. The Medical Council of India's National Guidelines, the Law Commission of India's Report, and Government Notifications regulating both national and international surrogacy are among the several endeavours made in this direction. The latest regulation is applicable in the form of Surrogacy (Regulation) Act, 2021.<sup>4</sup>

<sup>1</sup> The Surrogacy (Regulation) Act, 2021, Chapter I, s.2.(1)(zd)

<sup>2</sup> The Surrogacy (Regulation) Act, 2021(Act 47 of 2021)

<sup>3</sup> *Id.* at 2.

<sup>4</sup> Paramjit S. Jaswal & Jasdeep Kaur, "SURROGATE MOTHERHOOD IN INDIA: An Analysis of Surrogacy (Regulation) Act, 2021" 4 *Shimla Law Review* 258 (2021)

## II. BACKGROUND

In 2005, the Indian Council of Medical Research (ICMR) issued guidelines to regulate surrogacy arrangements.<sup>5</sup> The guidelines stated that the surrogate mother would be entitled to monetary compensation, the value of which would be decided by the couple and the surrogate mother. The guidelines also specified that the surrogate mother cannot donate her own egg for the surrogacy and that she must relinquish all parental rights related to the surrogate child. In 2008, the Supreme Court of India in the *Baby Manji Yamada vs. Union of India* case highlighted the lack of regulation for surrogacy in India.<sup>6</sup> In 2009, the Law Commission of India observed that surrogacy arrangements in India were being used by foreign nationals, and the lack of a comprehensive legal framework addressing surrogacy could lead to exploitation of poor women acting as surrogate mothers.<sup>7</sup> Further, the Law Commission recommended prohibiting commercial surrogacy, allowing altruistic surrogacy and enacting a law to regulate matters related to surrogacy. In 2013, surrogacy by foreign homosexual couples and single parents was banned. In 2015, a government notification prohibited surrogacy for foreign nationals<sup>8</sup> and permitted entry of embryos only for research purposes. Shortly thereafter in 2016, a Surrogacy (Regulation) Bill was introduced and passed by Lok Sabha, the lower house of the Indian parliament, proposing to permit only heterosexual Indian couples married for at least five years with infertility problems to access altruistic or unpaid surrogacy and thereby further banning commercial surrogacy. The 2016 bill lapsed owing to the adjournment of the parliament session. The bill was reintroduced as Surrogacy Regulation (2019) Bill, it is passed by the Parliament of India and got the assent of the President of India on 25<sup>th</sup> December, 2021 resulting into Surrogacy (Regulation) Act 2021 which came into force on 25<sup>th</sup> January, 2022 to constitute National Assisted Reproductive Technology and Surrogacy Board, State Assisted Reproductive Technology and Surrogacy Boards and appointment of appropriate authorities for regulation of the practice and process of surrogacy and for matters connected therewith or incidental thereto. The Act is in place to curb unethical practices and regulate the booming surrogacy practice in India. But it fails to address the main problems with current practices in the surrogacy industry in India.

## III. REGULATION OF SURROGACY AND SURROGACY PROCEDURES

The Surrogacy (Regulation) Act, 2021 comprises total eight chapters. Chapter I named 'Preliminary' gives definitions of different terms. Chapter II deals with 'Regulation of Surrogacy Clinics'. Chapter III is about 'Regulation of Surrogacy and Surrogacy Procedures'. Chapter IV talks about 'Registration of Surrogacy Clinics'. Chapter V deals with 'National Assisted Reproductive Technology and Surrogacy Board and Assisted Reproductive Technology and Surrogacy Boards'. Chapter VI is about 'Appropriate Authority'. Chapter VII deals with 'Offences and Penalties'. Chapter VIII is 'Miscellaneous'.

The provisions of the Surrogacy (Regulation) Act, 2021 particularly in Chapter III regarding 'Regulation of Surrogacy and Surrogacy Procedures' allows only Indian married couples and widow or divorcee woman to opt for surrogacy in the country. It has kept unmarried individuals, homosexual couples, members of the Lesbian, Gay, Bisexual, Transgender (LGBT) communities, persons in live-in relationships away from accessing the service of surrogacy.

## IV. VIOLATION OF RIGHT TO EQUALITY AND RIGHT TO LIFE

The provisions of the Surrogacy (Regulation) Act, 2021 discriminates unmarried individuals, homosexual couples, members of the Lesbian, Gay, Bisexual, Transgender (LGBT) communities, persons in live-in relationships and thus violate their right to equality<sup>9</sup> and reproductive right as a facet of right to privacy under right to life<sup>10</sup>. The ideal family in society consists of a couple, heterosexual, of course, with a possibility to bear a child and upbringing this child according to society's norms. The basic idea of having

<sup>5</sup>National Guidelines for Accreditation, Supervision & Regulation of ART Clinics in India, Indian Council of Medical Research, 2005, [http://icmr.nic.in/art/art\\_clinics.htm](http://icmr.nic.in/art/art_clinics.htm).

<sup>6</sup>AIR (2008) 13 SCC 518.

<sup>7</sup>Law Commission of India, "228th Report on Need for Legislation to Regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of Parties to a Surrogacy", (2009).

<sup>8</sup> Instructions regarding commissioning of surrogacy, Ministry of Health and Family Welfare, November 4, 2015, <http://www.icmr.nic.in/icmrnews/art/DHR%20notification%20on%20Surrogacy.pdf>.

<sup>9</sup> The Constitution of India, art.14

<sup>10</sup> The Constitution of India, art. 21

a child and the desire for parenthood is related to the biological process of giving birth to children. The parents' rights and obligations are based on the genetic contribution where the wife has to be the bearer of the gametes of the two parents. This is the fundamental nature of parenthood based on the biology of reproduction. Nevertheless, if we see beyond of the natural ways of parenthood, a person's desire to become a parent can have other possible ways like Surrogacy and adoption. These ways have given ample opportunities to people to become a parent other than from the natural and accepted practices. They can adopt the child or choose a surrogate mother to bear their child.<sup>11</sup> The Act excludes single men, women and LGBTQ couples without any explanation. So far, the surrogacy Act has not received a positive response from the people and is already taking backlash for putting women's autonomy on the back foot as it fails to protect reproductive rights and the right to parenthood. In addition, it has been unable to cater to the demands of the transgender community and LGBTQ couples to have a family. Navtej Singh Johar's landmark decision authorised and validated same-sex relationships. The prohibition of particular communities based on their sexual orientation under Adoption and Surrogacy laws has no reasonable classification. We can always argue that the right to equality is not absolute, and not all laws apply to everyone equally. Therefore, the test of reasonable classification has been introduced. Even the NALSA judgment extensively dealt with the principle of non-discrimination and equality to be applied to everyone irrespective of their gender identity and sexual orientation.<sup>12</sup> In 2010, the South Africa Children's Act 38 of 2005 made Surrogacy for same-sex couple legal. The gay couple in South Africa can opt for Surrogacy with the condition that at least one of the commissioning parent's gametes must be used in the IVF process. The right to Surrogacy has been granted the same as the heterosexual couple.<sup>13</sup> Thus looking at the recent judicial pronouncements in India, it is clear that the Supreme Court has been extremely progressive on the right to equality of the LGBT communities. In *n B. K. Parthasarathi v. Government of Andhra Pradesh*<sup>14</sup>, the Andhra Pradesh High Court upheld 'the right of reproductive autonomy' of an individual as a facet of his 'right to privacy' which is held to be a facet of Article 21 of the Constitution. The right to make a decision about reproduction is essentially a very personal decision either on the part of the man or woman. In *Suchita Srivastava v Chandigarh Administration*<sup>15</sup>, it was held that reproductive rights include a woman's entitlement to carry a pregnancy to its 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. By decriminalizing adultery and homosexuality in the landmark judgment of *Navtej Singh Johar & Ors. v. Union of India*<sup>16</sup> the court has held that women have a right to sexual autonomy, which is an important facet of their right to personal liberty. Further, if we look at the changes brought or proposed related to adoption and surrogacy, they have also failed to incorporate the rights of the LGBTQ community. This raises questions beyond the traditional framework of parental rights and obligations towards children. Post 2018 judgment, homosexuality has been recognized, but same-sex couples cannot adopt a child or opt for surrogacy. They are being deprived of parenthood based on their sexual orientation. Adoption by single LGBTQ people is recognized, but not by same-sex couples.<sup>17</sup> Adoption and Surrogacy are part of the decision when a person thinks of starting his family. How the person perceives his identity or sexual orientation has nothing to do with raising a child. There is no reason to believe that someone's sexual orientation or gender identity impacts raising a child and having a family. The person has every right to conduct his family's affairs following his personal belief and choices. The State ought to recognise the individual's autonomy in marriage, education, adoption and other such personal matters to the extent possible.<sup>18</sup> The judgement promoted the self-determination and non-discrimination based on sexual orientation. In *Devika Biswas v. Union of India*<sup>19</sup>, the Supreme Court of India held that right to health including reproductive rights was an integral part of Article 21. *Justice K. S. Puttaswamy vs Union of India and other*<sup>20</sup> judgment specifically recognized the Constitutional right of women to make reproductive choices, as a part of personal liberty under Article 21 of the Indian Constitution. These judgments have an important bearing on the sexual and reproductive rights of women.

<sup>11</sup> Anonza Priyadarshini, "Right to be a Parent and Heteronormative Laws – Aftermath of Navtej Singh Johar Judgment" Summer Issue 2022 *ILI Law Review* 20 (2022)

<sup>12</sup> *Ibid*

<sup>13</sup> *Ibid*

<sup>14</sup> AIR 2000 AP 156

<sup>15</sup> AIR 2009

<sup>16</sup> AIR 2018

<sup>17</sup> *Id* at 12

<sup>18</sup> *Shabnam Hashmi v. Union of India*, (2014) 4 SCC 1

<sup>19</sup> AIR 2016

<sup>20</sup> AIR 2017 SC4161

## V. CONCLUSION

The Surrogacy (Regulation) Act, 2021 is a significant step in the direction of regulating the rampant practice of surrogacy in India, but it needs to be more clear in some areas like why it has discriminated and prevented certain qualified people from becoming parent through surrogacy, like in case of unmarried individuals, homosexuals, LGBT communities, people in live-in relationship, etc. thereby violating their right to equality, right to privacy and right to reproductive autonomy as a facet of right to life guaranteed under the Constitution of India and also as has been upheld by the Apex Court of the country through its recent landmark judgements in a progressive direction. This class of people may have a sufficient resource to raise the child and provide a healthy life ahead, irrespective of their marital status, gender identity and sexual orientation; also the state has failed to safeguard the best interests of the children considering their long term welfare, who need care and protection. The society cannot transform independent of its government. So now it is the need of the hour that the legislature should bring about certain progressive amendments so as to make the implementation of the Act easier and in welcoming note by the larger portion of the Indian society to stand on an equal footing at par with other progressive countries where right to quality and right to life are being respected as every cost.

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