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THE CONSTITUTIONALITY OF THE SURROGACY (REGULATION) ACT, 2021

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INTRODUCTION

The birth of a child is critical for the society in which we live and for the family's well-being. Certain individuals are not endowed with the ability to produce a new life. Surrogacy assists in eradicating those distinctions. Surrogacy is defined in Black's Law Dictionary as "the act of bearing and delivering a child for another person." Surrogacy is an agreement in which a woman agrees to bear a child for another person, who would thereafter become the child's legal parents.¹ Numerous reasons have contributed to surrogacy's growth and development in India. The desire to have one's own biological child, the increase in infertility in society, and the decrease in the number of children available for adoption are just a few of the factors that have contributed to the development and advancement of new technologies and methods such as in vitro fertilisation (IVF), surrogacy contracts, and commercial surrogacy agencies.² Surrogacy dates all the way back to biblical times and the ancient Hindu period. Niyog Pratha is an old Hindu ritual in which women who were unable to conceive due to their husband's impotence were permitted to conceive through their brother-in-law. The child was the couple's property, and the brother-in-law had no claim on it.

There are two types of surrogacy, traditional surrogacy, in which a surrogate uses her own eggs to fertilise the embryo and then delivers it to the intended parents via artificial insemination, and gestational surrogacy, in which the mother's eggs are fertilised with fathers' or donor sperm and the embryo is then implanted into the surrogate's uterus. In traditional surrogacy, the surrogate is the child's biological mother, whereas in gestational surrogacy, the surrogate mother and child have no genetic relationship. Surrogacy agreements fall into two categories: altruistic surrogacy, in which the surrogate mother receives no monetary compensation or child support from the intended parents, and commercial surrogacy, in which the surrogate mother receives monetary compensation or child support in exchange for her services as a gestational surrogate. In 2002,

¹ Kirsty Stevens, and Emma Dally, *Surrogate Mother: One Woman's Story*, Futura Publications, (1986), p.3.

² Anita Stuhmcke, "For Love or Money: The Legal Regulation of Surrogate Motherhood" *Surrogate Motherhood, E Law: Murdoch University Electronic Journal of Law* 1995 December; 2(3): 27 p.

India legalised commercial surrogacy. And since then, India has been a popular destination for surrogacy agreements, owing to the low cost of technology, the availability of trained doctors, and the abundance of surrogate moms.

THE SURROGACY (REGULATION) ACT, 2021

In early December 2021, the Indian Parliament enacted two bills that became landmark legislation: the Assisted Reproductive Technology (Regulation) Act and the Surrogacy (Regulation) Act. While the Surrogacy (Regulation) Bill was previously passed in the Lok Sabha, it was unable to pass in the Rajya Sabha, which referred it to a Parliamentary Standing Committee for discussion. Finally, on 25th December 2021, the President signed the Surrogacy (Regulation) Act, 2021, which regulates the practise and process of surrogacy.

The following are the essential components of the Surrogacy (Regulation) Act, 2021:

- Commercial surrogacy is strictly prohibited, with the exception of altruistic surrogacy.
- Unless licenced under this Act, no surrogacy clinics shall engage in surrogacy operations or procedures or employ anybody who does not meet the Act's minimum qualifications.
- Within sixty days of the date of appointment of the appropriate authorities, each clinic undertaking surrogacy treatments shall apply for registration of their clinics. Renewal of registration is required every three years.
- Commercial surrogacy in any form shall not be conducted or promoted by any surrogacy clinic, gynaecologist, embryologist, or other medical practitioner. Only altruistic surrogacy is permissible under the 2021 Act.
- The intended couple must be legally married Indian men and women, the guy must be between the ages of 26 and 55, and the lady must be between the ages of 23 and 50, and neither of them must have had a previous biological, adoptive, or surrogate child.
- The surrogate mother must be an Indian lady between the ages of 25 and 35 who is seeking surrogacy. A woman who wishes to become a surrogate mother may not do it more than once in her lifetime.
- When an intending couple is in need of surrogacy due to a medical condition, they must receive a 'Certificate of Essentiality/Infertility' from the National/State Assisted Reproductive Technology and Surrogacy Board.

- The surrogate mother shall be fully informed of all known risks and complications associated with the procedure. Additionally, documented informed permission in the surrogate mother's native language shall be sought.
- A registry to be known as the National Assisted Reproductive Technology and Surrogacy Registry shall be created for the purpose of registering surrogacy clinics under this Act. Along with the Centre, each state and union territory shall create a surrogacy board of a similar nature.³ Surrogacy has become a widespread trend in the country. The Act's purpose is to establish successful surrogacy legislation, to prohibit commercial surrogacy while permitting ethical surrogacy. This way, they may put an end to the exploitation of surrogate women and children born via surrogacy. Although the Act was enacted to prevent this abuse, several of its provisions violate constitutional requirements. As the Act fails the Supreme Court's "Golden Triangle" test for the constitutional viability of the government's laws.⁴ The goal of this test is to check equality, democracy, and rights freedom, as well as to ensure that the state does not violate an individual's fundamental human rights.

RIGHT TO LIFE UNDER ARTICLE 21

Article 21 of the Indian Constitution is a priceless and protected right to life and personal liberty that affects the lives of every citizen.⁵ The right to life, personal liberty, and the right to subsistence are all inscribed.⁶ In *Consumer Education and Research Centre and Others v. Union of India*,⁷ the Supreme Court held that the term 'life' has a far broader meaning and includes the right to livelihood guaranteed by Article 21 of the Constitution. The same premise was recognised in the case of *Olga Tellis v. Bombay Municipal Corporation*⁸. However, the Act violates this "right to livelihood" by prohibiting commercial surrogacy entirely, denying poor women a significant opportunity to earn needed financial money or to obtain any type of financial security or protection for themselves or their families by consenting to be surrogates rather than receiving financial

³ <https://egazette.nic.in/WriteReadData/2021/232118.pdf>

⁴ *Minerva Mills Ltd. & Ors v. Union of India & Ors.*, 1980 AIR 1789.

⁵ Durga Das Basu, *Commentary on The Constitution of India*, 350 (8th edition 2010).

⁶ Article 21 of The Constitution of India, 1950.

⁷ *Consumer Education and Research centre and Ors, v. Union of India* 1995 AIR 922.

⁸ *Olga Tellis v. Bombay Municipal Corporation* 1986 AIR 180.

compensation. While it is acknowledged that poor women are trafficked or exploited in India, a complete prohibition on commercial surrogacy would not provide them with justice; rather, it would obliterate the right to livelihood granted to women by the Indian Constitution.

Additionally, the right to life encompasses the right to sexual autonomy, which includes the right to motherhood and procreation.⁹ In *Devika Biswas v. Union of India*,¹⁰ the Supreme Court recognised the right to reproduction as a necessary component of the 'right to life' under Article 21. The reproductive rights of women include the right to carry a child to term, the right to give birth, and the right to raise children. Additionally, they encompass private rights, dignity, and the integrity of the body. Thus, restricting surrogacy to heterosexual couples and widowed or divorced women above a certain age range and denying reproductive options to LGBT, single people, and elderly couples violates Article 21.

The Constitution prohibits the government from interfering with a person's prerogative, whether through the natural process or through infant surrogacy. In *B.K. Parthasarathi v. Government of Andhra Pradesh*,¹¹ the court determined that the state's intervention in reproduction constitutes a clear violation of an individual's "right to privacy," which was recognised as a component of the right to life under Article 21 in *K S Puttaswamy v. Union of India*,¹² where the court determined that an individual's privacy requires individual freedom of the body, mind, and decision-making. In *Suchita Srivastava & others v. Chandigarh Administration*,¹³ it was determined that "a woman's right to make reproductive choices is also a component of personal liberty as defined in Article 21 of the Indian Constitution." In a *Suo Moto* petition submitted in response to a female prisoner's plight, the high court stated that "a woman alone should have the right to govern her body, fertility, and motherhood decisions." Because the right to decide on reproduction is fundamentally a private and personal decision, it should always be based on women's preferences and governed by women's bodies, yet this Act intrudes on such decision-making processes.¹⁴ If a woman desires to

⁹ Prabhanjan Kumar Singh, *Critical Evaluation of Draft Surrogacy (Regulation) Bill, 2016*, Vol. 2 JAMIA LAW JOURNAL 161 (2017).

¹⁰ *Devika Biswas v. Union of India* AIR 2016 SC 4405.

¹¹ *B.K. Parthasarathi v. Government of Andhra Pradesh* 2000 (1) ALD 199.

¹² *K S Puttaswamy v Union of India* (2017) 10 SCC 1.

¹³ *Suchita Srivastava & anr. v. Chandigarh Administration* 2009, (9) SCC 1.

¹⁴ Sara E. Davies, *Reproductive Health as a Human Right: A Matter of Access or Provision?*, 9 J. HUM. RTS. 387, 387-97 (2010).

support a vulnerable couple by producing a child of her own, the state should not interfere with this humane deed, but should instead appreciate such actions. Additionally, the state fails to provide a compelling reason why unmarried and childless women will not be surrogates. Thus, in the lack of any moral basis, it may be claimed that the state's attempt to restrict women's reproductive choices violates a constitutional article.

RIGHT TO EQUALITY UNDER ARTICLE 14

Article 14 guarantees 'equality before the law and equal protection of the laws for all persons.' The fundamental principle enshrined in Article 14 prohibits class law but needs appropriate classification. The Court established two criteria for passing the test of acceptable classification: comprehensible differentials and reasonable linkage.¹⁵

The classification should be based on an understandable differentia that distinguishes those who are grouped together from those who are not. To be effective, the differentia must have a rational relationship to the objective of the applicable legislation. What is critical is that the classification basis and the aim of the Act under examination are congruent. If there are no discernible distinctions in the classification and no relationship to the object to be completed, the differentiation is invalid.¹⁶ The marriage-based classification in the Act permitting married couples is discriminatory and does not meet the Constitution's Article 14 standard of reasonable classification. Particularly when single parents, that is, unmarried individuals or parents, are authorised to adopt children.

The Act should be challenged since it contradicts the Supreme Court's decision to strike down Section 377 of the Indian Constitution, which decriminalised consensual sexual encounters between two adults of any sexual orientation. Thus, the Act denies homosexual couples the ability to raise children and refuses to recognise them as 'legitimate'.

In the case of National Legal Services Authority v. Union of India, the Supreme Court of India¹⁷ recognised transgender as a third gender, granting them the same authority as males and females.

¹⁵ Vikram Cement v. UOI, AIR 2007 SC 7.

¹⁶ Aparajita Amar & Arjun Aggarwal, The emerging laws relating Surrogacy: A procreational right for Single Parent, Transgenders and Foreigners, The SCC Online Blog.

¹⁷ National Legal Services Authority v. Union of India AIR 2014 SC 1863.

However, the Act does not ensure that many fundamental rights are equal for men and women. The existing Act establishes a clear standard for commissioning surrogacy that is highly restrictive and will disqualify transgender surrogacy commissioners.

Article 14 of the Indian Constitution guarantees equality before the law. The article's usage of the term 'any person' assures that the benefit referred to in Article 14 is not limited to citizens alone, but is available to any individual inside India's territory. However, the Act prohibits foreigners from participating in surrogacy. Under the Surrogacy Act, widows, divorcees, and Indian married couples are only permitted to choose the method of surrogacy, with others being excluded on the basis of marriage status, age, gender identity, and nationality for constituting an unreasonable classification impairing the right to equality. Allowing altruistic surrogacy only to married couples, widows, and divorcees and banning everyone else is counter to the Act's stated purpose.

Allowing exclusively domestic altruistic surrogacy would provide an incentive for corruption and abuse, forcing surrogacy into unethical hands.¹⁸ It may facilitate an abusive underground surrogacy trade. However, such clauses will fail the constitutional validity test. The Act's purpose is to prevent women from being exploited through surrogacy, yet creating distinction does not help achieve this goal.

RIGHT TO TRADE AND PROFESSION UNDER ARTICLE 19(1) (g)

Finally, the Act violates Article 19(1) (g), which guarantees "freedom of trade and profession." Due to the fact that it is not an absolute right, Article 19(6) establishes some conditions under which that right may be legitimately limited. Constraints are one of those things that are in the best interests of the people. And, in the public interest, the Surrogacy (Regulation) Act is introduced, but fails.

The Supreme Court of India, in *Chintaman Rao v. State of MP*,¹⁹ appropriately limited the term 'restrictions' in Article 19(6), stating that the expression 'reasonable restriction' imposed a constraint on a person exercising a right that should not be arbitrary or unreasonable in light of the public interest. Additionally, the Court stated that legislation should strike a reasonable balance

¹⁸ Meggitt, Lessons to be learnt in Parallels between Adoption and Surrogacy, POLICY ISSUES FORUM, 12, (1991).

¹⁹ *Chintaman Rao v. State of MP* 1950 SCR 759.

between the freedom afforded by Article 19(1) (g) and the social regulation provided by Article 19 (6).

However, criminalising commercial surrogacy effectively eliminates individual liberties and fails to achieve the necessary mandatory balance of individual liberty and societal regulation. Similarly, it violates Article 19(1) (g) of the Constitution to prohibit commercial surrogacy outright and permit only altruistic surrogacy. And it will defeat the purpose of this proposed Act, as surrogates having a child for an intended couple can still be abused; the only difference is that they will never be reimbursed for it. Additionally, any such blanket prohibition or partial restriction would drive the sector underground. Surrogacy is not just a source of money for surrogate mothers; it is also a source of revenue for the nation's numerous surrogacy facilities. However, by imposing a complete embargo on commercial surrogacy, the Act jeopardises the interests of numerous parties in this multibillion-dollar sector. Additionally, it does not qualify as a reasonable restriction. Hence, a number of the Act's provisions appear to be arbitrary and illogical, and thus unfavourable to residents.

FLAWS AND RECOMMENDATIONS

The law should evolve in lockstep with technological advancements so that those in need can benefit from their beneficial effects.²⁰ However, the Act enables only altruistic surrogacy and prohibits commercial surrogacy entirely. It prevents foreign nationals, NRIs, from engaging in surrogacy in the country. This precludes the surrogate mother from benefiting from commercial surrogacy. Commercial surrogacy is an extremely enticing option for either party. To begin, the poor surrogate mother obtains financial security; on the other hand, the infertile couple get their long-desired blood relative child. However, foreign currency investment is included. As a result, it is critical to create a regulatory middle ground that promotes commercial surrogacy. Commercial surrogacy could be permitted by imposing hefty fees but in a limited capacity, so that any woman can become a surrogate mother only once in her lifetime and must also meet the government's health and other requirements. Additionally, to avoid bargaining between the parties, the fee for each surrogacy should be predetermined. This will alleviate the surrogate mothers' immediate

²⁰ Report of the Select Committee on the Surrogacy (Regulation) Bill, 2019.

financial concerns, while also providing the intended parents with their desired blood relative child.

The government offers assistance to altruistic surrogacy that may be ineffective. It will allow for unscrupulous tactics, shady marketing, and the discreet completion of the surrogacy process. The Act makes the notion that by prohibiting commercial surrogacy, altruistic surrogates are not exploited, while ignoring the fact that uncompensated surrogacy is still exploitative. Additionally, the Act disregards the surrogate's potential income loss because she will be required to put her life on hold for two years in order to complete the surrogacy operation. A woman is expected to act as a surrogate and bear the mental and physical tolls of the entire endeavour fully for free and only out of "compassion," as many women would refuse to carry another's kid without compensation. The irony is that this "altruistic model" promotes forced labour.

Although the Act suggests that a certification of eligibility is required for both the intended couple and the surrogate mother, it does not define a timetable for providing the certification. According to the Act, an abortion requires the approval of the appropriate authority and the consent of the surrogate mother. However, it does not give the intended couple any say in the abortion choice. The Act makes no provision for intended parents, which sometimes benefits surrogate moms. There is no provision in the Act to reimburse a woman for earnings lost during pregnancy if she worked during that time. Appropriate compensation for the surrogate should be offered and strictly regulated by the government, leaving no room for negotiation. There is a need to insert a clause in the Act requiring each Fertility Clinic to offer a counselling service to ascertain if the surrogate mother came willingly or under duress. This may be a critical method for determining the surrogate mother's mental health.

The possibility of an unforeseen incident, disagreement, or separation between the intended pair, which might result in the kid being abandoned, should also be considered. To protect the best interests of such children, the Act must include specific provisions addressing the duties and responsibilities of intended spouses and surrogate mothers in circumstances involving the abandonment of surrogate children by intended parents. When a quarrel develops, it should be announced promptly that the child requires protection and assistance. Surrogacy may be the last

alternative for some infertile couples who are unable to conceive biological children. Having a child contributes to a couple's meaning and success, because the objective of a fundamental right is to make life more meaningful, complete, and worthwhile. As a result, surrogacy should be included in the scope of fundamental rights.

CONCLUSION

Over the last two decades, the number of women acting as surrogate moms has risen considerably. This is because surrogacy is gaining popularity among infertile couples and other individuals hoping to have a biologically linked child. Numerous women chose surrogacy for economic reasons as well. Despite widespread criticism of surrogacy and the role of women as surrogate mothers on ethical, moral, and social grounds, it is vital to address the surrogate mother issue from a legal and human rights perspective. By examining the increase in the number of intending parents seeking surrogacy in India and the women who agreed to become surrogate mothers, it is possible to conclude that, despite the complexity of the surrogacy process, both intending parents and surrogate mothers view surrogacy as a viable option for achieving their parental dreams and financially supporting their families.

Until now, the legislature's goal in enacting surrogacy legislation has been to prevent women from being exploited in the name of surrogacy. The legislature's most recent attempt to accomplish this goal is to fully prohibit commercial surrogacy in India and to authorise only altruistic surrogacy. How non-payment in surrogacy arrangements contributes to the goal of preventing women's exploitation is a subject that the legislature must address. A woman is getting compensated for services rendered, and the services rendered are entirely consistent with our country's official policies. Indeed, like with organ donation, a restriction on commercial surrogacy will result in the establishment of a criminal market. Though India prohibited organ donation, this practise continued and organ donors were exploited on a bigger scale following the ban. This was due to the fact that they were not protected by our nation's laws. When commercial surrogacy is prohibited entirely, they will be put in a considerably more vulnerable position. Agents and clinics may take advantage of their ignorance and convince them to act as surrogate mothers. If the surrogate mothers are not compensated at the conclusion of the process, they will be left with no legal recourse and, on top of that, they will be the wrongdoers without even realising they were

breaking the nation's laws. Additionally, the Act proposes to penalise people who commence the process of commercial surrogacy, and what happens to a child born through this method if still parties enter into a commercial surrogacy contract. If Indian law does not accept commercial surrogacy contracts, then the child born as a result of such a transaction is also not recognised. The life of a child who has made no mistake will be jeopardised.

Thus, the most effective strategy to address the concerns posed by surrogacy is not to outright prohibit commercial surrogacy, but to closely regulate surrogacy arrangements. The most typical reason for a woman to accept to be a surrogate mother is financial necessity. As a result, the legislation must ensure that the surrogate mother is compensated adequately and on time. There should be a cap on the minimum payment to the surrogate mother to ensure that she is not underpaid. Additionally, the law must address circumstances in which the surrogate mother has a miscarriage or is unable to conceive. Additionally, the surrogate mother must be compensated a minimal amount in these cases, as she has had anguish by being apart from her family during that time.

Additionally, the prohibition against foreign nationals seeking surrogate mothers in India must be lifted. This is because foreigners are currently seeking surrogate mothers from India in greater numbers than Indians, and they are also willing to pay more than Indians. The ultimate goal of women who agree to be surrogate mothers is financial gain, and if foreign nationals pay them more, they should be permitted to carry out the surrogacy process in India. At the moment, there is a significant disconnect between regulations and implementations. If strict regulations are implemented successfully, the complications associated with surrogacy will be significantly reduced. A ban is not the answer, as it could result in the growth of an underground surrogacy business that is even more harmful for the individuals involved.

The government should adopt guidelines that are compatible with individuals' fundamental rights and reflect changing societal standards, as well as take all necessary steps to ensure that this option is safe and dignified, as surrogacy is a gift from medical science to us. As a result, the Act fails to strike a balance between laws and rights, and therefore is not constitutionally justified, as demonstrated by Articles 14, 21, and 19(1) (g) interpretations, as well as Supreme Court rulings in significant cases. However, by addressing the aforementioned loopholes, this Act will be more effectively applied, which will be a significant step toward preserving surrogate mothers' rights.